

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED

April 30, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

ERWIN CARE PARTNERS, LTD.,)
)
Petitioner/Appellant,)
)
VS.)
)
CENTER ON AGING AND HEALTH,)
LLC, and THE TENNESSEE HEALTH)
FACILITIES COMMISSION,)
)
Respondents/Appellees.)

Appeal No. 01-A-01-9806-CH-00286

Davidson Chancery
No. 97-1924-III(I)

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL,
PRESIDING JUDGE, M.S.

CONCUR:
KOCH, J.
CAIN, J.

OPINION

This is a review of the decision of the Health Facilities Commission granting a certificate of need to the Center on Aging and Health, LLC for a 120-bed nursing home in Erwin. The Chancery Court of Davidson County found that the Commission's decision was supported by substantial and material evidence. We affirm.

I.

Health care facilities are highly regulated by the state. The legislature has decreed that facilities be built only after the builder receives a certificate of need from the Health Facilities Commission. Tenn. Code Ann. § 68-11-106. At the time the appellee applied for a certificate of need in this case, the Commission was required to consider whether (1) the facility is necessary in order to provide needed health care in the area, (2) the facility can operate economically, and (3) the facility will contribute to the orderly development of adequate and effective health care facilities and/or services. Tenn. Code Ann. § 68-11-108(b).

The Commission met and approved the certificate of need on November 14, 1995. In accordance with the statutory scheme, Erwin Care Partners, Ltd. (ECP), the operator of an existing nursing home in Unicoi County and a contestant before the Commission, requested a contested case hearing. Tenn. Code Ann. § 68-11-109. The hearing was held on October 1-3, 1996 before an administrative law judge, whose initial order granting the certificate was entered on January 24, 1997. ECP appealed the initial order to the full commission, and on April 11, 1997 the Commission entered a final order adopting the order of the administrative law judge.

ECP then filed a petition for review in the Chancery Court of Davidson County. See Tenn. Code Ann. § 4-5-322. On April 23, 1998 the chancellor entered a memorandum opinion affirming the Commission's final order.

II.

ECP argues on appeal, as they have at every step of this proceeding, that the applicant did not offer substantial and material evidence satisfying the three requirements of Tenn. Code Ann. § 68-11-108(b). The statutory scheme in this area, however, places the burden on ECP, once the Commission has voted to grant the certificate, to prove by a preponderance of the evidence in the contested case hearing that the certificate should not have been granted. Tenn. Code Ann. § 68-11-109(b). Thus, the question we must decide is whether ECP has carried its burden of showing that the facility is not needed, is not financially feasible, or will not contribute to the orderly development of adequate and effective health care facilities and/or services.

The administrative law judge found that ECP had failed to carry that burden. The Commission adopted those findings in its final order. On review, the chancellor found that the agency's findings were supported by substantial and material evidence. ECP asks us to penetrate this multi-layered insulation of the agency's decision and weigh the evidence for ourselves. This is not our task, however. Our job, as was the chancellor's, is to see if the agency's decision is supported by substantial and material evidence. *Humana of Tenn. v. Health Facilities Commission*, 551 S.W.2d 664 (Tenn. 1977). We have reviewed the record and concur in the chancellor's assessment of the proof.¹

ECP attacks the factual findings of the administrative law judge primarily by attacking the credibility of the applicant's principal witness. But we are far beyond

¹We have reviewed the record despite persuasive authority that the concurrent findings of the agency and the chancellor are conclusive on appeal. See *CF Industries v. PSC*, 599 S.W.2d 536 (Tenn. 1980).

the point where the credibility of the witnesses is a factor. *University of Tenn. v. Elliott*, 478 U.S. 788 (1986), and we cannot substitute our judgment for that of the Commission as to the weight of the evidence on a question of fact. Tenn. Code Ann. § 4-5-322(h).

The applicant asks us to find that this is a frivolous appeal. We decline to do so, however, because we think the appeal was brought in good faith and not to hinder or delay. Tenn. Code Ann. § 27-1-122.

The judgment of the court below is affirmed and the cause is remanded to the Chancery Court of Davidson County. Tax the costs on appeal to the appellant.

BEN H. CANTRELL,
PRESIDING JUDGE, M.S.

CONCUR:

WILLIAM C. KOCH, JR., JUDGE

WILLIAM B. CAIN, JUDGE

