IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2014 Session

MIDDLE TN REHABILITATION HOSPITAL, LLC v. HEALTH SERVICES & DEVELOPMENT AGENCY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 12515IV Russell T. Perkins, Judge

No. M2013-02180-COA-R3-CV - Filed August 22, 2014

This appeal arises from a petition for judicial review of the Tennessee Health Services and Development Agency's decision to deny one and grant the other of two competing applications for a certificate of need to establish a rehabilitation hospital. Discerning no error, we affirm the chancery court's order upholding the agency's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

AMY V. HOLLARS, SP. J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Alexandra Coulter Cross, Nashville, Tennessee, for the appellant, Middle Tennessee Rehabilitation Hospital, LLC.

Robert E. Cooper, Jr., Attorney General and Reporter; Sue A. Sheldon, Senior Counsel; Nashville, Tennessee, for the appellee, Tennessee Health Services and Development Agency.

Byron R. Trauger; Paul W. Ambrosius; W. Justin Adams; and Thomas A. Wiseman, III; Nashville, Tennessee, for the appellee, HealthSouth Rehabilitation Hospital of Williamson County, LLC.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Middle Tennessee Rehabilitation Hospital, LLC ("MTRH") owns Nashville

Rehabilitation Hospital, a 31-bed, comprehensive acute care medical rehabilitation hospital located in Nashville. HealthSouth Rehabilitation Hospital of Williamson County ("HealthSouth") is wholly owned by HealthSouth Corporation, which owns and operates inpatient rehabilitation hospitals in twenty-eight states and Puerto Rico. Vanderbilt Stallworth, an inpatient rehabilitation hospital located in Nashville, is a joint venture between Vanderbilt University Medical Center and HealthSouth.

In accordance with the rules of the Tennessee Health Services and Development Agency ("HSDA" or "the Agency"), on December 10, 2010, MTRH published in THE TENNESSEAN a letter of intent to submit a Certificate of Need application.[1] On December 15, 2010, MTRH filed its Certificate of Need application to relocate and replace its existing, dilapidated[2] 31-bed rehabilitation hospital to Williamson County, Tennessee.[3] MTRH's letter of intent estimated the total cost of the proposed project would be $19,550,000. In its application, MTRH represented that it had retained RehabCare Group, Inc. to provide the daily operations management of the proposed Williamson County hospital.

On December 20, 2010, HealthSouth published in THE CITY PAPER a letter of intent to file an application for a Certificate of Need to establish a new 40-bed rehabilitation hospital for inpatient and outpatient acute rehabilitation services in Williamson County at an estimated $27,000,000 cost. HealthSouth proposed that its hospital would be built adjacent to the site MTRH proposed. On December 22, 2010, HealthSouth filed its Certificate of Need application and requested simultaneous review with MTRH's application, pursuant to Tenn. Comp. R. & Regs. 0720-10-.03(3). In its application, HealthSouth stated that Vanderbilt University Medical Center faculty would medically lead and direct its proposed Williamson County rehabilitation hospital, as it does at Vanderbilt Stallworth. HealthSouth further represented that it would co-recruit the proposed facility's medical director with

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[1] *See* Tenn. Code Ann. § 68-11-1607(c)(1); Tenn. Comp. R. & Regs. 0720-10-.03(2).

[2] Nashville Rehabilitation Hospital, built over 50 years ago, no longer operates as a hospital because it is in disrepair and would require too much cost to upgrade to current standards. The hospital was originally licensed for 111 beds, but 80 of those beds have since been relocated to a Williamson County psychiatric hospital. The remaining 31 beds are on "inactive status." In its application, MTRH stated its intention to "put these 31 licensed beds back into full service," and noted that "construction of a new hospital to today's codes is more financially viable and will result in a more efficient and appropriate design for the intended use."

[3] The Tennessee Health Services and Planning Act of 2002, Tenn. Code Ann. § 68-11-1601 *et seq*., requires a certificate of need granted by the HSDA before "[t]he construction, development, or other establishment of any type of health care institution" and before "[a] change in the location of . . . existing or certified facilities providing health care services." Tenn. Code Ann. §§ 68-11-1607(a)(1); (a)(5).

Vanderbilt, and that the medical director "and a substantial number of [the proposed hospital's] medical staff will have faculty positions or appointments at Vanderbilt." HealthSouth's Certificate of Need application estimated $23,389,263 for project costs, which was $3,610,737 lower than estimated in its letter of intent.

On January 4, 2011, HealthSouth was notified by letter, with a copy to MTRH, that the Agency's executive director had deemed its application complete and that the application would enter the review cycle for simultaneous review with that of MTRH. At its regular March 23, 2011 meeting, the HSDA considered MTRH and HealthSouth's competing Certificate of Need applications. Before the eight participating Agency members voted, MTRH and HealthSouth agreed that only one rehabilitation hospital would be needed in the proposed service area. The Agency members voted on MTRH's application first, which resulted in a four-four tie, so MTRH's application was denied, pursuant to Tenn. Code Ann. § 68-11-1604(e)(5).[4] Next, member Gregory Lammert moved to approve HealthSouth's application and the Agency members voted five-three to approve it.[5]

MTRH timely petitioned for a contested case hearing to challenge the HSDA's denial of its Certificate of Need application and the approval of HealthSouth's application.[6] HealthSouth intervened without opposition. An Administrative Law Judge ("ALJ") sitting for the Agency conducted a hearing over nine days between September and November 2011. By initial order issued March 19, 2011, the ALJ made detailed findings of fact and conclusions of law and granted HealthSouth's Certificate of Need application and denied MTRH's application. Neither party filed a petition for appeal to the HSDA, so the initial order became a final order pursuant to Tenn. Code Ann. § 4-5-318(f).

MTRH petitioned the chancery court for judicial review of the Agency's final order under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322. HealthSouth intervened by agreed order. By memorandum and order entered August 30, 2013, the chancery court adopted the ALJ's factual findings and conclusions of law, rejected all of MTRH's claims, and found substantial and material evidence in the record to affirm the Agency's decision to deny MTRH's Certificate of Need application and to grant HealthSouth's application.

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[4] On the motion to approve MTRH's application, members Weaver, Jordan, Gaither, and Handorf voted "yes" and members Wright, Lammert, Southwick, and Jones voted "no."

[5] On the motion to approve HealthSouth's application, members Wright, Lammert, Gaither, Southwick, and Jones voted "yes" and members Weaver, Jordan, and Handorf voted "no."

[6] *See* Tenn. Code Ann. § 68-11-1610(a).

MTRH timely perfected this appeal.

ISSUES

We will consider: (1) Whether HealthSouth's Certificate of Need application should have been denied based on the HSDA's procedural rules; (2) Whether HSDA member Gregory Lammert had a disqualifying conflict of interest; and (3) Whether substantial and material evidence supports the HSDA's decision.

STANDARD OF REVIEW

Currently before this Court is MTRH's petition for judicial review of the HSDA's final order. The narrow standard contained in Tenn. Code Ann. § 4-5-322(h) governs judicial review of administrative agency decisions. *Willamette Indus., Inc. v. Tenn. Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999) (citing *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988)). This Court may reverse or modify the agency's decision only if it is:

> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
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> (3) Made upon unlawful procedure;
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> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
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> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

Under the Uniform Administrative Procedures Act ("UAPA"), this court must apply the substantial and material evidence standard to the agency's factual findings. *City of Memphis v. Civil Serv. Comm'n*, 239 S.W.3d 202, 207 (Tenn. Ct. App. 2007). Substantial

and material evidence is "'such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" *Wayne Cnty.*, 756 S.W.2d at 279-80 (quoting *S. Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984)). Substantial evidence "requires something less than a preponderance of the evidence . . . but more than a scintilla or glimmer." *Id.* at 280 (citations omitted). We may overturn the administrative agency's factual findings "only if a reasonable person would necessarily reach a different conclusion based on the evidence." *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 265 (Tenn. 2009) (citing *Martin v. Sizemore*, 78 S.W.3d 249, 276 (Tenn. Ct. App. 2001)). This narrow standard of review for an administrative body's factual determinations "suggests that, unlike other civil appeals, the courts should be less confident that their judgment is preferable to that of the agency." *Wayne Cnty.*, 756 S.W.2d at 279.

Issues of statutory construction present questions of law and are therefore reviewed de novo with no presumption of correctness. *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009).

ANALYSIS

I.

On appeal, MTRH contends that the Agency's final order should be reversed because the Agency ignored its own procedural rules by considering HealthSouth's Certificate of Need application despite three defects.

i.

The first defect MTRH points to is HealthSouth's failure to publish its letter of intent in a newspaper of general circulation. Each application for a Certificate of Need "shall be commenced by the filing of a letter of intent." Tenn. Code Ann. § 68-11-1607(c)(1). The applicant is required to publish the letter of intent in the Legal Notice section "in a newspaper of general circulation in the county where the proposed project is to be located." Tenn. Comp. R. & Regs. 0720-10-.03(2)(d). The HSDA's rules define a "newspaper of general circulation" as a publication that:

> (i) is regularly issued at least once a week;
> (ii) has a second class mailing privilege;
> (iii) includes a Legal Notice Section;
> (iv) is not fewer than four (4) pages in length;
> (v) has been published continuously during the immediately preceding one year period;

(vi) is published for dissemination of news of general interest; and
(vii) is circulated generally in the county in which it is published.

Tenn. Comp. R. & Regs. 0720-10-.03(2)(d)(2). HealthSouth published its letter of intent in THE CITY PAPER, a publication which had all of the characteristics listed in the Agency's rule, except for a second class mailing privilege. We credit the ALJ's findings that THE CITY PAPER did "not have a 'periodicals permit' f/k/a 'second class mailing privilege' . . . solely because it [was] a free publication" and that "[t]here is no proof or argument that THE CITY PAPER [did] not otherwise qualify as a 'newspaper of general circulation' under the Agency's rules."

The ALJ found that HealthSouth's publication of its letter of intent in THE CITY PAPER "substantially complied with the Agency's rules concerning publication and the objective of the [Certificate of Need] statute and Agency rules." "Tennessee courts have consistently held that statutory provisions setting forth the procedure for issuing notice require substantial compliance." *Morrow v. Bobbitt*, 943 S.W.2d 384, 389 (Tenn. Ct. App. 1996).[7] "'Substantial compliance' has been defined as '*actual* compliance in respect to the substance essential to every reasonable objective of the statute.'" *Id*. (quoting *Stasher v. Harger-Haldeman*, 372 P.2d 649, 652 (Cal. 1962)). Therefore, when there is actual compliance with all substantive matters, "mere technical imperfections of form or variations in mode of expression . . . should not be given the stature of non-compliance[.]" *Id*.

The evidence in the record shows that HealthSouth's letter of intent giving notice was timely published; that THE CITY PAPER met six of the seven characteristics set forth in the Agency's rule; that, even before it was published, MTRH disseminated information about HealthSouth's letter of intent to MTRH's supporters and interested parties; and that, as the ALJ found, there was public participation in the HSDA's March 23, 2011 hearing on the competing Certificate of Need applications.[8] Thus, we find that HealthSouth's publication

[7] The *Morrow* court cited the following cases: *Clapp v. Knox Cnty.*, 273 S.W.2d 694, 698 (Tenn. 1954) (holding statute setting forth procedure for notice of a hearing on a petition for a change in zoning regulations requires substantial compliance); *Scott v. Goss*, 311 S.W.2d 326, 329 (Tenn. Ct. App. 1957) (determining that statute setting forth procedure for resale of land acquired by tax deed requires substantial compliance); *S. Blow Pipe & Roofing Co. v. Grubb*, 260 S.W.2d 191, 197 (Tenn. Ct. App. 1953) (recognizing that statute setting forth procedure for notice of recording of a mechanics lien requires substantial compliance).

[8] For example, before the hearing, TriStar Health System filed a letter of opposition to the projects that both MTRH and HealthSouth proposed. At the hearing, a TriStar representative stated, "We appreciate [the HSDA's] consideration of the concerns addressed in that letter, but we have just chosen not to comment any further here today. We felt you've had plenty of input from others. But glad to answer any specific question you may have."

of the letter of intent in THE CITY PAPER substantially complied with the Certificate of Need statute and with the HSDA's rules, and we affirm the ALJ's determination that MTRH failed to prove that HealthSouth's application was incomplete based on notice being published in THE CITY PAPER.

ii.

The second procedural defect that MTRH points to is HealthSouth's lowering its estimated project costs between the time it submitted the letter of intent and filed the Certificate of Need application.[9] Tennessee Code Annotated section 68-11-1607(c)(7) provides that "[n]o substantive amendments to the [Certificate of Need] application, as defined by rule of the agency, shall be allowed." Under the HSDA's rules, a "substantive amendment" is one "which has the effect of increasing the number of beds, square footage, cost, or other elements which are reasonably considered in the discretion of The Agency to be integral components of the application." Tenn. Comp. R. & Regs. 0720-09-.01(24). However, the rule further states:

> A reduction of the above referenced components may be considered a substantive amendment if the amendment and supporting documentation are not received by the staff and Agency in a timely manner, necessary to allow The Agency to make an informed decision. Nothing in this rule shall be interpreted as limiting The Agency's authority to approve or deny all or part of any given application.

Id.

The applicable rule distinguishes between an amendment that increases the estimated cost and one that decreases the estimated cost, and provides that a cost decrease *may* be considered a substantive amendment to an application if it is untimely received. The HSDA received HealthSouth's amended decreased cost estimate of $23,389,263 within two days of the initial $27,000,000 estimate, so it had ample time "to make an informed decision," as it did at the March 2011 hearing. *Id*. Furthermore, the evidence in the record, including HealthSouth's "project costs chart," and the testimony of Lawrence Whatley,[10] substantially

[9] The HSDA's executive director deemed HealthSouth's application complete in January 2011, but MTRH waited until the March 23, 2011 hearing before the HSDA to suggest that HealthSouth's revising the cost estimate listed in its letter of intent voided its application for a Certificate of Need.

[10] Mr. Whatley is HealthSouth's national director of design and construction. He testified at length about the process used to come up with the estimated cost of HealthSouth's proposed rehabilitation hospital.

and materially supports the ALJ's finding that HealthSouth's original and amended cost estimates "were both made in good faith based upon then current information." We, therefore, affirm the ALJ's conclusion that MTRH failed to prove that HealthSouth's Certificate of Need application is void due to the change in estimated cost.

iii.

The third procedural defect MTRH points to is HealthSouth's failure to submit a proper affidavit swearing to the accuracy and truthfulness of the information contained in its application until after the application had been deemed complete. The HSDA's rules provide that a Certificate of Need application "shall be made on form(s) provided by The Agency" and that "[t]he applicant must provide all information requested in the application forms." Tenn. Comp. R. & Regs. 0720-12-.01(1). A second and distinct requirement is that "[t]he accuracy of the information provided must be attested to by the responsible party or his agent in a notarized statement. Providing false, incorrect, misleading, or fraudulent information is grounds for revocation of the certificate of need." Tenn. Comp. R. & Regs. 0720-12-.01(2).

HealthSouth's attestation affirmed the information contained in its Certificate of Need application as true, but HealthSouth inadvertently used the incorrect Agency form affidavit. The Agency notified HealthSouth that its application was complete on January 4, 2011. On March 21, 2011, the Agency notified HealthSouth of the error with its attestation form and HealthSouth filed the correct attestation form the next day and before the hearing. MTRH seems to argue that because HealthSouth's attestation was not submitted on the correct form until after the Agency deemed its application complete, the Agency should not have considered HealthSouth's application at all. The attestation requirement's objective is to deter an applicant from submitting false, incorrect, misleading, or fraudulent information. Undisputedly, HealthSouth did not submit a false, incorrect, misleading, or fraudulent application, and filing the wrong form was a technical error that HealthSouth immediately corrected upon notification. We, therefore, affirm the ALJ's determination that HealthSouth's attestation, which was later corrected, substantially complied with the Agency's rules and objectives.

In sum, we reject MTRH's claim that the final order should be reversed because the HSDA violated its rules by deeming HealthSouth's application complete despite procedural mistakes in the application process. None of these mistakes affected the merits of the HSDA's decision, and "[n]o agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4-5-322(i). It also bears noting that, by statute, the decision to deem a Certificate of Need application complete and ready for simultaneous

review lies within the Agency's sound discretion, and that discretion is to be applied by the Agency's executive director and staff. Tenn. Code Ann. § 68-11-1607(c)(2) ("The agency may refuse to consider the applications simultaneously, if it finds that the applications do not meet the requirements of 'simultaneous review' under the rules of the agency."); Tenn. Comp. R. & Regs. 0720-10-.03(3) ("The Executive director or his/her designee will determine whether applications are to be reviewed simultaneously."); Tenn. Comp. R. & Regs. 0720-10-.03(4)(d) ("Each application that is accompanied by the applicable filing fee will be reviewed for completeness by Agency staff."). "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules." *Jackson Express, Inc. v. Tenn. Pub. Serv. Comm'n*, 679 S.W.2d 942, 945 (Tenn. 1984).

Giving appropriate deference to the HSDA, we conclude that the procedural defects that MTRH raises regarding HealthSouth's application do not invalidate the HSDA's decision to grant HealthSouth a Certificate of Need.

II.

MTRH contends that the Agency's decisions to deny its application and to grant a Certificate of Need to HealthSouth were void *ab initio* because of HSDA member Gregory Lammert's participation. Mr. Lammert is the Executive Vice President and Chief Operating Officer of Willowbrook Home Health Care ("Willowbrook").

By statute, the HSDA consists of eleven members, one of whom, like Mr. Lammert, shall be a "representative of the home care industry" appointed by the Governor. Tenn. Code Ann. § 68-11-1604(b)(1)(F)(iv). An HSDA member who determines "that a matter scheduled for consideration by the agency results in a conflict with a direct interest, shall immediately notify the executive director and shall be recused from" participation. Tenn. Code Ann. § 68-11-1604(e)(7)(B). HSDA members must "make every reasonable effort to avoid even the appearance of a conflict of interest." Tenn. Code Ann. § 68-11-1604(e)(7)(B)(ii). "The presumption that such a conflict of interest may influence a decision is the basis for rules requiring recusal when a[n Agency member] has a disqualifying conflict of interest." *Wellmont Health Sys. v. Tenn. Health Facilities Comm'n*, No. M2002-03074-COA-R3-CV, 2004 WL 193074, at *6 (Tenn. Ct. App. Jan. 29, 2004).

The HSDA rules and applicable statute define "conflict of interest" as "any matter before the agency in which the member . . . of the agency has a direct or indirect interest that is in conflict or gives the appearance of conflict with the discharge of the member's . . . duties[.]" Tenn. Code Ann. § 68-11-1602(3); Tenn. Comp. R. & Regs. 0720-08-.02(1)(a). A "direct interest" is "a pecuniary interest in the persons involved in a matter before the agency." Tenn. Code Ann. § 68-11-1602(3)(A); Tenn. Comp. R. & Regs. 0720-08-.02(1)(b).

An "indirect interest" is "a personal interest in the persons involved in a matter before the agency that is in conflict or gives the appearance of conflict with the discharge of the agency member's . . . duties[.]" Tenn. Code Ann. § 68-11-1602(3)(B); Tenn. Comp. R. & Regs. 0720-08-.02(1)(c).

The only proof in the record that MTRH offers to support its contention that Mr. Lammert had a disqualifying direct and indirect conflict of interest is the ALJ's findings that 13.2% of patients discharged from Vanderbilt Stallworth in 2010 and 12.7% of those discharged from Vanderbilt Stallworth in 2011 began receiving follow-up care from Willowbrook. These findings were based upon a chart that MTRH member Patricia Greenberg submitted. The ALJ also found that 1.5% of patients discharged from Vanderbilt University Medical Center were served by Willowbrook, which was based on Ms. Greenberg's estimation from an eight-month sample of discharge records. This proof alone does not rise to the level of showing a personal interest on Mr. Lammert's part that conflicts with or gives the appearance of conflict with the discharge of his duties.

In arguing that Mr. Lammert possessed a direct conflict of interest, MTRH relies on two Tennessee cases, *Wellmont*, 2004 WL 193074, and *Methodist Healthcare-Jackson Hospital v. Jackson-Madison County General Hospital District*, 129 S.W.3d 57 (Tenn. Ct. App. 2003). However, those cases are distinguishable on their facts. In *Methodist*, one of the Commission members (Charles Mann) who voted in favor of granting Methodist's application for a Certificate of Need was the Executive Vice President and a principle owner of a surgical supply company. *Methodist Healthcare-Jackson Hosp.*, 129 S.W.3d at 70. Mr. Mann's surgical supply company sold approximately $405,093 in supplies to Methodist in the two years leading up to the Commission's vote on Methodist's Certificate of Need application. *Id*. The business transactions continued through and after the time that the Commission granted Methodist a Certificate of Need, and Mr. Mann did not recuse himself. *Id*. at 70-71. The Court held that Mr. Mann "had a disqualifying pecuniary conflict of interest" based on "Methodist's admission that it made purchases totaling approximately $405,093.00 from [the surgical supply company]" during the two years before the Commission's vote. *Id*.

The facts in *Wellmont* were similar to those in *Methodist*. *Wellmont*, 2004 WL 193074, at *6. The Court found that "[t]he record [was] clear that Commissioner Mann and/or [his surgical supply company] had a substantial relationship with Wellmont during the four years leading up to the vote. Specifically, the record show[ed] that [the surgical supply company] had sales to Wellmont of approximately $456,810" during that time. *Id*. Based upon these facts, the Court held that Mr. Mann had a conflict of interest and a duty to recuse himself from the Commission's vote, and that his vote approving Wellmont's application for a Certificate of Need was void *ab initio*. *Id.* at *9.

In both *Methodist* and *Wellmont*, the voting member had a disqualifying direct interest, i.e., a "pecuniary interest" under Tenn. Code Ann. § 68-11-1602(3)(A). Here, there is no proof of a vendor-vendee relationship, a written or oral referral contract, or a policy to refer patients to Willowbrook between Willowbrook and Vanderbilt or Vanderbilt Stallworth, nor is there proof that Mr. Lammert or Willowbrook solicited referrals from any party. The fact that a percentage of Vanderbilt Stallworth and Vanderbilt patients were later served by Willowbrook does not create a referral relationship that amounts to a direct pecuniary interest, as MTRH contends. There is no evidence of any business relationships or monetary transactions between Mr. Lammert and/or Willowbrook and any party in this case, unlike in *Methodist* and *Wellmont*. Thus, we conclude that Mr. Lammert did not have a direct conflict of interest requiring his recusal.

MTRH contends that, "[a]lternatively, Mr. Lammert had an indirect interest in HealthSouth because his company's regular business dealings with [Vanderbilt] Stallworth create the appearance of conflict." In distinguishing facts from conclusory allegations, we note again that the record contains no evidence of "business dealings" between Willowbrook and/or Mr. Lammert and Vanderbilt or Vanderbilt Stallworth.[11] Nothing in the record indicates why certain patients chose Willowbrook after discharge from Vanderbilt or Vanderbilt Stallworth. As the chancery court noted, Willowbrook will likely receive discharged patients from the rehabilitation hospital to be built in Williamson County, but this could happen regardless of who owns the rehabilitation hospital. The connection between Mr. Lammert, Willowbrook, HealthSouth, Vanderbilt, and Vanderbilt Stallworth in this case is simply too attenuated, especially given the fact that the HSDA is designed to include members of the public who, like Mr. Lammert, have special knowledge or expertise in the healthcare industry. *See* Tenn. Code Ann. § 68-11-1604(b). We find no basis on which we could conclude that Mr. Lammert had a personal interest in any entity involved in the competing applications that the Agency considered at the hearing.

Based on our exhaustive review of the record and the applicable case law, we conclude that the fact finder applied the proper standards in determining whether Mr. Lammert should have been recused from voting on MTRH and HealthSouth's applications and correctly determined that Mr. Lammert did not have a disqualifying conflict of interest. We find no impropriety in Mr. Lammert's participation in either vote.[12]

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[11] MTRH's conclusory allegation of "active referral relationships" between Willowbrook and Vanderbilt Stallworth is also unsupported by the record.

[12] Our reading of the transcript indicates that, at the hearing, Mr. Lammert, like the other HSDA members, did not prejudge the applicants, but rather considered each application on its merits. For example, Mr. Lammert questioned both HealthSouth and MTRH about their quality of outcomes data.

III.

Finally, MTRH argues that the Agency's decision to deny its Certificate of Need application and to grant that of HealthSouth "was arbitrary and capricious because it was unsupported by evidence that is both substantial and material in light of the entire record." Specifically, MTRH asserts that the Agency failed to consider the likelihood that granting MTRH's application would increase competition and decrease patient costs, that the Agency made a clear error of judgment in determining that adding forty new beds to the regional market would contribute to the orderly development of healthcare, and that the Agency disregarded evidence that the HealthSouth proposal is not a firm plan, but a placeholder intended to prevent competition from entering Williamson County.

Through its members, the HSDA has the duty and responsibility to "grant or deny certificates of need on the basis of the merits of such applications." Tenn. Code Ann. § 68-11-1605(1). Additionally, Tenn. Code Ann. § 68-11-1609(b) states:

> No certificate of need shall be granted unless the action proposed in the application is necessary to provide needed health care in the area to be served, can be economically accomplished and maintained, and will contribute to the orderly development of adequate and effective health care facilities or services. In making such determinations, the agency shall use as guidelines the goals, objectives, criteria and standards in the state health plan.

The criteria for determining whether a proposed project will contribute to the orderly development of adequate and effective health care services include:

> (a) The relationship of the proposal to the existing health care system (for example: transfer agreements, contractual agreements for health services, the applicant's proposed TennCare participation, affiliation of the project with health professional schools[13]);
>
> (b) The positive or negative effects attributed to duplication or competition;
>
> (c) The availability and accessibility of human resources required by the proposal, including consumers and related providers;
>
> (d) The quality of the proposed project in relation to applicable governmental or professional standards.

[13] We note that this factor weighs in favor of HealthSouth's application.

Tenn. Comp. R. & Regs. 0720-11-.01(3). Both MTRH and HealthSouth's witnesses testified extensively on all of the above factors, including competition. The ALJ found that "MTRH's assertions that it would provide needed competition . . . and also a lower charge for patients [were] not persuasive." This Court cannot re-weigh the evidence, and we find substantial and material evidence, such as testimony from Armand Balsano, a health planner, and from Kennedy Conner, a financial expert, to support the ALJ's findings on this issue.[14]

MTRH and HealthSouth disagreed on the number of beds needed for the proposed rehabilitation hospital in Williamson County which, in turn, depends on the proposed geographical service area. MTRH maintained that HealthSouth's proposed service area should not have included Lincoln County or Giles County. After carefully considering the testimony about the proper service area for a proposed Williamson County rehabilitation hospital, the ALJ found that the primary service area includes Williamson, Maury, Marshall, and Lewis counties, and that the secondary service area includes Giles, Lincoln, and southern Davidson counties. This determination is supported by substantial and material evidence showing that there is an established out-migration of patients from Lincoln County north to Davidson and Maury counties and from Giles County north to Davidson and Maury counties. Also, as the chancery court observed, an acute inpatient rehabilitation hospital is a regional service, and it is likely that Lincoln and Giles County residents who need rehabilitation services in Tennessee will seek and receive that care from a regional rehabilitation hospital in Williamson County rather than from an acute care hospital that has some rehabilitation beds, but not the same level of services. In short, we are not inclined to second-guess the fact finder in assessing the number of beds needed.

Lastly, we wholly reject MTRH's allegations that HealthSouth applied for a Certificate of Need in an attempt to be a "placeholder" and prevent competition and that, by voting for HealthSouth's application, the HSDA was somehow "kowtowing to the economic monolith that is Vanderbilt Medical Center." HealthSouth's affiliation with Vanderbilt was simply one factor among many, as set forth in the Agency's decision.

Upon considering the evidence adduced after a nine-day hearing at which witnesses for both parties testified, the ALJ entered very thorough findings that support the overall conclusion that "HealthSouth's history and experience demonstrates a far greater commitment to rehabilitation medicine than MTRH" and that HealthSouth "is better equipped to operate a rehabilitation hospital in Williamson County than MTRH." MTRH offers no meritorious reason showing the Agency's decision was arbitrary or capricious or unsupported by substantial and material evidence. Accordingly, we affirm the Agency's

[14] Mr. Conner's testimony showed that, in any case, actual patient charges for healthcare, including rehabilitation care, are primarily determined by Medicaid, Medicare, and private insurers.

decision in its entirety.

CONCLUSION

For the foregoing reasons, we affirm the chancery court's order upholding the HSDA's decision to grant a Certificate of Need to HealthSouth and to deny MTRH's application for a Certificate of Need. Costs of appeal are assessed against the appellant, Middle Tennessee Rehabilitation Hospital, LLC, and execution may issue if necessary.

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AMY V. HOLLARS, JUDGE