

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

H. H. Vonharten,

Appellant,

vs.

South Carolina Department of Motor
Vehicles,

Respondent.

Docket No. 14-ALJ-21-0604-AP

ORDER

RECEIVED

JUL 22 2015

SC Court of Appeals

This is an appeal by H. H. Vonharten (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH). The OMVH issued a Final Order and Decision following an administrative hearing held pursuant to S.C. Code Ann. § 56-1-270 (2008) upholding the decision of the South Carolina Department of Motor Vehicles (DMV) revoking Appellant's driver's license and driving privileges based upon a finding that Appellant is physically disqualified from safely operating a motor vehicle. The Administrative Law Court (ALC or Court) has jurisdiction to review this matter pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2014). Upon review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

On December 31, 2013, Dr. Paul Mazzeo, who is treating Appellant for Alzheimer's, submitted a written statement to the Department expressing his concern regarding Appellant's ability to safely operate a motor vehicle. The Department's Driver Improvement Office received Dr. Mazzeo's letter on January 15, 2014. On January 17, 2014, the Department sent a letter to Appellant indicating it had received information that his medical condition may not warrant a continuation of his driving privileges. Appellant was instructed to submit medical statements and records about his condition to the Department. On February 20, 2014, the Department informed Appellant that if it did not receive the necessary medical records and statements that his license would be revoked on March 22, 2014. On February 27, 2014, Appellant underwent an Occupational Therapy Driving Related Skills Assessment by Richard Craner at Beaufort Memorial Hospital. On April 7, 2014, Appellant completed a Defense Drivers Course at a school that was not certified by the Department to determine whether or not he was medically fit to continue

FILED

June 9, 2015

SC ADMIN. LAW COURT

operating a motor vehicle. On April 25, 2014, the Department received medical records and statements from Appellant. On May 16, 2014, the Department informed Appellant it had received incomplete medical statements and provided him with an additional fifteen days to provide the remaining information. On May 27, 2014, the Department directed Appellant to complete a driving skills reexamination within fifteen days. On June 3, 2014, Appellant completed and passed knowledge and skills tests. Appellant also met the vision standards to operate a motor vehicle with corrective lenses. His driving privileges were temporarily restored based upon his test scores and submission of completed medical statements.

On June 5, 2014, Dr. Mazzeo wrote the Department, reiterating his opinion that Appellant's dementia prevents him from safely operating a motor vehicle. On June 6, 2014, the Department informed Appellant that his medical records and statements had been forwarded to the Department's Medical Advisory Board (Board) for review. Appellant's driving privileges were suspended awaiting the Board's review. Ultimately, the Board recommended to the Department that Appellant's driving privileges be revoked. Based on that recommendation, on July 10, 2014, the Department informed Appellant that on August 9, 2014, his driving privileges would be revoked pursuant to S.C. Code Ann. § 56-1-270 and evidence that he was physically disqualified from safely operating a motor vehicle.

On September 24, 2014, a hearing was held in the Jasper County Courthouse related to Appellant's appeal of the Department's revocation of his driver's license. At the hearing, Appellant testified that he had difficulty turning his neck around, but did not believe it affected his ability to drive. Appellant reported having problems with dementia in the previous six months, including difficulty with his short term memory. Appellant's daughter, Lauren Vonharten, also testified at the hearing. She confirmed her father's lack of range of motion in his neck and agreed with him that it did not affect his driving. Appellant's daughter went on to testify that he lives alone and handles all of his own affairs. On December 1, 2014, the Hearing Officer issued an opinion upholding the Department's revocation of Appellant's license based on a finding he was physically disqualified from safely operating a motor vehicle.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2014). Therefore, the OMVH is an "agency" under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (Supp. 2014). As such,

the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2014); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2014). This section provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307. The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

ISSUES ON APPEAL

1. Did the Hearing Officer erroneously rely on inadmissible hearsay statements?
2. Did the Hearing Officer err in failing to consider a second medical opinion from Dr. Shissias?
3. Did the Hearing Officer err in failing to consider reasonable, less restrictive alternatives to revocation as proposed by Appellant's attorney?
4. Did the Hearing Officer erroneously conclude that traffic citations received more than a decade ago support the conclusion that Appellant is currently unable to safely operate a motor vehicle?
5. Did the Hearing Officer erroneously in giving greater weight to the opinion of Dr. Mazzeo than to the evidence that Appellant passed the vision, knowledge, and skills tests on June 3, 2014?

DISCUSSION

As described in great detail in the Hearing Officer's Final Decision, there is substantial evidence in this case to support her decision that Appellant is physically disqualified from safely operating a motor vehicle. Dr. Mazzeo, who was treating Appellant for Alzheimer's dementia, wrote a letter to the Department regarding his opinion that the severity of Appellant's condition prevented him from safely operating a motor vehicle. After several requests from the Department, Appellant provided medical statements completed by himself and Dr. Little, his primary care physician. Dr. Little noted that Appellant suffered from dementia and had a history of fainting episodes, for which the cause was unknown. Dr. Little suggested that Appellant should be able to demonstrate his driving skills. He did not indicate whether or not he was willing to ride in a motor vehicle operated by Appellant. At the hearing, Appellant testified that he had sought a second opinion from another neurologist. However, Appellant never provided the Department or the Hearing Officer with the opinion or medical statement of any other physicians beside Dr. Mazzeo and Dr. Little. Appellant underwent an Occupational Therapy Driving Related Skills Assessment at Beaufort Memorial Hospital, which was conducted by Richard Craner. As a result of his exam, Mr. Craner determined that Appellant had a number of mental and physical deficits, such as decreased trunk rotation, that might affect his ability to drive safely. Craner suggested that Appellant should refrain from driving. At the hearing, Appellant explained that he had experienced some dementia in the six months prior, such as trouble with his short term memory

and remembering names. He also admitted that he had difficulty turning around to check his blind spot, which was confirmed by the hearing testimony of his daughter, Laura Vonharten. Although Appellant was able to successfully pass both the Department's knowledge and skills tests, the Hearing Officer properly concluded, based upon the weight of all the evidence before her, that Appellant was unable to safely operate a motor vehicle.

The Hearing Officer's decision did not rely on inadmissible hearsay statements Appellant's family members made to medical providers.

On appeal, Appellant contends that the Hearing Officer relied on inadmissible hearsay. Dr. Mazzeo's December 31, 2013 letter stated that Appellant's "family has alerted [Dr. Mazzeo] to several concerns regarding his driving." At the hearing and in his appeal, Appellant argues that this statement constitutes inadmissible hearsay. During the hearing, the Hearing Officer first stated that she would allow such a statement as admissible hearsay as a statement made for the purpose of medical diagnosis or treatment. See SCRE 803(4). When Appellant renewed this same objection later in the hearing, the Hearing Officer stated that "Anything that would be hearsay within the letter, I'll exclude, but as far as it being offered, he does say in there that he is reiterating his opinion that....[Appellant's] dementia precludes him from driving, I'm going to allow that." Appellant also objected to statements made by Appellant's daughter Tracy to Craner, who included the information in his report under the heading "Referral Concerns." The Hearing Officer agreed to exclude these statements. Therefore, it is clear from the hearing transcript that the Hearing Officer did not take into consideration or base her decision on hearsay statements.

Furthermore, these statements constitute an exception to the hearsay rule and the Hearing Officer could rightfully have taken such statements under consideration in reaching her decision. Under SCRE 803(4):

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Appellant's family members were communicating to his physicians their concerns about his health, particularly the danger posed by his continued operation of a motor vehicle. These are the very types of statements addressed by this exception to the hearsay rule. Both Dr. Mazzeo and Craner stated their diagnosis of Appellant's condition to the Department and believed that statements by Appellant's family were relevant to include in their description. In addition, it is well established

in South Carolina that “[a]dmission of evidence falls within the trial court’s discretion and will not be disturbed on appeal absent abuse of that discretion.” State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000) (citing State v. Huggins, 325 S.C. 103, 481 S.E.2d 595 (1991)). Therefore, absent an abuse of discretion, the Hearing Officer could determine that these statements were an exception to the hearsay rule.

The Hearing Officer did not err by not taking into consideration the opinion of a physician whose report or statement was not presented at the hearing.

In his appeal, Appellant also argues that the Hearing Officer failed to properly consider the medical opinion of another physician. At the hearing, Appellant testified that he sought medical treatment from another neurologist, Dr. Charles Shissias. Artis testified that the Department had sent Appellant a neurological report to be completed by Dr. Shissias. Appellant had never returned the completed form to the Department. Both Appellant and his Attorney explained that Dr. Shissias had not completed the Department’s form because he was awaiting an MRI film before he issued an opinion about Appellant’s condition. At the hearing, Appellant also stated that Dr. Shissias believed Appellant did indeed have Alzheimer’s but was unwilling to complete the Department’s form because he did not want to contradict Dr. Mazzeo’s opinion. Both Appellant and his attorney admitted at the hearing that Appellant never submitted a complete neurological report to the Department. Neither provided any testimony or evidence that Dr. Shissias was willing to submit supplemental records and statements to the Department. The Hearing Officer was presented with the medical opinions of two physicians, Dr. Mazzeo and Dr. Little, as well as a physical therapist, Craner. Dr. Shissias’ medical opinion of Appellant’s physical condition and his ability to operate a motor vehicle was never properly before the Hearing Officer. There is no evidence in the Record that Appellant made a motion to consider late filed evidence. Thus, there is nothing in the record that supports Appellant’s argument that the Hearing Officer abused her discretion by failing to consider a report or record that was never offered into evidence.

The Hearing Officer was not required to adopt the license restrictions proposed by Appellant’s attorney.

Appellant also argues in his appeal that the Hearing Officer was in error by failing to consider less restrictive alternatives to license revocation. In his closing argument at the hearing, Appellant’s attorney argued that the Hearing Officer should grant Appellant a restricted license, which would limit his driving to certain daytime hours.

The decision to revoke Appellant's license is controlled by S.C. Code Ann. § 56-1-370 (Supp. 2014). The statute directs the Hearing Officer to "rescind its order of suspension, cancellation, or revocation, or, good cause appearing therefor, may continue, modify, or extend the suspension, cancellation, or revocation of the license." Based on this language, the hearing officer could have modified the nature of Appellant's revoked license and, perhaps, as Appellant's attorney argues, could have granted Appellant a restricted license. However, the language of the statute does not demand that the Hearing Officer modify Appellant's license. There is no evidence in the record that supports Appellant's argument that he could safely operate a motor vehicle during certain daylight hours despite his physical limitations and dementia.

The Hearing Officer did not err by basing the license revocation on Appellant's driving record.

Appellant argues that the Hearing Officer erroneously concluded that Appellant's misstatement of his driving record demonstrated that he was unable to safely operate a vehicle. Appellant reported in his Medical and Accident History Form that his last accident occurred in 1995. However, evidence presented at the hearing showed that Appellant was involved in a car accident on February 2, 2005. Appellant was listed as a contributor to that accident. The Hearing Officer also noted that Appellant was in a non-reportable accident on May 14, 2003, in which he was ticketed for failing to yield the right of way. Appellant argues that he has not had an accident in over a decade. In his opinion, this is proof that, in recent history, Appellant has become a more cautious and safe driver. Appellant argued that his lack of accidents or citations in the past decade should be a mitigating factor and not the basis for the Hearing Officer to conclude he could not safely operate a motor vehicle. A careful reading of the Hearing Officer's decision reveals that she based her decision to revoke the license upon Appellant's medical condition and not upon his driving record or misrepresentations on the accident history form. Therefore, this argument is without merit.

The Hearing Officer did not err by giving greater weight to the medical evidence in this case, including Dr. Mazzeo's opinion, than the evidence that Appellant successfully completed the Department's vision and skills tests.

Appellant argues that the fact that he passed the Department's knowledge and skills tests entitles him to a restricted license. However, under S.C. Code Ann. § 56-1-270:

The Department of Motor Vehicles having good cause to believe that a person holding a South Carolina driver's license is incompetent or otherwise not qualified to be licensed because of physical or mental disability may, upon written notice of at least ten days to the licensee, require him to submit to an examination. Upon the conclusion of such examination the department shall take action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license or may issue a license subject to restrictions permitted under Section 56-1-170. The license of any person may be suspended or revoked if they refuse or neglect to submit to such an examination.

Thus, the Hearing Officer can take into consideration medical reports and statements about Appellant's condition in addition to the results of the Department's own testing. Thus, a passing score on the knowledge and skills tests is not the only information considered when determining whether or not Appellant could safely operate a motor vehicle.

ORDER

IT IS HEREBY ORDERED, for the foregoing reasons, that the Hearing Officer's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

AND IT IS SO ORDERED.

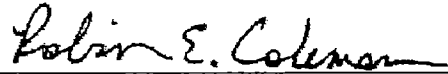


Deborah Brooks Durden
Administrative Law Judge

June 9, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman

Judicial Aide to Deborah Brooks Durden

June 9, 2015
Columbia, South Carolina

FILED

June 9, 2015

SC ADMIN. LAW COURT

LAW OFFICES

MOSS, KUHN & FLEMING, P.A.

JAMES H. MOSS

H. FRED KUHN, JR.

CORY H. FLEMING*

KIMBERLY L. SMITH

*ALSO MEMBER OF GA BAR

1501 North Street P.O. Drawer 507 - Beaufort, South Carolina 29901-0507

TELEPHONE 843-524-3373

FAX 843-524-1302

RECEIVED

JUL 22 2015

SC Court of Appeals

July 20, 2015

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: H.H. Vonharten v. South Carolina Department of motor Vehicles
Appellate Case No.: 2015-001491

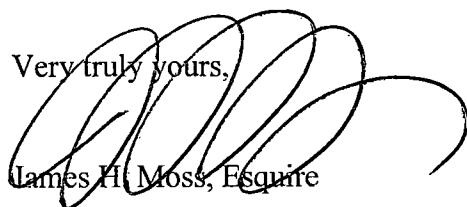
Dear Ms. Kitchings:

Enclosed for filing, in amendment of the original filing in the above referenced matter, is the following:

1. The Order of the Honorable Administrative Law Court Judge Deborah Brooks Durden, filed June 9, 2015;
2. The Notice of Motion and Motion to Reconsider or for Rehearing, filed on behalf of Appellant on June 16, 2015;
3. The Order Denying Appellant's Motion for Reconsideration or For Rehearing, filed by Judge Durden on July 7, 2015.
4. The Appellant's Notice of Appeal, originally file with the Court of Appeals July 14, 2015.

Please accept items 1-3 as an amendment and a cure to deficiencies in the Appellant's original Notice of Appeal, Item number four, above.

Thank you for your kind assistance.

Very truly yours,

James H. Moss, Esquire

MOSS, KUHN & FLEMING, P.A.

1501 NORTH STREET
P.O. DRAWER 507
BEAUFORT, SC 29901-0507



UNITED STATES POSTAGE
PITNEY BOWES
02 1R
0002009735 JUL 20 2015
\$ 01.86⁰
MAILED FROM ZIP CODE 29902

FIRST CLASS MAIL

MOSS, KUHN & FLEMING, P.A.

ATTORNEYS AT LAW
1501 North Street
P.O. Drawer 507
Beaufort, SC 29901-0507
(843) 524-3373

Volunteer Moss

To:

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

JUL 22 2015
SC Court of Appeals