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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2090989

Brian E. Cressman, M.D.

v.

Alabama Board of Medical Examiners

Appeal from Decision of the Alabama Board of Medical Examiners

BRYAN, Judge.

Brian E. Cressman, M.D., appeals from a decision of the Alabama Board of Medical Examiners ("the Board") revoking his Alabama Controlled Substances Certificate ("ACSC"). We transfer the appeal to the Montgomery Circuit Court.

The Board, acting pursuant to § 20-2-53, Ala. Code 1975, ordered Dr. Cressman to appear for a hearing to show cause why his ACSC should not be revoked. Following the hearing, the Board issued a decision revoking Dr. Cressman's ACSC on June 21, 2010. Thirty days later, on July 21, 2010, Dr. Cressman filed a notice of appeal from the Board's decision directly to this court.

Initially, we must determine whether the appeal is properly before this court. Dr. Cressman contends that his appeal from the Board's decision was properly filed directly to this court pursuant to § 34-24-367, Ala. Code 1975, and Rule 540-X-5-.04, Ala. Admin. Code (Alabama Bd. of Med. Exam'rs). Section 34-24-367 concerns the judicial review of decisions of the Medical Licensure Commission ("the Commission"), but that section does not refer to decisions of the Board.[1] Section 34-24-367, as amended in 2008, provides, in pertinent part, that "any action commenced for the purpose

[1]The Commission has "the exclusive power and authority to issue, revoke and reinstate all licenses authorizing the licensee to practice medicine or osteopathy in the State of Alabama." § 34-24-311, Ala. Code 1975. The Board has the authority to issue, suspend, or revoke an ACSC. § 20-2-53, and § 20-2-2(3), Ala. Code 1975; and Rule 540-X-5-.02, Ala. Admin. Code (Alabama Bd. of Med. Exam'rs).

of seeking judicial review of the administrative decisions of the ... Commission ... must be filed, commenced, and maintained in the Alabama Court of Civil Appeals." That section is contained in Title 34, Chapter 24, Article 8, Division 3, Ala. Code 1975; that division is entitled "Suspension or Revocation of Licenses." Although § 34-24-367 provides for a direct appeal to this court from an administrative decision of the Commission, that section does not provide for a direct appeal to this court from a decision by the Board to revoke an ACSC, the situation in this case. Therefore, § 34-24-367 is inapplicable to this appeal.

Dr. Cressman also cites Rule 540-X-5-.04, Ala. Admin. Code (Alabama Bd. of Med. Exam'rs), as supporting a direct appeal to this court. Rule 540-X-5-.04(2) provides, in pertinent part, that "any action commenced for the purpose of seeking judicial review of an administrative decision of the [B]oard, including ... judicial review pursuant to the Alabama Administrative Procedure Act, [§ 41-22-1 et seq., Ala. Code 1975,] must be filed, commenced, and maintained in the Alabama Court of Civil Appeals." The Board purportedly adopted that rule pursuant to § 20-2-53, Ala. Code 1975, a part of the

Alabama Uniform Controlled Substances Act, § 20-2-1 et seq., Ala. Code 1975. As noted, the Board initiated the administrative proceedings against Dr. Cressman pursuant to § 20-2-53. Section 20-2-53(b), Ala. Code 1975, provides, in pertinent part: "Anyone adversely affected by any order of a certifying board[2] denying, suspending, or revoking a registration [of persons dispensing controlled substances] ... may obtain judicial review thereof by filing a written petition for review with the Circuit Court of Montgomery County in accordance with Section 41-22-20[, Ala. Code 1975]." (Emphasis added.) Additionally, § 20-2-53(c), Ala. Code 1975, provides, in pertinent part, that "any action commenced for the purpose of seeking judicial review of the administrative decisions of a certifying board, including ... judicial review pursuant to the Alabama Administrative Procedure Act, must be filed, commenced, and maintained in the Circuit Court of Montgomery County, Alabama." (Emphasis added.) See, e.g., Benton v. Alabama Bd. of Med. Exam'rs, 467 So. 2d 234 (Ala. 1985) (reviewing the Montgomery Circuit Court's judgment

[2]The Board is a "certifying board" under § 20-2-2(3), Ala. Code 1975.

affirming a decision of the Board that had been appealed to that circuit court). Section 20-2-53 contains no provision allowing for the direct appeal from a decision of the Board to this court.

Therefore, Rule 540-X-5-.04, which provides that an appeal from a decision of the Board must be maintained in this court, conflicts with § 20-2-53, which provides that an appeal from a decision of the Board must be maintained in the Montgomery Circuit Court. "The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation." Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991).

> "It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized. See C. Sands, Sutherland Statutory Construction § 31.02 (4th ed. 1973). 'A regulation ... which operates to create a rule out of harmony with the statute, is a mere nullity.' Lynch v. Tilden Produce Co., 265 U.S. 315, 44 S. Ct. 488, 68 L. Ed. 1034 (1924). This is because an administrative board or agency is purely a creature of the legislature, and has only those powers conferred upon it by its creator. Woodruff v. Beeland, 220 Ala. 652, 127 So. 235 (1930)."

Ex parte City of Florence, 417 So. 2d 191, 193-94 (Ala. 1982). Therefore, because it conflicts with § 20-2-53, the provision

in Rule 540-X-5-.04 providing for an appeal from a decision of the Board directly to this court is a nullity.

Pursuant to § 20-2-53, Dr. Cressman should have filed his appeal to the Montgomery Circuit Court for review in accordance with § 41-22-20. This court lacks appellate jurisdiction to decide Dr. Cressman's appeal. Understandably, Dr. Cressman may have been misled by the provision in Rule 540-X-5-.04 indicating that he should appeal the Board's decision directly to this court. Dr. Cressman filed his notice of appeal to this court 30 days after the entry of the Board's decision, within the 30-day period allowed for an appeal from an administrative decision to the appropriate circuit court under § 41-22-20(d). Therefore, Dr. Cressman filed a timely notice of appeal, albeit to the wrong court. Accordingly, we transfer the appeal to the Montgomery Circuit Court for review in accordance with § 41-22-20. See Pischek v. Baldwin Youth Servs., Inc., 23 So. 3d 1168, 1170 (Ala. Civ. App. 2009) (indicating that our supreme court had transferred an appeal to this court because the appeal was actually within the appellate jurisdiction of this court); City of Birmingham v. George, 988 So. 2d 1031, 1032 (Ala. Civ. App. 2007) (same);

Palmer v. Browning, 33 So. 3d 1249, 1250 (Ala. Civ. App. 2009) (indicating that this court had transferred an appeal to our supreme court because the appeal was actually within the appellate jurisdiction of the supreme court); Brady v. Roebuck Honda, [Ms. 2090082, April 2, 2010] ___ So. 3d ___, ___ (Ala. Civ. App. 2010) (transferring to a circuit court an appeal filed directly to this court from an arbitrator's award when the appeal should have been brought in the circuit court); and Food World v. Carey, 980 So. 2d 404 (Ala. Civ. App. 2007) (transferring to a circuit court an appeal from a district court's denial of a Rule 60(b), Ala. R. Civ. P., motion when the appeal should have been brought in the circuit court).

APPEAL TRANSFERRED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.