IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-41936

HOME DIALYSIS OF NEW MEXICO,

Protestant-Appellee,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Respondent-Appellant.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
Chris Romero, Hearing Officer

Betzer, Roybal & Eisenberg, LLC
Benjamin C. Roybal
Albuquerque, NM

Sanchez, Mowrer & Desiderio, P.C.
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for Appellee

New Mexico Taxation & Revenue Department
David Mittle, Special Assistant Attorney General
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

WRAY, Judge.

{1} New Mexico Taxation and Revenue Department (the Department) appeals from the Administrative Hearing Officer's (AHO) grant of Home Dialysis of New Mexico's (Taxpayer) motion for summary judgment and determination that Taxpayer qualifies for the health care practitioner deduction in NMSA 1978, Section 7-9-93 (2023, amended 2024). This Court issued a calendar notice proposing to affirm. The Department filed a memorandum in opposition and Taxpayer filed a memorandum in support, both of which we have duly considered. Unpersuaded, we affirm.

{2} As an initial matter, the Department challenges this Court's application of the appropriate standard of review on appeal. [MIO 2-5] The Department argues that this Court incorrectly reviewed the AHO's decision "under the broader and less deferential standard" of whole-record, administrative review. [MIO 5] *See Robison Med. Rsch. Grp. v. N.M. Tax'n & Revenue Dep't*, 2023-NMCA-065, ¶ 4, 535 P.3d 709 ("A hearing officer's decision is set aside only if we find it to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." (text only) (citation omitted)). The Department argues that this Court should have reviewed the AHO's decision here under the "strict rules of construction" as articulated in *TPL, Inc. v. New Mexico Taxation & Revenue Department*, 2003-NMSC-007, ¶ 9, 133 N.M. 447, 64 P.3d 474. [MIO 3-4]

{3} Although the Department is entitled to a presumption of correctness in its tax assessments, our "strict rules of construction" apply as the standard that a taxpayer must meet to show entitlement deduction and not this Court's standard when reviewing an AHO's decision. *See Talbridge Corp. v. N.M. Tax'n & Revenue Dep't*, 2024-NMCA-044, ¶¶ 8-9, 550 P.3d 901 (explaining that despite the presumption of correctness and our strict rules of construction, we apply the whole-record, administrative standard of review to the AHO's order); *see also CCA of Tennessee, LLC v. N.M. Tax'n and Revenue Dep't*, 2024-NMSC-013, ¶ 11, 548 P.3d 11 (reviewing the AHO's order under our whole-record, administrative standard of review in order to determine whether the taxpayer "met its burden to overcome the presumption that the Department's assessment of gross receipts tax . . . was correct"); *accord* NMSA 1978, § 7-1-25(C) (2015) (providing the standard of review for appeals from an AHO's decision, and stating that "[u]pon appeal, the court shall set aside the decision and order of the hearing officer *only if found to be*: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence on the record; or (3) otherwise not in accordance with the law." (emphasis added)). As a result, we proceed under our long established standard of review.

{4} Substantively, the Department first maintains that the AHO erred by holding that Taxpayer qualified for the healthcare deduction under Section 7-9-93. [MIO 5-8] We proposed to conclude that the AHO did not err because of this Court's recent opinion in *Robison Medical Research Group*, 2023-NMCA-065, ¶ 12, where this Court held that employers may claim the health care deduction so long as they employ health care practitioners. [CN 2-3]

{5} In response, the Department argues that our reliance on *Robison Medical Research Group* was misplaced because of structural differences in the services provided between Taxpayer and the taxpayer in *Robison Medical Research Group.* [MIO 6-8] However, the Department does not direct this Court to any new fact, law, or argument that persuades us that our notice of proposed disposition was incorrect. The Department's framing in its memorandum of the types of services and the ways these services are provided by Taxpayer fail to address the operative facts and the finding of the AHO—Taxpayer provides services to patients through "duly licensed registered nurses, social workers, dieticians, and other healthcare personnel." [CN 2] Thus, Section 7-9-93 (2023) and other regulations permit Taxpayer "to take the [d]eduction on behalf of an employee, provided that [Taxpayer] is not otherwise excluded and the remaining requirements under the [s]tatute are satisfied." *Robison Medical Research Group*, 2023-NMCA-065, ¶ 12. Therefore, the Department fails to direct this Court to error in our proposed resolution on this issue. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that "[a] party responding to a summary calendar notice must come forward and specifically point out errors of law and fact," and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

{6} The Department also continues to assert that, even if Section 7-9-93 (2023) applies, Taxpayer is otherwise excluded from claiming the exception. The Department contends that we should view the exclusion as not limited to only licensed outpatient facilities, but rather all facilities licensed under the Public Health Act. [MIO 8-11] This Court proposed to affirm based on the unambiguous language of Section 7-9-93(F)(1) (2023) and 3.2.241.13(B) NMAC, which states that the exclusion applies to an entity that is "solely an outpatient facility" that is "licensed under the Public Health Act." [CN 3-4] We proposed to hold that the AHO correctly construed the relevant law because Taxpayer is not a licensed "facility" under the Public Health Act, *see* 7.11.2.7(F) NMAC (2/28/06) (repealed and replaced by 8.370.18.7(F) NMAC), but instead provides end stage renal dialysis services under 7.36.2.9(F) NMAC (repealed and replaced by 8.370.24.9 NMAC). [CN 3-4]

{7} In response, the Department continues to argue that this Court's reading of the exclusion language in Section 7-9-93 (2023) is too narrow and that any facility licensed under the Public Health Act should be excluded. [MIO 9-11] The Department's memorandum again does not direct this Court to any new fact, law, or argument that establishes how the AHO erred. Despite the Department's repeated claims that an end state renal disease dialysis entity like Taxpayer is always an outpatient facility, the statutes and regulations the Department cites fail to support this assertion. The broader definition of "facility" in 7.11.2.7(F) NMAC (2/28/06) is "a building or buildings in which outpatient medical services are provided to the public and which is licensed pursuant to this rule"). The facilities listed in 7.36.3.9(F)(A)-(E), which define "End State Renal Disease (ESRD) Facilities," satisfy this definition. The Department argues that

7.36.2.9(F) NMAC (recompiled 10/31/01) (repealed and replaced by 8.370.24.9 NMAC) (establishes that home dialysis is included in the broader definition of "outpatient facility" licensed by the Public Health Act. This provision defines ESRD services and 7.36.2.9(F)(3)(c) (recompiled 10/31/01) explains that "outpatient dialysis" is a type of care or service provided to patient and "furnished on an outpatient basis at a licensed transplant center, renal dialysis center, or renal dialysis facility," including "home dialysis performed by an appropriately trained patient at home." While it is necessary to read this provision as including home dialysis within the definition of "outpatient dialysis" services, it does not follow that home dialysis is performed at an outpatient facility. The Department does not dispute that Taxpayer performs dialysis in patients' homes. Section 7-9-93(F)(1)(b) (2023) limits the exclusion to "an entity that is *solely* an outpatient facility or intermediate care facility licensed" pursuant to the Public Health Act. (Emphasis added.) We cannot read Section 7-9-93(F)(1)(b) (2023) to include all entities that are licensed under the Public Health Act, despite the Department's repeated claim that this is a more appropriate reading of the statute. [MIO 8-11] *See Am. Fed'n of State, Cnty. & Mun. Emps. (AFSCME) v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 443 ("Statutes must also be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)). Although Taxpayer is licensed under the Public Health Act, that alone is insufficient to exclude Taxpayer from claiming the health care deduction under Section 7-9-93 (2023). Accordingly, the Department has not met its burden of demonstrating error on appeal. *See Hennessy*, 1998-NMCA-036, ¶ 24.

{8} The Department also continues to maintain that the AHO erred by applying NMSA 1978, Section 7-1-60 (1993), which estops the Department from withholding relief to Taxpayer. [MIO 11-12] We proposed to affirm based on our conclusions that Section 7-9-93 (2023) applied to Taxpayer and Taxpayer was not otherwise excluded. [CN 4-5] The Department's memorandum reasserts that Section 7-1-60's application is moot based on its previous assertions. [MIO 11] Based on our earlier analysis, we decline to address this argument further. Defendant also contends that the AHO's decision overreached its authority "by ordering that estoppel from withholding or denying relief applies presumptively to *every* party in *every* protest adverse to the Department." The Department misreads both the AHO's order and Section 7-1-60. The AHO estopped the Department from denying Taxpayer relief in *this* tax protest [RP 189-190; 191, ¶ J], which matches the language of Section 7-1-60. *See* § 7-1-60 (stating "the [D]epartment shall be estopped from obtaining or withholding the relief requested if it is shown by the party adverse to the [D]epartment that the party's action or inaction complained of was in accordance with any regulation effective during the time the asserted liability for tax arose"). We are therefore unpersuaded that the Department's argument impacts our analysis and disposition of the case, and the Department has not met its burden of demonstrating error in this regard. *See Hennessy*, 1998-NMCA-036, ¶ 24.

{9} Finally, the Department continues to assert that the AHO applied the wrong evidentiary standard when ruling on Taxpayer's motion for summary judgment. [MIO 12-16] This Court proposed to affirm the AHO's determination that the Department failed to

establish a genuine issue of material fact such that summary judgment was inappropriate. [CN 5-7] The Department does acknowledge that the AHO may rule on a motion for summary judgment. [MIO 12] *See* NMSA 1978, § 7-1B-8(G) (2019) ("The administrative hearings office shall rule on a dispositive motion, including a motion for summary judgment."). But in response, the Department argues that the AHO erred by disregarding the Department's evidence as unsupported and mere argument because neither the rules of evidence nor the rules of civil procedure apply to the proceedings, citing to NMSA 1978, Section 7-1B-6(D)(1)-(2) (2019). [MIO 12-15] However, the Department's citations to Section 7-1B-6(D)(1)-(2) are incomplete. Section 7-1B-6(D)(1) states, "[T]he Rules of Evidence do not apply. The hearing officer *may require reasonable substantiation of statements and or records tendered, the accuracy or truth of which is in reasonable doubt, to rule on the admissibility of evidence*." (Emphasis added.) Section 7-1B-6(D)(2) states, "[T]he Rules of Civil Procedure for the [d]istrict [c]ourts do not apply," but "[t]he hearing officer shall hear arguments, permit discovery, entertain and dispose of motions, require written expositions of the case as the circumstances justify and render a decision in accordance with the law *and the evidence presented and admitted*." (Emphasis added.)

{10} The Department has therefore failed to demonstrate that our proposed notice of disposition was incorrect. Rather, Sections 7-1B-6(D)(1)-(2) instead support the AHO's reliance upon the summary judgment standards for the Department to rebut with "sworn affidavits, depositions, and similar evidence" Taxpayer's prima facie showing to overcome the presumption that the Department's assessment was correct. [RP 185] *See* Rule 1-056(E) NMRA; *CCA of Tennessee, LLC*, 2024-NMSC-013, ¶ 10. Even under the lesser evidentiary standard, the AHO acted within its authority when it determined that the Department failed to present evidence or that the evidence presented was "'mere argument[s]' that were 'unsupported by evidence.'" [CN 6] Therefore, the Department fails to demonstrate that the AHO erred when finding that there was no genuine issue of material fact when granting Taxpayer's motion for summary judgment. *See Hennessy*, 1998-NMCA-036, ¶ 24. To the extent that the Department contends that the AHO exceeded its statutory authority, the Department likewise fails to demonstrate error based on our review of the applicable statutes.

{11} For the reasons stated in our notice of proposed disposition and herein, we affirm.

{12} IT IS SO ORDERED.

KATHERINE A. WRAY, Judge

WE CONCUR:

J. MILES HANISEE, Judge

ZACHARY A. IVES, Judge