

2012 WL 10194639 (Ark.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Arkansas.
Pulaski County

Maria DUBOSE, Petitioner,

v.

DIVISION OF MEDICAL SERVICES and OFFICE OF LONG TERM CARE, Respondent.

No. CV2012000296.
October 10, 2012.

Respondent's Brief in Support of the Final Agency Action

Claibourne C. Crews, Attorney, Office of Chief Counsel, P.O. Box 1437-SlotS260, Little Rock, AR 72203-1437, (501) 320-6350.

Comes now Respondent, Division of Medical Services and Office of Long Term Care, by and through its attorney, Claibourne C. Crews, and for its Brief in support of the Final Administrative Order issued by the DHS Office of Appeals and Hearings in Case No. 20105768 does allege and state:

INTRODUCTION

On October 11, 2010, the DHS Office of Long Term Care (OLTC) made a finding of long term care resident **neglect** against Petitioner Maria DuBose pursuant to [Ark. Code ann. § 12-12-1703\(15\)\(B\)\(i\) and \(iii\)](#). This finding was affirmed by the DHS Office of Appeals and Hearings (OAH). Respondent argues that the findings, inferences, conclusions and/or decisions of the OAH are supported by substantial evidence of record pursuant to [Ark. Code Ann. §25-15-212\(h\)\(5\)](#) and that the Final Agency Action should be affirmed.

FACTUAL BACKGROUND

On May 22, 2010, Petitioner was working as a CNA at the Beebe Retirement Center in Beebe, Arkansas. Petitioner and another staff member transferred an **elderly** resident to the toilet. After the other staff member left the bathroom, Petitioner left the bathroom leaving the resident unattended and the resident fell off the toilet. Petitioner admitted she left the resident unattended and that he fell while unattended.

The finding of long term care resident care **neglect** against Petitioner which resulted from this fall incident was a correct finding of **neglect** pursuant to [Ark. Code Ann. §12-12-1703\(15\)\(B\)\(i\)\(iii\)](#) as affirmed by the Office of Appeals and Hearings. The preponderance of substantial evidence presented during the administrative hearing established that Petitioner **neglected** to provide necessary care to the resident and failed to follow resident care treatment plan. Petitioner appeals from the Final Order issued by the OAH.

STANDARD OF REVIEW

Judicial review of the Department's decision is governed by the Arkansas Administrative Procedure Act, [Ark. Code Ann. §25-15-201](#), et. Seq. The standard for appellate review under the APA is limited to the six (6) criteria identified by [A.C.A. 25-15-212\(h\)](#). However, it is not the role of the appellate court to conduct a de novo review of the record. [Arkansas Department](#)

of *Human Services vs. Thompson*, 331 Ark. 181, 187, 959 S.W. 2d 46 (1988). The Supreme Court has stated that administrative agencies are better equipped than courts by specialization, insight through experience, and more flexible procedures to determine and analyze legal issues affecting their agencies. *Arkansas State Highway and Transportation Department v. Kidder*, 326 Ark. 595, 599, 933 S.W. 2d 794 (1996). Thus the judicial review is limited in scope because the appellate courts refuse to substitute their own judgment and discretion for that of an agency. *State Plan Board v. Bullock*, 345 Ark. 373, 377, 48 S. W. 3d 516 (2001). As such, the administrative agency or board is afforded great deference. *Id*

When conducting its review, the appellate court looks to the findings of the administrative agency, keeping in mind that courts have held that the hearing officer is in the best position to determine credibility of witnesses and decide the proper weight to give to the evidence. *White County Guar. Savings & Loan Ass'n vs. Farmers and Merchants Bank*, 262 Ark. 893, 562 S.W. 2d 582 (1978). The Court gives the evidence its strongest probative force to support the administrative decision. *Williams vs. Scott*, 278 Ark. 453, 455, 647 S.W. 2d 115 (1983).

ARGUMENT

The Department's Administrative Decision is supported by substantial evidence of record. Substantial evidence is valid, legal and persuasive evidence that a reasonable mind might accept as adequate to support the conclusions and to force the mind to pass conjecture. *Arkansas Real Estate Commission vs. Hale*, 12 Ark App. 229, 233, 674 S.W.2d 507 (1984). Conversely, the absence of substantial evidence is proof before the agency which is so nearly undisputed that fair-minded persons could not reach its conclusion. *Arkansas State Highway and Transportation Department vs. Kidder*, 326 Ark. 595, 598, 933 S.W. 2d 794 (1996). The question then is not whether the testimony would support a contrary finding but, instead, whether it supports the finding that was made. *Kidder* at 598; *Williams vs. Scott*, 278 Ark. 453, 455, 647 S.W. 2d 115 (1983). Based upon the administrative record here, it clearly did.

The testimony of the department's witnesses and the documentary evidence presented is substantial evidence which supports the finding of **neglect** that was made. Evidence in the record proved that the resident was "care planned" to not be left alone in the bathroom due to her being a fall risk; that Petitioner was trained to check care plans daily and had been in serviced on 5/10/10 that the resident was not to be left alone in the bathroom; and that Petitioner failed to follow the care plan and **neglected** the resident pursuant to *A.C.A. §12-12-1703(15)(i)(iii)*. Petitioner claimed she was not aware of the care plan regarding fall risks, that it wasn't in the care plan and that she had not been inserviced until the day after the incident. However, the Administrative Law judge found that she did find the Petitioner's testimony credible. The ALI is in the best position to determine credibility of witnesses and decide the proper weight to give to the evidence.

CONCLUSION

For the reasons stated above, there was substantial evidence of record to support the final agency action. The Administrative Law Judge correctly found that Petitioner's action in this matter constitutes **neglect** under *Ark. Code Ann. §12-12-1703(15)(B) (i) and (iii)*. The Court should dismiss the Petitioner's Petition for Judicial Review, deny her appeal and uphold in its entirety the Final Order entered by the DHS Office of Appeals and Hearings.

Respectfully submitted,

Respondents Division of Medical Services and Office of Long Term Care

By: <<signature>>

Claibourne C. Crews, Attorney

Office of Chief Counsel

P.O. Box 1437-SlotS260

Little Rock, AR 72203-1437

(501) 320-6350

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