IN THE COURT OF APPEALS OF IOWA

No. 2-129 / 11-0543
Filed March 14, 2012

JOHN DOE I and JOHN DOE II,
Petitioners-Appellants,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

A clinic and a physician appeal from the district court's dismissal of their petition seeking judicial review of a denial of a motion to quash a subpoena. **AFFIRMED.**

Michael J. Streit of Ahlers & Cooney, P.C., Des Moines, and David J. Darrell of Baudino Law Group, P.L.C., Des Moines, for appellants.

Thomas J. Miller, Attorney General, and Theresa O'Connell Weeg, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Eisenhauer, C.J., takes no part.

VOGEL, P.J.

John Doe I, a clinic, and John Doe II, a physician, (collectively the Appellants), appeal from the district court's ruling that dismissed their petition for judicial review of the Iowa Board of Medicine's denial of their motion to quash a subpoena. As the Board has not completed its investigation of the physician and acted on it, there has not been a "final decision in the contested case" such that judicial review is available to the physician. Moreover, although the Board's denial of the clinic's motion to quash is final agency action, the clinic's failure to advance an argument and cite authorities in support of its position as it pertains to the clinic has resulted in waiver of the issue on appeal. Finally, the physician's claim regarding judicial review of intermediate agency action fails because he is unable to satisfy the dual-pronged test for the invocation of judicial review of intermediate agency action. We therefore affirm.

I. Background Facts and Proceedings

The pertinent facts, found by the district court, are as follows:

> This case arose from an investigation of a doctor's practices by the Board of Medical Examiners going back to 2004. In 2008 the Board charged the doctor and a hearing was set. The Board sought a continuance alleging further instances of substandard practices had come to light. The motion was denied. The Board did not appeal.
>
> The Board then dismissed the original charges, advising the doctor it would investigate the concerns recently brought to light. In pursuit of that investigation, the Board issued subpoenas for patients' records to the doctor and medical facilities for whom he worked. Both moved to quash their respective subpoenas. An administrative law judge granted the motion in part and denied in part. Both the doctor and the clinic appealed. The Board denied their appeals. They now seek judicial review to have the subpoenas quashed in their entirety.

II. Standard of Review

We review the district court's dismissal of a petition for judicial review for correction of errors at law. *Paulson v. Bd. of Med. Exam'rs*, 592 N.W.2d 677, 678 (Iowa 1999).

III. Claim Preclusion

Appellants argue the district court's order should be reversed and that a hearing on claim preclusion should be allowed. The Board alleges error was not preserved as the district court did not rule on this issue. A Rule 1.904(2) motion is "necessary to preserve error when the district court *fails to resolve* an issue, claim, or other legal theory properly submitted for adjudication." *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002). While Appellants properly submitted a claim preclusion argument for the district court's consideration on judicial review, the district court did not address the argument in its ruling. With no ruling from the district court to review, and in the absence of a Rule 1.904(2) motion and subsequent ruling, we find this issue was not preserved for our appellate review.

IV. Dismissal of Petition for Judicial Review

Appellants next assert the district court erred in dismissing their petition for judicial review because they have exhausted all administrative remedies and the physician asserts judicial review is necessary to avoid prolonged, irreparable injury. On judicial review, Appellants petitioned the district court to reverse the Board's ruling and quash the subpoena, which in its entirety requested the records of twenty-eight patients. The Board contends dismissal was proper because there was not a final agency decision and because the requirements for

intermediate judicial review under Iowa Code section 17A.19(1) (2009) were not met.

A. Final Agency Decision

With respect to a subpoena in a contested case,[1] Iowa Administrative Code rule 653-25.13(8) reads:

> If the person contesting the subpoena is not a party to the contested case, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is a party to the contested case, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

(2009). The physician is a party to a contested case as defined by Iowa Code section 17A.2(5) and therefore the latter part of this rule applies. The clinic is not a party to a contested case. *See Portz v. Iowa Bd. of Med. Exam'rs*, 563 N.W.2d 592, 594 (Iowa 1997) (noting that a third party, from whom the Board sought medical records but was not the subject of the Board's investigation, was a non-party).

1. The Physician

Our supreme court has held that where a medical professional is the subject of an investigation by the Board, "the administrative law judge's refusal to quash the subpoena [does not] constitute final agency action. This is because, under our holding in *Christensen v. Iowa Civil Rights Commission*, 292 N.W.2d 429, 431 (Iowa 1980), there [is] no final agency action until *the [B]oard*

---

[1] A contested case is defined as "a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under Iowa Code section 17A.10A." Iowa Admin. Code r. 653-25.1. Iowa Code section 17A.2(5) provides "contested case" "means a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code chapter 148 governs persons licensed to practice medicine.

conclude[s] its investigation and finally act[s] on it." *Id.* (emphasis added). In *Leo v. Board of Medical Examiners of the State of Iowa*, our supreme court similarly held, "[b]efore a person may obtain judicial review of administrative action, that action must first have been officially sanctioned and thereafter reviewed within the agency to the fullest extent provided by law." 586 N.W.2d 530, 531 (Iowa 1998).

As the Board has not completed its investigation of the physician and acted on it, there has not been a "final decision in the contested case" such that judicial review is available to the physician. *Portz*, 563 N.W.2d at 594; *see* Iowa Code § 17A.19(1) ("A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any *final agency action* is entitled to judicial review thereof under this chapter.") (emphasis added). We therefore affirm as to this issue.

2. The Clinic

The clinic, as a non-party to a contested case, is able to challenge the subpoena under Iowa Administrative Code rule 653.25-13(5), which states, "Any person who is aggrieved or adversely affected by compliance with the subpoena . . . who desires to challenge the subpoena must . . . file a motion to quash or modify the subpoena." In *Portz*, our supreme court explained that what comprises final agency action varies for parties and non-parties to contested case proceedings. 563 N.W.2d at 593. As the clinic is not a party to the contested case proceeding, nor a subject of the investigation, the Board's refusal to quash the subpoena constituted final agency action that was eligible for judicial review by the district court. *See id.* at 594 (explaining that for a non-party

to a contested case proceeding, an administrative law judge's decision to quash a subpoena was agency final action and without judicial review, the non-party could never effectively contest the subpoena).

Where judicial review is available for the Board's denial of a motion to quash, we would normally proceed to the merits of the clinic's challenge. *Id.* The challenge asserted on appeal, however, centers on the burden the subpoena places on the *physician*, not the clinic.[2] As the clinic has failed to make any argument pertaining to the burden of producing patient records under the subpoena and further fails to cite any authority in support of this argument, this issue is waived for our review. *See* Iowa R. App. P. 6.903(2)(*g*)(3). We therefore affirm as to this issue.

V. Intermediate Review

The physician further argues he exhausted all administrative remedies in his attempts to have the subpoena quashed and judicial review is necessary to avoid prolonged, irreparable injury. A party seeking judicial review of intermediate agency action must show that "(1) adequate administrative remedies have been exhausted and (2) review of the final agency action would not provide an adequate remedy." *Richards v. Iowa State Commerce Comm'n*, 270 N.W.2d 616, 619–20 (Iowa 1978). Because "both requirements must be satisfied before intermediate judicial review is permitted, the failure to meet one requirement disposes of the issue." *Id.* at 620.

[2] We note the district court did not separately address the clinic's position, but rather found no "final agency action" as it applied to both the physician and the clinic.

We agree the physician exhausted his administrative remedies, as it pertains to his attempts to have the subpoena quashed, when he was denied relief by an administrative law judge in the Iowa Department of Inspections and Appeals, and then on appeal to the Board. *See, e.g.*, *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 681–82 (Iowa 1995) (holding the exhaustion requirement is met when further agency review is requested, even if it is ultimately denied), *abrogated by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44–48 (Iowa 2004). Our analysis therefore turns on whether the second prong was fulfilled.

Under the second prong of the test, the physician must show "delaying judicial review until after the agency proceeding is inadequate." *Salsbury Labs. v. Iowa Dept. of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979). The physician argues he would suffer irreparable harm in complying with the subpoena because of the costs associated with securing patient records. He further argues compliance with the subpoena would take an "emotional toll" on him and that he would endure "professional harm." Our supreme court has held that "expenses incident to completion of [an] administrative proceeding do not justify intermediate review." *Richards*, 270 N.W.2d at 620. The physician's argument as it relates to the costs of producing the requested records therefore must fail. *See id.* (noting that "all parties seeking intermediate review could meet the second requirement if expenditure of funds in the administrative proceeding rendered final review an inadequate remedy"). The physician "must show the existence of other reasons, peculiar to [his] own case, which make final review an inadequate remedy." *Id.* The physician's assertions regarding the emotional

toll the proceedings would cause and the professional harm he would endure are insufficient to show irreparable harm because he offers no explanation of "why or how this amounts to irreparable injury." *See Salsbury Labs.*, 276 N.W.2d at 837 (finding no showing of irreparable harm because "conclusory allegations" are insufficient). Because the physician had the burden to demonstrate why he "should be permitted to enter court prematurely" and he failed to satisfy this burden, the physician cannot satisfy both prongs of the test for judicial review of intermediate agency action. *Id.* Because the invocation of judicial review relies on satisfaction of both prongs, the physician's claim must fail. *Richards*, 270 N.W.2d at 620. We affirm as to this issue.

VI. Conclusion

As the Board has not completed its investigation of the physician and acted on it, there has not been a "final decision in the contested case" such that judicial review is available to the physician. Moreover, although the Board's denial of the clinic's motion to quash is final agency action, the clinic's failure to advance an argument and cite authorities in support of this argument as it pertains to the clinic has resulted in waiver of the issue on appeal. The physician's claim regarding judicial review of intermediate agency action must also fail because he is not able to satisfy the dual-pronged test for the invocation of judicial review of intermediate agency action. We therefore affirm.

AFFIRMED.