

IN THE COURT OF APPEALS OF IOWA

No. 3-916 / 13-0476
Filed December 18, 2013

FAWAD S. ZAFAR, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson,
Judge.

Dr. Fawad Zafar appeals from the district court order dismissing his
petition for judicial review. **AFFIRMED.**

David L. Brown and Jay D. Grimes of Hansen, McClintock & Riley, Des
Moines, for appellant.

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

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Dr. Fawad Zafar appeals from the district court order dismissing his petition for judicial review. He argues the district court erred in finding his petition for judicial review was untimely because his second petition for rehearing tolled the time in which he had to file for judicial review. He also argues his petition was timely because the agency entered amended final orders after he sought judicial review.

Because the petition for judicial review was not timely filed, we affirm the district court order dismissing it.

I. BACKGROUND FACTS AND PROCEEDINGS.

The present dispute began in January 2008 when the Iowa Board of Medicine charged Dr. Zafar with professional incompetency and engaging in practice harmful or detrimental to the public. Following extensive litigation, the board issued a final decision imposing discipline on October 22, 2010. Dr. Zafar filed a timely application for rehearing, which was granted. The board affirmed the October 22, 2010 decision on January 20, 2011.

On January 27, 2011, Dr. Zafar filed a second application for rehearing, which forms the basis for this appeal. In it, he raised one new challenge to the board's October 22, 2010 decision. Because the board did not rule on the second application within twenty days, it was denied by operation of law. See Iowa Code § 17A.16(2) (2011) ("An application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing.").

On March 4, 2011, Dr. Zafar filed a petition for judicial review. The board moved to dismiss, alleging the petition was untimely because it was not filed within thirty days of the January 20, 2011 order that affirmed the final decision.

Meanwhile, Dr. Zafar continued his litigation at the agency level by filing a “Demand for Removal of Public Record” on March 9, 2011. The board denied the motion on April 22, 2011. On the same day, it entered an order approving Dr. Zafar’s return to general surgery.

The district court denied the board’s motion to dismiss Dr. Zafar’s petition for judicial review on May 17, 2011, finding the board’s final decision was entered on April 22, 2011. The board requested reconsideration of the ruling, which was denied.

The judicial review action was briefed by the parties and submitted to the court. In its brief, the board again argued Dr. Zafar failed to file a timely petition for judicial review and urged the petition be dismissed. In its March 7, 2013 order, the district court found the petition for judicial review was untimely and dismissed the action. Dr. Zafar appeals.

II. SCOPE OF REVIEW.

We review the dismissal of a petition for judicial review for correction of errors at law. *Strickland v. Iowa Bd. of Med.*, 764 N.W.2d 559, 561 (Iowa Ct. App. 2009).

III. ANALYSIS.

Iowa Code chapter 17A, the Iowa Administrative Procedure Act, outlines the procedure for judicial review of agency action. Iowa Code § 17A.1. It allows

an aggrieved party to seek judicial review of a final agency action once all administrative remedies have been exhausted. *Id.* § 17A.19(1). Section 17A.19(3) provides that if a party files an application for rehearing under section 17A.16(2), the petition for judicial review must be filed within thirty days after the application has been denied or deemed denied. A party must file a petition for judicial review according to section 17A.19 in order for the district court to have jurisdiction to hear the petition. *Cooper v. Kirkwood Cmty. College*, 782 N.W.2d 160, 164-65 (Iowa 2010).

The sole question for our review is whether Dr. Zafar's petition for judicial review was timely. Dr. Zafar makes two arguments concerning the timeliness of his petition. The first question we must address is whether a second or subsequent application for rehearing extends the time in which one must file a petition for judicial review. The second question we consider is which orders are deemed final and appealable.

A. Did the second application for rehearing toll the deadline for judicial review?

As stated above, a party has thirty days to file a petition for judicial review after an application for rehearing is denied or deemed denied. Dr. Zafar's first application for rehearing was denied on January 20, 2011. There is no dispute that his petition for judicial review was not filed within thirty days of this denial. Instead, Dr. Zafar filed a second application for rehearing on January 27, 2011, and his petition for judicial review was filed within thirty days of the date the second application was deemed denied by operation of law. The question we

must resolve is when the thirty-day time limit for filing his petition for judicial review, as set forth in section 17A.19(3), began to run.

Chapter 17A does not address whether a party can file second or subsequent requests for hearing. However, our supreme court has indicated that a second application for rehearing may be available to an aggrieved party in an agency action. *Fisher v. Iowa Bd. of Optometry Exam'rs (Fisher II)*, 478 N.W.2d 609, 612 (Iowa 1991). In *Fisher*, the agency initially filed an order dismissing charges against the respondent, and the State filed a petition for rehearing. *Fisher v. Iowa Bd. of Optometry Exam'rs (Fisher I)*, 476 N.W.2d 48, 49 (Iowa 1991) (outlining the same facts relied upon by the court in *Fisher II*). An amended order was then issued, disciplining the respondent. *Id.* On appeal, Fisher had raised a challenge to the amended order that had not been raised in the agency proceedings. *Fisher II*, 478 N.W.2d at 612. The supreme court held, under that unique set of circumstances, the respondent was required to file a second application for rehearing to exhaust his administrative remedies as to that new issue. *Id.*

The facts in the case before us are distinguishable. In *Fisher I*, the respondent did not file the first application for rehearing—the State did. *Fisher I*, 476 N.W.2d at 49. The respondent had no need to file an application for rehearing because the charges against him had been dismissed with the entry of the board's original order; as the successful party, he had no reason to seek rehearing. It was not until the State filed its application for rehearing and an amended decision was entered that the respondent had any need to file an

application for rehearing. *Fisher II*, 478 N.W.2d at 612. While it was the second application for rehearing filed after entry of the final order, it was the respondent's first. The case at bar differs in two respects: no amended order was ever entered following the first application for rehearing and both applications for rehearing were filed by Dr. Zafar.¹

We find the court's ruling in *Fisher II* is in keeping with its rulings concerning successive Iowa Rule of Civil Procedure 1.904(2) motions, which were cited by the district court in its order dismissing Dr. Zafar's petition for judicial review. These rulings stand for the proposition that a rule 1.904(2) motion filed by a party following a denial of the party's prior rule 1.904(2) motion is improper and cannot extend the time for appeal if the judgment remained unchanged following the first motion. See, e.g., *In re Marriage of Okland*, 699 N.W.2d 260, 265-66 (Iowa 2005). The same rationale applies to applications for rehearing in administrative proceedings:

A party should not be able to extend the time for appeal indefinitely by filing successive motions that address the same issue, even if the party is able to articulate a new argument in support of her position. As the Fifth Circuit noted, a party is entitled to only one

¹ The supreme court recently expounded on the difference in deadlines for filing a petition for judicial review where one party files an application for rehearing versus where both parties file dueling applications for rehearing. *Christiansen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 188-91 (Iowa 2013). Where only one party files an application for rehearing, the petition for judicial review should be filed within thirty days after the final decision on the application. *Id.* at 188. However, where there are two applications for rehearing filed by dueling parties, section 17A.19(3) requires "the party to await the final agency decision on the last pending application for rehearing before filing a petition for judicial review, even if more than thirty days has transpired since the agency denied that party's application for rehearing." *Id.* at 190. Although Dr. Zafar argues *Christiansen* supports his position that he had thirty days from the denial of his second application for rehearing to file his petition for judicial review, we find it is not applicable to the case at bar where one party, has filed successive applications for rehearing.

bite at the apple. There are sound reasons for this rule. Repetitive motions waste scarce judicial resources and increase the cost of using the court system. Furthermore, when parties are required to present all arguments on an issue at the same time, the court can comprehensively analyze the issue before it, rather than doing so in a piecemeal, serialized fashion.

Boughton v. McAllister, 576 N.W.2d 94, 96-97 (Iowa 1998).

The grounds for Dr. Zafar's second application for rehearing existed at the time he brought his first application for rehearing, and as such, should have been brought at the same time. *Id.* at 97 (noting the plaintiff had a full opportunity to alert the court to any error in its consideration of and ruling on the first motion). Without an amended order being entered following the first application for rehearing, Dr. Zafar's second application for rehearing did not toll the thirty-day filing period for a petition for judicial review.

A. Which orders are deemed final and appealable under section 17A.19?

Dr. Zafar also contends the district court erred in dismissing his petition for judicial review as untimely because the court overlooked the orders made by the board on March 10, 2011, and April 22, 2011. He argues both orders were amended final decisions, and therefore his petition for judicial review—filed before either order was entered—was timely.

The March 10, 2011 order granted Dr. Zafar's January 26, 2011 request to replace the evaluation facility documented the board's conclusion it did not have jurisdiction to consider Dr. Zafar's second application for rehearing filed on January 27, 2011. To the extent the March 2011 order granted his request to replace the evaluation facility, the board's action was not an amendment of its

final decision on the contested case filed October 22, 2010, and in response to the first application for rehearing affirmed on January 20, 2011. It was instead a responsive action taken pursuant to Iowa Code section 17A.19(5), relating to Dr. Zafar's request for an accommodation in the execution and enforcement of the agency action from which he had appealed.

Similarly, the April 22, 2011 amended order was in response to a final evaluation report submitted to the board on April 6, 2011, as part of Dr. Zafar's efforts to comply with the requirements of the October 22, 2010 and March 10, 2011 orders. As such, the April 22, 2011 amended order was an action taken as part of the execution and enforcement of the earlier agency actions.

Neither of those orders were amended final decisions in the contested case proceedings from which Dr. Zafar had filed his petition for judicial review. If he wished to appeal either of those orders he would have been required to file a separate notice of appeal of other agency action. He is not, however, permitted to use those subsequent orders to bootstrap his petition for judicial review in order to save the untimely appeal.

Because the district court properly dismissed Dr. Zafar's petition for judicial review, we affirm.

AFFIRMED.