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Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-1418-MR

GREENVIEW HOSPITAL, INC. D/B/A
TRISTAR GREENVIEW REGIONAL
HOSPITAL — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 24-CI-00214

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, OFFICE OF
INSPECTOR GENERAL, DIVISION
OF CERTIFICATE OF NEED AND
BOWLING GREEN-WARREN
COUNTY COMMUNITY HOSPITAL
CORPORATION D/B/A THE
MEDICAL CENTER AT BOWLING
GREEN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, EASTON, AND L. JONES, JUDGES.

JONES, L., JUDGE: An administrative agency denied a health care provider a certificate of need for the construction of an additional medical facility in Bowling Green, Kentucky. The Franklin Circuit Court reviewed the agency's decision, found multiple errors, reversed, and directed the agency to approve the application. Though the administrative agency did not appeal, an affected third party did. We have reviewed the circuit court's order and, for the reasons discussed below, disagree that the agency's decision was erroneous. Therefore, we reverse the circuit court and, on remand, direct it to reinstate the administrative agency's decision.

I. BACKGROUND

On November 29, 2023, Bowling Green-Warren County Community Hospital Corporation d/b/a The Medical Center at Bowling Green (MedCenter) applied to the Commonwealth of Kentucky, Cabinet for Health and Family Services, Office of the Inspector General, Division of Certificate of Need (Cabinet), for a certificate of need (CON) that would enable it to construct a freestanding emergency department (FSED). According to MedCenter's application (#114-04-6122(1)), the proposed $14.5 million facility would be "a hybrid [FSED] and urgent care facility in a new 12,500 square foot facility to be located on approximately 1.5 acres of land at The Hub off Lovers Lane in Bowling

Green Kentucky."[1] MedCenter described the "need" for its proposed facility as follows:

> The proposal primarily seeks to serve patients residing in Warren County. [MedCenter] has the fourteenth (14th) busiest emergency department in Kentucky, with more than 43,000 visits each year. System wide, [MedCenter] Health treats greater than 72,000 emergency department patients annually across its five (5) acute care hospitals. The new facility will relieve congestion at [the MedCenter's] emergency department and increase access to urgent and emergent care services for what is recognized as the fastest growing community in the Commonwealth of Kentucky.[2]

In other words, MedCenter's proposed facility was designed to treat lower acuity patients who might either seek treatment at a hospital emergency department (ED) or an urgent care center. Parenthetically, the establishment of an urgent care center does not require a CON. MedCenter projected its proposed FSED would adequately accommodate the existing overcapacity issues and growing population of its proposed service area (which primarily consisted of Warren County, but also somewhat incorporated Allen, Logan, and Butler

[1] Trial Record (TR) at 20.

[2] TR at 22.

Counties)[3] because the proposed FSED would serve 26,171 patients during the first full year of operation and 29,383 patients in the second year.[4]

The Cabinet determined MedCenter's CON application qualified for nonsubstantive review under KRS[5] 216B.095(3) and 900 KAR[6] 6:075. Afterward, an "affected person" – Greenview Hospital Inc., d/b/a TriStar Greenview Regional East Hospital (TriStar) – opposed MedCenter's CON application. TriStar requested and was granted a hearing. *See* KRS 216B.085; KRS 216B.015(3); 900 KAR 6:075 § 2(7). At the hearing, TriStar's sole argument was that MedCenter's proposed FSED was not needed in the service area. *See* KRS 216B.040(2)(b) (providing in relevant part, "[t]he proposal [for a CON] shall meet an identified need in a defined geographic area"). It was TriStar's burden at the hearing to overcome a presumption to the contrary with clear and convincing evidence. *See* KRS 216B.095(4); 900 KAR 6:075 § 2(8) and (9).

Following the hearing, on February 22, 2024, the Cabinet entered Findings of Fact, Conclusions of Law, and a Final Order (Final Order) that denied

[3] MedCenter anticipated 78% of its patients would originate from Warren County, 4.5% from Allen, 4% from Logan, 3% from Butler, and 10.5% from "other." *See* November 29, 2023 application, TR at 23.

[4] TR at 23.

[5] Kentucky Revised Statutes.

[6] Kentucky Administrative Regulations.

MedCenter's application because the proposed FSED was not needed in the service area. MedCenter then filed an original action in Franklin Circuit Court contesting the Cabinet's decision. *See* KRS 216B.115. On September 16, 2024, the circuit court entered an order reversing the Cabinet and directing it to grant MedCenter a CON. The circuit court determined that clear and convincing evidence failed to demonstrate MedCenter's proposed "hybrid" FSED was not required in the service area.

TriStar now appeals the circuit court's order. It concedes the Cabinet's Final Order misconstrued some evidence of record. Nevertheless, it claims the evidence the Cabinet misconstrued was not material to its decision and that, overall, the evidence the Cabinet relied upon was clear and convincing proof that MedCenter's proposed FSED was not needed in the service area. Accordingly, TriStar asserts the circuit court erred by either reversing the Cabinet, or by failing to remand this matter back to the Cabinet for reconsideration.

II. STANDARD OF REVIEW

With adjudicatory administrative hearings, judicial review of an administrative agency's decision generally revolves around arbitrariness.[7] *Hardin v. Louisville/Jefferson Cnty. Metro. Gov't*, 701 S.W.3d 155, 161 (Ky. 2024); *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 792 (Ky. 2019);

[7] KRS 13B.020(3)(b) excludes certificate of need hearings from the ambit of KRS Chapter 13B.

Kentucky Auth. for Educ. Television v. Estate of Wise, 614 S.W.3d 506, 509-10 (Ky. App. 2020); *Alvey v. Davis*, 583 S.W.3d 20, 23 (Ky. App. 2019); *Watson v. Kentucky State Police*, 542 S.W.3d 300, 302 (Ky. App. 2018). "By 'arbitrary' we mean clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence." *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994) (quoting *Crouch v. Police Merit Bd*., 773 S.W.2d 461, 464 (Ky. 1988)). Substantial evidence is evidence that "when taken alone or in the light of all the evidence" is of "sufficient probative value to induce conviction in the minds of reasonable men." *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5, 7 (Ky. App. 1984) (quoting *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). The credibility and weight of the evidence is within the province of the administrative agency, as factfinder. *Ford Contracting Inc. v. Kentucky Transp. Cabinet*, 429 S.W.3d 397, 407 (Ky. App. 2014). "As an appellate court, we step into the shoes of the circuit court" to determine if the administrative agency acted arbitrarily. *Baptist Convalescent Center, Inc. v. Boonespring Transition Care Center, LLC*, 405 S.W.3d 498, 502-03 (Ky. App. 2012).

Pursuant to KRS 216B.095, when a CON application is granted nonsubstantive review, 900 KAR 6:075 § 2(8) creates a dual presumption that the facility or service is required or needed and that it complies with the State Health Plan. If a hearing is not requested, the "Office of Inspector General shall approve

each application for a certificate of need that has been granted nonsubstantive review status[,]" unless the nonsubstantive review status was improperly granted. 900 KAR 6:075 § 2(10). An affected party may challenge an application's nonsubstantive review status by requesting a hearing to rebut the two presumptions by clear and convincing evidence to the contrary. Clear and convincing evidence is "proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *D.H. v. Cabinet for Health and Family Servs.*, 640 S.W.3d 736, 740 (Ky. App. 2022) (quoting *Cabinet for Health and Family Servs. v. K.S.*, 585 S.W.3d 202, 209 (Ky. 2019)).

III. ANALYSIS

It is uncontested that MedCenter's proposed FSED complies with the State Health Plan.[8] Therefore, the sole issue is whether the Cabinet properly determined that TriStar rebutted, with clear and convincing evidence, the presumption that MedCenter's FSED was required or needed in the service area.

To address that issue, we first turn to the relevant substance of the Cabinet's Final Order, which undisputedly misinterpreted some of the evidence of record as we will outline below:

[8] There is no component in the State Health Care Plan for FSEDs, and urgent care centers do not require certificates of need.

FINDINGS OF FACT

. . .

Parties and Background Information:

7. Applicant [MedCenter] FSED and Urgent Care would operate its freestanding emergency department ("FSED") under the license of The Medical Center at Bowling Green ("TMC-BG"), a 337-bed acute-care hospital that operates in Warren County.

8. TMC-BG itself is operated by Bowling Green-Warren County Community Hospital Corporation, a nonprofit healthcare system with facilities throughout southeastern Kentucky.

9. TMC-BG has a high-volume emergency department with 26 treatment bays.

10. [MedCenter] currently operates an urgent-care center that it plans to fold into the new facility, if this application is approved. The urgent-care center in operation currently is located on Lovers Lane, near the proposed site of the new FSED.

11. Affected Party TriStar Greenview Hospital [(TriStar)]falls under the HCA Healthcare umbrella, one of the 186 hospitals with emergency departments throughout the country. HCA also operates 142 freestanding emergency departments and has over 280,000 employees within its system. [TriStar] is in one of HCA's 15 divisions, which is based in Nashville, Tennessee.

12. [TriStar] is a 211-bed acute care hospital, which operates an emergency department ("ED") with 25

treatment "bays," in which emergency-room patients and urgent-care patients are treated.

13. The level of care for each [TriStar] patient is determined through triage. The patients are rated on a 1 to 5 index, ranging from lowest to highest acuity. These ratings are known as the Emergency Severity Index ("ESI") for level of acuity. This system is universally-utilized by perhaps up to 96% of hospitals.

The Application and the Project:

14. [MedCenter] filed CON No. 114-04-6122(1), which it characterized as "a hybrid freestanding emergency department (FSED) and urgent care facility in a new 12,500 square foot facility to be located on approximately 1.5 acres of land at The Hub off Lovers Lane in Bowling Green, Kentucky."

15. There is a capital expenditure proposed of $14,500,000 to implement this project.

16. The primary geographic service area is identified by [MedCenter] as "primarily" patients residing in Warren County. The proposed service area map also includes adjacent counties Allen, Butler and Logan.

17. The FSED application of [MedCenter] was granted nonsubstantive review status on January 4, 2024[,] by the Division of Certificate of Need, as requested by [MedCenter].

18. [TriStar] timely filed its request for a public hearing in this matter on January 25, 2024.

. . .

21. In Year One of operations, [MedCenter] projects that about 5757 [patients] will need emergency department services, and that there will be about 22 to 24% of those

patients who will require an inpatient level of service and will need to be transferred to an acute-care hospital.

22. [MedCenter] projects that 78% of its patients will originate from Warren County. It projects the other patients to originate in the adjacent counties of Allen, Butler, and Logan (11.5%) and the remaining 10% from other areas.

23. At the FSED/[urgent care center], patients would be seen in a reception area, then would be taken to a treatment bay for medical screening, as required by the Emergency Medical Treatment and Active Labor Act ("EMTALA") for emergency departments. The ESI acuity rating would be applied, then patients would be assigned for the appropriate level of care.

. . .

26. [MedCenter] contends need exists, due in part to the fact that the TMC-BG emergency department has been operating over capacity, acknowledged by the [TriStar] expert witness. Using 2023 data, TMC-BG had 43,930 emergency-department visits, which exceeded its 2019 pre-COVID volume of 44,465 visits by a little over one percent.

27. [MedCenter] posits that about five percent of the patients presenting at the TMC-BG emergency department leave without being examined/treated. However, it also concedes that most of those patients are low acuity.

28. About 78% of the patients who are projected to present to the FSED/[urgent care center], if approved, would have the level of acuity that would require urgent-care services, rather than emergency-department services.

Relevant Facts to Rebut Need:

29. [TriStar] filed an application, CON No. 114-04-6059(1), which was issued on April 30, 2023, for a second acute-care hospital that will be known as TriStar Greenview Regional East Hospital ("TGH-East"). The hospital's location will be at 656 Frist Blvd in Bowling Green. This street is located off Lovers Lane, where the [MedCenter's] proposed facility is to be located. The distance between the two proposed locations is about 1500 feet.

30. TGH-East is planned to have 12 treatment bays in its emergency department on the first floor of the facility. It will provide both emergency and urgent-care services.

31. [MedCenter] opposed the TGH-East application, based on a lack of need. It is unclear from the testimony whether this lack of need related to the emergency-department services, in whole or in part.[9]

32. [TriStar] filed an application, CON No. 114-04-5833(1), which was issued on August 24, 2017, for a freestanding emergency department. This facility will be located on a plot of land on Lovers Lane, about 1000 feet from [MedCenter's] proposed FSED.

33. The new [TriStar] freestanding emergency department will have 11 treatment bays and will provide both emergency and urgent-care services.

34. [TriStar] plans to have its new FSED in operation by September, 2025. While the building has not yet been constructed, the roads leading to the FSED are under

[9] MedCenter later appealed the Cabinet's decision to grant TriStar a CON for TGH-East – first, to the Franklin Circuit Court (which affirmed), and later to this Court (which likewise affirmed). *See Bowling Green–Warren Cnty. Cmty. Hosp. Corp. v. Cabinet for Health and Fam. Servs.*, No. 2024-CA-0859-MR, 2025 WL 2678986 (Ky. App. Sep. 19, 2025).

construction. Additionally, financing has been approved and the plans have been submitted to the overlay district.

35. Younger[10] admitted that [TriStar's] freestanding emergency department construction has been delayed since the CON application was approved in 2017. Factors such as the coronavirus pandemic, and a failed proposed relocation contributed to the delays.

. . .

38. [MedCenter] is no stranger to certificate of need project delays, as it was granted a CON to expand its complement of acute-care beds in 2016, and the project has not yet been completed, as of the date of this hearing, some 7 or 8 years later.

39. Neither The Joint Commission, nor the Centers for Medicare and Medicaid Services ("CMS"), recognize a facility category for hybrid freestanding emergency departments and urgent-care centers.

40. Hospitals are not prohibited from adding additional treatment bays to an existing emergency department, and this does not require a certificate of need.

41. Urgent-care services may be provided at various types of facilities. These include doctor's offices, urgent-care centers, freestanding emergency departments, and acute-care hospital emergency departments.

42. All emergency departments treat patients that have various levels of acuity. This would include urgent-care services, as well as traditional emergency services.

43. Warren County's population is growing significantly. Additionally, Kentucky's population has increased since 2015, but statewide emergency department usage has

[10] TriStar witness Sam Younger was at all relevant times the Chief Operating Officer for TriStar.

decreased at a rate of about 1.4%. Emergency department visits in the Barren River Area Development District ("ADD") in which Warren County is located, generally have decreased by roughly 1.5% annually since 2015. The most recent Kentucky Annual Utilization and Services Report ("utilization report") shows emergency department visits within Warren County to have decreased about 0.3% since 2015.

44. The utilization report figures indicate that both [TriStar] and TMC-BG have seen a decrease in emergency department visits since 2019.

45. The coronavirus pandemic has impacted emergency department usage in Kentucky, and this usage generally has not yet returned to pre-COVID levels.[11]

46. [TriStar] would examine and treat any patient presenting to its emergency department, regardless of level of acuity (if able to do so).

47. [TriStar] treats all patients, regardless of payor source, or ability to pay. This is required by EMTALA.

48. To plan for emergency department utilization, 1500 visits per treatment bay per year is the usual figure for calculations, although this may vary, with regard to levels of patient acuity. This figure is set forth in the American College of Emergency Physicians planning

[11] ¶¶43-45 of the Final Order, while not unsupported, require some elaboration. MedCenter adduced evidence at the CON hearing that in 2019, total visits at *its* ED were 43,930; in 2020, they were 36,422 (the decrease owing largely to COVID); in 2021, they were 38,159; in 2022, they were 43,156; and in 2023, they were 44,265, which slightly exceeded its 2019 level. TriStar also adduced evidence that total visits at its ED and others (excluding MedCenter) were commensurately high in 2019; went down in 2020 (due to COVID); and that in 2021 through 2023, steadily rose and reapproached 2019 levels. Thus, while MedCenter's 2023 level exceeded its 2019 level, usage generally had not yet returned to pre-COVID levels; and a return to pre-COVID levels did little to demonstrate that the need for more ED capacity had significantly increased since 2019.

guide: “Emergency Department Design: A Practical Guide to Planning for the Future,” by Jon Huddy, AIA.

49. TGH-East would account for 18,000 emergency department visits per year, once in operation.

50. The [TriStar] freestanding emergency department would account for 16,500 emergency department visits per year, once in operation.

51. Despite TMC-BG currently being over capacity in its own emergency department and lacking ED-level services for about 2656 patient visits per year, the other acute-care hospitals in the counties from which [MedCenter] expects to draw 90% of its patients currently have available capacity, which total about 5424 annual patient visits.

52. While [MedCenter] anticipates 5757 patient visits per year at its proposed FSED/[urgent care center], because it acknowledges that about 78% of these patients will need only urgent-care level of services, this leaves roughly 1267 patient visits per year who may need emergency department services. Another 22 to 24% of patients would be expected, historically, to have an acuity level that would require their transfer to an acute-care hospital for inpatient services, after triage at a freestanding emergency department. Subtracting this number (at the lower percentage calculation) would result in 988 patients needing emergency department services from [MedCenter] in its first year of operation, as per its own projections.

53. Adding the lack of current capacity at TMC-BG of 2656 ED patient visits per year, to the 988 ED-level patient visits per year that [MedCenter] projects in its first year of operation, would create a need within [MedCenter’s entire] healthcare system in Bowling Green of 3644 patient visits per year at the emergency department levels of acuity.

54. Considering the capacity from the existing acute-care hospitals in the proposed service area (8080 patient visits/year), along with [TriStar] facilities granted a CON, a total surplus capacity of 39,924 ED-level patient visits would exist within the service area. These would alleviate the lack of capacity at TMC-BG, and supplant the projected need at [MedCenter's] FSED, as well as provide up to an additional 36,280 ED-level patient visits per year.

55. Even if neither of the [TriStar] facilities opened within the next several years, the existing emergency departments within the service area have enough capacity to meet the needs as set forth by the TMC-BG and [MedCenter] facilities, with an additional 4436 ED-level patient visits per year.

56. [MedCenter] contends that many patients are unaware of the level of services they need. By visiting a hybrid FSED/[urgent care center], patients may receive care for their lower-acuity needs at a lower cost. This cost savings only would apply to the physician's fee for the examination, as ancillary services would be billed at emergency-department rates. Moreover, the patients would not be aware of the potential cost savings until after having been screened for their level of acuity and having received treatment for their ailments.

57. Based on the capacity of [TriStar Hospital], the new facility, TGH-East, and the new [TriStar] freestanding emergency department, Joe Thomas, in his capacity as an Expert in Emergency Medicine believes there is no unmet need for emergency department services.

58. Daniel Carter, an Expert in Healthcare Planning and Healthcare Finance does not believe there is an unmet need for an emergency department in the geographical service area.

CONCLUSIONS OF LAW

. . .

10. . . . [T]he geographic service area, as self-identified by the applicant as "primarily" Warren County (along with adjacent counties), is the area in which need is to be proven.

. . .

12. [TriStar Hospital] is located within the identified geographic service area, and has formally indicated an intention to provide similar services within Bowling Green and Warren County, and therefore, is an "affected person."

. . .

16. 902 KAR 20:016, Section 7 sets forth the licensing requirements for an off-campus Kentucky hospital-owned freestanding emergency department ("FSED").

17. A Kentucky-licensed hospital (such as [MedCenter]) that seeks to establish an FSED . . . shall obtain a certificate of need. This application meets the circumstances set forth in 902 KAR 20:016, Section 7(3). Compliance with licensing regulations is not within the purview of the approval of a certificate of need, and the licensure terms addressed herein are only for the purpose of showing the requirement for a certificate of need.

18. Urgent care facilities have no Kentucky regulatory requirement to obtain a certificate of need.

19. Neither The Joint Commission, nor the Centers for Medicare & Medicaid Services recognize urgent care centers as a defined healthcare facility type.

20. There is no category of "hybrid" freestanding emergency department and urgent care center in Kentucky or federal health-facility regulations.

21. At first blush, it may appear this application analysis would be more complex, because the Applicant's testimony at the hearing related to the approval of "a hybrid freestanding emergency department (FSED) and urgent care facility . . ." However, classifications of healthcare facilities and services in Kentucky, and the requirement for certificates of need for certain of those facilities and services is within the purview of the Office of Inspector General, through the promulgation of regulations. An applicant filing an application for a service or facility characterized by a name attributed to the applicant does not grant additional, or specific review and analysis criteria that do not exist within current statutes and regulations. [MedCenter], in its witness testimony, seeks to have its application reviewed as a "hybrid" emergency department and urgent care center [footnote omitted], as if there were two facilities combined under one roof. However, certificates of need are not required for urgent care centers, which are not a facility category recognized by state or federal regulating entities. Therefore, the urgent-care services proposed by [MedCenter] are evaluated with regard to the means by which they may add value to all of the services offered at its proposed freestanding emergency department, with ultimate analysis of whether the proposed FSED (and its attendant emergency-department level of acuity services) is needed in the geographical service area. Of note, the [MedCenter] application acknowledges this is an FSED application and that there are not separate (FSED and urgent care center) components to the approval process:

> "The FSED will be operated as a hospital-based department under the hospital license of The Medical Center . . . . The department shall function in a manner consistent with 902 KAR 20:016, Section 4(8), which

> governs the operation of hospital-based emergency services and, specifically, Section 7, which governs off-campus, Kentucky hospital-owned FSEDs. The project will include urgent care **services** . . . ." (Emphasis added)

The January 18, 2024 CON Newsletter gave public notice of [MedCenter's] application to "[e]stablish a freestanding emergency department."

22. While a great deal of testimony from both parties centered around the provision of urgent-care services in the geographical service area, because this application relates to a freestanding emergency department, this testimony and evidence about urgent-care services is irrelevant to the determination of need for an FSED. Urgent care services may be provided at many types of medical facilities, and there are no regulations relating to requirements or standards for urgent care facilities or services.

23. [TriStar] was granted two certificates of need for facilities that will have emergency department treatment bays (the TriStar Greenview Regional East Hospital and a freestanding emergency department). These CONs were issued prior to the coronavirus pandemic that the expert witnesses in this matter agreed had impacted emergency-department utilization. The facts indicate emergency-department utilization, on the whole, has not returned to pre-pandemic levels. With CONs having been issued with a presumption of need in 2016 and 2017, and with that need having decreased in the interim years, it is reasonable to conclude that the need that existed at the time the CONs were issued can be alleviated with the implementation of the CONs and the operation of the two [TriStar] facilities. There has been no proof offered by [MedCenter] after the need-rebuttal facts set forth by [TriStar] that need will have increased above the pre-pandemic levels, such as to require even

> more emergency-department services than will be provided by [TriStar] upon operations of its new hospital and freestanding emergency department.
>
> 24. If a certificate of need has been granted to an entity, it is presumed the project will be implemented. Otherwise, steps may be made toward revocation. So long as the CON exists, the need that it was granted to alleviate no longer exists, in theory, if not in practice. In this case, despite the current nonexistence of an FSED building, [TriStar] has taken the requisite steps to implement its project, based on the totality of the circumstances. Therefore, with [TriStar] having successfully rebutted the presumption of need in this case (as set forth in Paragraph 25, below) and the burden of proof having shifted to [MedCenter], there is a much higher bar to prove that need actually does exist in Warren County for another freestanding emergency department, especially given that [TriStar] proved its case by clear and convincing evidence. [MedCenter] has not met this bar.
>
> 25. [TriStar] has rebutted the presumption of need granted to Med Center Health FSED and Urgent Care, by clear and convincing evidence, as set forth herein.
>
> 26. Med Center Health FSED and Urgent Care, in its case-in-chief that followed the rebuttal of its presumption of need, failed to prove that an additional freestanding emergency department in the identified geographical service area is needed.

In summary, the Cabinet determined MedCenter's proposed FSED was not needed in the area MedCenter designated. The Cabinet believed the area already possessed, or would possess, more than enough capacity to care for the 26,000 to 29,000 patients MedCenter projected its "hybrid" FSED would need to treat in order to relieve the congestion at MedCenter's hospital-based ED. The

Cabinet based its decision on: (1) the existing urgent care centers in the area, (2) the acute care hospitals located in the outlying counties, (3) the potential alternative for MedCenter to simply expand its existing ED, and (4) the two facilities Tristar already had CONs to build.

MedCenter thereafter petitioned the Franklin Circuit Court to review the Cabinet's decision. The circuit court found MedCenter's arguments persuasive, and those arguments formed the basis of the circuit court's ultimate determination that the Cabinet materially erred in finding clear and convincing evidence demonstrated MedCenter's proposed FSED was not needed. We will discuss those arguments below.

A. Whether the Cabinet Erred by Failing to Distinguish Between a "Traditional" and a "Hybrid" FSED

MedCenter asserts the Cabinet erred by treating its CON application as a proposal for a traditional FSED rather than a hybrid FSED which would combine emergent services with urgent care. The Cabinet found the distinction to be irrelevant because there is no CON requirement for the establishment of an urgent care center, and no specific licensure classification for a hybrid FSED. In fact, there is no definition or description of a hybrid FSED in Kentucky statutes or regulations.

MedCenter argues: "There is nothing in any CON statute or regulation that suggests a hearing officer can arbitrarily ignore the *true nature* of a proposed

health facility because it does not fit neatly into one of the licensure categories identified by the Cabinet." Appellees' Brief at 15 (emphasis added). We agree. However, we do not find the Cabinet's decision was arbitrary, nor do we find the Cabinet ignored the *true nature* of MedCenter's proposed facility.

MedCenter's argument centers on the uncontested fact that its hospital-based ED is overcrowded with low-acuity patients, and its belief that the over-crowding is due to patient confusion regarding whether to present to an ED or urgent care facility for treatment of their ailment or injury. MedCenter argues that addressing patient confusion is a "need" in its defined service area – a need that only its proposed CON could satisfy because there is no other *hybrid* FSED in the area. However, MedCenter concedes that low-acuity patients would still present to its hospital-based ED, and the hospital-based ED legally could not refuse to provide services for those patients. MedCenter also concedes that there would also be high-acuity patients presenting to their hybrid FSED who still would need to be transferred to a hospital for proper care. Nevertheless, MedCenter theorizes that more low-acuity patients would present to their hybrid FSED which would relieve the long wait-time at their hospital-based ED and save some of these patients money (if the patients present during urgent care hours and don't require ancillary services, *e.g.*, labs and x-rays).

This argument is less about *capacity* and more about *filtration*. "Need" is not defined in any of the statutes or regulations surrounding the application for a CON. However, the overarching purpose of our CON legislation is to prevent the unnecessary duplication of medical services. Our General Assembly has determined that "the proliferation of unnecessary health-care facilities, health services, and major medical equipment results in costly duplication and underuse of such facilities, services, and equipment; and that such proliferation increases the cost of quality health care within the Commonwealth." KRS 216B.010.

MedCenter asserts that the potential reduction in the number of patients unable to determine whether they should be treated at an ED or an urgent care center is a "health service" a hybrid FSED is uniquely capable of providing. In its CON application, MedCenter argues there is a *need* for this health service. Its logic, then, leads to the conclusion that *every* service area needs such a health service; and, because this health service can *only* be provided by a hybrid FSED, every service area needs at least one hybrid FSED – regardless of how many traditional FSEDs or hospital EDs might already be overcrowding those service areas.

However, MedCenter ignores the simple fact that patients do not present to a hybrid FSED for the service of having their conditions classified as

emergent or non-emergent. Patients present for the same reason they present at any urgent care facility, traditional FSED, or hospital ED, namely, to receive *treatment* for their conditions. That is the ultimate health service any urgent care, hospital ED, or FSED – traditional or hybrid – provides; its *true nature*. Furthermore, MedCenter ignores the fact that every emergency department, whether hospital-based or free-standing, treats patients regardless of their level of acuity; they are all essentially "hybrid." This is not a matter of how patients will be treated, but how patients will be billed. Therefore, adding a new FSED into an overcrowded service area would *duplicate* health services and run contrary to the overarching purpose of our CON legislation.

MedCenter argues that the Cabinet has approved other hybrid FSEDs throughout the Commonwealth. However, those were approved as FSEDs. If those FSEDs choose to operate a particular hybrid model, there is nothing preventing them from doing so as urgent care services do not require a CON.

MedCenter's argument weighs against it here. First, as the Cabinet recognized, Kentucky, when issuing CONs, does not distinguish between hybrid or traditional FSEDs. Kentucky simply issues CONs for FSEDs. Therefore, the Cabinet was correct in analyzing whether there was a need for additional emergent care treatment options in the community. Even assuming a hybrid FSED is best suited for alleviating patient confusion regarding the level of care needed, granting

MedCenter a CON would not obligate MedCenter to operate a hybrid FSED; and granting MedCenter a CON would not require its hybrid FSED to show proof it has alleviated patient confusion regarding whether to go to an ED or urgent care facility. In other words, granting MedCenter its FSED would not be a means of satisfying this supposed need. Simply put, this *need* MedCenter proffered was not relevant to the CON proceeding.

B. Whether a Need for a New FSED Existed in the Area

This is the dispositive issue governing the remainder of our analysis: The extent to which the defined service area was *already* capable of treating the same patients MedCenter's proposed FSED would treat. If sufficient capacity to treat these patients already existed in the service area, then MedCenter was not entitled to a CON. With that in mind, we will proceed to a discussion of MedCenter's remaining arguments.

1. Whether the Cabinet Took Improper Evidence into Consideration When Assessing the Area's Current Ability to Address Overcapacity

MedCenter alleges the Cabinet went beyond the scope of nonsubstantive review in rendering its decision. In particular, MedCenter believes it was inappropriate for the Cabinet to consider alternatives to granting the requested CON.

Nonsubstantive review is governed by 900 KAR 6:075(2)(11):

> The cabinet shall disapprove an application for a certificate of need that has been granted nonsubstantive review if the cabinet finds that the:
>
> . . .
>
> > (b) Presumption of need . . . has been rebutted by clear and convincing evidence by an affected party.

An affected party may request a hearing to challenge the presumption of need, and, at that hearing, may "present oral or written arguments and evidence relevant to the matter which is the subject of the hearing[.]" KRS 216B.085(3). There is no limitation to the evidence presented at a CON hearing except relevance. We do not find the Cabinet acted arbitrarily in its consideration of the evidence.

2. Whether the Cabinet's Mathematical Errors are Material

It is uncontested that MedCenter's hospital-based ED, located at TMC-BG, operates above-capacity. However, MedCenter claims the Cabinet erred by underestimating the level at which the hospital emergency department was operating over recommended capacity. Recall, the Cabinet determined (in Findings of Fact Nos. 51 and 53 of its Final Order) that MedCenter had been unable to provide "ED-level services for about 2656 patient visits per year" at TMC-BG. As MedCenter noted in its petition for review,[12] that figure was

[12] *See* Petition, ¶¶43-45, TR at 8-9.

calculated by Daniel Carter, one of TriStar's expert witnesses. Carter multiplied 27 (the total number of ED treatment spaces available at TMC-BG) by 1,500 (the recommended planning number for calculating visits per treatment bay per year), which resulted in 40,500; and he then subtracted that amount from 43,156 (the total number of ED visits TMC-BG received in 2022), which resulted in an over-capacity figure of 2,656.

However, the evidence supported (and the Cabinet found) that MedCenter only had *twenty-six* emergency department treatment bays. *See* Final Order, ¶ 9. Additionally, TMC-BG is an academic medical center as well as a safety-net provider for high acuity patients; therefore, according to expert testimony provided at the CON hearing, the appropriate recommended capacity benchmark for calculating MedCenter's hospital-based ED visits per treatment bay per year should have been 1,250 – not 1,500. Thus, substituting 26 and 1,250 into the above calculations ultimately leads to a much greater over-capacity figure of 10,656 for 2022 – and, with respect to years 2019, 2020, 2021, and 2023, an average annual over-capacity figure of around 10,000.[13]

Furthermore, in the Cabinet's Finding of Fact No. 52, the Cabinet stated that MedCenter projected 5,757 patients visits per year to its proposed FSED

[13] Again, MedCenter adduced evidence at the CON hearing supporting that in 2019, its total ED visits were 43,930; in 2020, they were 36,422; in 2021, they were 38,159; in 2022, they were 43,156; and in 2023, they were 44,265.

with 1,267 of those patients requiring emergent care as opposed to urgent care services. MedCenter argues the testimony was 26,171 projected patient visits in its first year of operation with 5,757 patients being billed for emergent care.

While the errors are concerning, they do not affect the result; even with the adjustment, there was ample capacity in the service area to deny MedCenter's CON application for an FSED.

3. Whether TriStar's Previously Approved CONs Were Appropriate for the Cabinet's Consideration of Need

In 2016 and 2017, TriStar was awarded two CONs by the Cabinet. The first was for the establishment of an acute care hospital with an ED[14] which would be located on Frist Boulevard in Bowling Green, which is off Lovers Lane and approximately 1,500 feet from MedCenter's proposed FSED. The second was for an FSED which would be on Lovers Lane and approximately 1000 feet from MedCenter's proposed FSED. Together these facilities will provide twenty-three new treatment bays in the community with the capacity to address 34,500 patient visits yearly. This more than covers the proposed need, even under the corrected capacity calculation.

[14] MedCenter contested the CON and appealed the Cabinet's decision – first, to the Franklin Circuit Court (which affirmed), and, later to this Court (which likewise affirmed). *See Bowling Green–Warren Cnty. Hosp. Corp. v. Cabinet for Health and Fam. Servs.*, No. 2024-CA-0859-MR, 2025 WL 2678986 (Ky. App. Sep. 19, 2025).

While neither facility had been completed at the time of MedCenter's CON hearing, roadwork was underway, financing had been approved, and plans had been submitted. Medical facilities are not constructed overnight, and it was not arbitrary for the Cabinet to consider these future resources in its determination of need.

4. Whether the Cabinet Made Other Improper Considerations

MedCenter argues it was improper for the Cabinet to expect patients wanting to be cared for at a MedCenter-operated facility to instead seek care at another facility. "Branding" is not a need contemplated by our Kentucky statutes or regulations. And, while it is uncontested that MedCenter's hospital, TMC-BG, offers an array of surgical and obstetric services not provided elsewhere in the area, those services would not be available at MedCenter's proposed FSED either. Patients requiring those services who presented to MedCenter's proposed FSED would be transferred to TMC-BG or another appropriate facility, just as they would if they presented at any other FSED, hospital ED, or urgent care in the area.

Similarly, MedCenter claims it was improper for the Cabinet to include as resources the emergency care capacity in the surrounding counties because the distance between Bowling Green and these counties is too great to expect patients to travel. Yet MedCenter included the residents of these same counties in the proposed service area for its FSED.

Finally, MedCenter argues it was improper for the Cabinet to suggest an expansion of its hospital-based ED at TMC-BG as an alternative means of relieving overcrowding at the facility. Whether or not this is a topic for formal as opposed to nonsubstantive review, we do not find the Cabinet's consideration of this factor material to the ultimate decision.

Taken as a whole, there was substantial evidence, relevant to the stated purpose of the CON legislation outlined in KRS 216B.010, to support the Cabinet's finding that TriStar overcame the presumption of need.

C. Whether the Cabinet Improperly Shifted the Burden of Proof

Contained in the Cabinet's Final Order under Conclusions of Law No. 24, is the statement: "Therefore, with [TriStar] having successfully rebutted the presumption of need in this case . . . and the burden of proof having shifted to [MedCenter], there is a much higher bar to prove that need actually does exist in Warren County for another [FSED], especially given that [TriStar] proved its case by clear and convincing evidence. [MedCenter] has not met this bar." MedCenter argues the Cabinet misapplied the law because there is no "burden-shifting" provision in the laws and regulations governing CON proceedings.

While the Cabinet's statement may be inartful, we cannot agree it constitutes a misapplication of the law. Substantial evidence must provide the basis for the Cabinet's decision. *See Kentucky Auth. For Educ. Television*, 614

S.W.3d at 509-10. "In determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight." *Ward*, 890 S.W.2d at 643 (internal quotation marks and citation omitted). After TriStar's proof attacking the presumption of need, MedCenter had the opportunity to present evidence on its own behalf. The Cabinet weighed the evidence at the conclusion of the hearing and found the evidence of need was insufficient to overcome the evidence weight of the evidence presented by TriStar. Assessing the weight of the evidence was clearly the prerogative of the Cabinet as factfinder. *See Ford Contracting*, 429 S.W.3d at 407. We do not find the Cabinet placed an unauthorized burden upon MedCenter, and we cannot say the Cabinet's assessment of the evidence was clearly erroneous.

IV. CONCLUSION

As 900 KAR 6:075 § 2(11)(b) provides, "The cabinet shall disapprove an application for a certificate of need that has been granted nonsubstantive review if the cabinet finds that the . . . [p]resumption of need . . . provided for in subsection (8) of this section has been rebutted by clear and convincing evidence by an affected party." Here, the Cabinet's Final Order disapproving MedCenter's CON application followed that mandate. The Franklin Circuit Court erred by finding to the contrary and reversing. We therefore REVERSE the Order of the

Franklin Circuit Court. Upon REMAND, the circuit court shall reinstate the Final Order of the Cabinet denying the Certificate of Need.

ALL CONCUR.

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