

NOT DESIGNATED FOR PUBLICATION

JAMES BRUCE JOHNSON, * **NO. 2010-CA-1253**
M.D.

*
VERSUS **COURT OF APPEAL**

*
LOUISIANA STATE BOARD **FOURTH CIRCUIT**
OF MEDICAL EXAMINERS *
STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2009-12361, DIVISION "C"
Honorable Sidney H. Cates, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

LOVE, J., CONCURS AND ASSIGNS REASONS
TOBIAS, J., CONCURS IN THE RESULT.

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APRIL 13, 2011

AFFIRMED

James Bruce Johnson, M.D., appeals the district court's judgment affirming the Louisiana State Board of Medical Examiners' decision to suspend his medical license. For the reasons that follow, we affirm the judgment of the district court.

Facts

Dr. Johnson is a plastic surgeon who decided to cease his drug and alcohol abuse in 2004 by voluntarily seeking treatment. In May 2005, Dr. Johnson agreed to be monitored for drugs and alcohol by the Physicians Health Foundation of Louisiana (PHFL). The agreement was that Dr. Johnson submit urine samples for testing by FirstLab, a company who administers drug tests for PHFL. According to the Appellee, the Louisiana State Board of Medical Examiners (the "Board"), Dr. Johnson admitted to having a lifelong chemical dependency problem while practicing as a full-time surgeon in Metairie, Louisiana. In 2005 Dr. Johnson was diagnosed as being polysubstance dependent on cocaine, alcohol, and opiates, and also diagnosed as suffering from a narcissistic personality disorder.

The appellee suggests that Dr. Johnson did not seek treatment on his own accord as he represents, but that Dr. Johnson was hospitalized after a psychotic episode wherein his neighbors called the police after he was "shooting aliens with

a cross-bow in his backyard”. Just as disturbing, the Board maintains that Dr. Johnson continued to prescribe himself drugs and performed a nine-hour surgical procedure in his office when he did not have hospital staff privileges. Lastly, the Board argues that even after Dr. Johnson’s medical license had been suspended, he continued to prescribe medication for his girlfriend and another patient.

Dr. Johnson is a graduate from the University of Michigan’s medical school. He is a plastic surgeon and an ENT specialist who, prior to 2008, was licensed to practice in the states of Louisiana and California. Dr. Johnson attributes his bizarre behavior in his backyard to withdrawals from ceasing his drug use. He maintains that he has not used drugs or alcohol since February 13, 2005.

According to Dr. Johnson, his urine was randomly tested 80 times between 2005 and 2008 by FirstLab and at no time did he test positive for drugs. However, on December 12, 2005, Dr. Johnson’s urine sample showed Interference which is considered “invalid” by FirstLab standards.

Procedural History

Dr. Johnson was charged with various violations of the Medical Malpractice Act (“MPA”) (*discussed infra*). An evidentiary hearing was conducted before the Board on August 26 and 27, 2009. On October 19, 2009, the Board rendered an Opinion finding that Dr. Johnson had violated the MPA and that he could not return to practice medicine in Louisiana until he could show six months of sobriety through the Board substance abuse program. Upon successful completion, Dr. Johnson’s license would be reinstated with a probationary period of five years. During that five year period, Dr. Johnson would be randomly tested by FirstLab.

On November 23, 2009, Dr. Johnson petitioned the Civil District Court for the Parish of Orleans for judicial review of the Board’s decision. On May 4, 2010,

the district court affirmed the Board's ruling finding that the Board did not act arbitrarily and capriciously. It is from this judgment that Dr. Johnson takes the instant appeal.

Assignments of Error

On appeal, Dr. Johnson offers the following eight assignment of errors: that the district court erred in (1) affirming the Board's determination that Dr. Johnson violated the MPA by engaging in "recurring", "habitual" or "excessive" use of drugs or alcohol; (2) affirming the Board's determination that Dr. Johnson is professionally and medically incompetent; (3) affirming the Board's determination that Dr. Johnson engaged in unprofessional conduct; (4) affirming the Board's determination that Dr. Johnson violated the Board's office based surgery rules; (5) affirming the Board's determination that Dr. Johnson improperly prescribed medications under Louisiana law; (6) affirming the Board's determination that Dr. Johnson engaged in the practice of medicine without a license; (7) affirming and refusing to reduce or alter the sanctions that the Board imposed upon Dr. Johnson; and (8) upholding the Board's February 27, 2009 Order denying Dr. Johnson's Motion to Compel the Board's Director of Investigations to produce an email exchange between the Board's Director of Investigations ("DOI") and the Director of the PHFL. For the purpose of clarity we will address each assignment of error individually, however, we find that assignments numbers 4-7 fall under one legal analysis.

Standard of Review

The imposition of an administrative sanction is in the nature of a disciplinary measure and we will not set aside an administrative agency's decision to impose a particular sanction unless that decision is arbitrary, capricious or an abuse of discretion. *Armstrong v. La. Bd. of Med. Examiners*, 03-1241, p. 10 (La.App. 4 Cir. 2/18/04), 868

So.2d 830, 838. Pursuant to La.Rev.Stat. 49:956(4), an “agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence” and, accordingly, upon review of administrative actions, we recognize “the strong presumption of validity and propriety in such administrative actions where casting judgment upon the professional behavior of a fellow member of a profession is a matter peculiarly within the expertise of an agency composed of members of that profession.” *Armstrong*, at pp. 10-11, 868 So.2d at 838 (citation omitted). Thus, given the jurisprudential presumption of correctness of an agency's action, the appellant has the burden of proving the record contains no facts to establish the validity of the charges levied against him. *See Armstrong, supra*.

Pastorek v. Louisiana State Bd. of Medical Examiners, 2008-0789 (La. App. 4 Cir. 12/17/08), 4 So.3d 833, 836-837.

Assignment of Error #1

Dr. Johnson argues that the district court erred in finding that he violated the MPA by engaging in “recurring”, “habitual” or “excessive” use of drugs or alcohol. Dr. Johnson claims that there is not “one shred of evidence” that he engaged in the use of drugs or alcohol since February 13, 2005. More specifically he argues that his urine samples showed Interference when using the urine testing method used by PHFL, but not by the method used by gas chromatography (GCMS). Therefore, he argues that this evidence fails to support the finding that Dr. Johnson violated La. R.S. 37:1285(A)(5)¹. The appellee briefs that Dr. Johnson seeks to place an exact time frame on his abuse limiting it to after February 13, 2005, when he had been abusing alcohol for approximately 20 years, using cocaine for nearly two years and was abusing hydrocodone for approximately four years.

¹ **Causes for nonissuance; suspension; revocation; or the imposition of restrictions; fines; reinstatement; publication of action; stays.** (A). The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other restrictions on any license or permit issued under this Part for the following causes: . . . (5) Habitual or recurring abuse of drugs, including alcohol, which affect the central nervous system and which are capable of inducing physiological or psychological dependence.

The appellee also argues that Dr. Johnson was hospitalized at River Oaks Hospital where he was first treated after his psychotic episode in his backyard. He then relapsed days before entering the Betty Ford Clinic in early February 2005. During this time, he was diagnosed with polysubstance dependence by River Oaks Hospital, Betty Ford Clinic, Palmetto Addiction Center and Addiction Recovery Resources Center of New Orleans.

It is well established law that:

[t]he board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other restrictions on any license or permit...for the following causes: Habitual or recurring abuse of drugs, including alcohol, which affect the central nervous system and which are capable of inducing physiological or psychological dependence”.

La. R.S. 37:1285.

The record supports that in 2005 Dr. Johnson signed a monitoring contract with PHFL wherein he agreed to random drug testing among other preventative acts. Between 2005 and 2007, Dr. Johnson did not have a positive test and his negative tests were deemed invalid because of Interferences. Further, the agreement that Dr. Johnson entered into required more than just testing; it required that he not attempt to medically treat himself, that he undergo intensive outpatient treatment, and that he attend AA meetings. The appellee proved at trial that Dr. Johnson failed to fulfill most of his requirements under the contract. We agree and support the Board’s assessment that “the primary consideration here is the protection of the public. With all the evidence at hand it is impossible to say that Dr. Johnson is free of drugs and alcohol...”.

Further, we cannot say that the district court erred in finding otherwise considering Dr. Johnson’s admitted drug abuse, his various stays at treatment

centers, his inability to adhere to the PHLF agreement and his failure to test positive on a regular basis when tested by FirstLab, the method to which he consented.

This Court finds that Dr. Johnson's theory that using the costly GCMS method would result in more accurate and possibly favorable results reveal traits of his diagnosed narcissistic personality disorder (*discussed infra*) by insisting on venturing outside of the original contract by altering the rules to fit his needs.

There is no error by the district court finding Dr. Johnson a habitual drug user under La. R.S. 37:1285.

Assignment of Error #2

Dr. Johnson argues that the district court erred in affirming the finding that the Board found him professionally and medically incompetent under La. R.S. 37:1285(A)(12)², which he attributes to the DOI's diagnosis that he suffered from a narcissistic personality disorder which prevented him from complying with the PHFL monitoring contract. He argues that he does not have any psychiatric or psychological condition today that would prevent him from practicing medicine safely and this is supported by the testimony of his personal psychologist, Dr. Judith Barnes-Cochran, Ph. D. He further maintains that the court based its opinion solely on the testimony of Dr. Ken Roy, a psychiatrist, who concluded that people with a narcissistic personality disorder should be prevented from practicing medicine.

Causes for nonissuance; suspension; revocation; or the imposition of restrictions; fines; reinstatement; publication of action; stays. (A). The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other restrictions on any license or permit issued under this Part for the following causes: ... (12) Professional or medical incompetency;

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of “manifest error” or unless it is “clearly wrong,” and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Arceneaux v. Domingue*, 365 So.2d 1330, 1333 (La.1978); *Canter v. Koehring*, 283 So.2d 716, 724 (La.1973). See also, *Sevier v. United States Fidelity & Guaranty Co.*, 497 So.2d 1380, 1383 (La.1986); *West v. Bayou Vista Manor, Inc.*, 371 So.2d 1146, 1150 (La.1979); *Davis v. Owen*, 368 So.2d 1052, 1056 (La.1979); *Cadiere v. West Gibson Products Co.*, 364 So.2d 998, 999 (La.1978); *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989).

The record supports that corroborated testimony of different psychiatrists concluding that the diagnosis of narcissistic personality disorder impaired Dr. Johnson’s ability to comply with the monitoring contract; therefore, as we stated above, we would be placing the public at risk if he were allowed to practice medicine without fulfilling his obligation under the rules set out by PHLF. We find that the district court considered all of the testimony at trial as to Dr. Johnson’s personality disorder and that the trier of fact made reasonable inferences from the testimony presented. The district court did not err in affirming the Board’s decision finding Dr. Johnson incompetent under La. R.S. 13:1285(A)(12).

Assignment of Error #3

Dr. Johnson argues that the district court erred in affirming the Board's determination that he engaged in unprofessional conduct. Specifically, Dr. Johnson maintains that he voluntarily entered the PHFL monitoring program and that the mere Interference in his urine alone does not constitute unprofessional conduct.

The Board maintains that Dr. Johnson's unprofessional conduct was not merely the Interference in his urine, but his inability to uphold his commitment to the contract by failing to call in to the Physicians Health Program ("PHP") drug testing notification system, failing to notify PHP in advanced of his leaving town, failing to be in compliance with his medical and psychological treatment, and failing to disclose all of the medications he was taking.

In *Doe v. Louisiana State Bd. of Medical Examiners*, 94-0985 (La.App. 4 Cir. 4/26/95), 654 So.2d 824, the Board found that the doctor's unprofessional conduct was based upon his "[d]eceptive conduct, performance of a non-indicated surgical procedure and submission of fraudulent Medicare claims." This court reversed the district court's finding that the Board acted arbitrarily and capriciously relying on *Montalbano v. Board of Medical Examiners*, 560 So.2d 1009 (La.App. 4th Cir. 1990), wherein "[we] recognized that the scope of judicial review of actions taken by an administrative agency is limited to a determination of whether the decision was unreasonable, arbitrary or capricious or amounted to an abuse of discretion. [We] stated further that reviewing courts 'must be cognizant of the strong presumption of validity and propriety in such administrative actions where casting judgment upon the professional behavior of a fellow member of a profession is a matter peculiarly within the expertise of an agency composed of members of that profession.'" *Montalbano, Id. at 1011.*

In the instant matter, we find that Dr. Johnson's behavior was unprofessional under the statute. Although there is no direct link between his practice of medicine and his particular behavior in failing to abide by the monitoring agreement, we hold Dr. Johnson to a high standard as a professional. We find that his failure to comply with the contract indirectly affects his ability to competently practice medicine. The record reveals that Dr. Johnson's approach to the contract was nonchalant, irresponsible and uncaring, an approach that the fellow members of his profession found inadequate. However, we do not solely base our decision on just his failure to comply with the contract. We agree, and the record supports, that the district court properly concluded in its Reasons for Judgment that "[t]he next charge, of unprofessional conduct, is based on Respondent's performance of the office based surgery...and on Respondent's self-prescribing practices and his prescribing for D. J.³ without keeping any records or justification".

La. R.S. 49:964(G) provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) **Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;** or (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. **In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review.** In the application of the rule, where the agency has the opportunity to judge

³ From the record, D. J. was Dr. Johnson's girlfriend at that time.

the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues. (emphasis added)

The district court was not arbitrary or capricious and this Court's evaluation of the entire record supports the district court's finding. We find no error.

Assignments of Error #4, #5, #6 and #7

We address the following assignments of error collectively because they refer to whether Dr. Johnson engaged in the practice of medicine without a license by violating the Board's office based surgery rules and improperly prescribing medications and whether the sanctions imposed upon Dr. Johnson were proper. The legal analysis below applies to these assignments of error.

We first address that the district court, as did the Board, found three instances whereby Dr. Johnson engaged in activities that directly compromised his medical license.

According to the Board, Dr. Johnson performed an extensive cosmetic surgical procedure in his office involving anesthesia. The district court concluded that "[t]here was also competent and sufficient evidence that Dr. Johnson performed a lengthy and extensive office-based surgery in May 2008 when he knew or should have known that he did not have hospital privileges in violation of rules on office based surgeries."

La. Admin. C., Title 46, Section 7309(A)(2)(a)(I)⁴ specifically forbids office based surgeries without hospital staff privileges. Dr. Johnson maintains that the type of surgical procedure he performed involved "conscious sedation" as opposed

⁴ According to the Board's opinion, this section of Title 46 is interpreted as "a physician performing office based surgery shall possess current staff privileges to perform the same procedure at a hospital located within a reasonable proximity".

to “deep sedation” referred to in La. Admin. C., Title 46, Section 7309(a), and that he did not need hospital staff privileges with “conscious sedation”. Dr. Colon testified on behalf of the Board, and opined that Dr. Johnson should not have performed the procedure in his office without hospital privileges. Dr. Bruce Halperin, Dr. Johnson’s expert, testified that it was not the best medical practice for Dr. Johnson to have engaged in such a procedure. The district court reasoned that:

[t]here was also competent and sufficient evidence that Dr. Johnson performed a lengthy and extensive office-based surgery in May 2008 when he knew or should have known that he did not have hospital privileges in violation of rules on office based surgeries. The Court further finds that there was competent evidence presented to the Board that this type of procedure was not exempted from the Rules as involving conscious sedation [sic]. The Board's decision in this regard was not arbitrary, capacious, or an abuse of discretion.

Dr. Johnson also argues that there was no evidence as to the standard of care in prescribing controlled substances and the Board's findings are not supported by the evidence. The Court finds these arguments to be without merit. There was competent and sufficient evidence presented as to the standard of care on prescribing through the testimony of experts, the language of the rules themselves, and the PHP Monitoring Agreements, which Dr. Johnson consented to be bound by. Further, the Board was not arbitrary in its findings that the prescriptions were not supported by the patients' charts, i.e., without legitimate medical justification. ...

The Board's findings that Dr. Johnson practiced medicine without a license by prescribing testosterone to himself while his license was suspended, was reasonable and supported by competent and sufficient evidence including the testimony of experts and Dr. Johnson's testimony. The Board's finding that the December 11, 2008 prescription was an original prescription was not arbitrary, capricious, or an abuse of discretion.

In *Reaux v. Louisiana Bd. of Medical Examiners*, 2002-0906 (La.App. 4 Cir. 5/21/2003), 850 So.2d 723, this court determined that:

[i]n reviewing the Board's decision, the district court had to determine whether the Board's factual findings were supported by substantial evidence and whether the Board's conclusions and sanctions were arbitrary or capricious or constituted an abuse of its discretion. To reverse the Board's decision, the district court had to find that the Board's factual findings constituted manifest error.... To modify the penalties imposed by the Board, the district court had to find that the penalties were arbitrary, capricious, an abuse of discretion, or grossly disproportionate to the offense.

In this case, the record supports the district court's determination that Dr. Johnson did indeed violate the rules of practicing medicine. Further, in accordance with *Reaux*, we do not find that the punishment imposed upon Dr. Johnson is disproportionate to the offenses (performing a surgical procedure and prescribing medication with a suspended medical license). We reiterate the importance of protecting society from what we consider dangerous behavior and practices that can possibly impact the life of an unsuspecting individual. The Board was not arbitrary and capricious in its findings and the district court did not err in affirming those findings.

Assignment of Error #8

Lastly, Dr. Johnson argues that the district court erred in upholding the Board's February 27, 2009 Order denying Dr. Johnson's Motion to Compel the to produce an email exchange between the DOI and the Director of the PHFL.

In a brief argument, Dr. Johnson claims that the district court erred in denying his motion to compel the production of e-mails between DOI sand the PHFL. He argues that the correspondence falls within the broad scope of

discoverable information and that he was entitled to uncover factual information relating to the allegations and findings of the PHFL in order to properly defend his license.

The Board maintains that the records sought by Dr. Johnson are confidential and privileged because they are exempt from disclosure under the Louisiana's Public Records Law and are deemed to be confidential and privileged.

Dr. Johnson cites La. Code Civ. Pro. Art.1422 in support of his position.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

La. Code Civ. Pro. Art. 1422.

This Court recognized in *Francois v. Norfolk Southern Corp.*, 2001-1954 (La.App. 4 Cir. 3/6/02), 812 So.2d 804, that the trial court's discretion is considered abused when a motion is denied and that motion is to compel the production of relevant information. Such information becomes relevant when examination of the requested information may be the only means available to the party seeking discovery to defend against claims. However, trial courts have broad discretion in regulating pretrial discovery, which discretion will not be disturbed on appeal absent a clear showing of abuse. *Council of City of New Orleans v. All Taxpayers, Property Owners*, 2003-0189 (La.App. 4 Cir. 2/24/03), 841 So.2d 72, writ denied, 2003-0626 (La. 4/4/03) 840 So.2d 1221.

The documents sought were privileged documents between the Board and the PHP. Dr. Johnson fails to make a succinct argument as to how this privileged information falls within the scope of admissible evidence just because the communication between the parties resulted in the disciplined actions.

Decree

For the reasons stated above, we affirm the district court's ruling affirming the Louisiana State Board of Medical Examiners' decision to suspend the medical license of James Bruce Johnson, M.D.

AFFIRMED