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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0596**

In the Matter of the Chiropractic License
of Curtis L. Cich, D. C.,
License No. 2369

**Filed November 18, 2008
Affirmed in part and reversed in part
Klaphake, Judge**

Minnesota Board of Chiropractic Examiners
License No. 2369

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Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Relator, Curtis L. Cich, D.C., seeks review of a decision of the Minnesota Board of Chiropractic Examiners (the board) concluding that he engaged in unprofessional conduct, exploited patients for personal gain, engaged in deceptive conduct toward the public, and utilized threatening fee-collection techniques in violation of Minn. Stat. § 148.10 (2004). Relator also seeks relief from the board-imposed discipline of a two-

year suspension of his license and assessment of a \$50,000 civil penalty and costs. Because the board's decision was based on substantial evidence and was not arbitrary and capricious with respect to three violation determinations, we affirm in part, but we reverse the finding regarding improper fee collection techniques, and amend the civil penalty imposed to conform to the statutorily defined limits.

D E C I S I O N

On review of a contested-case hearing, this court may affirm or remand for further proceedings, or it may reverse or modify the agency's decision if the substantial rights of the relator have been prejudiced because the decision is, among other reasons, either "unsupported by substantial evidence" or "arbitrary and capricious." Minn. Stat. § 14.69 (2006). A decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). But an agency's decision is arbitrary and capricious if it reflects the agency's will and not its judgment. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001).

1. Date Record Closes

Relator first argues that the board acted without jurisdiction because, pursuant to Minn. Stat. § 14.61 (2006), the administrative law judge's (ALJ) recommendation became the final decision within 90 days of the record closing. Relator asks this court to construe the statute as stating that the record closes within 10 days of the ALJ's submission of its recommended decision. Applying a de novo standard of review, we

conclude that relator's suggested construction is incorrect. *See Piestch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004) (giving de novo review to statutory interpretation question). Minn. Stat. § 14.62, subd. 2a (2006), provides that "the report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it under subdivision 1 within 90 days after the record of the proceeding closes under section 14.61." In turn, Minn. Stat. § 14.61, subd. 2, states:

Closure of record. In all contested cases where officials of the agency render a final decision, the contested case record must close upon the filing of any exceptions to the report and presentation of argument under subdivision 1 or upon expiration of the deadline for doing so. The agency shall notify the parties and the presiding administrative law judge of the date when the hearing record closed.

The term "[a]rguments in subdivision 1" refers to arguments of the parties "to the majority of the officials who are to render the decision." Minn. Stat. § 14.61, subd. 1. In the present case, the board is the agency charged with rendering a decision.

Minn. Stat. § 14.61 plainly provides that, in a contested case, the record closes upon the filing of exceptions to the report and presentation of argument to the board or on the date the board sets if more time is required by the parties. If the board then fails to issue its decision within 90 days of the presentation of arguments or of the announced date the record closes, the ALJ's decision becomes final. Minn. Stat. § 14.62, subd. 2a.

Because the board did not set a specific date for the closing of the record, the record closed on March 7, 2008, when the parties filed the final memorandum for the

board's consideration as agreed during arguments before the board. The decision issued on March 27, 2008, was therefore properly within the 90-day time limit.

2. *Substantial Evidence/Arbitrary and Capricious*

Relator next argues the board's decision improperly rejected the credibility determinations of the ALJ, made findings and conclusions opposite from those made by the ALJ, and largely adopted the proposed findings and conclusions of the complaint panel.

The decision of the ALJ is entitled to some weight. *In re Denial of Eller Media Co. Appls. for Outdoor Adver. Permits*, 664 N.W.2d 1, 6 (Minn. 2003). But the agency decision-maker owes no particular deference to the ALJ's findings, conclusions, or recommendation. *Blue Cross*, 624 N.W.2d at 278. Although an agency owes no particular deference to the ALJ's report, Minn. Stat. § 14.62 requires an agency to give reasons for its rejection of the ALJ's recommendation, and failure to do so is evidence that the agency's decision was arbitrary and capricious. *Bloomquist v. Comm'r of Natural Res.*, 704 N.W.2d 184, 190 (Minn. App. 2005); *see City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984) (agency is not required to give ALJ's recommendation same deference that appellate court must accord agency findings). Here, relator complains that the board accepted the red-lined factual findings proposed by the complaint panel. He further argues that, although the board did state reasons for deviating from the ALJ's findings, the stated reasons cleverly masked its wholesale acceptance of the panel's recommendations. Our review of the record leads us to a different conclusion.

In its decision, the board provided detailed findings that rejected the ALJ's recommended findings and set forth specific reasons for accepting as credible the testimony of the complaint witnesses. These findings are directly supported in the record and accurately reflect the testimony of the parties. The board's findings, although different from the ALJ's, are rational and well reasoned. Based on the record, we conclude that the board's factual findings are substantially supported by the record. *See City of Moorhead*, 343 N.W.2d at 846 (reviewing court defers to the agency's factual findings, and should affirm those findings if the record contains substantial evidence supporting them).

This court must also examine whether substantial evidence exists to support the board's conclusions. *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002) (defining substantial evidence as "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety"); *see also In re Petition of N. States Power Co.*, 416 N.W.2d 719, 724 (Minn. 1987) (holding that in applying the substantial-evidence test, the reviewing court should determine whether the agency adequately explained how it derived its conclusion and whether that conclusion was reasonable).

First, the board determined that relator's conduct violated two statutory provisions for unprofessional conduct: (1) that relator's conduct in misleading patients into believing that insurance would cover their treatment costs or that they otherwise would not have to pay for treatment constituted unprofessional conduct in violation of Minn.

Stat. § 148.10, subs. 1(a)(11), (e); and (2) that relator failed to conform to minimum standards of practice by not providing statements of accounts on a regular basis in violation of Minn. Stat. § 148.10, subd. 1(a)(11). In support of these findings, the board noted that had the patients been properly and timely informed of the amount of the outstanding bills, they would not have continued treating and incurring debt.

Minn. Stat. § 148.10, subd. 1(a)(11), authorizes the state board of chiropractic examiners to suspend a chiropractor's license for "unprofessional conduct," which is defined to include

any unethical, deceptive or deleterious conduct or practice harmful to the public, any departure from or the failure to conform to the minimal standards of acceptable chiropractic practice, or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established.

Id., subd. 1(e). The question presented is whether the record supports a determination that relator's conduct constitutes unprofessional conduct per se, or whether the record supports the conclusion that relator's conduct "negatively affect[ed] the professional-patient/client relationship and [was] unethical, deceptive and harmful to the public."

On careful review, the record supports the board's first two conclusions. Indeed, the record includes testimony of three witnesses who complained of similar verbal assurances by relator that the insurance would cover their care or that they need not be concerned about fees. In addition, there is evidence of written complaints from two other patients regarding misleading statements made by relator with the nature and extent of assurances being similar to those complained of by the testifying witnesses. In reviewing

the record in its entirety, the evidence supports the board's findings that: (1) relator failed to submit regular statements of accounts to his patients; (2) relator knew that the patients were financially vulnerable or unsophisticated; (3) the patients trusted relator as an insurance coverage expert; (4) the patients each signed a statement acknowledging their financial responsibility; (5) the patients uniformly testified that they were verbally assured that these forms were routine or "just for the file"; (6) the patients testified that they would have terminated treatment had they known the amount of outstanding balances or if relator had not misrepresented that continued treatment would be covered by insurance; and (7) relator had a practice of withholding bills until termination of treatment. The board further determined that the witnesses' testimony was credible because it was consistent with the other witness testimony and consistent with prior complaints filed against relator. Based on this record, the board's first two conclusions of violation are substantially supported by the evidence.

Relator argues that the patients' complaints were not filed until after he initiated collection, and their testimony is suspect because it was motivated by their financial self-interest and was made after extensive coaching by the complaint panel's attorneys. While this interpretation of the facts may be plausible, because this court must defer to the board's determinations if supported by the record, relator's arguments are insufficient to overturn the board's decision. Further, we also reject relator's argument that several of the complaints were resolved by earlier corrective action of the board and that he fully complied with these demands. The record clearly demonstrates that relator continued to

make misleading statements to patients regarding insurance coverage and did not remind them they were ultimately responsible for expenses, as he had agreed to do.

The board further concluded that relator violated a third statutory provision, Minn. Stat. § 148.10, subd. 1(19), by “exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee.” The board determined that relator failed to provide current, regular billing statements, and that had the three patients been informed of their current financial obligations on a regular basis, as required by the chiropractic standards of practice, they would not have continued treatment. Relator received financial gain because the patients’ continued treatment in ignorance of their large outstanding balances. Again, this conclusion is supported by the evidence set forth above.

Finally, the board concluded that relator violated Minn. Stat. § 148.10(e)(5), by engaging in threatening, dishonest, or misleading fee collection techniques. The record does not support this conclusion. Minn. Stat. § 148.10(e)(5) defines unprofessional conduct to include, “directly or indirectly engaging in threatening, dishonest, or misleading fee collection techniques.” Two expert witnesses testified that relator’s fee collection techniques—submitting outstanding bills to an attorney for collection and initiating legal proceedings to recover unpaid bills—were well within the standards of the practice. The board reasoned, however, that this provision was violated if a bill was initially incurred by means of misleading or dishonest tactics. This reasoning improperly expands the plain meaning of the statutory language and is not consistent with standards of statutory interpretation. *See State v. Iverson*, 664 N.W.2d 346, 350-51 (Minn. 2003)

(holding the principal method of determining the legislature's intent is to rely on the plain meaning of the statute). Relator's conduct did not violate established standards for "fee collection techniques"; it merely misled the patients into continuing non-reimbursable treatment. Thus, the board's fourth conclusion is unsubstantiated in the record.

On this record, we conclude the board's decision is supported by the record and is not arbitrary and capricious with respect to the first three violation determinations, but is not supported in its conclusion with respect to the fourth violation.

3. *Excessive Penalty*

Relator finally argues that the board exceeded its authority in imposing the excessive penalty of a two-year license suspension, \$50,000 fine, and costs. This complaint is partially valid.

The board's authority includes the power to grant, deny, revoke, suspend, condition, limit, restrict, or qualify a license to practice chiropractic. *See* Minn. Stat. § 148.10. Curiously, there is no guideline for the board to follow in imposing discipline. In the past, agency assessment of penalties and sanctions has been reviewed for an abuse of discretion. *See In re Haugen*, 278 N.W.2d 75, 81 n.10 (Minn. 1979) (recognizing assessment of penalties and sanctions by an administrative agency is not a factual finding, but the exercise of a discretionary grant of power); *In re Minn. Tipboard Co.*, 453 N.W.2d 567, 569 (Minn. App. 1990) (holding reviewing court should not interfere with sanctions imposed by agency unless a clear abuse of discretion is shown), *review denied* (Minn. May 30, 1990).

The purpose of a [b]oard proceeding concerning the revocation of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. The function of the [b]oard is, therefore, not only to consider [relator's] acts, but also the harm to the public if such acts remain unpunished and the deterrent effect upon others of a severe penalty.

Padilla v. Minn. State Bd. of Med. Exam'rs, 382 N.W.2d 876, 877-78 (Minn. App. 1986), review denied (Minn. Apr. 24, 1986).

Indeed, a two-year suspension of license is severe. The board defended its discipline decision because of the financial harm caused to the patients and relator's disregard for lesser disciplinary measures imposed by the board. The board also remarked on the nature of the relationship between a vulnerable patient and a doctor—a relationship of trust. *See Padilla*, 382 N.W.2d at 877-78 (stating “[p]rofessionals have a deep responsibility not to abuse the trust which licensure places in them . . . there is no other profession in which one passes so completely within the power and control of another as does the medical patient”). In light of the trust relationship and relator's history of problems in this area, we defer to the discretion of the board to regulate its own profession. Thus, though extreme, we conclude that the board's decision to impose a two-year suspension was not an abuse of its discretion.

On the other hand, the board had only limited authority to impose a civil penalty. Under Minn. Stat. § 148.10, subd. 3(3) (2006), the board could

impose a penalty not exceeding \$10,000 for each separate violation, the amount of the civil penalty to be fixed so as to deprive the doctor of chiropractic of any economic advantage gained by reason of violation charged, to reimburse the board

for the cost of the investigation and proceeding, or to discourage similar violations.

Here, the board assessed a \$50,000 civil penalty, calculated as \$10,000 for each of the four violations found, and an extra \$10,000 to discourage future violations, as well as costs. The extra \$10,000 fine is plainly in excess of the board's statutory authority. Again, looking at the plain language of the statute, the board may only impose a civil penalty of up to \$10,000 for each violation. In addition, the statute provides no authority to assess costs over the \$10,000 limit. Rather, the statute clearly permits up to \$10,000 per violation—that amount of penalty to be determined with reimbursement of costs in mind. Thus, to deter future violations or to allow for costs, the board's sole statutory option is to impose the upper limit of \$10,000 per violation. Accordingly, we reduce the civil penalty to the statutory limit of \$30,000; \$10,000 per violation.

We affirm the board's decision with respect to the first three violations and its license suspension, but reverse the fourth determination regarding collection techniques and reduce the civil penalty to the statutory limit of \$30,000 for three violations.

Affirmed in part and reversed in part.