

[Cite as *Ross v. State Med. Bd. of Ohio*, 2004-Ohio-2130.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael R. Ross, M.D.,	:	
Appellant-Appellee,	:	
v.	:	No. 03AP-971 (C.P.C. No. 02CVF09-10028)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellant.	:	

O P I N I O N

Rendered on April 27, 2004

Elizabeth Y. Collis, for appellee Michael R. Ross, M.D.

Jim Petro, Attorney General, and *Rebecca K. Hockenberry*,
for appellant State Medical Board of Ohio.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Appellant, the State Medical Board of Ohio ("board"), appeals from a judgment of the Franklin County Court of Common Pleas that reversed its order revoking the medical license of appellee, Michael R. Ross, M.D. For the following reasons, we reverse the trial court's judgment and affirm the board's order.

{¶2} Appellee is licensed to practice medicine in a number of states, including North Carolina and Ohio. In December of 2001, appellee entered into a Consent Order ("order") with the North Carolina Medical Board. In that order, appellee admitted that he provided medical services through Virtual Medical Group.com, L.L.C., ("VMG"). VMG provides medical services, including drug prescriptions, over the internet. Appellee admitted that he prescribed drugs through VMG without examining patients and without a prior patient-physician relationship. He admitted that prescribing drugs without a physical examination or a prior patient-physician relationship was unprofessional conduct within the meaning of N.C.Gen.Stat. 90-14(a)(6). Appellee also split fees with VMG and assisted VMG in the unauthorized practice of medicine, conduct he admitted was unprofessional. As a result of his admitted unprofessional conduct, the North Carolina Medical Board suspended appellee's medical license for 60 days, but stayed that suspension upon appellee's compliance with certain terms and conditions. Those terms and conditions, among other things, required appellee to refrain from prescribing drugs without physically examining patients and to refrain from splitting fees with a business organization.

{¶3} By letter dated March 14, 2002, the board notified appellee of its intention to determine whether or not to sanction appellee due to the North Carolina Medical Board's action. See R.C. 4731.22(B)(22). Following a hearing, the board's hearing officer issued a report and recommendation. In that report, the hearing officer determined that R.C. 4731.22(B)(22) authorized the board to sanction appellee based upon the action of the North Carolina Medical Board. The hearing officer recommended the permanent revocation of appellee's license to practice medicine in Ohio. The board did not follow

that recommendation. Instead, the board ordered the revocation of appellee's medical license (a less severe sanction than permanent revocation).

{¶4} Appellee appealed the board's order to the Franklin County Court of Common Pleas. That court found reliable, probative, and substantial evidence to support the board's order. However, the trial court determined that the order was not in accordance with law because the board never seriously considered sanctions less severe than the revocation of appellee's medical license. Therefore, the trial court reversed the board's order and remanded the matter to the board for reconsideration of its sanction.

{¶5} The board appeals, assigning the following error:

After properly concluding that the State Medical Board of Ohio's finding that Dr. Ross violated R.C. 4731.22(B) was supported by the requisite evidence and in accordance with law, the Franklin County Court of Common Pleas erred by vacating the Board's lawfully imposed sanction.

{¶6} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence, and is in accordance with the law. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87; *Rossiter v. State Med. Bd. of Ohio*, 155 Ohio App.3d 689, 2004-Ohio-128, at ¶11. Reliable, probative and substantial evidence has been defined as follows:

* * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571.

{¶7} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the commission's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} Neither party appeals the trial court's determination that the board's order was supported by reliable, probative, and substantial evidence. The board contends the trial court erred when it determined that the board's order was not in accordance with law. We agree.

{¶9} The trial court, relying on *Brost v. Ohio State Med. Bd.* (1991), 62 Ohio St.3d 218, determined that the board's order was not in accordance with law because the board did not seriously consider a sanction less severe than revocation. However, *Brost* is distinguishable from the present case. In *Brost*, the board adopted a hearing officer's recommendation to revoke Brost's license. The hearing officer's recommendation noted that revocation was the minimum sanction that the board could impose pursuant to the

board's disciplinary guidelines. The Supreme Court of Ohio reversed, noting that "[i]f, in fact, the board felt constrained to abide by the disciplinary guidelines without consideration of lesser sanctions provided in R.C. 4731.22(B), then the board's actions were, consequently, not in accordance with law." *Id.* at 221. In *Brost*, the court was unable to conclude with any degree of certainty whether or not the board felt compelled to apply its guidelines as binding authority. *Id.* Accordingly, the Supreme Court of Ohio remanded the case to the board for reconsideration of the sanction.

{¶10} In the present case, however, there is no evidence that the board felt constrained by its disciplinary guidelines. To the contrary, the minutes of the board's meeting concerning appellee's license indicate that all members of the board affirmatively understood "that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation." This court has found that exact language sufficient to demonstrate the board was not constrained by its disciplinary guidelines and that the board considered the full range of available sanctions. See *Bouquett v. Ohio State Med. Bd.* (1997), 123 Ohio App.3d 466, 472-473; *Feldman v. State Med. Bd. of Ohio* (Sept. 30, 1999), Franklin App. No. 98AP-1627. Additionally, the board noted that it permanently revoked the licenses of two other physicians who had engaged in similar unprofessional conduct. Here, the board only revoked appellee's medical license, a lesser sanction than the permanent revocation recommended by the hearing officer. Given the board's acknowledgment that its disciplinary guidelines did not limit it to any sanction and its imposition of a less severe sanction than that recommended by the hearing officer, it is clear that the board did not

feel constrained by its disciplinary guidelines and that it considered the full range of sanctions authorized by R.C. 4731.22(B).

{¶11} Although not addressed by the trial court, appellee also contends the board's order was not in accordance with law because R.C. 4731.22(B)(22) did not authorize the board to take action against his Ohio medical license. That statute permits the board to sanction a physician holding an Ohio medical license when the physician's medical license has been suspended or limited by the licensing authority of another state. Appellee contends that his license was not suspended or limited for purposes of R.C. 4731.22(B)(22) because the North Carolina Medical Board stayed his suspension and imposed limitations on his medical license no different than those imposed on any other physician practicing in North Carolina. We disagree.

{¶12} The order appellee entered into with the North Carolina Medical Board suspended appellee's medical license for 60 days. Although the North Carolina Medical Board stayed the suspension, the stay of a suspension does not render the suspension a nullity. Rather, the stay simply holds the imposed sanction in abeyance subject to compliance with the stated terms and conditions. Moreover, the terms and conditions of the stay are a limitation on appellee's medical license. If appellee violates the terms and conditions of the stay, the suspension of his license would be enforced. Because appellee's medical license was suspended and limited by the North Carolina Medical Board, the board had authority pursuant to R.C. 4731.22(B)(22) to sanction appellee.

{¶13} When the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law, a reviewing court may not modify a sanction authorized by statute. *Henry's Cafe, Inc. v. Ohio Bd. of Liquor Control* (1959), 170 Ohio

St. 233; *Merritt v. Ohio Liquor Control Comm.*, Franklin App. No. 02AP-709, 2003-Ohio-822, at ¶34. R.C. 4731.22(B) authorizes the board to revoke appellee's Ohio medical license if his medical license in another state is suspended or limited by that state's licensing authority. R.C. 4731.22. Because the board's sanction was authorized by statute, the trial court could not interfere with or modify the penalty imposed. *Henry's Cafe, Inc.*, supra; see, also, *DeBlanco v. Ohio State Med. Bd.* (1992), 78 Ohio App.3d 194, 202.

{¶14} In conclusion, the trial court erred when it found that the board's order was not in accordance with law. Therefore, appellant's lone assignment of error is sustained. Because the board's order was supported by reliable, probative, and substantial evidence and was in accordance with law, the trial court could not interfere with or modify the board's choice of sanctions. Accordingly, we reverse the trial court's judgment and affirm the board's order.

Judgment reversed
and cause remanded.

LAZARUS, P.J., and PETREE, J., concur.
