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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000768-MR

BRADFORD QUATKEMEYER, M.D. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 09-CI-009589

KENTUCKY BOARD OF
MEDICAL LICENSURE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Bradford Quatkemeyer, M.D., brings this appeal from an April 21, 2011, opinion of the Jefferson Circuit Court affirming the Kentucky Board of Medical Licensure's Order of Probation. We affirm.

Quatkemeyer is a family practice physician licensed to practice in the Commonwealth of Kentucky. The sister of one of Quatkemeyer's patients filed a grievance against him with the Kentucky Board of Medical Licensure (Board). She claimed that Quatkemeyer over prescribed controlled substances to her sister. An investigation ensued, and the Board rendered an Emergency Order of Restriction barring Quatkemeyer from prescribing controlled substances.

Subsequently, a full evidentiary hearing was held, and a hearing officer for the Board rendered detailed Findings of Fact, Conclusions of Law, and Recommended Order. Therein, the hearing officer found that Quatkemeyer committed sundry violations of the standard of care involving a number of patients. Kentucky Revised Statutes (KRS) 13B.110. The hearing officer recommended that the Board take "appropriate action against his license." Quatkemeyer filed exceptions with the Board. Ultimately, the Board adopted the hearing officer's recommended order.[1] In particular, the Board concluded:

> 10. Quatkemeyer is guilty of violating KRS 311.595(9), as illustrated by KRS 311.597(3) and (4) by failing to record in the medical records the results of his examinations of his patients and by failing to maintain adequate medical records of the care and treatment that he provided to his patients.
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> 11. Quatkemeyer is guilty of violating KRS 311.595(9), as illustrated by KRS 311.597(3) and (4) by failing to monitor adequately the patients' use of

[1] If an administrative agency adopts a hearing officer's recommended order, such order then becomes the order of the agency. It is permissible for an administrative agency to employ a hearing officer to conduct evidentiary hearings. *Our Lady of the Woods, Inc. v. Commonwealth, Kentucky Health Facilities and Health Servies Certifiate of Need and Licensure Boards*, 655 S.W.2d 14 (Ky. App. 1982).

> prescribed medications and by failing to institute adequate oversight or controls when faced with evidence of possible misuse or diversion of prescribed medication.
>
> 12. Quatkemeyer is guilty of violating KRS 311.595(9), as illustrated by KRS 311.597(4) by his departure from and failure to conform to the standards of acceptable and prevailing medical practice in Kentucky in the diagnosis of at least some of his patients' medical conditions.
>
> 13. Quatkemeyer is guilty of violating KRS 311.595(9), as illustrated by KRS 311.597(4) by his departure from and failure to conform to the standards of acceptable and prevailing medical practice in Kentucky in his treatment of some of his patients.
>
> 14. Quatkemeyer is guilty of violating KRS 311.595(9), as illustrated by KRS 311.597(3) and (4) by prescribing Adipex to Patient B for periods of time greater than the recommended three months during which the patient had high blood pressure and when there were limited and mixed results for weight loss as a result of the prescriptions.

As a consequence, the Board rendered an Order of Probation and curtailed Quatkemeyer's ability to prescribe controlled substances. KRS 311.594; KRS 13B.120. Quatkemeyer then sought review of the Board's order with the Jefferson Circuit Court. KRS 311.593. The circuit court affirmed the Board's Order of Probation, thus precipitating our review. KRS 13B.160.

To begin, judicial review of an administrative agency's decision is limited. Our primary inquiry centers upon whether the agency's decision was arbitrary. *Am. Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964); *Parrish v. Ky. Bd. of Medical Licensure*,

145 S.W.3d 401 (Ky. App. 2004). Thus, we step into the shoes of the circuit court and review the administrative agency's decision for arbitrariness. In conforming therewith, an agency's findings of fact will not be disturbed if supported by substantial evidence of a probative value; however, issues of law are reviewed *de novo*. *Parrish*, 145 S.W.3d 401.

Quatkemeyer argues that the "Board may not impose discipline based on guidelines or standards of care that are not tethered to duly adopted administrative regulations." Quatkemeyer's Brief at 4. Essentially, Quatkemeyer maintains that the Board erred by equating violations of the standard of care to conduct justifying disciplinary action by the Board. Rather, Quatkemeyer believes that the appropriate standard of care must be specifically set forth in a promulgated regulation or statute in order to justify disciplinary action by the Board.

KRS 311.595(9) empowers the Board to deny, suspend, or probate the license of a physician who has "[e]ngaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public . . . ." And, KRS 311.597 sets forth a nonexclusive list of conduct legislatively determined to constitute "dishonorable, unethical, or unprofessional conduct" that is "likely to deceive, defraud, or harm the public." Included therein and relevant to our appeal is KRS 311.597(4), which reads:

> Conduct which is calculated or has the effect of bringing the medical profession into disrepute, including but not limited to any departure from, or failure to conform to the standards of acceptable and prevailing medical practice within the Commonwealth of Kentucky,

> and any departure from, or failure to conform to the principles of medical ethics of the American Medical Association or the code of ethics of the American Osteopathic Association. For the purposes of this subsection, actual injury to a patient need not be established.

Under KRS 311.597(4), conduct that brings the medical profession into disrepute specifically includes a physician's departure from the "standards of acceptable and prevailing medical practice within the Commonwealth of Kentucky." Therefore, a physician's breach of the standard of care may constitute conduct that brings the medical profession into disrepute under KRS 311.597(4). By juxtaposing KRS 311.597(4) and KRS 311.595(9), it is clear that a physician's breach of the standard of care qualifies as conduct bringing the medical profession into disrepute which in turn constitutes conduct that is dishonorable or unprofessional of a character likely to harm the public. In a nutshell, a physician's breach of the standard of care may be, under appropriate circumstances, sufficient to justify disciplinary action by the Board under KRS 311.595(9) and KRS 311.597(4). Accordingly, we conclude that the Board properly relied upon the prevailing standard of care to determine whether Quatkemeyer's conduct justified discipline per KRS 311.595(9) and KRS 311.597(4). *Parrish*, 145 S.W.3d 401.

In several different allegations of error, Quatkemeyer attacks the Board's retained expert, Dr. David Wallace. Quatkemeyer believes that Dr. Wallace's opinions upon the standard of care and breach of such standard were insufficient to support the Board's findings. We disagree.

The record indicates that Dr. Wallace was a family practice physician licensed in this Commonwealth. In addition, Dr. Wallace was a member of both the American Academy of Family Physicians and the Kentucky Academy of Family Physicians. Dr. Wallace opined upon the standard of care and upon whether Quatkemeyer breached such standard after reviewing several patients' charts. From a review of his credentials, Dr. Wallace possessed the expertise to so testify. *See Tapp v. Owensboro Medical Health System, Inc.*, 282 S.W.3d 336 (Ky. App. 2009). Also, expert testimony is generally the proper method to establish the applicable standard of care as to a medical professional in a disciplinary matter. *Parrish*, 145 S.W.3d 401. Hence, we are of the opinion that Dr. Wallace's testimony was properly admitted to establish both the standard of care and breach of such standard by Quatkemeyer. And, the admission of Dr. Wallace's testimony did not violate Quatkemeyer's due process. See *Parrish*, 145 S.W.3d 401.

Next, Quatkemeyer maintains that the Board erroneously interpreted KRS 311.597(3). Quatkemeyer believes that KRS 311.597(3) requires proof of patient injury and specifically argues that the "[e]numeration of specific things in a statute excludes other things not mentioned." Quatkemeyer Brief at 10. Because KRS 311.597(4) specifically states that patient injury is not required, Quatkemeyer infers that patient injury is required under KRS 311.597(3) as it fails to mention patient injury therein.

KRS 311.597(3) provides:

> A serious act, or a pattern of acts committed during

> the course of his medical practice which, under the attendant circumstances, would be deemed to be gross incompetence, gross ignorance, gross negligence, or malpractice.

KRS 311.597(3) plainly states that a serious act or a pattern of acts deemed to be "gross incompetence, gross ignorance, gross negligence, or malpractice" may constitute dishonorable or unprofessional conduct likely to harm the public under KRS 311.595(9). It is axiomatic that a physician may be either grossly incompetent or grossly ignorant without involving patient injury. However, for a physician's conduct to constitute gross negligence or malpractice, there must be a concomitant injury. Gross negligence and malpractice are based upon principles of negligence; thus, both contain the element of injury. 65 C.J.S. *Negligence* § 88 (2000); 65 C.J.S. *Negligence* § 162 (2000).

In this case, the Board concluded that Quatkemeyer's breaches of the standard of care amounted to violations of either KRS 311.597(4) alone or of both KRS 311.597(3) and KRS 311.597(4). Since it is undisputed that KRS 311.597(4) does not require patient injury, any misinterpretation by the Board of KRS 311.597(3) constitutes harmless error.

Finally, Quatkemeyer raises a plethora of allegations related to the sufficiency of evidence:

> 1. The Finding that Dr. Quatkemeyer failed to adequately monitor medication usage by Patients A, B, C, D, E, P and R is not supported by the evidence.
>
> 2. Because the Hearing Officer failed to specify which patients were inadequately monitored and because Dr.

> Quatkemeyer's monitoring efforts differed as between patients, the Finding that Dr. Quatkemeyer inadequately monitored must be remanded for additional factual findings.
>
> 3. The Trial Court erred in affirming the Board's Conclusion that Dr. Quatkemeyer violated the Medical Practice Act by failing to properly diagnose Patients A,G, or H.
>
> 4. The Trial Court erred in affirming the Board's Conclusion that Dr. Quatkemeyer provided inadequate care to certain patients.

Quatkemeyer's Brief at 15, 20, 21, and 23.

Upon review of the record, we conclude that sufficient evidence existed to support the Board's findings that Quatkemeyer breached myriad standards of care and violated KRS 311.597(4) and KRS 311.595(9) by so doing. Indeed, the record is replete with evidence demonstrating Quatkemeyer's breaches of the standard of care. We recognize that the evidence was conflicting, but it was within the discretion of the Board, and not the Court, to judge the credibility of such evidence. *See 500 Assocs., Inc. v. Natural Res. and Env't Prot. Cabinet*, 204 S.W.3d 121 (Ky. App. 2006).

We deem any remaining allegations of error as either meritless or moot by our particular disposition of this appeal.

In sum, we hold that substantial evidence of a probative value existed to support the Board's findings of fact and that the Board did not err as to issues of law. Also, the Board employed proper procedure to provide adequate due process of law. *See Parrish*, 145 S.W.3d 401. Therefore, the Board's Order of Probation

was not arbitrary.[2] *See Am. Beauty Homes Corp.*, 379 S.W.2d 450; *Parrish*, 145 S.W.3d 401.

For the foregoing reasons, the opinion of the Jefferson Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I address only those issues with which I dissent. As to the remainder of the issues, I concur.

Quatkemeyer argues that guidelines or standards of care not tethered to administrative regulations are beyond the disciplinary authority of the Board. I agree, and therefore dissent from the majority opinion.

Quatkemeyer asserts that the Hearing Officer made a finding that Quatkemeyer inadequately monitored some patients without specifying either the inadequacy or which patients. I agree with Quatkemeyer that this matter should be remanded for additional factual findings by the Hearing Officer to specify what he failed to do regarding each particular patient.

[2] In future actions, we impress upon the Kentucky Board of Medical Licensure to be cognizant of its legal duty to compile an administrative record that is "readily capable of review." *Monumental Life Ins. Co. v. The Dep't of Revenue*, 201 S.W.3d 500, 502 (Ky. 2006). In this case, the record was not bound securely; rather, masses of loose documents were held together with mere rubber bands. Needless to say, many rubber bands were broken. We point out that the "compilation of a circuit court record could serve as an example of a properly organized official administrative record." *Id.* at 502 n. 1.

BRIEFS FOR APPELLANT:

Randy J. Blakenship
Erlanger, Kentucky

C. Ed Massey
Erlanger, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Randy J. Blakenship
Erlanger, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

C. Loyd Vest II
Louisville, Kentucky