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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000700-MR

JON M. STRAUSS, M.D.

APPELLANT

ON REMAND FROM SUPREME COURT
CASE NO. 2017-SC-000260-DG

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 10-CI-007765

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, MAZE AND L. THOMPSON, JUDGES.

L. THOMPSON, JUDGE: Jon Strauss, M.D., appeals from an order of the Jefferson Circuit Court which affirmed an order of the Kentucky Board of Medical Licensure (hereinafter referred to as “the Board”). The Board’s order adopted *in toto* a recommended order, which set forth findings of fact and conclusions of law, from a hearing officer. The Board’s order also placed Dr. Strauss on probation for

five years and subjected his medical license to various terms and conditions. This case was remanded to this Court by the Kentucky Supreme Court for us to review whether or not the evidence introduced before the hearing officer supported the Board's final order. We believe that the evidence does support the Board's order and affirm.

This case has previously been before this Court and the Kentucky Supreme Court. We will utilize the recitation of facts from the Supreme Court opinion.

Jon M. Strauss, M.D. (Strauss) is a family medicine practitioner who, at times relevant to this matter, maintained offices in Berea, Richmond and Mt. Vernon, Kentucky. Disciplinary action against him began in 2010 with a grievance regarding sexual contact with, and ensuing threats against, Patient A. Three other grievances were subsequently filed, one of which also involved sexual contact with another patient identified as Patient U. The matter resulted in an eleven-day hearing involving 130 documents and 60 exhibits and ultimately the issuance of a five-year probation order with conditions. We begin with a brief overview of the grievances and the ensuing disciplinary process to give context to the two discrete statutory issues raised by the appeal.

Patient A filed the first grievance with the Board alleging Strauss had sexual contact with her while she was a patient, including an unsuccessful attempt to have intercourse, and that he threatened her with "trouble" and a mental institution if she left his care. After investigation, a Board inquiry panel filed a formal complaint against Strauss. The second grievance was raised by a father who complained of the medications

Strauss was prescribing for his daughter, Patient B, a drug addict. When the investigation revealed significant concerns about Strauss's patterns of prescribing involving Patient B and eight other patients and he declined remedial education and temporary monitoring, the inquiry panel filed an Amended Complaint. While preparing for the matter, the Board learned that Strauss had treated and prescribed medications for his wife and other family members, resulting in a Second Amended Complaint. The third grievance, from a former co-worker, alleged that Strauss subjected patients to unnecessary office visits and hospitalizations and overused psychological diagnoses. Following review by a Board consultant, which raised concerns, this resulted in the Third Amended Complaint. Finally, the administrator of the St. Joseph Berea Hospital filed a grievance alleging Strauss had engaged in sexual relations with three patients while they were hospitalized (one was Patient A, one was deceased and the third was identified as Patient U). Patient U confirmed the sexual contact, her complaints to hospital nurses, sexual intercourse in both Strauss's office and the hospital, overmedication given to her prior to sexual acts and threats by Strauss that intimidated her when she tried to leave his practice. This last grievance resulted in the final Fourth Amended Complaint.

The aforementioned complaints were issued by Inquiry Panel B of the Board. The Board, created pursuant to [Kentucky Revised Statute (KRS)] 311.530, consists of the deans from the University of Kentucky and University of Louisville medical schools, the dean of the Pikeville College of Osteopathy, the Commissioner of Public Health and eleven members appointed by the Governor, including seven licensed medical doctors and one licensed osteopathic physician, as well as three citizens. The Board divides into two inquiry/hearing panels for consideration of discipline, with one panel investigating and deciding whether a complaint should issue and the other panel then adjudicating any complaint

and imposing discipline where appropriate. The panels alternate these responsibilities. In this case, Inquiry Panel B issued the Complaints against Strauss and then Hearing Panel A was charged with acting on those Complaints. The hearing panel is authorized to appoint a hearing officer, KRS 311.565(1)(g) and KRS 311.591(5), and it did so in Strauss's case.

The hearing officer heard testimony and admitted exhibits over eleven days in 2009-2010 and issued a detailed 47-page document entitled "Findings of Fact, Conclusions of Law, and Recommended Order" (Recommended Order). After detailing the evidence supporting his factual findings, the hearing officer concluded that the Board had met its burden to prove violations of KRS Chapter 311 by a preponderance of the evidence. KRS 13B.090(7). The seven violations were: (1-2) sexual contact with Patients A and U in violation of KRS 311.595(5); (3-4) "dishonorable, unethical or unprofessional conduct" in his treatment of Patients A and U in violation of KRS 311.597(4); (5) inappropriate prescription of controlled substances to Patient U in exchange for sexual contact with her in violation of KRS 311.595(9) as illustrated by KRS 311.597(4); (6) inaccurate, misleading and internally inconsistent medical records in violation of KRS 311.595(9); and (7) failure to provide the Board with complete medical records involving Patient U and attempts to obstruct the investigation in violation of KRS 311.595(12) and KRS 311.590(2). The hearing officer thus found statutory violations as alleged in the Fourth Amended Complaint and recommended the Board "take any appropriate action against [Strauss's] license for those violations." This Recommended Order was issued August 18, 2010.

Hearing Panel A took up the matter at its September 2010 meeting, after reviewing the Recommended Order and written exceptions and hearing from counsel for both the Board and Strauss. It adopted the findings and

conclusions of the hearing officer and imposed a five-year probation period that allowed Strauss to continue practicing medicine with conditions. He was not allowed to see female patients without supervision, he was required to attend two specific professional courses regarding “proper boundaries” with patients and medical records documentation, and he was to be evaluated by the Kentucky Physicians Health Foundation to determine if there was any condition that could adversely affect his ability to practice medicine. Strauss was also required to pay a \$5,000 fine and costs of \$31,802.07.

In November 2010 Strauss petitioned Jefferson Circuit Court for review, seeking not only a reversal of the Board’s order but also naming the fifteen individual Board members and seeking declaratory, injunctive and monetary relief pursuant to 42 U.S.C. § 1983. Intensive motion practice followed and in September 2012 the circuit court denied Strauss’s various motions to stay, dismissed the declaratory, injunctive and monetary relief claims, and dismissed the individual Board members from the suit. Strauss’s brief on the merits was filed in April 2014 and one year later the circuit court, having dealt with additional motion practice including Strauss’s attempted introduction of sixteen affidavits, affirmed the Board’s final order.

The circuit court found that the Board’s order was supported by substantial evidence and that the hearing officer and the Board had both proceeded correctly under the applicable statutes.

Kentucky Bd. of Med. Licensure v. Strauss, 558 S.W.3d 443, 445-47 (Ky. 2018)

(footnote omitted).

Strauss appealed to this Court in May of 2015. He argued that the hearing officer and Board violated sections of KRS Chapter 13B and that the

evidence presented against him did not support the Board's final order. This Court ruled that it believed the hearing officer and Board did violate parts of KRS Chapter 13B; therefore, the Court reversed and remanded. The Court did not rule on the sufficiency of evidence issue.

The Board then appealed to the Kentucky Supreme Court. That Court held that the hearing officer and the Board did not violate KRS Chapter 13B. The Supreme Court then remanded the case back to this Court for us to determine whether there was sufficient evidence to support the Board's decision to put Strauss on probation.

At the administrative level, KRS 13B.090(7) states that the Board must prove by a preponderance of the evidence that Strauss violated the statutes it claimed. The preponderance of the evidence standard is what is used to support the Board's penalty. The preponderance of the evidence standard means that it was more likely than not that Strauss violated the statutes the Board claimed he did. *See Ross v. Commonwealth*, 455 S.W.3d 899, 907 (Ky. 2015); *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007).

Upon review of an administrative agency's adjudicatory decision, an appeal court's authority is somewhat limited. The judicial standard of review of an [administrative agency's] decision is whether the [agency's] findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that

has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Com'n, 85 S.W.3d 621, 624 (Ky. App. 2002) (citations omitted).

Strauss argues on appeal that there was not substantial evidence to show that he had inappropriate sexual relations with Patients A and U because they were unreliable witnesses who lacked credibility. He argues that they contradicted their own testimony, that they abused drugs, and that they had mental health issues.

We believe that the hearing officer and the Board did not err in this case and that the hearing officer's findings were supported by substantial evidence. Both Patient A and Patient U testified. The hearing officer found Patient U to be a credible witness. The hearing officer found Patient A to be less credible, but because her account of the sexual encounters with Strauss shared similarities to the account of Patient U, the hearing officer found some credibility in her accusation.

In addition, other witnesses testified and shared information that supported the Board's accusations of inappropriate sexual contact. Patient A testified that Strauss would have her come to his clinic after regular office hours.

Strauss denied this at the hearing, but Reba Bowling, an office manager who used to work for Strauss, testified that she witnessed Patient A alone in the office after regular hours on multiple occasions. The hearing officer found Bowling's testimony credible and believed Strauss lied about Patient A's being in his office after regular business hours. This, the hearing officer believed, gave additional credence to Patient A's allegations.

As for Patient U, during one instance of sexual contact at a hospital, Patient U informed nursing staff about the incident and was interviewed by Dr. Thomas Fowles, who used to work in Strauss' clinic. At the time, Dr. Fowles did not believe Patient U's allegation, but her testimony at the hearing was similar to that relayed to hospital staff and Dr. Fowles at the time of the incident.

In addition, James Baker, who was employed by Strauss at his clinic, informed a Board investigator that he had walked into a patient exam room and witnessed Strauss leaning over a patient, identified as Patient X. Baker told the investigator that Strauss was leaning over Patient X with his hands on each side of the patient's torso. Baker also said that Strauss' face was close to the patient's face. Baker told the investigator that he believed this conduct did not appear appropriate. Later, Baker told a similar story to Dr. Fowles, but indicated that Strauss was unconscious on top of Patient X and Patient X was either unconscious or nearly so. During his testimony before the hearing officer, Baker denied seeing

any inappropriate conduct between Strauss and Patient X. The hearing officer found Baker's testimony to be unreliable, but gave credence to the information he gave to the Board investigator and Dr. Fowles. The hearing officer found that this inappropriate conduct with Patient X supported the accusations of Patients A and U.

The allegations of sexual misconduct in this case revolved around issues of credibility. Strauss provided evidence that the testimony against him was unreliable and the Board provided evidence that it was reliable. "The hearing officer is charged with the duty of judging the credibility of witnesses and weighing the evidence." *Norsworthy v. Kentucky Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009). A history of drug use and psychological issues is not sufficient to overturn a hearing officer's finding of credibility. *Id.* The hearing officer found the testimony of Patient U credible. It also found the information Baker gave to the investigator and Dr. Fowles about Patient X credible. While the hearing officer found Patient A to be less credible than Patient U, he did give her testimony some weight because of the similarities between the experiences of Patients A and U.

The testimony and evidence relied upon by the hearing officer and the Board can be found in the record. We must defer to the hearing officer's judgment about credibility and as to how much weight to give the evidence presented.

Thompson, supra. We believe that there was a preponderance of the evidence to support the hearing officer and the Board's finding that Strauss violated certain sections of the Kentucky Revised Statutes. Further, we conclude that substantial evidence supports the Board's final order and affirm.

Upon remand of this case to this Court, we allowed the parties to file supplemental briefs. In his supplemental brief, Strauss asks us to interpret the Kentucky Supreme Court's holding in *Strauss* regarding how much of the record needs to be reviewed by the Board. We do not believe such interpretation is necessary. The Supreme Court clearly states that "the Board is charged with considering the record including the recommended order and exceptions. The extent of the record consideration beyond the recommended order and exceptions is a matter committed to the Board's sound discretion." *Strauss*, 358 S.W.3d at 457. The Board has the discretion to review all of the record or none at all depending on the circumstances of the case. In this case, it is clear that the Board reviewed the Fourth Amended Complaint, the hearing officer's recommended order, and the exceptions filed by both parties. Further, the Board's Hearing Panel heard arguments from counsel for both Strauss and the Board. It appears as though the Board's Hearing Panel felt it could rule on the issues without resorting to other parts of the record. That decision was within its discretion.

Based on the foregoing, we affirm.

ALL CONCUR.

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