

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-001919-MR

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 14-CI-002350

JON M. STRAUSS, M.D.

APPELLEE

OPINION  
REVERSING

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BEFORE: LAMBERT, NICKELL, AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: Following judicial review of an order entered by Kentucky Board of Medical Licensure (“KBML”) revoking the medical license of Jon M. Strauss, M.D., on December 10, 2015, the Jefferson Circuit Court, Division Nine, remanded the matter to KBML for further proceedings to include a review of the entire administrative record. KBML timely appealed, believing the Jefferson Circuit Court’s decision was contrary to plain statutory language and binding

authority. Shortly thereafter, this matter was abated pending resolution of a case raising similar issues already working its way through the appellate system. The case was returned to the active docket for consideration of pending motions but was once again abated pending resolution of another appeal, this one involving challenges by Dr. Strauss to a 2010 KBML order placing him on probation. Following a grant of discretionary review in that case, the Supreme Court of Kentucky rendered its Opinion in *Kentucky Board of Medical Licensure v. Strauss*, 558 S.W.3d 443 (Ky. 2018), *reh'g denied* (Nov. 1, 2018), *cert. denied*, 139 S.Ct. 1354, 203 L.Ed.2d 590 (2019) ("*Strauss I*"), which became final on November 1, 2018. This matter was returned to the active docket for briefing and now stands ready for resolution. Following a careful review, and based on the guidance in *Strauss I*, we reverse.

In August 2011, KBML received a grievance alleging Dr. Strauss demonstrated erratic behavior and engaged in a poor standard of care, failed to properly monitor his patients' chronic conditions, engaged in questionable prescribing practices, committed insurance fraud, engaged in unethical and unprofessional behaviors, and abandoned patients. After a lengthy investigation, on June 20, 2013, a complaint was issued against Dr. Strauss' medical license. An emergency order of restriction was entered contemporaneously which prohibited

Dr. Strauss from prescribing, dispensing, or professionally utilizing controlled substances during the pendency of the complaint.

A hearing on the complaint was scheduled for January 22, 2014, before a hearing officer. Dr. Strauss identified no defense witnesses, exhibits, or evidence upon which he intended to rely although required to do so under the terms of a prehearing conference order. When the matter was called, counsel for Dr. Strauss indicated neither he nor Dr. Strauss would participate because “there is no point to it.” Counsel stated his belief the process was flawed, illegitimate, and a sham. After some discussion, both Dr. Strauss and his counsel left the hearing. The hearing officer subsequently issued a recommended order finding Dr. Strauss in default; Dr. Strauss filed exceptions asserting he was not in default as he had participated at every stage of the proceedings and expressed his willingness to testify before the Board (as opposed to the hearing officer). On March 20, 2014, after reviewing the complaint, recommended order, and exceptions thereto, KBML, through its hearing panel, issued an order of revocation.

On April 28, 2014, Dr. Strauss sought judicial review in Jefferson Circuit Court. After briefing, the trial court heard oral arguments on October 12, 2015. On December 10, 2015, the trial court entered an order concluding the factual basis of the KBML order finding Dr. Strauss in default was supported by substantial evidence. However, the trial court remanded the matter upon finding

KBML’s hearing panel abused its discretion when it reviewed only the complaint, recommended order, and exceptions, rather than the entire administrative record as required by KRS<sup>1</sup> 13B.120(1). This appeal followed.

The sole issue before this Court is whether KRS 13B.120(1) requires KBML to review the entire administrative record prior to rendering its final order. Our Supreme Court has provided clear and definitive authority on this precise question in *Strauss I*. There, after a lengthy discussion of the issue, the Supreme Court stated:

In sum, 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. Contrary to Strauss’s claim, KRS 13B.120 does not mandate an independent review of the entire record.

*Strauss I*, 558 S.W.3d at 457.

Although Dr. Strauss urges us to rule to the contrary and thereby “recognize the dangers and limitations of the Supreme Court’s decision in *Strauss I*,” we simply cannot disregard binding Supreme Court authority. SCR<sup>2</sup> 1.030(8)(a) (“The Court of Appeals is bound by and shall follow applicable

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Rules of the Supreme Court of Kentucky.

precedents established in the opinions of the Supreme Court and its predecessor court.”). On the strength of *Strauss I*, we conclude the trial court erred in concluding KBML was required to review the entire administrative record and the failure to do so constituted an abuse of discretion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is REVERSED with directions to enter a new judgment consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Leanne K. Diakov  
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BRIEF FOR APPELLEE:

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