

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Leo D'Souza, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-97
The State Medical Board of Ohio,	:	(C.P.C. No. 08CVF-05-7342)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 29, 2009

Dinsmore & Shohl, LLP, Eric J. Plinke and Nicole M. Loucks,
for appellant.

Richard Cordray, Attorney General, and Kyle C. Wilcox, for
appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, Leo D'Souza, M.D., appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, State Medical Board of Ohio ("the Board"), that permanently revoked appellant's certificate to practice medicine. Because the common pleas court did not abuse its discretion in concluding both that substantial, reliable, and probative evidence supports the Board's order and that the Board's order is not contrary to law, we affirm.

I. Procedural History

{¶2} On August 9, 2007, the Board issued a notice of hearing to appellant proposing to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board alleged that appellant violated: (1) R.C. 4731.22(B)(6), in departing from or failing to conform with minimal standards of care, (2) R.C. 4731.22(B)(12), in committing an act in the course of practice that constitutes a misdemeanor, (3) R.C. 4731.22(B)(18), in violating the code of ethics of the American Medical Association ("AMA"), and (4) R.C. 4731.22(B)(20), in violating a rule the Board promulgated. The proposed disciplinary action arose from appellant's treatment of five juvenile psychiatric patients at Cincinnati Counseling Services ("CCS") between 1998 and 2006 when appellant, according to the allegations, improperly examined the genitalia of the five patients with ungloved hands in his office during psychiatric appointments.

{¶3} At a hearing commencing December 17, 2007, the Board provided testimony from Patients 1, 3, and 5, each of whom testified appellant, on at least one occasion, touched his genitals with an ungloved hand. Patient 4's mother stated her son told her appellant touched her son's genitals during an office visit but never suggested any follow-up or referral for her son's physical health issues. Patient 4's mother also testified appellant told her, without ever having examined Patient 4's sister, she could give some of Patient 4's prescription medication to his younger sister.

{¶4} By contrast, appellant stated he never physically touched the patients' genitalia but conducted visual-only genital exams for the purpose of determining whether the patients had sexually transmitted diseases or Fragile X Syndrome, a condition that includes, as an indicator, larger than normal testicles. According to appellant's testimony,

psychiatrists, as licensed physicians, may conduct physical exams, including genital exams, and the ones he conducted were appropriate because they were strictly visual.

{¶5} In terms of expert testimony, the Board provided the testimony of Dr. Peter J. Geier, a psychiatrist in private practice. Dr. Geier testified, to a reasonable degree of medical certainty, that appellant's conduct with regard to the five patients represented a departure from, or failure to conform to, the minimal standard of care. Appellant responded with the testimony of Dr. Bernard DeSilva, a psychiatrist, and Dr. Luis Pagani, a neurologist, both of whom stated appellant's conduct was within the minimal standard of care. In total, appellant called 18 witnesses to rebut the charges against him.

{¶6} On April 3, 2008, the Board's Hearing Examiner filed a Report and Recommendation. After reviewing the record from the hearing, the Board, at a May 14, 2008 meeting, rendered an Entry of Order approving and confirming the recommendation of the Hearing Examiner to permanently revoke appellant's certificate to practice medicine and surgery in Ohio. Appellant appealed from the Board's order to the Franklin County Court of Common Pleas on May 19, 2008 and requested a stay of the Board's order pending his appeal.

{¶7} After denying appellant's motion for stay pending appeal, the common pleas court on December 29, 2008, issued a judgment affirming the Board's decision to permanently revoke appellant's certificate. Appellant timely appealed from the judgment of the common pleas court; the Board in response filed a motion to dismiss for lack of jurisdiction pursuant to Civ.R. 12(B)(2) and R.C. 119.12.

II. Motion to Dismiss

{¶8} Even though the Board raises its jurisdictional issue for the first time on appeal, subject matter jurisdiction cannot be waived and may be raised at any time. See, e.g., *State ex rel. Bond v. Velotta*, 91 Ohio St.3d 418, 419, 2001-Ohio-91; *In re King* (1980), 62 Ohio St.2d 87, 88-89. The Board's motion to dismiss for lack of jurisdiction is premised on the language of R.C. 119.12, which gives appellant 15 days from the date the Board's adjudication order is mailed to "file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal." R.C. 119.12. While the Board acknowledges appellant timely filed his notice of appeal with the Board and the common pleas court, the Board argues appellant failed to set forth the grounds for his appeal, leaving the common pleas court without jurisdiction to consider the appeal.

{¶9} To support its argument, the Board relies on *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058 ("*Medcorp I*") where the Supreme Court held that "to satisfy the 'grounds of the party's appeal' requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of review." *Id.* at ¶20. Here, the language of appellant's notice of appeal is nearly identical to the language in *Medcorp I* that the Supreme Court found did not comply with the requirements of R.C. 119.12.

{¶10} After the Board filed its motion to dismiss for lack of jurisdiction, the Supreme Court reconsidered its *Medcorp I* decision. In *Medcorp v. Ohio Dept. of Job & Family Servs.* (Dec. 15, 2009), 2009-Ohio-6425 ("*Medcorp II*"), the Supreme Court clarified that "[t]he holding in *Medcorp I* shall apply only to cases filed on and after

June 15, 2009, the date on which the opinion in *Medcorp I* was published in the Ohio Official Reports advance sheets." *Medcorp II* at ¶4. As appellant filed his notice of appeal on May 19, 2008, *Medcorp I* does not control the jurisdictional issue. Moreover, application of pre-*Medcorp I* cases resolves the issue in appellant's favor. See, e.g., *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802 (concluding a notice of appeal was sufficient under R.C. 119.12 in asserting as grounds for the appeal that "[t]he revocation of [appellant's] medical license is not supported by reliable, probative, and substantial evidence"). Under *Derakhshan*, appellant's notice of appeal is sufficient.

{¶11} Accordingly, we deny the Board's motion to dismiss for lack of jurisdiction.

III. Assignments of Error

{¶12} On appeal, appellant assigns three errors:

First Assignment of Error: The trial court's decision is in error because the Board's order is contrary to law and not supported by substantial, probative and reliable evidence where it is based on witnesses who did not provide reliable evidence and could not be confidently trusted.

Second Assignment of Error: The trial court erred in affirming the Board's order despite the order being contrary to law as to its finding that appellant violated O.A.C. 4731-26-02(A) constituting sexual misconduct.

Third Assignment of Error: The trial court's decision is in error because the Board's order is contrary to law and not supported by substantial, reliable, and probative evidence where it finds appellant violated medical ethics and deviated from the minimal standards of care for conducting an examination within his scope of practice.

IV. Standard of Review

{¶13} Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a *de novo* review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶14} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. *Id.*; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (defining an abuse of discretion). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. An appellate court, however, has plenary review of purely legal

questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

V. First Assignment of Error – Witness Credibility

{¶15} In his first assignment of error, appellant asserts the common pleas court abused its discretion in affirming the Board's order because the Board relied on witnesses who lacked credibility. Specifically, appellant points to the Hearing Examiner's Report and Recommendation in which the Hearing Examiner states she did not "completely believe either side's testimony as to what happened; rather, she has found portions of each side's evidence to be credible." (Order, Report and Recommendation, 49.) Based on the Hearing Examiner's statement, appellant argues that substantial, probative, and reliable evidence necessarily does not support the Board's order.

{¶16} The common pleas court did not abuse its discretion in giving deference to the Board's findings. The Hearing Examiner considered the testimony of all six of the Board's witnesses and all 18 of appellant's witnesses. Moreover, the Hearing Examiner stated "[a]ll exhibits, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing" her recommendation. (Order, R&R, 6.) Only after reviewing the entire record did the Hearing Examiner conclude "that, on numerous occasions, [appellant] failed to conform to the minimal standard of care, violated the Principles of Medical Ethics, and engaged in sexual misconduct with patients." (Order, R&R, 49.) See also *Arlen v. State Med. Bd. of Ohio* (1980), 61 Ohio St.2d 168, 172-73 (stating "[t]he distinguished medical board is capable of interpreting technical requirements of the medical field and is quite capable of determining when certain conduct falls below a reasonable standard of medical care").

{¶17} While appellant challenges the Hearing Examiner's statement that she "does not completely believe either side's testimony as to what happened," the common pleas court explained that her approach still "comports with accepted methodology in fact-finding." (Decision, 4.) As the common pleas court properly noted, the finder of fact "may take note of the inconsistencies and resolve them accordingly, 'believ[ing] all, part or none of a witness's testimony.' " *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶32, quoting *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67; *Parsons v. Washington State Community College*, 10th Dist. No. 05AP-1138, 2006-Ohio-2196, ¶21. Moreover, noting especially the Hearing Examiner's "expansive recitation of the evidence," the common pleas court examined the record and concluded the Hearing Examiner's findings of fact "have ample support in the record by reliable, probative, and substantial evidence." (Decision, 5.)

{¶18} The common pleas court thus examined the entire record and, deferring to the Board's resolution of the conflicting evidence, found substantial, reliable, and probative evidence to support the Board's findings through its Hearing Examiner. Appellant points to nothing that indicates the common pleas court abused its discretion in so doing, other than to disagree with the underlying credibility determinations. On this record, appellant's suggestion that we further consider witness credibility is not appropriate for this court's role in reviewing the common pleas court's decision. Accordingly, we overrule appellant's first assignment of error.

VI. Second Assignment of Error – Ohio Adm.Code 4731-26-02(A)

{¶19} Appellant next asserts the common pleas court erred in affirming the Board's order because the finding that appellant violated Ohio Adm.Code 4731-26-02(A),

sexual misconduct, is contrary to law. As the Board noted, the finding under Ohio Adm.Code 4731-26-02(A) has two components: (1) "touching" of a regulated body area occurred for "purposes other than appropriate examination or treatment," and (2) the examination occurred without gloves. (Order at 48, citing Ohio Adm.Code 4731-26-02(A) and Ohio Adm.Code 4731-26-01(G).) Appellant argues the Board's order supports neither finding, so the common pleas court erred in affirming the order.

{¶20} Because Ohio Adm.Code 4731-26-02(A) was enacted November 30, 2006, appellant's conduct with Patient 3 is the only conduct at issue under appellant's second assignment of error, as Patient 3's appointment with appellant occurred on December 4, 2006. Appellant testified he did not touch Patient 3's genitals but conducted a visual-only exam to look for possible sexually transmitted diseases. Such testimony, appellant argues, makes a finding of sexual misconduct under Ohio Adm.Code 4731-26-02(A) impossible since the definition of "sexual misconduct" under Ohio Adm.Code 4731-26-01(G)(2) requires a physical "touching" of one of the enumerated body parts.

{¶21} Contrary to appellant's testimony, Patient 3 testified appellant lifted Patient 3's penis and touched his testicles while appellant was not wearing gloves. Indeed, Patient 3 testified appellant was the one who raised the issue of sexually transmitted diseases and offered to check for any signs of those diseases. Acknowledging Patient 3's testimony, appellant dismisses it by claiming it is not reliable because psychiatric patients are prone to lying and to distorting reality.

{¶22} At best, appellant asks this court to conclude the common pleas court abused its discretion in refusing to resolve the conflicting evidence differently than did the Board. At worst, appellant suggests a psychiatric patient's testimony as a matter of law is

unreliable. Neither position has merit. See *Conrad* at 111 (noting when evidence consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, acting as finder of fact, because the administrative body had the opportunity to determine the credibility and weight of the evidence).

{¶23} Here, the Hearing Examiner specifically found that "[o]n December 4, 2006, when Patient 3 was 19 years old, [appellant] examined Patient 3's genitalia with ungloved hands during a psychiatric office visit for the purpose of determining if Patient 3 was infected with a sexually transmitted disease." (Order, R&R, 44.) Adopting the Hearing Examiner's factual findings, the Board further adopted the Hearing Examiner's reliance on the expert opinion of Dr. Geier, who testified the appropriate standard of care for a psychiatrist in appellant's position would have been to refer these patients to a primary care physician or a urologist to perform such examinations if they were medically necessary. With those predicates, the Hearing Examiner found, and the Board agreed, that appellant had "no acceptable reason * * * to have examined these patients' genitalia while they were in his office for psychiatric care and treatment." (Order, R&R, 49.)

{¶24} The Hearing Examiner's factual findings are sufficient to support the requisite findings under Ohio Adm.Code 4731-26-02(A) and 4731-26-01(G). Patient 3's testimony provides evidence of a physical "touching," Dr. Geier's testimony establishes the contact occurred for "purposes other than appropriate examination or treatment," and Patient 3's testimony establishes the touching occurred without gloves. Since the record contains sufficient evidence to meet the applicable legal standard, the common pleas

court did not err in affirming the Board's decision finding a violation of Ohio Adm.Code 4731-26-02(A). We overrule appellant's second assignment of error.

VII. Third Assignment of Error – Medical Ethics and Standard of Care

{¶25} In his third assignment of error, appellant contends the common pleas court erred in affirming the Board's decision because substantial, reliable, and probative evidence does not support the Board's findings that appellant violated medical ethics and deviated from the minimal standard of care. Specifically, appellant asserts (1) the Board's expert, Dr. Geier, had no basis for his opinion that appellant violated medical ethics, and (2) the common pleas court's decision is contrary to law because it impermissibly limits the scope of practice of a licensed psychiatrist.

{¶26} R.C. 4731.22(B)(18) allows the Board to revoke a physician's certificate if it finds that person violated any provision of the code of ethics of the AMA. R.C. 4731.22(B)(18). Dr. Geier testified that if the allegations against appellant regarding the examination of patients' genitals were true, then appellant's conduct, with or without gloves, violated specific provisions of the Principles of Ethics of the AMA. Dr. Geier specifically cited articles I, II, IV, and VIII of the AMA's guidelines. The evidence in turn supports the factual predicate of Dr. Geier's opinion, as Patients 1, 3, and 5 all testified appellant touched their genitals with ungloved hands during psychiatric appointments.

{¶27} Although appellant offered contrary opinion testimony, his testimony does not detract from the Board's finding that appellant violated the AMA's ethics code, as the Board is charged with giving appropriate weight to conflicting testimony. See, e.g., *Conrad* at 111. Substantial, reliable, and probative evidence supports the Board's

decision that appellant violated medical ethics, and the common pleas court did not abuse its discretion in so concluding.

{¶28} Appellant nonetheless contends the common pleas court's decision is contrary to law because it places impermissible limitations on the scope of a psychiatrist's practice. Appellant argues psychiatrists are licensed physicians subject to the same licensing examination and training requirements as all other physicians. Appellant contends that, with that training, a psychiatrist's conducting a physical examination is appropriate as a fundamental component of medicine. Relying on R.C. 4731.34(A)(3), appellant argues the common pleas court's decision usurps the legislative function by denying a licensed physician the ability to conduct an examination merely because he practices within the specialty of psychiatry.

{¶29} Appellant's argument is unpersuasive. Although appellant met the licensing requirements of the state of Ohio, a standard of care exists in his chosen specialty. Dr. Geier testified the standard of care involves referring patients requiring genital exams to either their primary care physicians or urologists. According to Dr. Geier, even a visual examination is below the standard of care if conducted on a minor patient unaccompanied by a parent or guardian. Were Dr. Geier's testimony alone insufficient, the record also indicates appellant's office at CCS was not equipped for conducting physical or genital examinations, as the room did not have a sterile examination table, sink or sterile gloves. Moreover, although appellant was a licensed physician, his being licensed did not permit him to conduct any and all medical procedures, as indicated in the testimony of Dr. Geier. The patients at issue presented for psychiatric counseling and

medication management, and the Board, based on the evidence presented, found appellant had "no acceptable reason" to conduct these exams. (Order, R&R, 49.)

{¶30} In the end, appellant's contention that the standard of care does not differ between and among the many specialties of medical practice leads to an unsupportable conclusion. What is within the standard of care for a cardiothoracic surgeon will not be the same as for a pediatrician, a podiatrist or a psychiatrist, even though all are subject to the same licensure requirements of the state. The Board's order did not usurp the legislative function; rather, it found appellant's conduct fell below the accepted standard of care for a psychiatrist practicing in an outpatient setting. The common pleas court did not err in affirming that decision, and we overrule appellant's third assignment of error.

VIII. Disposition

{¶31} In sum, the common pleas court did not abuse its discretion in affirming the Board's order, as substantial, reliable, and probative evidence supports that order, and it is in accordance with law. Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion denied;
judgment affirmed.*

SADLER and TYACK, JJ., concur.
