

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

William W. Nucklos, M.D.,	:	
Appellant-Appellant	:	
v.	:	No. 09AP-406
State Medical Board of Ohio,	:	(C.P.C. No. 08CVF08-12230)
Appellee-Appellee	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 29, 2010

Collis, Smiles & Collis, LLC, Elizabeth Y. Collis and Terri-Lynne B. Smiles, for appellant.

Richard Cordray, Attorney General, *Barbara J. Pfeiffer* and *Karen A. Unver*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, William W. Nucklos, M.D. ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas affirming an order of appellee, State Medical Board of Ohio ("the Board"), permanently revoking appellant's license to practice medicine and surgery. For the following reasons, we affirm.

{¶2} In a notice of summary suspension and opportunity for hearing dated October 10, 2007, the Board notified appellant that it had adopted an entry of order summarily suspending his certificate to practice medicine and surgery in Ohio, pursuant to R.C. 4731.22(G). The Board alleged that from March 2001 to October 2002, appellant

inappropriately prescribed controlled substances and/or dangerous drugs to 28 patients in a manner inconsistent with minimal standards of care and/or without a legitimate medical purpose. The notice cited conduct such as prescribing despite failure to order and/or document ordering appropriate consultations, failure to perform appropriate physical examinations, and failure to order and/or document ordering appropriate diagnostic testing. The notice further alleged appellant had violated R.C. 4731.22(B)(2), (B)(3), (B)(6), and (B)(20), along with Ohio Adm.Code 4731-21-02. Appellant was also advised that he was entitled to a hearing on this matter.¹

{¶3} A hearing was held before a hearing examiner for the Board on June 2 through June 6, 2008 and concluded on June 12, 2008. Appellant and the Board both provided expert testimony, but none of appellant's former patients testified. Appellant also invoked his Fifth Amendment right not to incriminate himself.

{¶4} Following the hearing, the hearing examiner issued a written report and recommendation, which was received by the Board on July 18, 2008, recommending that appellant's license be permanently revoked. On August 13, 2008, the Board issued an entry of order permanently revoking appellant's license to practice medicine and surgery in Ohio. Appellant then filed an appeal with the common pleas court, pursuant to R.C. 119.12. On March 31, 2009, the common pleas court affirmed the Board's order revoking

¹It should be noted that appellant's license was initially suspended in 2006 following a criminal trial that resulted in multiple convictions arising from the conduct at issue. However, those convictions were overturned on March 9, 2007. The State appealed that decision to the Supreme Court of Ohio. In the interim, on October 10, 2007, the Board dismissed the suspension predicated upon appellant's criminal convictions and, on that same date, issued a separate notice of summary suspension and opportunity for hearing, summarily suspending appellant's license based upon standard of care and prescribing violations. It is that October 2007 action which is the subject of this appeal. The Supreme Court of Ohio subsequently affirmed the decision overturning appellant's criminal convictions and the criminal matter was then remanded to the Clark County Court of Common Pleas for retrial. Although the retrial was pending at the time the instant appeal was filed, the criminal case has since been dismissed without prejudice.

appellant's license. In this timely appeal, appellant now asserts the following two assignments of error for our review:

Assignment of Error 1:

It is an abuse of discretion for the trial court to uphold a finding of permanent license revocation when the Medical Board relied upon exhibits that were not medical records and not reliable, probative or substantial evidence.

Assignment of Error 2:

It is an abuse of discretion for the trial court to uphold the Medical Board's permanent revocation Order when the Board was acting outside the express limitation of its authority under R.C. §4731.052, the intractable pain statute.

{¶5} In an administrative appeal, pursuant to R.C. 119.12, the trial court considers the entire record to determine whether a decision is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. Therefore, the authority of a common pleas court in reviewing a decision of the medical board, which is an administrative agency, is limited to determining whether the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Conrad* at 111.

{¶6} The Ohio Supreme Court has defined reliable, probative, and substantial evidence 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.

(Footnotes omitted.)

{¶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 board'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. Absent an abuse of discretion on the part of the trial court, a court of appeals cannot substitute its judgment for that of the board or the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. "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, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App.3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} In his first assignment of error, appellant asserts the Board improperly relied upon exhibits which were not medical records. Appellant repeatedly argues the exhibits submitted by the Board, specifically state's exhibit Nos. 1-28, are not his patients' actual medical records. He argues the use of these misleading exhibits, which were comprised of incomplete, altered medical records, as well as additional information such as pharmacy logs and police investigative reports, which appellant did not have at the time

he administered treatment, did not constitute reliable, probative, and substantial evidence upon which the Board could base its decision. Appellant further contends that because the Board's expert witness also relied exclusively upon these same exhibits in formulating his opinion, his testimony is flawed and does not constitute reliable, probative and substantial evidence upon which the Board could base its decision.

{¶9} Appellant contends the exhibits containing the purported medical records were missing documentation, such as the results of his patients' drug screens. He submits that when the records were seized from his practice, there were various documents which had not yet been filed, and that these unfiled documents were not contained in state's exhibit Nos. 1-28. Appellant claims he has not had access to his actual medical records since the day they were seized from his office in October 2002. Without access, he asserts he is unable to compare the exhibits to his actual medical records in order to prove each specific omission, addition, or alteration that exists and to prove that his patient records do in fact support and document the care he provided to his patients. Consequently, he further submits that this circumstance has improperly shifted the burden of proof to him to prove that his actual medical records properly support and document the care he provided.

{¶10} Appellee disputes appellant's assertion that its exhibits contain only parts of each patient's medical records and that there are additional records, such as drug screen results, which exist but were missing from the exhibits. The Board argues that such an assertion is pure conjecture because there is no testimony to support it. Appellee further argues that there was additional evidence considered by the Board beyond just state's exhibit Nos. 1-28 and the testimony of the Board's expert, such as appellant's testimony from the criminal trial. Additionally, the Board submits that the testimony of appellant's

former office manager, Tricia Woodruff, dispels any notion that the exhibits did not include the medical records of appellant's patients.

{¶11} We find appellant's argument to be without merit. If appellant had reason to doubt the authenticity of the medical records submitted by the Board in state's exhibit Nos. 1-28, appellant could have challenged those records using a variety of methods. Appellant could have questioned the authenticity of the records through the former office manager, Tricia Woodruff, or by subpoenaing the person who did the filing for appellant during the two-month time period after Ms. Woodruff left the office and before the records were seized. However, appellant offered no testimony from any witnesses to establish that certain drug screens were in fact scheduled or conducted. Additionally, appellant himself exercised his Fifth Amendment right not to incriminate himself and refused to answer even the most basic of questions, including whether or not there were additional materials. See *Baxter v. Palmigiano* (1976), 425 U.S. 308, 96 S.Ct. 1551 (the Fifth Amendment does not preclude adverse inferences from being drawn against parties to civil actions when they invoke the privilege and refuse to testify in response to probative evidence offered against them in a civil cause).

{¶12} Alternatively, appellant was also free to make a request for the issuance of a subpoena so that he could inspect the records that were originally seized from his office. The medical board is subject to the Administrative Procedure Act, R.C. Chapter 119, as a result of its licensing function. *Korn* at 686. "The Ohio State Medical Board's determination to suspend a physician's license is an adjudication and is, consequently, subject to R.C. 119.09, issuance of subpoenas, pursuant to R.C. 119.07." *Korn* at paragraph six of the syllabus.

{¶13} R.C. 119.09 provides, in relevant part:

For the purpose of conducting any adjudication hearing * * * the agency may, *and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned.* * * *

(Emphasis added.) See also Ohio Adm.Code 4731-13-13 ("Upon written request, the board shall issue subpoenas for purposes of hearing to compel the attendance and testimony of witnesses and production of books, records and papers. Each subpoena shall indicate on whose behalf the witness is required to testify."). Appellant did not exercise this option.

{¶14} Through the use of its exhibits, as well as the expert testimony of Theodore V. Parran, Jr., M.D. ("Dr. Parran") and the testimony of appellant in the criminal trial, the Board produced reliable, substantial and probative evidence. For example, as the trial court noted, Dr. Parran testified that in preparing for the criminal trial in 2006, he prepared an expert report based upon his review of 49 patient office charts, a pharmacy board generated prescription profile of the controlled drugs taken by those patients, and two undercover police investigation reports. However, the undercover reports were not included in his expert report, which cited violations involving 28 patients.

{¶15} He further testified that he also prepared an expert report for the Board, which was based upon the medical records of the 28 patients he had previously reviewed, along with his initial report prepared in the criminal case, and the transcript of his testimony in the criminal case. Thus, in addition to the pharmacy board generated prescription profiles and the police investigative documents, both of which Dr. Parran acknowledged were not part of appellant's original file but which were easily

distinguishable from medical records, he reviewed the original patient records at issue in preparing his first expert report, which he then later used to prepare his expert report for the Board.

{¶16} Additionally, Dr. Parran testified that despite occasional entries in patient records indicating that a drug screen should be scheduled at a future visit, he did not find evidence in the patients' files demonstrating that appellant had actually followed through with the drug screens. Put another way, Dr. Parran did not find drug screen results in the relevant patient files, nor did he find orders for those drug screens or even notes documenting any drug screen results, thereby leading to the conclusion that those drug screens were in fact never ordered, even if certain notes indicated an intention to do so in the future.

{¶17} We do not dispute that it is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof. *Smith v. City of Columbus*, 10th Dist. No. 02AP-1219, 2003-Ohio-3303, ¶24, citing *Chiero v. Bur. of Motor Vehicles* (1977), 55 Ohio Misc. 22, 24. Yet, we disagree with appellant's contention that the burden of proof was improperly shifted to him to prove that the Board's allegations were false. Appellant cannot simply speculate or allege that the Board's records are inaccurate and that there are additional records somewhere out there which would support his position. Appellant failed to attempt to put on any actual evidence that would call into question the validity or reliability of the documents submitted by the Board. To the contrary, as the trial court noted, Ms. Woodruff identified her own handwriting on some of the records, as well as appellant's handwriting. Additionally, Ms. Woodruff was unable to verify appellant's assertion that a stack of unfiled documents had not made its way in to the patients' medical record files, since Ms. Woodruff left the office two months

before the seizure of the documents and could not testify as to whether or not the office was up to date in its filing at the time the records were seized.

{¶18} We find the trial court did not abuse its discretion in finding that the testimony and records referenced above constitute reliable, substantial and probative evidence. The trial court did not act unreasonably or arbitrarily in finding the records and testimony to be reliable for several reasons. First, the records were kept in the ordinary course of business. Second, Ms. Woodruff identified various records and also identified some of the records as containing her handwriting as well as appellant's handwriting. Additionally, the trial court was within its prerogative to find Dr. Parran to be a qualified expert, particularly given Dr. Parran's background in this area, and thus to find his testimony to be credible and afford it significant weight. Dr. Parran adequately explained his procedure for reviewing and identifying the records and distinguishing between the patient charts and the documents which were obtained after the records were seized from appellant's office, and he also testified he used the pharmacy logs simply to confirm appellant's prescribing history for each patient. We further find the common pleas court did not abuse its discretion in finding the records and the testimony to be probative and substantial, in that they addressed the issues in question, as well as the specific matters alleged in the notice served upon appellant.

{¶19} Accordingly, we overrule appellant's first assignment of error.

{¶20} In his second assignment of error, appellant asserts the Board is statutorily prohibited from disciplining a physician for prescribing pain medication for pain patients unless the requirements of R.C. 4731.052 are met. In essence, appellant argues the Board's authority to revoke appellant's license under R.C. 4731.22 is limited by R.C. 4731.052. Appellant argues the Board must prove that appellant violated *both* R.C.

4731.052 and the Board's intractable pain rules set forth under Ohio Adm.Code 4731-21 before it can impose discipline for prescribing controlled substances to intractable pain patients. Because the Board did not allege or find that appellant's treatment and care violated R.C. 4731.052, appellant submits the Board was without the authority to take disciplinary action and permanently revoke appellant's license. However, as the trial court noted, appellant has failed to provide sufficient legal authority to support this position.

{¶21} Chapter 4731 of the Revised Code vests the Board with broad authority to regulate the medical profession in Ohio and to discipline physicians whose conduct fails to conform to its regulations. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-276, 2009-Ohio-4849. R.C. 4731.22 authorizes the Board to discipline those within its licensing authority. *State of Ohio ex rel. Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328. Specifically, R.C. 4731.22(B) grants the Board the authority to revoke, suspend, limit, refuse to register, or reinstate a certificate to practice medicine, based upon one or more of the many reasons enumerated in that division. *Landefeld v. State Med. Bd. of Ohio* (June 15, 2000), 10th Dist. No. 99AP-612.

{¶22} R.C. 4731.052 and the rules set forth in Ohio Adm.Code 4731-21, codify the standard of care for physicians practicing pain management, as established by those physicians practicing such medicine prior to the enactment of the statute and the rules. *Dahlquist v. Ohio State Med. Bd.*, 10th Dist. No 04AP-811, 2005-Ohio-2298, ¶18. R.C. 4731.052 addresses a physician's authority to treat intractable pain using dangerous drugs. *Id.* R.C. 4731.052(B) directed the board to adopt rules to "establish standards and procedures to be followed by physicians in the diagnosis and treatment of intractable pain, including standards for managing intractable pain by prescribing, personally furnishing, or administering dangerous drugs in amounts or combinations that may not be

appropriate when treating other medical conditions." See *Dahlquist* and R.C. 4731.052(B). Ohio Adm.Code 4731-21 was then adopted in response to the enactment of R.C. 4731.052.

{¶23} Ohio Adm.Code 4731-21-02 sets forth rules for the utilization of prescription drugs for the treatment of intractable pain. Specifically, Ohio Adm.Code 4731-21-02(A) sets forth accepted and prevailing standards of care. Among others, these include requirements such as: conducting an initial evaluation that includes a relevant history; establishing and documenting a medical diagnosis indicating the presence of intractable pain; ordering an evaluation by one or more other practitioners who specialize in the treatment of the anatomic system or area of the body perceived as the source of pain prior to a diagnosis of intractable pain; and formulating and documenting an individualized treatment plan specifying the medical justification of the treatment via the utilization of prescription drugs on a protracted basis or in combinations or amounts that may be inappropriate for treating other medical conditions. A violation of a provision of any rule in Ohio Adm.Code 4731-21, such as one or more violations of Ohio Adm.Code 4731-21-02, constitutes a violation of the minimal standards applicable to the administration of drugs under R.C. 4731.22(B)(2), a violation of the provision against prescribing or administering drugs for other than legal and legitimate therapeutic purposes under R.C. 4731.22(B)(3), if done knowingly or recklessly, and a violation of the minimal standards of care of similar practitioners under similar circumstances set forth in R.C. 4731.22(B)(6). See Ohio Adm.Code 4731-21-05.

{¶24} Appellant argues R.C. 4731.052 prohibits the Board from basing an order on alleged violations of R.C. 4731.22 when the violations arise solely from the prescribing of controlled substances for chronic pain. Appellant relies upon R.C. 4731.052(D) to

support his argument that the Board was without the authority to take disciplinary action and permanently revoke his license. R.C. 4731.052(D) reads as follows:

A physician who treats intractable pain by managing it with dangerous drugs is not subject to disciplinary action by the board under section 4731.22 of the Revised Code solely because the physician treated the intractable pain with dangerous drugs. The physician is subject to disciplinary action only if the dangerous drugs are not prescribed, furnished, or administered in accordance with this section and the rules adopted under it.

{¶25} While R.C. 4731.052 provides specific standards and procedures for the diagnosis and treatment of intractable pain with dangerous drugs and, consequently, for pursuing disciplinary action against physicians who provide that type of treatment and fail to comply with those standards and procedures, R.C. 4731.052 does not prohibit the Board from pursuing disciplinary action under R.C. 4731.22 against physicians who fail to practice within minimal standards of care, fail to maintain minimal standards applicable to the selection or administration of drugs, or prescribe drugs for other than legal and legitimate purposes, or fail to comply with accepted and prevailing standards of care.

{¶26} In this case, the violations did not arise simply based upon the prescribing of controlled substances for chronic pain. Instead, many of the violations occurred because appellant's conduct generally fell below the minimal standards of care required of a physician. Examples include appellant's inappropriate or non-existent diagnoses and hopelessly incomplete and inadequate medical records, among numerous others.

{¶27} To illustrate, appellant was cited with a violation of R.C. 4731.22(B)(6). It states, in relevant part, that the Board shall revoke, suspend, or place a doctor on probation if his acts constitute a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, regardless of whether or not there was actual injury to a patient. Appellant was also cited

with a violation of R.C. 4731.22(B)(2), which permits revocation of a certificate to practice medicine if a physician fails to maintain minimal standards applicable to the selection or administration of drugs or the failure to use acceptable scientific methods in the selection of drugs or other modalities for treatment. In addition, appellant was cited with a violation of R.C. 4731.22(B)(3), which authorizes the Board to revoke a physician's license for personally furnishing, prescribing, or administering drugs for other than legal and legitimate therapeutic purposes. Finally, appellant was cited with a violation of R.C. 4731.22(B)(20), which provides that a licensed physician may be disciplined for violating any rule promulgated by the Board. Here, the rule cited was Ohio Adm.Code. 4731-21-02. The common pleas court found that all of these violations were properly supported by reliable, probative and substantial evidence, as discussed below.

{¶28} Dr. Parran testified that appellant failed to conform with the minimal standards applicable to the selection or administration of drugs and failed to conform to the minimal standards of care of similar practitioners, thereby violating R.C. 4731.22(B)(2) and (B)(6), respectively. Dr. Parran testified that appellant furnished, prescribed, or administered drugs for reasons other than legal and legitimate therapeutic purposes, in violation of R.C. 4731.22(B)(3), and violated R.C. 4731.22(B)(20) by violating Ohio Adm.Code 4731-21-02 regarding the utilization of prescription drugs for the treatment of intractable pain. Examples of appellant's non-conformity were numerous.

{¶29} According to the testimony of Dr. Parran, the medical histories taken by appellant were insufficient, as were the physical examinations. Appellant's patient records failed to show a work-up of any medical history, lacked laboratory testing, lacked records of prior treatment and failed to document impressions or a diagnosis in many cases. Additionally, the common pleas court cited to testimony and evidence establishing

that appellant: (1) inappropriately prescribed controlled substances in a manner below the minimal standard of care and without documenting a legitimate purpose, such as by prescribing without any diagnostic workup or evaluation, or adding more controlled substances or higher doses without documenting a supporting diagnosis or for no apparent reason when the patient reported doing well; (2) prescribed high doses or potentially fatal doses of controlled substances without verifying the patient's current level of medication or tolerance level; (3) gave early prescription refills; (4) continued to prescribe despite patients missing medicine checks and/or urine screens; (5) continued to prescribe without contacting other doctors despite notification that patients were seeing other doctors and receiving controlled substances; (6) failed to maintain minimal standards applicable to the selection or administration of drugs and failed to employ acceptable scientific methods in the selection of drugs or other modalities for treatment; (7) prescribed high doses of opiates to patients following gaps in treatment without regard for patient health and safety; and (8) failed to order appropriate consultations from an independent physician with respect to the patient's affected organ system as required under the intractable pain rules.

{¶30} Here, the Board's permanent revocation of appellant's license to practice was not based solely upon appellant's treatment of chronic pain patients using dangerous drugs. As noted above, the Board cited to and subsequently found numerous violations, many of which related to general minimal standards of care applicable to practitioners as a whole. We further note, as did the common pleas court, that, although appellant was not cited with a violation of R.C. 4731.052, he appears to assert the protections found in section (D), which he claims should shield him from any disciplinary action. However, like the common pleas court, we disagree. We make no finding with respect to violations of

R.C. 4731.052, which were not alleged. Yet, we fail to see how he can offer this shield here, as it seems apparent from various related facts contained within the record that, had he actually been cited with a violation of this statute, he would not be shielded from discipline because he failed to follow the steps which could possibly protect him, had the only allegation against him been treating chronic pain patients using dangerous drugs. However, as noted above, the violations asserted against him and subsequently proven did not include a violation of R.C. 4731.052 and encompassed much more than simply using dangerous drugs to treat chronic pain patients.

{¶31} Accordingly, we find the common pleas court did not abuse its discretion in finding that the Board's order was supported by reliable, probative and substantial evidence. Furthermore, we find said order is in accordance with law. Consequently, we overrule appellant's second assignment of error.

{¶32} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
