

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julie A. Taylor, M.D.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-262
State Medical Board of Ohio,	:	(C.P.C. No. 09CVF-14524)
Defendant-Appellee.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on November 16, 2010

Jurca & Lashuk, LLC, Jeffrey L. Jurca and Jason P. Grable,
for appellant.

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

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Julie A. Taylor, M.D., appeals from a decision of the Franklin County Court of Common Pleas, affirming the September 9, 2009 order of the State Medical Board of Ohio ("Board"). The Board found Dr. Taylor in violation of R.C. 4731.22(B)(19) and placed temporary limitations on Dr. Taylor's license to practice medicine. The Board concluded that Dr. Taylor was unable to practice medicine according to acceptable and

prevailing standards of care by reason of mental illness unless she received appropriate treatment and monitoring. For the reasons that follow, we affirm.

{¶2} On September 27, 2004, the Board notified Dr. Taylor that it had reason to believe she was in violation of R.C. 4731.22(B)(19) in that she was impaired due to mental illness. The Board ordered Dr. Taylor to undergo a psychiatric evaluation by Dr. Stephen Noffsinger, a board certified psychiatrist. Dr. Noffsinger examined Dr. Taylor in January 2005. He found that Dr. Taylor suffers from Bipolar II Disorder and Post Traumatic Stress Disorder and had a history of multiple psychiatric inpatient hospitalizations in late 2003 and 2004. Dr. Noffsinger prepared a report classifying Dr. Taylor's Bipolar II Disorder as in full remission because her depressive symptoms had gradually resolved during the spring of 2004, and for the past two months her depressive symptoms had been well controlled with treatment. Based on her history and the recurrent nature of her illness, Dr. Noffsinger opined that it was foreseeable that Dr. Taylor would experience future disabling episodes of her mental illness. Dr. Noffsinger further opined that Dr. Taylor's condition was treatable. Therefore, in Dr. Noffsinger's opinion, as long as Dr. Taylor continued in treatment including medication and counseling, and was monitored and supervised by the Board, Dr. Taylor was capable of practicing medicine according to acceptable and prevailing standards of care.

{¶3} On January 9, 2008, the Board issued a Notice of Opportunity Letter, advising Dr. Taylor that the Board intended to determine whether to limit, revoke, permanently revoke, or suspend her license for being in violation of R.C. 4731.22(B)(19) (inability to practice according to acceptable and prevailing standards of care by reason of

mental illness). Dr. Taylor requested a hearing. The hearing took place on November 6, 2008.

{¶4} The hearing examiner found that Dr. Taylor was in violation of R.C. 4731.22(B)(19) and proposed placing conditions on her license. The Board, however, remanded the matter for consideration of materials filed by Dr. Taylor with her objections to the report. Dr. Taylor presented evidence by means of a letter and affidavit from her then treating psychiatrist, Gerald A. Melchiode, M.D. Dr. Melchiode stated that based upon his treatment and most recent examination of Dr. Taylor on October 21, 2008, Dr. Taylor had the ability to practice medicine according to acceptable and prevailing standards of care without the need of any restrictions, conditions, limitations, monitoring, or treatment.

{¶5} On remand, both the hearing examiner and the Board rejected Dr. Taylor's position that she could practice without restrictions. The hearing examiner issued a new report, but proposed the same order, and the Board adopted both. On September 9, 2009, the Board imposed a temporary limitation for an indefinite period of time on Dr. Taylor's ability to practice medicine and surgery in Ohio.

{¶6} Dr. Taylor appealed the Board's order to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. The court of common pleas found reliable, probative, and substantial evidence to support the Board's order. The court overruled the assigned errors concerning alleged due process violations, and prejudice due to delay in bringing the action, and ultimately found the Board's order to be in accordance with law.

{¶7} Dr. Taylor appealed to this court assigning the following as error:

[I.] The trial court erred in its analysis by determining that Dr. Taylor was in violation of R.C. § 4731.22(B)(19) due to past mental illness.

[II.] The trial court erred in finding that the Board's promulgation of O.A.C. § 4731-28-01 did not expand R.C. 4731.22(B)(19).

[III.] The trial court erred in finding that the Board gave proper notice to Dr. Taylor consistent with her due process rights.

[IV.] The trial court erred in finding that the Board timely commenced the administrative action consistent with Dr. Taylor's due process rights.

[V.] The trial court erred in finding that Dr. Taylor did not suffer material prejudice due to the Board's delay in prosecuting the administrative action.

[VI.] The trial court erred and abused its discretion in finding that the Order of the Board was supported by reliable, probative, and substantial evidence.

[VII.] The trial court erred by applying the incorrect standard of review.

{¶8} Pursuant to R.C. 119.12, when a trial court reviews an order of an administrative agency, it must consider the entire record to determine if the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. If a party appeals the trial court's decision to affirm, reverse, vacate, or modify the agency's order, the appellate court must determine whether the trial court abused its discretion in its examination of the record for reliable, probative, and substantial evidence. *Pons v. Ohio St. Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶9} Reliable, probative, and substantial evidence has been defined as follows:

"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. "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. "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.)

{¶10} 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.

{¶11} On questions of law, an appellate court's review is plenary. *Univ. Hosp., Univ of Cincinnati College of Med. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶12} With this standard in mind, we address Dr. Taylor's assignments of error. Assignments of error one through three are related to the decision that Dr. Taylor was in violation of R.C. 4731.22(B)(19). That section provides, in pertinent part, as follows:

The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

* * *

(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills.

{¶13} Dr. Taylor argues that in order for the Board to find a physician in violation of R.C. 4731.22(B)(19), there must be evidence of a *current* inability to practice according to acceptable and prevailing standards of care. Dr. Taylor asserts that the state presented evidence only of her history of *past* mental illness, and at the time of her examination and the subsequent Notice of Opportunity letter was mailed, her condition was in full remission.

{¶14} The evidence shows that both Dr. Noffsinger and Dr. Melchiode opined that Dr. Taylor was currently capable of practicing medicine, albeit Dr. Noffsinger qualified his opinion by stating that her ability to practice must be limited by certain restrictions, treatment, and monitoring. The record demonstrates that Dr. Taylor has, since 2004, voluntarily sought and engaged in treatment for her conditions, and she was undergoing such treatment at the time of her Board ordered examination. Therefore, she argues, although she may have been unable to practice according to acceptable and prevailing standards of care in the past, she is currently able to do so.

{¶15} As far as it goes, Dr. Taylor's argument is correct. A history of mental illness may not result in an individual being unable to practice according to acceptable and prevailing standards of care. In *Landefeld v. State Med. Bd. of Ohio* (June 15, 2000), 10th Dist. No. 99AP-612, a physician sought to use his bipolar condition as a defense to charges of misconduct brought under other provisions of R.C. 4731.22(B). The physician submitted to a Board ordered mental examination, and the examining physician found that even though the physician suffered from bipolar disorder, his impairment did not render him unable to practice according to acceptable standards of care. The physician

was under the care of a doctor and his treatment included administration of the drug lithium carbonate that had stabilized his moods.

{¶16} This court then stated that "[i]n considering the language of R.C. 4731.22(B)(19), we do not interpret the statute as requiring the board to charge a licensed practitioner under that division in every instance in which the physician asserts (or even establishes) that he suffers from a mental illness. Specifically, R.C. 4731.22(B)(19) is not triggered by mere evidence of a mental illness; rather, the board's authority to charge and discipline a practitioner under (B)(19) is dependent upon the board's finding of an individual's 'inability to practice according to acceptable and prevailing standards of care' by reason of a mental illness." Id.

{¶17} The question then becomes whether a practitioner who suffers from a mental impairment that is in full remission due to ongoing care and treatment can still have restrictions placed on her license. Dr. Taylor argues that she was blindsided by an administrative rule that was not in effect at the time she was charged. The first mention of this administrative rule in this case appeared in the hearing examiner's 2009 report and recommendation. Ohio Adm.Code 4731-28-01, effective June 30, 2007, provides that, for purposes of R.C. 4731.22(B)(19), the following definitions apply:

(A) "Mental illness" includes, but is not limited to, mental disorder; and

(B) "Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills", includes inability to practice in accordance with such standards *without appropriate treatment, monitoring, or supervision.*

(Emphasis added.)

{¶18} Dr. Taylor argues that the rule improperly expands the definitions of mental illness and inability to practice beyond that of the statute. She argues that she never was given notice that she would be judged under a standard that is different from the statute. She contends that the rule was not created until almost three years after her mental examination, and therefore it is unfair for her to be held to a new standard. We disagree.

{¶19} Former Ohio Adm.Code 4731-16-03 contained the same definition of "inability to practice in accordance with acceptable and prevailing standards of care" as that of Ohio Adm.Code quoted above. When Ohio Adm.Code 4731-16-03 was repealed, it was replaced with the current rule. However, the same standard has been in place since Dr. Taylor was given notice of the charges against her.

{¶20} The Supreme Court has specifically recognized and respected the expertise of the medical board in medical matters. *Arlen v. State* (1980), 61 Ohio St.2d 168. Here, the rule serves to clarify that the "unable to practice" language of R.C. 4731.22(B)(19) includes those practitioners, such as Dr. Taylor, who are unable to practice in accordance with acceptable and prevailing standards of care without proper treatment, monitoring, and supervision. Because the same definition of inability to practice was present before, during, and after Dr. Taylor was charged with a violation of R.C. 4731.22(B)(19), she cannot now complain that the Board changed the standard by which it evaluated her.

{¶21} Under the definition set forth in the rule, the Board could have and did find Dr. Taylor currently unable to practice medicine without appropriate treatment, monitoring, or supervision.

{¶22} Assignments of error one, two, and three are overruled.

{¶23} In her fourth and fifth assignments of error, Dr. Taylor contends that the Board unreasonably delayed pursuing the charges against her, and that the delay materially prejudiced her.

{¶24} It is undisputed that nearly three years elapsed from January 19, 2005 when Dr. Noffsinger issued his report until January 8, 2008 when the Board issued its Notice of Opportunity letter to Dr. Taylor. In the meantime, the Board promulgated Ohio Adm.Code 4731-28-01 (effective June 30, 2007) which Dr. Taylor alleges created a new standard upon which any inability to practice according to acceptable and prevailing standards of care would be determined.

{¶25} It appears from the record that much of the delay in going forward with formal charges resulted from the Board continuing to seek information on Dr. Taylor's condition and treatment. In November 2006, the Board received additional interrogatory responses from Dr. Taylor outlining her current treatment and status. At that time, Dr. Taylor was not practicing medicine, and she was receiving Social Security disability benefits. In July 2007, the Board received treatment records from Dr. Taylor's treating psychiatrist, Dr. Rena Kay. The additional materials were sent to Dr. Noffsinger in December 2007. Dr. Noffsinger wrote a letter in December 2007 indicating that the additional information did not change his opinion that Dr. Taylor was able to practice according to acceptable and prevailing standards of care *if* she complied with treatment and conditions.

{¶26} Much of the delay is attributable to Dr. Taylor. In June 2005, the Board requested that she sign a release for her medical records. In September 2006, she had still not signed the release regarding treatment records, and this stalled the progress of the investigation.

{¶27} In order to find a due process violation, Dr. Taylor must show more than mere delay in bringing the action. She must also show material prejudice. *Smith v. State Med. Bd. of Ohio* (July 19, 2001), 10th Dist. No. 00AP-1301; *McCutcheon v. Ohio State Med. Bd.* (1989), 65 Ohio App.3d 49, 56-57.

{¶28} Here, Dr. Taylor argues that she was materially prejudiced by the delay because, in the middle of the period of inactivity, the Board enacted Ohio Adm.Code 4731-28-01, which changed the standard under which she was judged unable to practice according to acceptable, and prevailing standards of care.

{¶29} As discussed in connection with the first three assignments of error, the definition of inability to practice never changed. Only the number of the rule changed. In Baldwin's Ohio Administrative Code, Vol. 11A, under the "Historical and Statutory Notes" there is an editor's note that "[e]ffective 6-30-07, 4731-28-01 contains provisions of former 4731-16-03." A check of Ohio Adm.Code 4731-16-03 shows that the definition was the same. Dr. Taylor cannot show that she was materially prejudiced, nor can her due process rights have been violated by the delay since she was responsible for a large portion of the delay.

{¶30} The fourth and fifth assignments of error are not well-taken and are overruled.

{¶31} In her sixth assignment of error, Dr. Taylor argues there is no evidence from which the Board could have found her in violation of R.C. 4731.22(B)(19). Dr. Taylor emphasizes that the Board's own expert opined that Dr. Taylor "is presently capable of practicing medicine according to acceptable and prevailing standards of care." (State's exhibit No. 9, at 9.) However, Dr. Taylor ignores the portion of Dr. Noffsinger's report that found her ability to continue to practice medicine according to acceptable and prevailing standards of care is contingent upon her ongoing compliance with certain conditions. The court of common pleas did not abuse its discretion in finding reliable, probative, and substantial evidence that supported the Board's decision.

{¶32} The sixth assignment of error is not well-taken and is overruled.

{¶33} In her final assignment of error, Dr. Taylor argues that the court of common pleas applied an incorrect standard of review in considering her due process arguments. Because our review of those assignments of error is plenary, the assignment of error is moot.

{¶34} Based on the foregoing, Dr. Taylor's assignments of error one through six are overruled, and the seventh assignment of error is rendered as moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.
