

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dobroslav M. Valik, D.D.S., :
Petitioner :
 :
v. : No. 2358 C.D. 2007
 : Submitted: June 6, 2008
 :
State Board of Dentistry, :
Respondent :
 :

BEFORE: HONORABLE BERNARD McGINLEY, Judge
HONORABLE ROCHELLE FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: August 13, 2008

Dobroslav M. Valik, D.D.S., (Valik) petitions for review from an order of the State Board of Dentistry (Board) of the Bureau of Professional and Occupational Affairs (Bureau) which revoked his dental license and ordered Valik to make restitution in the amount of \$10,000.00.¹ We affirm.

On July 30, 2001, the Bureau, on behalf of the Board, filed an order to show cause against Valik, alleging that he violated Sections 4.1(a)(2) and 4.1(a)(8) of the Dental Law (Law), Act of May 1, 1933, P.L. 216, as amended, 63 P.S. §§ 123.1(a)(2) and 123.1(a)(8), because he accepted \$10,000.00 from a patient for dental services he did not perform and then did not return the money to the patient.²

¹ Upon review of the Board's motion to strike Valik's reply brief, we deny such motion.

² Section 4.1 of the Law was added by the Act of December 20, 1985, P.L. 513.

A hearing was thereafter held before a hearing examiner. The hearing examiner issued a proposed adjudication and order and the Board thereafter filed a notice of intent to review. On December 4, 2007, the Board issued its final adjudication and order, concluding that Valik was subject to disciplinary action under Sections 4.1(a)(2) and (8) of the Law.

The Board found that Valik was the holder of a dental license since 1975, which authorized him to practice dentistry. Further, Valik was employed at the office of Daniel A. Rader, D.M.D. (Rader) from the first week of April, 1999 through Labor Day of that same year. Valik filled in for Rader because Rader had been hospitalized.

Janet C. Fenerty was a patient of Rader's and, prior to Rader's hospitalization, Fenerty and Rader discussed Rader redoing all of her lower teeth. Fenerty met Valik during Rader's absence. In April of 1999, Valik treated Fenerty's lower bridge.

On August 9, 1999, Fenerty and Valik entered into an agreement whereby Fenerty would pay Valik \$10,000.00 for treatment of Fenerty's upper arch, including replacement of three bridges and three root canals. Valik represented to Fenerty the money was to be used to help Valik rent and purchase office equipment for his own business. He picked up the personal check at Fenerty's home and told her he would perform the work after he returned from his trip to Slovakia. Rather than purchasing dental equipment, Valik used the money for his personal financial problems, including a failing business in Slovakia.

Valik left his employment with Rader's office in early September of 1999. Valik did not leave the \$10,000.00 with Rader's office, nor did he perform the dental work on Fenerty or, alternately, return the money to Fenerty. Valik left

for Slovakia in September. While in Slovakia, Valik's father became ill and his trip was extended. Valik did not return home until December.

During Valik's absence, Fenerty had a tooth ache, which Rader treated, as well as performing a root canal, upon his return to his practice on September 21, 1999. About one and one-half years later Rader completed all of the work that Valik had contracted to perform on Fenerty.

On November 29, 1999, Valik sent two letters to Fenerty. The first letter explained that he would repay her the \$10,000.00 as soon as he received a wire transfer from Slovakia. He also promised to pay Fenerty two percent interest per month, retroactive to September of 1999. The second letter indicated that Fenerty would receive the money owed by January 12, 2000. No money was ever sent to Fenerty, nor did Valik thereafter perform any work on Fenerty.

Based on the above, the Board determined that Valik made misleading, deceptive, untrue or fraudulent representations to Fenerty in violation of Section 4.1(a)(2) of the Law and also engaged in unprofessional conduct under Section 4.1(a)(8) of the Law. Specifically, Valik asked Fenerty to write him a \$10,000.00 check for dental services to pay rent and purchase equipment. Valik clearly departed from established office policy that all payments should list Rader as payee and be delivered to the front desk of Rader's office. Valik thereafter cashed the check and traveled to Slovakia, where he admittedly used the money to address his failing business there. Despite promises, Valik never returned the money to Fenerty, nor did he perform the promised dental work. The Board also found that Valik practiced dentistry under a lapsed license.

In the opinion of the Board, Valik's continued practice of dentistry placed the public at risk. As such, having concluded that Valik violated Sections

4.1(a)(2) and (8) of the Law, the Board revoked his license and also ordered Valik to return \$10,000.00 to Fenerty.³ This appeal followed.⁴

Initially, Valik argues that the Board erred in considering and determining that his dental license had lapsed because Valik was never put on notice that the status of his license was at issue. In accordance with Section 5 of the Law, 63 P.S. § 124, “[b]efore the license of any licensee ... is suspended or revoked by the board, a written copy of the complaint made shall be furnished to the licensee ... against whom the same is directed and an opportunity be afforded him or her to be heard before the board” Here, Valik argues that the order to show cause filed by the Board, did not mention a lapsed license and maintains that in accordance with Matter of Rosenbaum, 478 Pa. 93, 385 A.2d 1329 (1978), a disciplinary action cannot be based on matters that are not included in the formal charge.

³ Sections 4.1(a)(2) and (8) of the Law provide:

a) The board shall have the authority, by majority action, to refuse, revoke or suspend the license of any dentist or dental hygienist or certificate of an expanded function dental assistant for any or all of the following reasons:

...

(2) Making misleading deceptive, untrue or fraudulent representations.

...

(8) Engaging in unprofessional conduct. For purposes of this clause (8), unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing dental or dental hygiene practice and standard of care for expanded function dental assistants in which proceeding actual injury to the patient need not be established.

⁴ Our review is limited to determining whether constitutional rights were violated, and whether the decision is in accordance with law and supported by substantial evidence. McGrath v. State Board of Dentistry, 632 A.2d 1027 (Pa. Cmwlth. 1993).

In Rosenbaum, the charges filed against the attorney contained fourteen charges of solicitation. The special disciplinary court concluded that the charges of solicitation were unproved. However, the special disciplinary court held that the attorney was guilty of unprofessional conduct. On appeal to this court the attorney argued, and we agreed, that the special disciplinary court erred in finding him guilty of unprofessional conduct because the petition for the imposition of discipline filed did not give the attorney due and proper notice of the charge.

Here, Valik argues that the Board improperly found him guilty of having a lapsed license when such a charge was not contained in the order to show cause. We agree with the Board, however, that it did not find Valik guilty of practicing with a lapsed license.

In the present case, the Board in its order to show cause charged Valik with violating Sections 4.1(a)(2) and 4.1(a)(8) of the Law, 63 P.S. § 123.1(a)(2) and § 123.1(a)(8), because he accepted \$10,000.00 from a patient for dental services he never performed and did not return the money to the patient. The Board then, after a hearing, specifically found Valik guilty of the conduct outlined in the order to show cause.⁵ In Rosenbaum, unlike the present case, the special

⁵ The Board's "CONCLUSIONS OF LAW" are as follows:

1. The Board has jurisdiction over Respondent
2. Respondent received notice of the charges against him and was given an opportunity to be heard
3. Respondent is subject to disciplinary action under Section 4.1(a)(2) of the Dental Law, 63 P.S. § 123.1(a)(2), for making misleading, deceptive, untrue, or fraudulent representations by accepting payment for dental work not performed and using said payment to instead address his personal financial difficulties
4. Respondent is subject to disciplinary action under Section 4.1(a)(8) of the Dental Law, 63 P.S. § 123.1(a)(8), for

disciplinary court found the attorney guilty of unprofessional conduct based upon other facts made known through the attorney's testimony regarding an entirely different transaction not otherwise apparent. Here, the Board merely made a finding that Valik's license for practicing dentistry had lapsed.⁶ However, the Board did not conclude that the disciplinary action it ordered was based on a lapsed license.⁷ As a result, the instant case is not one in which the Board found Valik guilty of an offense for which he had not been charged.

On the contrary, the formal charges against Valik included a charge that Valik violated "63 P.S. § 123.1(a)(2) in that Respondent [Valik] made misleading, deceptive, untrue and fraudulent representations by accepting payment

engaging in unprofessional conduct by accepting payment for dental work not performed and using said payment to instead address his personal financial difficulties

(Board's decision at p. 6.)

⁶ Board's Findings of Fact No. 3. While we acknowledge that the Board did find that Valik had engaged in the above-mentioned conduct while operating under a lapsed license and subsequently used this finding to support its determination, we find this distinct from the Board specifically finding Valik guilty of a lapsed license.

⁷ In accordance with 1 Pa. Code § 35.173:

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. Any participant shall, on timely request, be afforded an opportunity to show the contrary. Any participant requesting the taking of official notice after the conclusion of the hearing shall set forth the reasons claimed to justify failure to make the request prior to the close of the hearing.

In Gleeson v. State Board of Medicine, 900 A.2d 430 (Pa. Cmwlth. 2006), petition for allowance of appealed denied, 591 Pa. 685, 917 A.2d 316 (2007), the licensee argued that the State Board of Medicine violated his due process rights by referencing a consent agreement, which agreement was not part of the administrative record. This court concluded that the "Board properly took judicial notice of its own records and, therefore, in so doing, did not violate Licensee's due process rights." Gleeson, 900 A.2d at 440.

for dental work he never performed.” Order to Show Cause at p. 2. Additionally, under the same facts, the Board charged Valik with engaging in unprofessional conduct under 63 P.S. § 123.1(a)(8), by accepting payment for the never performed dental work. Order to Show Cause at p. 3. Nowhere in the charges does the Board allege that Valik engaged in unprofessional conduct under 63 P.S. § 123.1 by practicing dentistry under a lapsed license. Although the lapsed license was a factor considered by the Board, its disciplinary action was supported by substantial evidence of other violations of the Law.

Next, we address the issue of whether substantial evidence supports the Board’s determination that Valik violated Sections 4.1(a)(2) and (8) of the Law.

Section 4.1(a)(2) provides that the Board may refuse, revoke or suspend a license for “[m]aking misleading, deceptive, untrue or fraudulent misrepresentations.” In accordance with 49 Pa. Code § 33.212(2) “misleading, deceptive, untrue or fraudulent representations” includes “[m]isrepresenting or concealing a material fact in obtaining payment for dental services.”

Here, Valik contracted with a patient to perform dental services. Valik accepted \$10,000.00 from Fenerty prior to performance of the services so that he could rent space and obtain equipment. As found by the Board, however, Valik instead used the \$10,000.00 to address his own personal financial difficulties, including a failing business in Slovakia. He accepted payment, yet he never performed the contracted for services. Furthermore, despite two letters informing the patient that he would indeed refund the money owed to her, Valik has not done so. At the very least, Valik misrepresented a material fact in obtaining payment for medical services as he told Fenerty that he needed to be paid

up front so that he could set up an office and get equipment, yet he instead used the money for his failing business in Slovakia.

Nonetheless, Valik argues that there was insufficient evidence to support a finding that he had knowledge or intended to defraud Fenerty and claims that this case is similar to Snell v. State Examining Board, 490 Pa. 277, 416 A.2d 468 (1980). Before addressing the facts in Snell, we first observe that the Board is not required to find evidence of each of the common elements of fraud. Moses v. State Dental Council and Examining Board, 400 A.2d 664 (Pa. Cmwlth. 1979). Section 4.1(a)(2) of the Law authorizes revocation or suspension of a license for “misleading, deceptive, untrue **or** fraudulent misrepresentations. (Emphasis added.) However, the Law requires some knowledge or intent by the licensee. Moses.

In Snell, a group of oral surgeons was charged with fraudulently or unlawfully practicing dentistry under the Law, in that they filed false claims with an insurance company. Specifically, the Board alleged that the oral surgeons performed surgical removal of erupted teeth and then submitted claims for the removal of impacted teeth. Surgical removal of impacted, but not erupted, teeth was covered under the insurance plans. The Supreme Court stated that in order to prove fraudulent misrepresentation under the Law, the Board must show that the licensee had knowledge of the falsity or an intent to misrepresent by clear and convincing evidence. The Supreme Court concluded that suspension of the oral surgeons’ licenses was in error. Although the surgeons’ signatures appeared on forms submitted to the insurance carrier, the signatures were affixed via a rubber stamp and thus actual knowledge of wrongdoing or intent to defraud could not be presumed.

Here, unlike Snell, which focused only on fraudulent conduct, this case is concerned with whether Valik's actions were misleading, deceptive, untrue or fraudulent. Unlike Snell, it was Valik himself in this case who represented that for \$10,000.00 he would perform dental work on a patient, yet he never performed the services. He personally told Fenerty that the money was needed up front so that he could rent office space and get equipment. However, as found by the Board, he instead used the \$10,000.00 to address his personal financial problems, including a failing business in Slovakia. Thus, in obtaining payment from Fenerty, Valik misrepresented a material fact, i.e., how the money Fenerty paid Valik would be used. There was substantial evidence, therefore, to support the Board's finding that Valik intentionally made misleading, deceptive, untrue or fraudulent misrepresentations by accepting payment for dental work that was never performed and further, by refusing to return the money despite the assurances he made to do so.

As to whether Valik engaged in unprofessional conduct in violation of Section 4.1(a)(8) of the Law, we observe that 49 Pa. Code § 33.211 defines unprofessional conduct as follows:

(a) *Dentists.* Unprofessional conduct, as defined in section 4.1(a)(8) of the act (63 P.S. § 123.1(a)(8)), includes the following conduct by a dentist:

...

(4) Withdrawing dental services after a dentist-patient relationship has been established so that the patient is unable to obtain necessary dental care in a timely manner.

...

(8) Failing to provide necessary dental care to a patient in a timely manner or to apprise the patient of the need for the care.

Here, Valik claims that there is no evidence that he intended to accept payment and not perform the services. Specifically, Valik claims that despite Fenerty's agreement to have him perform the dental work when he returned from Slovakia, Fenerty chose to have the dental work performed by her former dentist. The findings of the Board, however, are that Rader initially treated Fenerty because she had a toothache while Valik was still in Slovakia and only later performed the dental work promised by Valik. The findings further show that the work which was to be performed by Valik was not completed by Rader until a year and half later. Thus, Valik's claim that he did not have an opportunity to perform the work is not supported by the findings of the Board. Valik's representations that he needed the payment in advance to buy dental equipment followed by his trip to Slovakia where he spent the money on his own personal problems, including a failing business there, are substantial evidence of intent to accept payment and not provide the services promised.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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	:	
State Board of Dentistry,	:	
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ORDER

Now, August 13, 2008, the Order of the State Board of Dentistry, in the above-captioned matter, is affirmed. The motion to strike the reply brief of Dobroslav M. Valik, D.D.S., filed by the State Board of Dentistry, is denied.

JIM FLAHERTY, Senior Judge