IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

JAMES E. LUNDEEN, SR., M.D.,	:	
	:	
Appellant	:	CASE NO. 11CV-16295
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

DECISION AND JUDGMENT ENTRY
AFFIRMING THE ORDER OF THE STATE MEDICAL BOARD OF OHIO
AND
NOTICE OF FINAL APPEALABLE ORDER

BEATTY, JUDGE

This is an appeal pursuant to R.C. 119.12 from a December 14, 2011, Order of the State Medical Board of Ohio (the "Board") permanently revoking Appellant's certificate to practice medicine and surgery in Ohio.

I. FACTS

On May 11, 2011, the Board issued a Notice of Summary Suspension and Opportunity for Hearing (the "Notice") to Appellant James E. Lundeen, Sr., M.D. The Board summarily suspended Appellant's certificate to practice medicine on the grounds that his continued practice presented a danger of immediate and serious harm to the public. The Board alleged that, with respect to 26 identified patients:

> Dr. Lundeen inappropriately treated these patients and/or failed to appropriately treat them, and/or failed to appropriately document his treatment of these patients. For example,
>
> (a) he failed to conduct appropriate physical examinations and did not record objective physical-examination findings such as height and weight, blood pressure, medication allergies,

reflexes present or absent, sensation, ability to stand, sit, lie, and/or walk on toes or heels;

(b) he excessively and inappropriately prescribed narcotic analgesics and other drugs of abuse despite indications of possible addiction, drug abuse, or diversion in some patients, and failed to appropriately refer such patients to an addictionologist;

(c) he often prescribed increasing dosages of narcotics that were not supported by an objective change in the medical status of the patients, and/or he failed to document that there was an objective change in the clinical status other than the fact that the patient required more analgesic medication; and/or

(d) his medical management and/or treatment was not appropriate to the patients' diagnoses and/or their clinical situation. (Notice, p. 1-2).

Appellant requested an administrative hearing, which was held on August 22, 24-26, and 29-30, September 27, 28 and 30, and October 5-7 and 13, 2011. During the hearing, the State presented the testimony of expert witness John W. Cunningham, M.D. and the testimony of two patients.

Appellant did not testify at the hearing or call an expert witness to testify at the hearing. Appellant submitted a written statement that was not under oath (Ex. Z) and a written report of David B. Ross, M.D. that was not under oath. (Ex. A).

In this appeal, Appellant's assignments of error do not specifically address the merits of the opinions of Dr. Cunningham concerning treatment of the 26 patients. Accordingly, only examples of those opinions will be set forth here to provide background.

A. Failure to Conduct Appropriate Physical Examinations

Dr. Cunningham testified that Dr. Lundeen's examination of Patient 3, diagnosed with lumbar disk displacement, was insufficient because there was no documentation that

he checked the patient's reflexes and sensation, and no discussion of the patient's past medical history. (T. at 344-46). For Patient 5, who had suffered "multiple crushing injuries," Dr. Cunningham stated that the patient "required a musculoskeletal exam of the neck, upper back, low back, and all four extremities," but these were not shown in Dr. Lundeen's records, which contained no objective findings as to reflexes, sensation, ability to stand, sit, lie, walk on toes or heels, etc. (St. Ex. 30 at 45; R&R at 78). Dr. Cunningham testified that Dr. Lundeen's examination of Patient 11 was "very, very inadequate" because the patient had injuries to the upper back, pelvis, wrist, knee, lower back, and ankle, but Dr. Lundeen did not examine all these areas or even note which knee, ankle or wrist was injured. (T. 446-448; R&R 154).

B. Inappropriate Prescribing of Narcotics Despite Indications of Abuse

Patient 1 reported that she ran out of Dilaudid on one occasion and that her drugs were stolen on another occasion. (T. 222-25). Dr. Cunningham testified that these reports were "red flags" that should have been "very, very alarming" when a patient is taking narcotics. (T. 226-28). Dr. Cunningham testified that the patient should have been referred to a specialist in addictionology, Dr. Lundeen should have been "more skeptical" of the patient's reports of pain, and he violated the standard of care by continuing to prescribe increasing dosages of narcotics to Patient 1. (T. 233-34).

Dr. Cunningham testified that Patient 9 suffered contusions in May 2000 that should have healed within days or weeks. (T. 421, 424-425). Dr. Lundeen prescribed Percocet for Patient 9 through July, 2001, Vicodin through July 2003, and Xanax and Soma through 2011. (R&R 143; St. Ex. 9 at 224-25). Dr. Cunningham stated that given the increasing narcotic dosage without objective changes in medical status, he was

concerned about narcotic dependency and opined that Patient 9 required referral to a physician skilled in diagnosing and treating narcotic addiction and dependence issues. (St. Ex. 30 at 75-80; R&R 145).

In August, 2009, Dr. Lundeen prescribed Percocet and Neurontin for Patient 22. (St. Ex. 22 at 46-48; R&R 262). On December 19, 2009, Patient 22 attempted suicide and admitted that he had taken another person's methadone. (St. Ex. 22A at 9; R&R 267). On December 30, 2009, Dr. Lundeen prescribed Percocet and Neurontin as before and added prescriptions for Dilaudid, Xanax, and Cymbalta. (St. Ex. 22 at 13, 46; R&R 263). Patient 22 testified that Dr. Lundeen never got up to examine him. (T. 598). Patient 22 testified that while he was a patient of Dr. Lundeen, he was arrested, and later convicted of, aggravated possession of prescription drugs. (T. 601). Dr. Cunningham testified that Patient 22's drug-seeking behavior was not addressed by Dr. Lundeen, nor was Patient 22's suicide attempt, and that Dr. Lundeen violated the standard of care by increasing Patient 22's narcotic medication. (T. 1060-61).

C. Increasing Dosages of Narcotics Unsupported by Objective Changes

On Patient 1's first visit in November 2002, Dr. Lundeen prescribed Vicodin. (St. Ex. 1 at 191-203; R&R 25-27). Within a year, Dr. Lundeen added Percocet and Valium, and by 2007, Dr. Lundeen was prescribing Lidoderm, Valium, Percocet, and Dilaudid for Patient 1. (*Id.*). Dr. Cunningham testified that he saw no explanation in Dr. Lundeen's records to justify the "huge increase in narcotics over time." (T. 220-22).

Patient 10 first saw Dr. Lundeen for a back sprain in February 2006. (St. Ex. 10 at 8-9, 19-144; R&R 146). At that visit, Dr. Lundeen prescribed Percocet, Flexoril, and Feldene. (St. Ex. 10 at 145; R&R 148). At the last recorded visit, Dr. Lundeen was

prescribing Magnacet, Dilaudid, Duragesic, Xanax, Tofranil, Flexeril, Triavil, Ambien, and Feldene. (St. Ex. 10 at 155; R&R 150). Dr. Cunningham testified that there appeared to be no medical reason for the substantial increase in Patient 10's narcotic medication, there was no attempt by Dr. Lundeen to determine the reason for Patient 10's need for increasing dosages, and that this violated the standard of care. (T. 437-438).

D. Inappropriate Medical Management or Treatment

Dr. Lundeen prescribed medications for Patient 4 for multiple major cardiac conditions, including congestive heart failure, hypertension, and atrial fibrillation. (St. Ex. 4 at 2-3; R&R 71-72). Dr. Cunningham testified that these conditions are life-threatening (T. 357-361, 367), but that Dr. Lundeen's records do not show that he listened to the patient's heart or checked for hardening of the carotid arteries. (T. 362-364). Dr. Cunningham testified that the standard of care required checking blood pressure, listening to the heart and lungs at every visit, and checking weight. (*Id*.).

Patient 15 testified that Dr. Lundeen prescribed Cymbalta, Lamictal, and Klonopin, psychiatric medications, without asking her about mental issues or symptoms or the conditions with which she had been diagnosed. (T. 591-592; R&R 209-210).

Dr. Cunningham testified that Dr. Lundeen prescribed Xanax, Celexa, and Zoloft to Patient 9 for anxiety and a personality disorder without any indication that he assessed her psychological conditions. (T. 425-426).

In his report, Dr. Ross stated that Dr. Cunningham did not demonstrate a "single event concerning medicinal pain management that clearly was substandard." (Ex. A at 45). Dr. Ross stated that Dr. Lundeen's care of the patients at issue did not warrant Board discipline. (*Id*. at 48).

In his written statement, Dr. Lundeen indicated that his care for the patients was authorized by the Bureau of Workers' Compensation ("BWC"), his work was subject to review by the BWC, his care was within minimal standards, and his use of controlled substances was within Board guidelines, statutes and rules. (Ex. Z).

II. FINDINGS OF THE BOARD

On November 18, 2011, the Hearing Examiner issued a 358-page Report and Recommendation. The Hearing Examiner concluded that with respect to the 26 patients, Appellant failed to conform to minimal standards of care and failed to maintain minimal standards applicable to the selection or administration of drugs. (R&R p. 356). The Hearing Examiner added:

> Dr. Lundeen's departures from the minimal standards of care were numerous. …
> …
> Dr. Lundeen has not acknowledged that his prescribing practices were flawed. If he had recognized the need to make substantial changes in his practices, there would be an argument for remediation.
>
> There were multiple violations. The pattern of violations continued for many years and affected numerous patients. ….
> …
> Overall, the Hearing Examiner does not believe that Dr. Lundeen is amenable to improvement through education, monitoring, or other similar tools that the Board can use to protect the public. He has demonstrated enormous carelessness and arrogance that are central to the repeated violations demonstrated in the hearing record.
>
> In sum, the Hearing Examiner finds that violations by Dr. Lundeen are so pervasive and serious that the public in Ohio cannot be adequately protected by anything less than a permanent revocation of Dr. Lundeen's medical license. (R&R p. 357-358).

The Board addressed this matter at its December 14, 2011 meeting. One Board member criticized Appellant for "indiscriminate prescribing of multiple narcotics simultaneously," questioned how "patients could even function if they were taking all the

medications prescribed," and stated that "Dr. Lundeen's care primarily consisted of prescribing ever-increasing amounts of narcotics with little or no thought of trying different avenues of treatment or discussions of quality of life." (Minutes, p. 6). Another Board member commented that Appellant "has exhibited an extended pattern of insufficient diagnosis and insufficient treatment." (*Id*., p. 6-7). On December 14, 2011, the Board issued an Order permanently revoking Appellant's medical certificate.

On December 29, 2011, Appellant filed this appeal.

III. LAW

When considering an appeal from an order of the Medical Board, a common pleas court must uphold the order if it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

The Court's scope of review of an agency's decision in an administrative appeal is limited. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110 (1980). The Court is to "give due deference to the administrative resolution of evidentiary conflicts" because the fact finder had the opportunity to observe the witnesses and weigh their credibility. (*Id*.) The Court "will not substitute its judgment for the Board's where there is some evidence supporting the Board's Order." *Harris v. Lewis*, 69 Ohio St.2d 577, 578 (1982).

The Ohio Supreme Court has recognized that the General Assembly granted the Medical Board a broad measure of discretion. *Arlen v. State*, 61 Ohio St.2d 168, 174 (1980). In *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949), the court stated:

> … The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of men equipped

> with the necessary knowledge and experience pertaining to a particular field. …

"Accordingly, when courts review a medical board order, they are obligated to accord due deference to the board's interpretation of the technical and ethical requirements of the medical profession." *Landefeld v. State Med. Bd.*, 10th Dist. No. 99AP-612, 2000 Ohio App. LEXIS 2556, p. 9.

IV. THE COURT'S FINDINGS AND CONCLUSIONS

Before addressing Appellant's Assignments of Error, the Court will address Appellant's Motion for Order Requiring the Board to File a Complete Record of Proceedings, or in the alternative, Motion to Supplement the Record filed March 6, 2012.

Appellant's Motion requests an Order that the Board include in the record the following documents for its December 14, 2011 and January 11, 2012 meetings: draft minutes, proposed changes to minutes, audio recordings, and transcripts of audio recordings. Pursuant to Ohio Admin. Code 4731-9-01(A), the Board's final approved meeting minutes "constitute the official record of its proceedings." Accordingly, draft minutes and proposed changes to the minutes are not part of the official record. Under the Rule, audio recordings of the meetings constitute "transitory documents." Moreover, no transcript of the meetings was prepared, inasmuch as Respondent did not engage a court reporter as permitted by Ohio Admin. Code 4731-9-01(B). While Appellant has also requested minutes of the January 11, 2012 meeting, the minutes of the December 14, 2011 meeting reflect the Board's consideration and disposition of this matter. For these reasons, Appellant's Motion is denied.

Appellant's First Assignment of Error asserts that Dr. Cunningham did not, and could not, provide an adequate review of Dr. Lundeen's care because Dr. Cunningham is

not qualified in Dr. Lundeen's area of practice, Dr. Cunningham had an alleged conflict of interest that was concealed from the Board, and all of the relevant records and evidence were not provided for his review.

In *Leak v. State Med. Bd*, 10th Dist. No. 09AP-1215, 2011-Ohio-2483, ¶12, the Court held as follows: "[W]hen the board does hear expert testimony, the expert must be capable of expressing an opinion grounded in the particular standard of care applicable to the area of practice for the physician facing discipline."

The State's expert witness, Dr. Cunningham, has been licensed to practice medicine in Ohio since 1969 and has practiced in the area of occupational medicine for over thirty years. (State's Ex. 29; T. 156-159). Since 1984, Dr. Cunningham has been board-certified in occupational medicine. (State's Ex. 29; T. 157-158). Occupational medicine is a subspecialty of preventative medicine, and focuses on workers, industry, and the workplace environment. (T. 156-159).

Appellant argues that Dr. Cunningham is not qualified to opine regarding Dr. Lundeen's subspecialty, "permanent total disability" treatment. However, Appellant has presented no evidence that "permanent total disability" is a recognized medical specialty. The evidence establishes that Dr. Lundeen practices occupational medicine, the area in which Dr. Cunningham is board-certified. Dr. Cunningham testified that he has experience treating patients with occupational injuries, patients with chronic pain, and patients who are off work with disabilities. (T. 1349-1353). He also has experience in providing controlled substances for management of pain in these patients. (T. 1352). The record shows that Dr. Cunningham was qualified to, and did, express opinions as to the standard of care applicable to the area of practice of Dr. Lundeen.

Appellant contends that Dr. Cunningham had a conflict of interest in that some of the patient files initially provided to him were files he had previously reviewed at the request of the BWC. Dr. Cunningham testified that pursuant to instructions from the Board, he did not review or offer opinions in this case on any patient records that he had previously reviewed for the BWC. (T. 1156-1157). Thus, he had not previously reviewed records of any of the 26 patients relevant to this case. While Appellant argues that this alleged conflict was not disclosed, the information was disclosed at the hearing and is part of the hearing record reviewed by the Board. (T. 1153-1157). Appellant has not established the existence of any conflict of interest relevant to this case.

Appellant asserts that complete patient files were not provided to Dr. Cunningham prior to his review. The evidence is that Dr. Cunningham prepared an initial report (St. Ex. 30), and that after additional patient records were provided to him, he provided a supplemental report on August 3, 2011 (St. Ex. 30A; T. 173-174; R&R 9-10). Dr. Cunningham's opinions regarding Dr. Lundeen's care and treatment of the patients did not change. (St. Ex. 30; R&R 10). The supplemental report was provided to Appellant prior to the start of the hearing, and Appellant's counsel questioned Dr. Cunningham about both reports at the hearing. (*See* T. 1157-1161).

As the finder of fact, the Board was entitled to find credible, and rely upon, the evidence presented by the Board, including the testimony of Dr. Cunningham. The Court is not to substitute its judgment for that of the Board. For the foregoing reasons, the Court concludes that Appellant's First Assignment of Error is without merit.

Appellant's Second Assignment of Error asserts that the "BWC precluded Dr. Lundeen from fully participating in the Medical Board Hearing." Appellant states that

the BWC's threats of civil and criminal prosecution left him with no alternative but to assert his Fifth Amendment rights and submit his arguments and contentions in writing rather than testify at the hearing.

In *Urban v. State Med. Bd.*, 10th Dist. No. 03AP-426, 2004-Ohio-104, ¶33, a physician argued that the Board violated his due process rights by proceeding with disciplinary action while a criminal prosecution was pending, as he could defend himself only by giving up his Fifth Amendment rights. The Court rejected this argument, holding that "the Fifth Amendment protection against compulsory, self-incriminating testimony does not extend to prohibit civil litigation while the possibility of criminal prosecution exists." Similarly, in *Walker v. State Med. Bd.*, 10th Dist. No. 01AP-791, 2002-Ohio-682, p. 14, the Court rejected a physician's argument that her due process rights were violated when the Board proceeded with disciplinary action after she asserted her Fifth Amendment rights. The Court stated: "Merely because appellant and her counsel felt that her testimony was strategically vital to her defense does not violate or implicate any Fifth Amendment guarantee. The potential loss of her medical license does not, in and of itself, raise a claim of compulsion by the state."

Ohio law is clear that the Board could proceed with disciplinary action regardless of whether Appellant chose to testify. Accordingly, Appellant's Second Assignment of Error is without merit.

Appellant's Third Assignment of Error asserts that one of the prosecuting Assistant Attorney Generals impermissibly took part in the Board's post-hearing deliberations.

The minutes of the Board's December 14, 2011 meeting reflect that during the discussion of this matter, a Board member mentioned that he had taken notice of "Dr. Lundeen's lack of basic equipment and supplies" in his office. (R. 16, p. 20377). The Notice of Opportunity for Hearing letter had included allegations regarding the condition of Dr. Lundeen's offices, allegations that the Hearing Examiner found were not established by the evidence. (R&R p. 356). The minutes reflect that the following then occurred:

> Mr. Appel asked for an opportunity to speak briefly to clarify the record. Dr. Suppan recognized Mr. Appel. Mr. Appel noted that Dr. Strafford and Mr. Hairston have made reference to Dr. Lundeen's alleged lack of supplies. Mr. Appel stated that that allegation was not proven and therefore is not part of the hearing record. Mr. Appel cautioned the Board not to rely on that allegation in making its decision. (R. 16, p. 20377).

In *DeBlanco v. St. Med. Bd.*, 78 Ohio App.3d 194, 198 (10th Dist. 1992), the Court stated that "Under R.C. 119.10, the Assistant Attorney General assigned to represent the agency in the prosecution is not entitled to take part in the board's post-hearing deliberations." In that case, the Court found that there had been no showing of "undue influence exerted by the Attorney General" and no evidence of prejudice to the appellant. (*Id.*).

In *Korn v. Ohio Medical Bd.*, 61 Ohio App.3d 677, 686, (10th Dist. 1988), the Court held that "In order to support reversal of a judgment, the record must show affirmatively not only that error intervened, but that such error was to the prejudice of the party seeking such a reversal."

The record reflects that Appellant did not object to the statement by Mr. Appel. The statement by Mr. Appel clarifies that the issue of the condition of Dr. Lundeen's offices was not before the Board. The statement is thus not an effort to influence the

substantive conclusions of the Board on the issues that were before the Board. In addition, because the statement is an effort to prevent the Board from considering discipline against Appellant based on allegations that had been found not to have been established, the statement is to the benefit of Appellant. The Court finds that there has been no showing of "undue influence" by the Assistant Attorney General or prejudice to Appellant. Accordingly, Appellant's Third Assignment of Error is overruled.

Appellant's Fourth Assignment of Error asserts that the Board refused to enforce subpoenas, precluding Dr. Lundeen from obtaining exculpatory evidence. Specifically, Appellant contends that the BWC failed to complete production of documents seized from him in March, 2011.

In response to Appellant's subpoenas, the Hearing Examiner ordered that the BWC produce records relating to Patients 1 through 26 and other documents relating to allegations in the Notice. (Aug 10, 2011 Entry at p. 12). On August 18, 2011, the BWC produced to Dr. Lundeen a computer disk with copies of all seized records relating to Patients 1 through 26 and another disk containing copies of other documents seized from Dr. Lundeen's office. (T. 1701, 1858).

During the hearing, Appellant asserted that the BWC had not produced all of the documents and other materials seized from his office. The BWC responded that it had produced all patient records, but that it was continuing to search for additional documents requested, such as bankruptcy records. (T. 1702-1703, 1710).

Dr. Lundeen began presentation of his case on October 6, 2011. At that time, the Hearing Examiner set a deadline of October 13, 2011 for the BWC to complete its production of documents. (T. 1801). On the scheduled date, the BWC produced

additional documents. (T. 1825). The Hearing Examiner confirmed that the BWC had produced the records relating to Patients 1 through 26. (T. 1875). Appellant's counsel argued that certain documents had not been produced, but mentioned only documents concerning Dr. Lundeen's employees and documents concerning Dr. Lundeen's office, such as records of inventory and purchases and travel records. (T. 1873-1876). The Hearing Examiner noted that there was no explanation of why documents concerning Dr. Lundeen's employees were relevant to any allegations in the Notice. (T. 1875). As noted, the allegations relating to Dr. Lundeen's offices were found not to be established by the evidence, and thus were not a basis for the Board's discipline.

A party challenging an agency's failure to issue or enforce a subpoena is required to demonstrate prejudice. *Burneson v. Ohio State Racing Comm'n*, 10th Dist. No. 08AP-794, 2009-Ohio-1103, ¶22. The record shows that the Board acted to enforce the subpoenas to the BWC, and that voluminous documents were produced, including the records relating to Patients 1 through 26, the patients whose care is at issue in this proceeding. Appellant has not shown any material non-compliance with the subpoenas or that the BWC failed to produce any documents that are relevant to this case. Appellant thus has failed to show any prejudice.

For the foregoing reasons, Appellant's Fourth Assignment of Error is overruled.

Appellant's Fifth Assignment of Error asserts that the Board made "hundreds" of procedural and substantive due process errors, but does not specify, or include argument on, the alleged errors. It is not the duty of the Court to create arguments for the parties or search the record for evidence to support them. *Sisson v. Ohio Department of Human*

Services, 9th Dist. No. 2949-M, 2000 Ohio App. LEXIS 1691, p. 6. Appellant's Fifth Assignment of Error is overruled.

For the foregoing reasons, the Court finds that the Board's Order is supported by reliable, probative and substantial evidence and is in accordance with law. The Board's Order is **AFFIRMED**. This is a final, appealable Order. Costs to Appellant.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 06-28-2012

Case Title: JAMES E LUNDEEN SR MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 11CV016295

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 11CV016295

Case Style: JAMES E LUNDEEN SR MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0162952012-03-0699980000
   Document Title: 03-06-2012-MOTION TO COMPEL - GENERAL
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 11CV0162952012-01-3199980000
   Document Title: 01-31-2012-OBJECTION TO
   Disposition: MOTION IS MOOT