

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION**

MARVIN H. RORICK, MD,

APPELLANT,

CASE NO. 15CVF-09-8243

vs.

JUDGE WILLIAM WOODS

**STATE MEDICAL BOARD
OF OHIO**

APPELLEE.

**DECISION AND ENTRY
AFFIRMING THE ENTRY OF ORDER
OF THE STATE MEDICAL BOARD OF OHIO
MAILED ON SEPTEMBER 17, 2015**

Woods, J.

This matter is before the Court pursuant to the appeal filed by Marvin H. Rorick, M.D. (Appellant) from the Entry of Order of the State Medical Board of Ohio (Board) issued on September 9, 2015 and mailed on September 17, 2015.

For the reasons that follow this Court **AFFIRMS** the Entry of Order.

I. STATEMENT OF THE CASE

Appellant appealed the Entry of Order from the Board that suspended his certificate to practice for a minimum of 30 days and imposed other conditions. Appellant asserted that the Entry of Order is not supported by reliable, substantive or probative evidence and is not in accordance with law. Among other things, the Appellant took issue with the Board's expert claiming that said expert was not qualified and that he failed to render opinions as to the proper standard of care.

II. FACTS RELEVANT TO THE APPEAL

Appellant is a neurologist in the Cincinnati area. In 2013 the Appellant was investigated by the Board when it came to the Board's attention that the Appellant appeared to be violating the

standard of care regarding his treatment of some of his patients. The Board issued a Citation Letter to the Appellant on or about July 10, 2013 informing the Appellant of the Board's decision to take disciplinary action as to his care concerning 12 patients. The main issue advanced against the Appellant concerned his willingness to proscribe narcotic medication with little to no controls as it related to those patients.

The Board also employed an expert; i.e., Dr. Jay Berke. Dr. Berke was/is a board-certified neurologist who has held a certificate to practice medicine since 1977. Dr. Berke testified - as to the care and treatment of the 12 identified patients – that the Appellant violated the appropriate standard of care. The testimony of Dr. Berke was accepted by the Hearing Examiner when he prepared his 154 page Report and Recommendation (R&R). The Court has reviewed the certified record and it concurs with the Hearing Examiner's well-founded findings, and a lengthy rephrasing of those findings by this Court is unnecessary. However the following provides an overview of the Hearing Examiner's findings. It comes at page 150 of the R&R:¹

- Patient 2:** failed to take appropriate action despite signs of potential misuse of medication.
- Patient 3:** failed to try or document trying alternative therapies to treat the patient's mechanical back pain.
- Patient 4:** failed to attempt or document attempting to wean patient from medications despite documenting that headaches were likely due to daily use of medications.
- Patient 6:** failed to appropriately document description of headaches treated with Stadol.
- Patient 7:** failed to appropriately document findings to support the diagnosis of migraine headaches; failed to conduct and/or order appropriate diagnostic studies and/or obtain or review antecedent treatments to support the diagnosis of migraine headaches; failed to try or documenting trying alternative treatment modalities prior to initiating treatment with controlled substances, and failed to refer patient to psychiatrist.
- Patient 8:** prescribed medication to treat peripheral neuropathy without documenting findings to support that diagnosis, and failed to order or document appropriate evaluation or therapy of documented seizures.
- Patient 9:** failed to try or document trying physical therapy or other alternatives prior to prescribing controlled substances.
- Patient 10:** failed to obtain or document obtaining a neurosurgical review.
- Patient 11:** continued to prescribe controlled substances despite evidence of potential

¹ The darker text is a 'copy image' from the R&R contained in the certified record.

medication misuse, although it is evident that Patient 11 was an exceptionally difficult patient; and prescribed Stadol for diagnosis of unspecified migraine without documenting sufficient information to make that diagnosis, such as headache frequency, location, nature, duration or impact.

Patient 12: failed to take appropriate action despite signs of potential misuse of medication.

The Hearing Examiner recommended that the Appellant be reprimanded; placed on probation for a minimum of one year; complete training in prescribing controlled substances; be monitored during the process; as well as other common reporting requirements.

The Appellant filed objections and the matter was heard by the Board. The Board decided that the recommended sanction was not sufficient and increased the sanction. The Board imposed a minimum 30 day suspension and placed language within its Entry of Order that corresponded with the application of the suspension.

The Appellant filed his appeal with this Court on September 18, 2015. Appellant requested a Stay that was granted on October 6, 2015. After requesting and receiving a change to the briefing schedule, the Appellant filed his Brief on January 8, 2016. The Board filed its Brief on January 22, 2016 and the Appellant filed his Reply on January 29, 2016.

This matter is now ready for review.

III. STANDARD OF REVIEW

R.C. § 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. R.C. 119.12 provides in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

In *Our Place* the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

- (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 Comm.* (1992), 63 Ohio St. 3d 570, 571.

From within this framework, this Court will render its decision.

IV. LAW AND ANALYSIS

The Appellant listed five assignments of error and this Court will address those claimed errors in the order pled.

A) The Board’s Order is contrary to law and not supported by substantial, reliable and probative evidence because it relies upon testimony of an expert incapable of expressing opinions regarding the applicable standard of care:

As to this assignment of error, the Appellant’s argument can be simplified as follows: Dr. Berke – the Board’s expert – was unqualified to render opinions so the Hearing Examiner and the Board could not rely on his testimony. Appellant therefore asserted that without the aid of an expert the Entry and Order is not supported by reliable, probative and substantial evidence. The Board responded two fold to this argument. First, the Board indicated that Dr. Berke is in fact qualified to render the opinions he rendered. Second, the Board reminded the Appellant that the Board has its own expertise and it – with or without the opinion of Dr. Berke – can determine a breach of a standard of care. In regard to the expertise of the Board, Board member Dr. Steinbergh stated the following at the September 9 Board meeting:

. . . Dr. Steinbergh noted that she learned in medical school that this was inappropriate prescribing and Dr. Rorick graduated from medical school just a few years after she did. Dr. Steinbergh opined that **every physician on the Board knows that Dr. Rorick’s prescribing was inappropriate.** (Emphasis added)

Dr. Steinbergh’s comment was not contested by any other member of the Board. Dr. Steinbergh went on to agree with the proposed amendment to the sanction as proposed by Board member Dr. Sojn.

As to the claim that Dr. Berke was not an appropriate expert, please note the following from *Leak v. State Medical Board of Ohio*, 2011-Ohio-2483 (10th Dist.) at ¶12:

This assignment of error essentially questions whether there was reliable, probative, and substantial evidence in the form of testimony supporting the board's disciplinary order against Dr. Leak. Although such evidence need not be heard by the board in the form of expert testimony, when 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. *Lawrence v. State Med. Bd. of Ohio* (Mar. 11, 1993), 10th Dist. No. 92AP-1018. " 'The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity [with them].' " *Griffin v. State Med. Bd of Ohio*, 10th Dist. No. 09AP-276, 2009-Ohio-4849, ¶13. This rule is codified at R.C. 2743.43(A)(3). This rule acknowledges that a medical expert well-versed and well-credentialed in one field may not be an expert in other medical fields. *Id.*

Hence, the case law clearly established that an expert in one medical field is not necessarily an expert in all fields. However, there is no requirement that the expert be so similar as to be a twin.

Dr. Berke provided the appropriate testimony concerning the care provided to the patients associated with the Citation Letter. The Appellant attempted to rely upon the claimed divergence between Dr. Berke's practice and that of the Appellant. Appellant highlighted the fact that Board's expert's practice was limited in regard to opioid therapy while the Appellant's practice was much more significant. The Appellant also tried to show a geographical difference between the Appellant and the expert's practice.

In the end this Court holds that the arguments advanced by the Appellant concerning the expertise of Dr. Berke – at best – go to the weight of the testimony and not to the admissibility.² Hence, the Hearing Examiner and the Board were entitled to rely on the opinions of Dr. Berke and therefore, there was more than adequate reliable, probative and substantial evidence to support the

² Ironically, Dr. Benedetti – Appellant's expert – had no training in neurology. (Hr. Tr. at page 643)

Entry of Order. Having so held, there is no reason to address the Board's ability to serve as its own expert.

B) The Board's Order is contrary to law and not supported by substantial, reliable and probative evidence because the Board and/or the Board's expert failed to comply with OAC 4731-13-18(G):

Next the Appellant claimed that the Board failed to comply with OAC §4731

-13-18(G). Please note the following from the Administrative Code:

4731-13-18. Exchange of documents and witness lists

(G) Any witness who intends to testify as an expert, including the respondent, **must submit** a written report. A written report by an expert **shall** set forth the opinions to which the expert witness will testify and the bases for such opinions. This paragraph will not preclude the respondent from testifying as a fact witness. (Emphasis added)

The Appellant claimed that the report issued by the Board's expert differed from the opinions rendered at the hearing. The Appellant claimed that the use of the term 'absolute duty to ween' in the report somehow mislead or tricked the Appellant into not knowing what Dr. Berke would opine at the hearing. As such, the Appellant claimed again it was error for the Hearing Examiner and the Board to accept Dr. Berke's testimony.

The Board responded by raising a number of issues. The Board claimed that there was no objection to Dr. Berke's testimony until after the Board rested on the following day of the hearing. Even though the objection was untimely, the Hearing Examiner allowed briefing on the issue and after a review the Hearing Examiner overruled the objection.

The Board also asserted that Appellant's argument that he was prejudiced in his ability to prepare his defense "strains credulity". A simple review of the extensive July 10, 2013 Citation Letter confirms the Board's argument. Said letter – patient by patient – established the issues that would be addressed by the Board. A hearing was requested by the Appellant; the Appellant retained and secured testimony from an expert on his behalf; the Appellant was on notice of the

charges and specific patients involved; the Appellant retained counsel; and the Appellant was heard at the hearing.

There is no due process issue in this case. Furthermore, there was no violation of OAC §4731-13-18(G). The testimony of Dr. Berke did not substantially or materially change from the opinion noted in his report. There was no violation and there was no lack of due process.

C) The Board's Order is contrary to law and not supported by substantial, reliable and probative evidence because it relies upon OARRS (Ohio Automated RX Reporting System) data as evidenced in violation of R.C. 4729.86(B):

The Appellant claimed that the OARRS data should not have been used by the Board as a basis for its Entry and Order. The Board responded by noting that the Appellant timely objected to the OARRS report during the hearing and the Hearing Examiner sustained the objections. Hence, there was no improper use of OARRS.

The OARRS report was in evidence because the Appellant had in fact pulled the report for Patient 2 and said report was contained within Patient 2's file. Furthermore, the Board argued that even if the OARRS report somehow was relied upon by the Board it would have been harmless error because there were a great number of other 'red flag' issues in Patient 2's charts that also supported a finding that Appellant had violated the standard of care.

In his merit Brief, the Appellant did not address OARRS as those reports related to any particular Patient. However, in his Reply Brief the Appellant responded to the Board's arguments and also asserted that the documentation was also in Patient 7's file. The Appellant argued that the existence of the OARRS placed the finding in question.

A review of the Board notes indicate that Board member Dr. Soin address the OARRS report issue. However, Dr. Soin was not asserting that the allegations in the OARRS report were true. Dr. Soin was asserting that a problematic OARRS report should trigger a response from doctors that there could be an issue with their patients requiring further inquiry.

After a careful review of the certified record, there was no error associated with the reference to the OARRS by the Hearing Examiner or the Board.

D) The Board's Order is contrary to law and not supported by substantial, reliable and probative evidence because the Board erroneously determined that Dr. Rorick failed to try alternative therapies and non-pharmacologic approaches for patient 3 and patient 9:

Here the Appellant claimed that there was not sufficient evidence to support a specific finding as to Patients 3 and 9 where the Board held that the Appellant had failed to try alternative therapies while treating the patients with opioids. The Appellant asserted that the evidence, viewed in his favor, should have led to the conclusion that he did in fact pursue alternative therapies for those two patients. In response the Board advanced the evidence found within the Appellant's patients' files.

The Appellant established that Patient 3 was a 41 year-old woman who reported back pain when she began her treatment with the Appellant. The records reflected that from the beginning of Patient 3's treatment, the Appellant proscribed high doses of oxycodone, hydrocodone, and tramadol. (Hr. T. at 318; Board's Exhibit 15 at page 4). The record reflected that the pain reported by Patient 3 was mechanical in nature. The Appellant started and maintained a high level of doses and apparently only informed the Patient of the need to exercise. Hence, there was contra evidence in the record that – if believed – would establish the holding that Patient 3 was never treated with anything other than powerful narcotics.

The Board then reviewed the evidence in regard to Patient 9. The Appellant's records indicated that Patient 9 was a woman who first treated with the Appellant in 2005. (Hr. T. at p. 338) Appellant proscribed Vicodin. The Board pointed out that Patient 9 had a normal examination but she was reporting back pain. The Board claimed that the evidence showed that the Appellant continued to treat Patient 9 with only medication and he did it as a 'first resort'. (Hr. T. at p. 342) Appellant argued at the hearing and during this appeal that his suggestion to the Patient that she

engage in weight loss and conditioning programs was sufficient to meet the standard of care. That argument was rejected by the Hearing Examiner and the Board.

Here the Appellant has pled that the Hearing Examiner and the Board should have believed his version of the facts. That is not grounds for reversal in an administrative appeal. The record reflects that the Board had reliable, probative and substantial evidence that the Appellant failed to meet the standard of care and its decision to sanction the Appellant is lawful.

E) The Board's Order is contrary to law and not supported by substantial, reliable and probative evidence because the Board wrongly concluded that Dr. Rorick violated the minimal standards of care by not obtaining a neurosurgical review for patient 10:

Appellant's Brief asserted that there was no evidence to support the Board's finding concerning Patient 10. Appellant claimed that Patient 10 did receive the appropriate care as directed by his primary care provider. As such, there was no need for the Appellant to order the additional testing.

Concurrently, the Appellant advanced a semantic argument concerning the charges against him and the nature of his care concerning Patient 10. He then used dictionary definitions of 'modality' to claim that he could not have violated R.C. §4731.22(B)(2) or (6). Appellant concluded that "failure to obtain or document obtaining somebody else's treatment does not amount to a failure to employ modalities for treatment of disease." (Appellant's Brief at page 20)

The Board's Brief laid out the care provided to Patient 10 by the Appellant as noted in the Appellant's own records. The Board claimed that the evidence showed that the Appellant became aware of a disc herniation (Exhibit 10 and Hr. Tr. at page 346) The Board noted that the Appellant failed to order any surgical consultation for the Patient. The Board and its Expert felt that it was below the standard of care not to have noted in Patient 10's chart that a neurosurgical consult was suggested to the patient and/or ordered for the patient.

The Board also argued that its interpretation of R.C. §4731.11(B)(2) was reasonable. A consult was/is consistent with ‘other modalities’ and the lack of any evidence that a consult was requested or discussed with Patient 10 supports the Board’s holding.

The evidence supports the Boards finding as to Patient 10. There is reliable, probative and substantial evidence to support this finding.

This Court has reviewed the certified record. The Board’s decision was based on reliable, probative and substantial evidence and is in accordance with law. The Board had the right to increase the sanction and it exercised that right in a manner that provided the Appellant with due process of law. This Court has found no error.

V. DECISION

This Court holds that the Entry of Order of the State Medical Board of Ohio, mailed on September 17, 2015 is supported by reliable, probative and substantial evidence and is in accordance with law. Accordingly, this Court hereby **AFFIRMS** the Entry of Order.

The Stay entered on October 6, 2015 is lifted.

Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

It is so ordered.

THIS IS A FINAL APPEALABLE ORDER.

William Woods, Judge

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Franklin County Court of Common Pleas

Date: 02-10-2016

Case Title: MARVIN H RORICK MD -VS- STATE MEDICAL BOARD OHIO

Case Number: 15CV008243

Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "W. H. Woods", is written over a circular blue seal. The seal contains the text "FRANKLIN COUNTY OHIO" and "ALL THINGS ARE POSSIBLE WITH GOD".

/s/ Judge William H. Woods

Court Disposition

Case Number: 15CV008243

Case Style: MARVIN H RORICK MD -VS- STATE MEDICAL BOARD
OHIO

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes