

[Cite as *Levine v. State Med. Bd. of Ohio*, 2011-Ohio-3653.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jack Mark Levine, D.O., :
 :
Appellant-Appellant, :
 :
v. : No. 10AP-962
 : (C.P.C. No. 09CVF10-16197)
State Medical Board of Ohio, : (REGULAR CALENDAR)
 :
Appellee-Appellee. :

D E C I S I O N

Rendered on July 26, 2011

Spetnagel and McMahon, Thomas M. Spetnagel, and Paige J. McMahon, for appellant.

Michael DeWine, Attorney General, and *Katherine J. Bockbrader*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Jack Mark Levine, D.O., appeals the judgment of the Franklin County Court of Common Pleas, in which the trial court affirmed the order of appellee, State Medical Board of Ohio ("board"), permanently revoking his license to practice osteopathic medicine and surgery in the state of Ohio.

{¶2} Appellant graduated from the New York College of Osteopathic Medicine in 1982. In 1989, he was licensed by the board to practice osteopathic medicine and surgery in Ohio. His Ohio license expired in July 2002, at which time he was practicing medicine in Illinois. In October 2006, appellant restored his Ohio license shortly before relocating to Pike County, Ohio. He began practicing medicine at Pike Community Hospital in early 2007.

{¶3} By letter dated June 11, 2008, the board notified appellant that it would consider disciplinary action based on four allegations of misconduct. The charges arose from appellant's treatment of three female patients who the board referred to as Patient 1, Patient 2, and Patient 3. Appellant treated each patient for opioid addiction by prescribing Suboxone, a drug designed to minimize withdrawal symptoms and curb addiction to opioids.

{¶4} The board's first charge alleged that, between November 2007 and December 2007, appellant engaged in sexual misconduct with Patient 1 over the course of several "inappropriate" phone calls. Specifically, the board alleged that appellant (1) asked Patient 1 to write him notes about sex and masturbation; (2) told her that "she needed a master to tell her what to do"; (3) asked her to say "Fuck me master"; (4) told her that he "would like to 'fuck [her]' and that when [he called] she should be 'Ready to fuck' "; (5) told her that she should see his "cock right now"; (6) told her that he wanted her to "get a vibrator"; (7) called her his "sex toy"; and (8) asked her whether she liked what she felt, referencing his penis, when she was previously in his office. According to the board, appellant made these statements after Patient 1 had tested positive for drugs other than Suboxone, yet appellant continued to prescribe her Suboxone anyway.

{¶5} In the second and third charges, the board alleged that appellant engaged in sexual misconduct with Patient 2 and Patient 3 at separate times in 2007. According to the second charge, appellant told Patient 2, after she tested positive for the use of drugs other than Suboxone, that she would have to "prostitute herself" again for him to prescribe her more Suboxone. The third charge alleged that appellant asked Patient 3 to write him notes about masturbation and to bring him those notes on her next visit, and that he inappropriately "touched" and "bounced" her breasts when examining her during an office visit in 2007.

{¶6} The fourth charge accused appellant with misleading the board's investigator about the sexual misconduct with Patient 1. In particular, the board claimed that appellant lied by telling the investigator that he made only one inappropriate call to Patient 1 and that he did not call her his "sex toy."

{¶7} According to the board, the first three charges, if proven, warranted discipline under R.C. 4731.22(B)(6) and (B)(20). Pursuant to R.C. 4731.22(B)(6), appellant's conduct represented "[a] departure from, or the failure to conform to, minimal standards of care of practitioners under the same or similar circumstances," and, under R.C. 4731.22(B)(20), his actions amounted to a violation of "any rule promulgated by the board," to wit: sexual misconduct under Ohio Adm.Code 4731-26-02 and 4731-26-03. The fourth charge constituted false, fraudulent, deceptive or misleading statements under R.C. 4731.22(B)(5).

{¶8} A board-appointed hearing examiner conducted a four-day evidentiary hearing wherein appellant admitted to the first and fourth charges: engaging in sexual misconduct with Patient 1 and misleading the board's investigator. (Tr. 74-75.) Based

on these admissions, the hearing examiner found the first and fourth charges to be supported by sufficient evidence. The hearing examiner did not, however, find sufficient evidence supporting the second and third charges (the allegations involving Patients 2 and 3). Based on these findings of fact and conclusions of law, the hearing examiner recommended the permanent revocation of appellant's license, stayed subject to certain probationary terms and conditions. Both parties objected to the recommendation.

{¶9} On September 9, 2009, the board met to consider the hearing examiner's recommendation. The board disagreed with the hearing examiner's conclusions regarding Patients 2 and 3 and, consequently, amended the second and third conclusions of law to reflect violations of R.C. 4731.22(B)(6) and (B)(20). Although the board amended both conclusions of law, the board did not amend the hearing examiner's second and third factual findings. The board also disagreed with the sanction proposed by the hearing examiner and ordered that appellant's license to practice osteopathic medicine and surgery be permanently revoked.

{¶10} Appellant timely appealed the board's order to the trial court. After finding that the second and third conclusions of law contradicted the corresponding findings of fact, the trial court found the error to be harmless based on appellant's admissions to the first and fourth charges. After reviewing the minutes of the board's September 2009 meeting, the trial court determined that the board revoked appellant's license based on the allegations involving Patient 1, not the allegations involving Patients 2 and 3. Because sufficient, reliable evidence supported the board's decision to permanently revoke appellant's license, the trial court affirmed.

{¶11} Appellant now timely appeals, advancing the following assignment of error for our consideration:

THE LOWER COURT ERRED IN FINDING THAT THE ORDER OF THE STATE MEDICAL BOARD OF OHIO TO PERMANENTLY REVOKE APPELLANT'S CERTIFICATE TO PRACTICE OSTEOPATHIC MEDICINE AND SURGERY WAS SUPPORTED BY THE REQUISITE AMOUNT OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE AND WAS IN ACCORDANCE WITH LAW.

{¶12} "In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence, and is in accordance with the law." *Schechter v. Ohio State Med. Bd.*, 10th Dist. No. 04AP-1115, 2005-Ohio-4062, ¶55, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. The Supreme Court of Ohio has defined the concepts of 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.

{¶13} The standard of review is more limited on appeal to this court. Unlike the trial court, this court 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 commission's order was supported by reliable, probative, and substantial evidence, this court's role is confined to determining whether the court of common pleas abused its discretion. *Roy*

v. Ohio State Med. Bd. (1992), 80 Ohio App.3d 675, 680. 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. However, on the question of whether the commission's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶14} First, appellant argues that the trial court erred by finding the conclusions of law involving Patients 2 and 3 to constitute harmless error. Because those conclusions of law were inconsistent with the findings of fact involving Patients 2 and 3, he contends that the board's order was not supported by sufficient, reliable, and probative evidence, and that, as a result, the trial court was required to vacate the board's decision. We disagree.

{¶15} This court has repeatedly held that a trial court is not required to vacate the board's disciplinary action merely because some of the board's allegations were unsupported by sufficient evidence. See, e.g., *Weiner v. State Med. Bd.* (Nov. 24, 1998), 10th Dist. No. 98AP-605; *Landefeld v. State Med. Bd.* (Jun. 15, 2000), 10th Dist. No. 99AP-612; *Graor v. State Med. Bd.*, 10th Dist. No. 04AP-72, 2004-Ohio-6529. The board may revoke a physician's license for "one or more" of the reasons enumerated in R.C. 4731.22(B), and, therefore, "in a given case, the trial court would only need to find substantial, reliable and probative evidence supporting one ground for revocation in order to uphold the board's order." *Landefeld*; see also *Weiner* (affirming trial court's decision to permanently revoke physician's license even though one of three allegations

was not supported by evidence); *Graor* at ¶¶30-31 (affirming permanent revocation even though some of the board's findings were not in accordance with law).

{¶16} In *Landefeld*, for instance, the trial court upheld the board's decision to permanently revoke the physician's license despite the fact that allegations of fee splitting and fraudulent billing were not supported by sufficient evidence. This court affirmed the trial court's decision because additional violations justified the board's decision. In reviewing the minutes of the board's proceedings, this court determined that "the focal point of concern by board members, in addressing the evidence against appellant, went to the issue of his medical treatment of patients and not the charges relating to fee splitting and billing." *Id.*

{¶17} We reach the same conclusion here. Whether or not sufficient evidence supported the charges involving Patients 2 and 3, it was undisputed that appellant engaged in sexual misconduct with Patient 1 and that he subsequently lied about that misconduct. As a result, the board was authorized to revoke his license for violating a "rule promulgated by the board," R.C. 4731.22(B)(20), for departing from "minimal standards of care of similar practitioners under the same or similar circumstances," R.C. 4731.22(B)(6), or for "[m]aking a false, fraudulent, deceptive, or misleading statement * * * in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board." R.C. 4731.22(B)(5).

{¶18} In fact, the charge involving Patient 1 was the focal point of the board's concern, as evidenced by the minutes from the board's September 2009 meeting. One

of the board members, Dr. Suppan, was "absolutely appalled" by appellant's actions towards Patient 1. (Minutes at 9.) She stated that, by calling Patient 1 his "sex toy," appellant "objectified the patient to the point where he made her less than human." (Minutes at 9.) Dr. Amato and Dr. Madia agreed. Dr. Madia said that appellant went "beyond just sexual boundaries" with Patient 1 and "was using treatment to use the patient as a sex toy." (Minutes at 9.) The only board member who commented on Patients 2 and 3 was Dr. Steinberg, but even she recognized that Patient 1 was the focus of the board's concern. (Minutes at 7-8.) Appellant notes as much in his brief: "The Board made it clear * * * that the main reason for the opprobrium it heaped upon [appellant] was for using such words as 'sex toy' during the telephone calls with Patient 1." (Appellant's brief at 20.) Therefore, because the board arrived at a sanction that was supported by sufficient, reliable, and probative evidence, the trial court did not abuse its discretion by affirming the board's order.

{¶19} We also reject appellant's argument that the board violated his right to due process by considering the morality of his conduct. First, appellant has provided no authority forbidding such considerations. In fact, the Supreme Court of Ohio has recognized the inherent expertise of licensing boards in matters of professional ethics and morals: "[W]hen reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and *ethical* requirements of its profession." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. (Emphasis added.) "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." *Arlen v. State* (1980), 61 Ohio St.2d 168, 173, quoting *Farrand v. State Med. Bd.* (1949), 151 Ohio St. 222, 224.

{¶20} Regardless, the board's deliberations were proper and germane to the issues at hand. The board was tasked with determining, inter alia, whether appellant deviated from the minimum standards of similarly situated practitioners, and the minutes from the board's meeting confirm that such an analysis occurred. Dr. Suppan expressed "a great deal of difficulty with a physician, who should hold human beings above all else, being able to categorize a human being as a toy or a sex toy." (Minutes at 9.) This misconduct, according to Dr. Suppan, violated principles that were "so fundamental to the practice of medicine." Dr. Amato also found appellant's conduct to fall below minimum standards, stating that appellant used "his prescriptive authority, his granted license to heal, in a way that could only hurt." (Minutes at 9.) Furthermore, Dr. Madia supported permanent revocation based on his view that appellant "was using treatment to use [Patient 1] as a sex toy." (Minutes at 9.) Thus, contrary to appellant's claims, nothing about the board's discussions reveals an arbitrary or capricious attitude.

{¶21} Finally, appellant also argues that the board improperly considered the allegations involving Patients 2 and 3 during its deliberations. This argument lacks merit. As explained above, the board's primary focus was Patient 1, not Patients 2 and 3. Because the board's sanction was supported by sufficient, reliable, and probative evidence, the trial court did not abuse its discretion by affirming the board's decision. See, e.g., *Slinghuff v. State Med. Bd.*, 10th Dist. No. 05AP-918, 2006-Ohio-3614, ¶20; see also *Clayman v. State Med. Bd.* (1999), 133 Ohio App.3d 122, 128-29 (finding that,

although the board discussed uncharged misconduct, there was "sufficient, reliable, probative, and substantial evidence in the record that substantiates both the charges against appellant and the penalty imposed by the board to outweigh appellant's claims of prejudice from discussion of these patient care issues").

{¶22} Based upon the foregoing, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
