[Cite as *Griffin v. State Med. Bd. of Ohio*, 2009-Ohio-4849.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brian Frederic Griffin, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-276 (C.P.C. No. 08CVF-13539)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on September 15, 2009

Dinsmore & Shohl, LLP, *Thomas W. Hess* and *Gregory P. Mathews*, for appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} This is an administrative appeal from the Ohio State Medical Board ("Board"). On August 13, 2008, the Board permanently revoked Dr. Brian F. Griffin's medical license, staying the revocation in lieu of three years probation. The conduct at issue allegedly occurred between 1999 and 2001 when Dr. Griffin was a student in a fellowship, at a Columbus, Ohio pain management clinic. In addition to his argument that the Board's decision was not supported by reliable, probative, or substantial evidence, Dr. Griffin also argues that the Board violated his due process rights by waiting roughly five

years after learning about the complained-of conduct to bring a formal disciplinary proceeding against him. The trial court affirmed the Board's order, and this appeal ensued.

{¶2} Dr. Griffin assigns three errors for our review:

> [I.] THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION BY APPLYING THE INCORRECT LEGAL STANDARD TO DR. GRIFFIN'S DUE-PROCESS ASSIGNMENT OF ERROR.
>
> [II.] THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION BY FINDING THAT THE BOARD DID NOT VIOLATE DR. GRIFFIN'S DUE PROCESS RIGHTS BY WAITING FIVE YEARS TO INSTITUTE THE ADMINISTRATIVE ACTION AGAINST HIM.
>
> [III.] THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION BY FINDING THAT THE ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE WHERE THE EXPERTS RELIED UPON BY THE BOARD WERE INHERENTLY UNRELIABLE.

{¶3} The Ohio Revised Code vests the Board with broad authority to regulate the medical profession in this state, and to discipline any physician whose care constitutes "[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established." R.C. 4731.22(B)(6).

{¶4} The common pleas court is the reviewing tribunal for appeals from administrative agencies, such as the Board, and the standard of review is provided by R.C. 119.12. This statute provides that the trial court may affirm the agency's order complained of in the appeal if, after considering the entire record, the court finds that the order 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-Ohio-122. On appeal, courts must defer to the Board's interpretation of the technical and ethical requirements of that profession. Id. at syllabus.

{¶5} Our review is even more limited than that of the trial court because it is the trial court's function to examine the evidence. Id. The court of appeals' function is solely to determine whether the trial court abused its discretion—"not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." Id. Furthermore, neither we, nor the trial court may substitute our judgment for that of the Board. See id. (citing *Lorain City Sch. Dist. Bd. of Ed. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260–61).

DUE PROCESS

{¶6} The first two assignments of error are procedural, in that they claim that the Board violated Dr. Griffin's due-process rights by waiting so long after the alleged violations to bring formal accusations against him. We will therefore address these assigned errors together.

{¶7} One of the fundamental principles of due process is that it is considered procedurally unfair to allow the state to bring charges against an individual long after the individual committed the alleged wrongful acts. See generally *U.S. v. McDonald* (1982), 456 U.S. 1, 7, 102 S.Ct. 1497 (noting that delays before indictment may give rise to a general due process violation, but do not violate the speedy trial clause of the Sixth Amendment). This is why most crimes have statutes of limitations. In Ohio, excluding murder, the state must prosecute most crimes (felonies) within six years. See R.C. 2901.13; see also *State v. Selvage*, 80 Ohio St.3d 465, 467, 1997-Ohio-287.

{¶8} This case is, of course, *not* a criminal prosecution, but rather a professional disciplinary proceeding by an administrative agency. The Board derives its authority to conduct its disciplinary proceeding from R.C. 4731.22(B)(6), which provides:

> 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 * * * for one or more of the following reasons:
>
> * * *
>
> (6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established[.]

{¶9} There is no per se statute of limitations in R.C. 4731.22. We have held that administrative agencies must give licensees a fair hearing and determination as expeditiously as possible under the circumstances, but we have never imposed a per se time limitation upon an agency. See, e.g., *Gourmet Beverage Center, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1217, 2002-Ohio-3338, ¶25 ("[I]t is the duty of an administrative agency to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of the litigants."). Agencies are free to set their own parameters regarding time limitations, but this is purely voluntary. One court of appeals opined that when an administrative agency *does not* have a self-imposed time limitation for prosecution, the agency might leave itself vulnerable to due process challenges such as this one. See *Mowery v. Ohio St. Bd. of Pharmacy* (Sept. 30, 1997), 11th Dist. No. 96-G-2005, 1997 WL 663505, at *4, n.1. Thus, when evaluating a due-process argument within the context of an agency's delay in bringing formal accusations against a professional license holder, there is no precise standard. In the absence of a

specified time limit, we focus our analysis on whether the licensee suffered any material prejudice as a result of the agency's delay. See, e.g., *Smith v. State Med. Bd. of Ohio* (July 19, 2001), 10th Dist. No. 00AP-1301, 2001 WL 811839, at *5 ("[W]e find that appellant failed to demonstrate how he has been materially prejudiced by the Board's delay, and that the trial court did not abuse its discretion by rejecting the affirmative defense of laches.").

{¶10} The crux of Dr. Griffin's due-process argument centers not on any prejudice that he may have suffered, but on the Board's "unjustified delay." (Appellant's brief, at 7.) Further, he argues that the common pleas court applied the wrong standard to his due-process argument—that the court instead considered the doctrines of laches and estoppel, which he argues are separate and distinct from due process: "Laches is an equitable doctrine that discourages parties from sitting on their rights. * * * 'The purpose of equitable estoppel is to prevent actual or constructive fraud[,] and to promote the ends of justice.' " (Appellant's brief, at 10, citing *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145.) Regardless of the origins of these two principles, they exist to protect the fundamental fairness of our judicial system, much like due process. Moreover, regardless of which standard the common pleas court applied, Dr. Griffin has still failed to demonstrate any material prejudice.

{¶11} Absent demonstrating some material prejudice as a result of the Board's delay in bringing formal accusations against Dr. Griffin, we cannot hold that the Board violated his due process rights, or that the trial court abused its discretion by applying the wrong legal standard to the claimed due-process violation. We, therefore, overrule the first and second assignments of error.

RELIABILITY OF EXPERT TESTIMONY

{¶12} The third assignment of error is substantive, and concerns the merits of whether there was reliable, probative, and substantial evidence supporting the Board's disciplinary order against Dr. Griffin. Dr. Griffin argues that the evidence the Board relied upon was insufficient because the state's expert testimony was inherently unreliable, based on the experts' lack of familiarity with the relevant standard of care in the field of pain management. (See Appellant's brief, at 16.) We will examine the 3100-page transcript of the 17-day hearing before the Board (hereafter "Tr."), and specifically focus on the 136-page report and recommendation issued by Board hearing officer, R. Gregory Porter, filed on July 7, 2008 (hereafter "Report").

{¶13} Although the Board is not required to present expert testimony to support a charge against an accused physician, the charge must somehow be supported by reliable, probative, and substantial evidence. *In re Williams* (1991), 60 Ohio St.3d 85, syllabus. When the Board does present expert testimony, however, the expert must be capable of expressing an opinion in terms of the particular standard of care that applies to the physician whose license is at issue. *Lawrence v. State Med. Bd. of Ohio* (Mar. 11, 1993), 10th Dist. No. 92AP-1018, 1993 WL 69476, at *3. In civil litigation, the legislature has enacted a statutory provision that a person is not competent to testify unless they practice in the "same or a substantially similar specialty as the defendant." R.C. 2743.43(A)(3). "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 between the[m]." Id. The rationale behind this rule is

that just because a medical expert is well-educated and well-credentialed does not necessarily mean that the expert should be qualified as an expert in every medical field. See, e.g., *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶17 ("[E]ven a qualified expert is capable of rendering scientifically unreliable testimony.").

{¶14} The experts at issue in this case are Thomas Chelimsky, M.D., and Bashar Katirji, M.D., who are purportedly world-renowned in the field of neurology. (See Appellee's brief, at 6.) According to the hearing examiner's report, the pain management field has two differing philosophical foundations, one rooted in neurology, the other rooted in anesthesia. This is supported in part by the fact that three separate certifying boards "offer subspecialty certification in pain medicine: the American Board of Anesthesiology, the American Board of Psychiatry and Neurology [ABPN], and the American Board of Physical Medicine and Rehabilitation." (Report, at 23.) Dr. Chelimsky testified that all three boards use the same certifying exam. Id.

{¶15} Prior to his training in pain management, Dr. Griffin was board certified in emergency medicine in 1988. He was later certified by the American Academy of Pain Management in 2001, and certified with a subspecialty in pain medicine by the American Board of Anesthesiology in 2004. Since 2003, Dr. Griffin has been the president and owner of Interventional Pain Solutions, in Columbus, Ohio. His practice is solely devoted to interventional pain management. (Report, at 14.)

{¶16} Dr. Chelimsky was board certified in internal medicine in 1986 by the American Board of Electrodiagnostic Medicine in 1992, in neurology and neurophysiology by the ABPN in 1992 and 1994 respectively, and in pain management by the ABPN in 2000. (Report, at 17.)

{¶17} Dr. Katirji was board certified in neurology and neurophysiology by the ABPN in 1985 and 1992 respectively, by the American Board of Electroencephalography in 1985, by the American Association of Electrodiagnosis and Electromyography in 1986, and by the American Board of Electrodiagnostic Medicine in 1990. (Report, at 16.) Dr. Katirji is not certified in any area of pain management, or physical medicine and rehabilitation, and he testified that he does not practice in the field of interventional pain management. (Report, at 17.)

{¶18} Dr. Katirji opined that he is an expert in somatosensory evoked potentials (SSEPs), which are studies that involve stimulating nerves in the limbs and recording nerve activity from the spine to the brain. (Tr. 1016.) SSEPs are performed by placing electrodes on nerves at the base of the neck and on the fingers. (Tr. 1017–18.) Then, the practitioner sends an electric current through the nerves and documents the nerve response. Dr. Katirji stated that although SSEPs may indicate an abnormality along the nerve route, there is no way for the doctor to pinpoint the problem. His conclusion, thus, was that SSEPs have no ability to identify the source of pain, and that there is no medical reason for a physician to conduct these tests.

{¶19} Dr. Katirji specifically reviewed the records of those of Dr. Griffin's patients referenced in the Board's allegations, and his general conclusion was that neither Dr. Griffin nor W. David Leak, M.D., the fellowship's program director, specifically indicated why they performed SSEPs and other similar tests on each patient. (Report, at 27.) Dr. Katirji's belief was that for each new patient presenting radiating pain, Drs. Griffin and Leak simply ordered a standard battery of tests that included SSEPs. See id. "In summary, I find that Drs. [Leak and Griffin] practiced below minimal standards of care by

performing unnecessary electrodiagnostic testing for no apparent clinical reason in most of their patients." (Report, at 28.) Despite this generalized conclusion, Dr. Katirji stated that the original test data for the patients was not available, and that he was only able to review tabulated charts of the data. See id. at 27–28. The report does not state whether the reason the original test data was unavailable was in any way attributable to the length of time that had passed since the tests were administered.

{¶20} In response to the Board's expert testimony, Dr. Griffin argues that although well qualified in neurology, Drs. Chelimsky and Katirji were not qualified to render reliable expert opinions regarding the diagnosis, management, and treatment of the interventional pain patients at issue. (Appellant's brief, at 17.)

> The opinions of Dr. Chelimsky and Dr. Katirji reflected the general consensus of neurologists on the use of * * * pain medications, and various injections to diagnose and treat pain. Using their neurology approach, [they] testified that a needle EMG is always necessary in conjunction with nerve conduction studies in the diagnosis of rad[iating pain], that STCs are not reproducible, reliable, or valid, and that SSEPs are not effective in the diagnosis of radi[ating pain], and have no ability to identify pain.

Id. at 18 (quoting Tr. 1024–25, 1142–43, 1154, 1584–94).

{¶21} Another of the Board's witnesses, Mark V. Boswell, M.D., Ph.D., explained, however, how the viewpoints and philosophies of neurologists and anesthesiologists differ in the field of pain medicine:

> The neurology approach is more medication and less intervention. Anesthesiology has always been more interventional in the sense of doing nerve blocks and stimulators and pumps, things like that.

Dr. Boswell went on to explain that he worked with Dr. Chelimsky for 15 years, and would have interdisciplinary meetings so they could discuss patients and work together because they had different approaches. They did not always agree on approaches, but they always had a good plan for the patients that they co-managed. (Tr. 43–45.)

{¶22} Dr. Boswell was also board certified in pain medicine by the American Board of Anesthesiology in 1993, and by the American Board of Pain Medicine in 1995, and 2004. (Report, at 22.) At the time of the hearing, Dr. Boswell was Professor and Chair of the Department of Anesthesiology, and Director of the Messer Racz Pain Center at the Texas Tech University Health Sciences Center in Lubbock, Texas. The pain medicine program at Texas Tech is one of the top ten programs of its kind in the country. Id.

{¶23} Dr. Boswell further stated that regardless of the different approaches taken by him in comparison with Dr. Chelimsky, both physicians' treatments were within the standard of care. Id. Perhaps if Dr. Chelimsky had been practicing alongside Dr. Griffin, they would have co-managed their patients in a similar manner.

{¶24} Dr. Griffin also proffered expert testimony at the Board's hearing. James P. Bressi, D.O., was board certified in anesthesiology by the American Osteopathic Board of Anesthesiology in 1993, with a qualification in pain management in 1996, and was also certified by the American Academy of Pain Management. (Report, at 19.) David R. Longmire, M.D., was certified by the American Academy of Pain Management in 1982, and by the American Board of Electroencephalography and Neurophysiology in 1989, and Gary W. Jay, M.D., who graduated from Northwestern University Medical Center in

1976, and has 25 years experience in the private practice of pain medicine. At the time of the hearing, Dr. Jay was the medical director for pain at Schwarz Biosciences.

{¶25} The trial court found that there was "no dispute as to any of [the] experts' qualifications." (February 4, 2009 Decision, at 12.) The trial court also found that "[a]ll of the experts appeared highly qualified and well-versed in the arena of pain management." Id. Although the trial court recognized the two contrasting philosophies in pain medicine, the court did not attempt to explain or reconcile the differences in testimony proffered by the experts from a neurological background versus the experts from an anesthesiology background. Indeed, the trial court did not have to reconcile the two because the trial court's analysis centered on two issues: (1) was the Board's decision in accordance with law?; and (2) was the Board's decision based upon reliable, substantial, and probative evidence? The decision as to which medical philosophy is more appropriate for pain management is best left to the medical professionals, not appellate judges or trial court judges sitting in an appellate role on an administrative appeal. This is the clear indication of *Pons*, supra.

{¶26} As noted above, the trial court was supposed to review the record in this case, and determine whether there was reliable, probative, and substantial evidence to support the Board's action. The trial court having found that there was such evidence in the record, our review is limited to whether the trial court abused its discretion in so finding. This is a difficult standard to overcome, and was not overcome here.

{¶27} The evidence clearly demonstrates that there were two types of expert witnesses in this case: Some of the experts were highly trained in neurology. The other

experts were experienced and highly-credentialed pain medicine doctors, with backgrounds in anesthesiology. *Lawrence*, at *3; *Valentine*, at ¶17.

{¶28} The trial court considered the disparity in qualifications among the experts in this case. The trial court then found:

> Based upon the evidence presented[,] the Hearing Officer came to the conclusion that the [sic] Dr. Griffin's treatment of 23 patients violated the minimum standard of care * * * includ[ing] subjecting patients to unnecessary tests[,] and in some cases an extraordinary number of tests. The Hearing Officer found that Dr. Griffin had done so without documenting the necessity for those tests and without heed to abnormal results when abnormal results were obtained. * * *

(Decision, at 9.) These findings were clearly supported by the witnesses called by the Board. It is not our place to substitute our judgment for that of the Board (or the trial court).

{¶29} After reviewing the evidence in this case, we conclude that the trial court did not abuse its discretion in finding that there was reliable, probative, and substantial evidence supporting the Board's order. Accordingly, we overrule the third assignment of error.

{¶30} Having overruled all three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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