[Cite as *Griffin v. State Med. Bd. of Ohio*, 2011-Ohio-6089.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George D.J. Griffin, III, M.D.,	:	
Appellant-Appellant,	:	
		No. 11AP-174
v.	:	(C.P.C. No. 10CVG-05-7480)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on November 22, 2011

Dinsmore & Shohl, LLP, Eric J. Plinke and *Gregory P. Mathews*, for appellant.

Michael DeWine, Attorney General, and *Henry G. Appel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Appellant, George D.J. Griffin, III, M.D., 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"), finding departures from minimal standards of care and imposing a 120-day suspension of appellant's license to practice medicine and staying all but 30 days of the suspension. The board's order also placed appellant on probation for a period of at least three years and imposed conditions including, but not limited to, further coursework, monitoring and reporting.

{¶2} Appellant is a physician and orthopedic surgeon, practicing in the areas of orthopedic surgery, orthopedic spine surgery, arthroscopics, total joint replacement, and pain management. Appellant graduated from the University of Cincinnati Medical School in 1975 and subsequently completed a one-year internship at Cincinnati General Hospital. In 1980, appellant completed a four-year orthopedic residency at the University of Cincinnati and opened a private practice in Cincinnati, Ohio. In 1981, appellant became board certified in orthopedics and is currently a member of the Freiberg Society, the Cincinnati Academy of Medicine, the Cincinnati Orthopedic Society, the Ohio State Medical Association, the North American Arthroscopy Association, and is a diplomat of the American Pain Management Board.

{¶3} Appellant testified that, in 1981, he began treating patients for pain management as part of his regular practice. Further, appellant testified that, currently, he spends more than 50 percent of his time with chronic pain patients and the remainder in the practice of orthopedics and spine. As part of his practice, appellant prescribes pain medications, including: OxyContin, Avinza, Kadian, Methadone, Lyrica, Neurontin and Ultram.

{¶4} In a letter dated January 14, 2009, the board notified appellant that it intended to determine whether or not to discipline him for failing to provide treatment in accordance with the minimal standards of care with regard to 14 patients during the approximate time period of 2000 to 2008. The board provided examples of this conduct for each of the 14 patients as follows:

> [1.] You inappropriately and excessively prescribed Schedule II narcotics and Neurontin to Patient 1, including directions to

take 1700 mg.[1] of OxyContin per day and 7200 mg. of Neurontin per day. Further, you inappropriately prescribed Ultram to Patient 1.

[2.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 2, including directions to take 1920 mg. of OxyContin per day. Further, you failed to refer, provide and/or document the treatment of Patient 2's spasticity.

[3.] You inappropriately and excessively prescribed Schedule II narcotics and Lyrica to Patient 3, including directions to take 1280 mg. of OxyContin per day, 160 mg. of Methadone per day and 1200 mg. of Lyrica per day.

[4.] You inappropriately and excessively prescribed Schedule II narcotics and Lyrica to Patient 4, including directions to take 1200 mg. of OxyContin per day at one point, 500 mg of Kadian per day at one point and 600 mg. of Lyrica per day.

[5.] You inappropriately and excessively prescribed Schedule II narcotics and Lyrica to Patient 5, including directions to take 1440 mg. of OxyContin per day at one point, 2100 mg. of Kadian per day at one point and 1600 mg. of Lyrica per day.

[6.] You inappropriately and excessively prescribed Schedule II narcotics and Lyrica to Patient 6, including directions to take 1680 mg. of OxyContin per day and 900 mg. of Lyrica per day.

[7.] You inappropriately and excessively prescribed Schedule II narcotics and Lyrica to Patient 7, including directions to take 1920 mg. of OxyContin per day at one point, 2200 mg. of Kadian per day at one point, and 8400 mg. of Neurontin per day.

[8.] You inappropriately and excessively prescribed Schedule II narcotics and Neurontin to Patient 8, including directions to take 1280 mg. of OxyContin per day and 8400 mg. of Neurontin per day.

[9.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 9, including directions to take 960 mg. of OxyContin per day at one point, 960 mg. of Avinza per day at one point and 1200 mg. of Kadian per day at one point.

[1] Should be 1600 mg. of OxyContin as pointed out by the board in its January 14, 2009 letter.

> Further, you inappropriately prescribed two long acting opioids concurrently to Patient 9.
>
> [10.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 10, including directions to take 1040 mg. of OxyContin per day despite the following observations for Patient 10: a urine drug screen positive for illegal drugs of abuse; the presence of Hepatitis C; depression; anxiety and migraine headache.
>
> [11.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 11, including directions to take 640 mg. of OxyContin per day despite the following observations for Patient 11: multiple positive urine drug screens for cannabinoids, a negative urine drug screen for oxycodine and diazepam despite your having prescribed said medications to Patient 11, a negative urine drug screen for pregabalin despite your having prescribed said medication to Patient 11, Patient 11's criminal history for drug-related felonies, and a call from a pharmacist advising that Patient 11 was selling drugs.
>
> [12.] You inappropriately and excessively prescribed Schedule II narcotics and Neurontin to Patient 12, including directions to take 1920 mg. of OxyContin per day and 12,000 mg. of Neurontin per day.
>
> [13.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 13, including directions to take a combination of 240 mg. of OxyContin per day and 720 mg. of Avinza per day.
>
> [14.] You inappropriately and excessively prescribed Schedule II narcotics to Patient 14, including directions to take 1400 mg. of Kadian per day.

{¶5} In addition, the board's letter indicated that appellant's alleged acts, conduct, and/or omissions, individually and/or collectively, warrant discipline pursuant to R.C. 4731.22(B)(6) because appellant's conduct represented " '[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.' " (Jan. 14, 2009, Notice of Opportunity for Hearing.)

{¶6} On February 5, 2009, appellant timely requested a hearing, pursuant to R.C. Chapter 119, in order to address the board's allegations. Further, in a letter dated June 11, 2009, the board notified appellant regarding two errors in the January 14, 2009 letter and corrected the same: (1) paragraph 1(a) should reference 1600 mg. of OxyContin, instead of 1700 mg., and (2) Patient 11's last name was misspelled on the confidential patient key.

{¶7} On October 5, 8, 9, and 13, 2009, a board-appointed hearing examiner conducted a four-day evidentiary hearing wherein Yeshwant P. Reddy, M.D. ("Dr. Reddy") testified as an expert on behalf of the state, and Richard V. Gregg, M.D. ("Dr. Gregg"), testified as an expert on behalf of appellant. The record further reflects that appellant also testified on his own behalf.

{¶8} Dr. Reddy, a spine physiatrist and pain consultant testified that, in managing a patient's pain, there are no limitations on maximum dosages for pure pain medications. (Tr. 49-50.) He stated that, according to general literature, "the highest dose of the medication you give is the medication which keeps the patient's pain under reasonable control, makes him functional, and there are no side effects." (Tr. 49.) Dr. Reddy also stated that "[t]he side effect[s] provided for these long-acting medications are quite high, and that's the reason any literature, any pain book, states that you start low, go slow, and watch for the side effects." (Tr. 51.) Dr. Reddy explained that giving a heavy dose of pain medication to an opioid naïve patient causes respiratory depression, increasing the chances of fatal abnormalities. (Tr. 51.)

{¶9} Upon reviewing 25,000 pages of medical records, of the 14 patients at issue, Dr. Reddy concluded that the problem is not in appellant's care, or in following the due regulations, rather, "[t]he problem is giving high doses." (Tr. 300.) In fact, Dr. Reddy testified that he can see that appellant is a compassionate and caring doctor, trying to help his patients. (Tr. 302.) Dr. Reddy also testified that, even without having personally seen these patients, based upon the descriptions in their charts, he could conclude these were "usual pain patients." (Tr. 301.) However, Dr. Reddy stated that appellant is "treating usual patients with unusual doses of medications." (Tr. 150, 290-91.) Additionally, Dr. Reddy expressed concern regarding the treatment of Patient 11 because (1) appellant doubled her dose of OxyContin at the first office visit, and (2) appellant continued prescribing OxyContin subsequent to noticing possible drug diversion, noncompliance with instructions, and illegal drug use. (Tr. 71-73, 79-80, 91-92, 300.)

{¶10} The hearing examiner issued a 43-page report and recommendation containing a patient-by-patient summary of the facts concerning appellant's treatment of the 14 patients, including medications and dosing. Also, the hearing examiner provided a detailed patient-by-patient summary of the testimony of Drs. Reddy, Gregg, and Griffin regarding whether appellant's conduct fell below the minimal standard of care. Upon consideration of the evidence, the hearing examiner found that appellant's conduct constituted a violation of R.C. 4731.22(B)(6) with respect to 13 out of 14 patients as follows:

> [Patient 1] * * * inappropriately and excessively prescribed 1,600 mg of OxyContin per day and 7,200 mg of Neurontin per day; * * * inappropriately prescribed Ultram * * *

[Patient 2] * * * inappropriately and excessively prescribed 1,920 mg of OxyContin per day * * *

[Patient 3] * * * inappropriately and excessively prescribed 1,280 mg of OxyContin per day, 160 mg of Methadone per day, and 1,200 mg of Lyrica per day * * *

[Patient 4] * * * inappropriately and excessively prescribed 1,200 mg of OxyContin per day at one point, and 500 mg of Kadian per day at one point * * *

[Patient 5] * * * inappropriately and excessively prescribed 1,440 mg of OxyContin per day at one point, 2,100 mg of Kadian per day, and 1,600 mg of Lyrica per day * * *

[Patient 6] * * * inappropriately and excessively prescribed 1,680 mg of OxyContin per day and 900 mg of Lyrica per day * * *

[Patient 7] * * * inappropriately and excessively prescribed 1,920 mg of OxyContin per day at one point, 2,200 mg of Kadian per day at one point, and 8,400 mg of Neurontin per day * * *

[Patient 8] * * * inappropriately and excessively prescribed 1,280 mg of OxyContin per day and 8,400 mg of Neurontin per day * * *

[Patient 9] * * * inappropriately and excessively prescribed 960 mg of OxyContin per day at one point, 960 mg of Avinza per day at one point and 1,200 mg of Kadian per day at one point * * *

[Patient 10] * * * inappropriately and excessively prescribed 1,040 mg of OxyContin per day, despite the following observations * * *: depression, anxiety and migraine headaches * * *

[Patient 11] * * * inappropriately and excessively prescribed 640 mg of OxyContin per day, despite the following observations: multiple positive urine drug screens for cannabinoids, a negative urine drug screen for Oxycodone despite * * * having prescribed said medication, * * * a negative urine drug screen for Pregabalin (Lyrica) despite * * * having prescribed said medication, * * * Patient 11's

> criminal history for drug-related felonies, and a call from a pharmacist advising that Patient 11 was selling drugs * * *
>
> [Patient 12] * * * inappropriately and excessively prescribed 1,920 mg of OxyContin per day and 12,000 mg of Neurontin per day * * *
>
> [Patient 14] * * * inappropriately and excessively prescribed 1,400 mg of Kadian per day * * *

(See Report and Recommendation, p. 34-38.)

{¶11} The hearing examiner recommended that appellant's certificate to practice medicine and surgery in the state of Ohio be suspended for a period of 120 days, all but 30 days of which are stayed. Further, following appellant's suspension, the hearing examiner recommended at least three years of probation, subject to the following conditions: (1) he must obey the law; (2) he must submit quarterly declarations of compliance to the board; (3) he must personally appear before the board at designated times; (4) he must complete a course or courses regarding prescribing controlled substances and submit documentation of successful completion and a summary report of the course(s) before the end of the first year of probation; (5) he must complete a course or courses regarding pharmacology and submit documentation of successful completion and a summary report of the course(s) before the end of the first year of probation; (6) he must submit the name and curriculum vitae of a monitoring physician to the board within 30 days of reinstatement, and said physician, if approved by the board, shall monitor appellant in his medical practice, review appellant's charts and report to the board regarding the same; and (7) he must keep a controlled substances log. (See Report and Recommendation, 39-42.)

{¶12} On April 5, 2010, appellant filed objections to the hearing examiner's report and recommendation, along with a motion to appear at the April 14, 2010 meeting in order to personally address the board. On April 14, 2010, the board considered the hearing examiner's report and recommendation, appellant's personal statement, and Assistant Attorney General Pfeiffer's response. Subsequently, members of the board discussed this matter, focusing on: (1) appellant's treatment of Patient 11, wherein red flags regarding diversion were ignored; (2) appellant's propensity for prescribing unusually high doses of medication to usual pain-management patients; and (3) appellant's sub-par recordkeeping. Due to appellant's deficiencies in recordkeeping, the board amended the hearing examiner's report and recommendation in order to include a course on medical recordkeeping as a condition of appellant's probation. The board approved and confirmed the hearing examiner's amended report and recommendation. (April 14, 2010, Board Meeting Minutes.)

{¶13} On May 17, 2010, appellant appealed the board's order to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. On February 4, 2011, the trial court journalized a decision and entry adopting the board's order, finding it to be supported by reliable, probative, and substantial evidence and in accordance with law. Further, on February 15, 2011, the trial court journalized a judgment entry affirming the decision of the state medical board for the reasons set forth in the February 4, 2011 decision and entry.

{¶14} On February 23, 2011, appellant filed a timely notice of appeal, setting forth seven assignments of error for our consideration:

> [1.] THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE BOARD'S ORDER WAS SUPPORTED

> BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH LAW BECAUSE THE BOARD RELIED ON "EXPERT" TESTIMONY THAT WAS NOT BASED ON RELIABLE SCIENTIFIC METHODOLOGY.
>
> [2.] THE COURT OF COMMON PLEAS DEPRIVED DR. GRIFFIN OF A MEANINGFUL APPEAL UNDER R.C. 119.12 BY GIVING UNDUE DEFERENCE TO THE MEMBERS OF THE BOARD.
>
> [3.] THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE BOARD'S ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE BECAUSE THE STATE'S EXPERT DID NOT TESTIFY THAT DR. GRIFFIN'S DOSING INSTRUCTIONS DEVIATED FROM THE STANDARD OF CARE.
>
> [4.] THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE BOARD'S ORDER COMPLIED WITH R.C. 119.07 BECAUSE THE BOARD INAPPROPRIATELY CONSIDERED ALLEGATIONS REGARDING DOSING INSTRUCTIONS AND OTHER TREATMENT MODALITIES THAT WERE NOT IN THE NOTICE OF OPPORTUNITY FOR HEARING.
>
> [5.] THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE BOARD'S ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH LAW BECAUSE THE BOARD'S ORDER WAS BASED UPON INCORRECT FINDINGS REGARDING NEURONTIN ABSORPTION.
>
> [6.] THE COURT OF COMMON PLEAS ERRED IN FINDING THAT DR. GRIFFIN'S TREATMENT OF PATIENT 11 WAS BELOW THE MINIMUM STANDARD OF CARE.
>
> [7.] THE COURT OF COMMON PLEAS ERRED BY INAPPROPRIATELY PLACING THE BURDEN OF PROOF ON DR. GRIFFIN.

{¶15} "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.

{¶16} The standard of review is more limited on appeal to this court. "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In reviewing the court of common pleas' determination that the board'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. "On questions of law, however, the common pleas court does not exercise discretion and the court of appeals' review is plenary." *Landefeld v. State Med. Bd.* (June 15, 2000), 10th Dist. No. 99AP-612.

{¶17} For ease of discussion, we address appellant's assignments of error out of order. We begin our discussion with appellant's seventh and fourth assignments of

error because they address the standard applied by the trial court and procedure applied by the board, rather than the merits of the board's findings. In appellant's seventh assignment of error, he argues that the trial court inappropriately placed the burden of proof on appellant to "justify" his prescriptions. (Appellant's brief, 24.) Appellee contends that the trial court did not place the burden of proof on appellant by opining that appellant did not provide any reasonable explanation for prescribing up to more than six times the amount of pain medication than other practitioners. (Appellee's brief, 24.) Appellee also contends that it clearly bore the burden of proof in this matter and in doing so introduced (1) thousands of pages of patient records, and (2) Dr. Reddy's expert opinion regarding the same. (Appellee's brief, 24.)

{¶18} "[I]t is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof." *Nucklos v. State Med. Bd.*, 10th Dist. No. 09AP-406, 2010-Ohio-2973, ¶17. In the present matter, the record clearly indicates that appellee set forth sufficient evidence to meet its burden of establishing that appellant prescribed unusually high doses of pain medication to 14 patients. In his testimony, Dr. Reddy referenced thousands of pages of medical records that he reviewed for each of the 14 patients in order to prepare his expert opinion. Dr. Reddy testified that, according to the medical records, each of the 14 patients had usual issues regarding pain management; however, appellant prescribed unusually high doses of pain medication to all 14 patients. (Tr. 149-50.) Dr. Reddy also testified that appellant's treatment of each of the 14 patients fell below the minimum standard of care. (Tr. 92 (11), 110-11 (1), 133 (2), 141-42 (3), 149 (4), 162 (5), 163 (6), 164 (7), 166 (8), 169 (9), 178 (10), 185 (12), 186 (13), 190 (14).)

{¶19} In its decision, the trial court stated that, "when the levels are far beyond what other practitioners would consider appropriate for similarly situated patients, then the appellant should have, but did not offer, some substantive basis to support the departures." (See Feb. 4, 2011 Decision and Entry, 6.) In review of the record, we agree that appellant, in response to Dr. Reddy's testimony that he prescribed unusually high doses of pain medication to address "usual" pain-management issues, did not present any contradictory evidence to explain his reasoning for prescribing such high doses of pain medication to the 14 patients. As such, the trial court's above-cited statement requires nothing more of appellant than it would of any party faced with adverse evidence during litigation. See *Smith v. Columbus*, 10th Dist. No 02AP-1219, 2003-Ohio-3303, ¶25, see also *Nucklos* at ¶17. Therefore, we find that the trial court did not shift the burden of proof to appellant, and, as such, appellant's seventh assignment of error is not well- taken.

{¶20} Appellant's seventh assignment of error is overruled.

{¶21} In his fourth assignment of error, appellant argues that the board's order failed to comply with R.C. 119.07 by considering allegations regarding dosing instructions and other treatment modalities that were not in the notice of opportunity for hearing ("notice"), consequently denying him due process. (See appellant's brief, 17.) Specifically, appellant states that the board inappropriately considered allegations regarding: (1) dosing frequency, (2) practice of prescribing a range of pills to certain patients, and (3) failure to explore other modalities. (See appellant's brief, 17-18.) In response, appellee contends that the notice adequately warned appellant that the board intended to review all of his prescribing habits with respect to the 14 patients and that it

implicitly warned appellant regarding the review of other treatment modalities. (See appellee's brief, 18.) In addition, appellee contends that, even if the notice is somewhat deficient, appellant has failed to establish any prejudice because: (1) he has not identified any additional evidence that would have been produced, and (2) he has not identified any additional legal arguments that would have been made. (Appellee's brief, 19.)

{¶22} "A fundamental requirement of due process, that is, notice and an opportunity to be heard, must be afforded an individual whose professional license is subject to revocation in an administrative hearing." *Johnson v. State Med. Bd. of Ohio* (Sept. 28, 1999), 10th Dist. No. 98AP-1324. Pursuant to R.C. 119.07, "[n]otice shall * * * include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice." Further, "the right to a hearing includes the right to appear at the hearing prepared to defend oneself through testimony, evidence, or argument against the charges brought." *Johnson*, citing *In re Shelley* (Dec. 31, 1992), 10th Dist. No. 92AP-440. As such, "due process requires that an individual receive fair notice of the precise nature of the charges that will be raised at a disciplinary hearing." *Johnson* citing *Shelley*.

{¶23} In *Johnson*, another case involving the prescribing of controlled substances, this court stated that we have not established a bright line test regarding the sufficiency of notice of the nature of the charges forming the basis of an administrative hearing. Id. The *Johnson* notice accused the appellant of violating R.C. 4731.22(B)(2) and (B)(6) as to 15 patients because he:

> (1) utilized controlled substances and other dangerous drugs despite his failure to conduct an appropriate physical examination and/or make objective physical findings substantiating the necessity of the medications; (2) utilized these medications in amounts and combinations which had no therapeutic value and/or were not indicated; (3) utilized multiple narcotics and/or multiple benzodiazepines, concurrently, without appropriate medical justification; and (4) routinely prescribed benzodiazepines and narcotics in treatment of injuries that occurred many years previously.

Id. Further, the *Johnson* notice included a "Patient Key," which identified, by name, patients 1 through 15. Id.

{¶24} In determining that the *Johnson* notice sufficiently apprised the appellant of the precise nature of the charges to be raised against him at the disciplinary hearing, we noted that: (1) the board's notice referenced specific sections of R.C. 4731.22 which formed the basis for the charges; (2) the notice included general allegations as to the 15 patients regarding the appellant's inappropriate use of controlled substances and dangerous drugs; (3) the notice included a "Patient Key," giving the appellant the benefit of the medical records and the "knowledge of his treatment of each of the identified patients." Id.

{¶25} Here, the notice specifically references R.C. 4731.22(B)(6), advising appellant that his conduct constitutes " '[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances.' " (See Jan. 14, 2009 Notice of Opportunity for Hearing, 3.) Further, the notice includes 14 specific examples of appellant's conduct and clearly states that appellant's conduct is not limited to the examples set forth in the notice. Each example of appellant's conduct, as stated in the notice, advises appellant that he "inappropriately and excessively prescribed Schedule II narcotics" and other drugs, to each of the 14

patients. (Notice of Opportunity for Hearing, 3.) The notice also specifically lists the names of the drugs, as well as the dosage amounts, for each of the 14 patients. In addition, the notice advises appellant that he failed to "refer, provide and/or document the treatment of Patient 2's spasticity," as well as failing to address certain red flags with Patient 11 regarding possible drug abuse and diversion. (See Notice of Opportunity for Hearing, 1.) Finally, the board attached to the notice a confidential "Patient Key," identifying all 14 patients by name.

{¶26} Upon review, we find that, in line with our decision in *Johnson*, the notice in the present matter sufficiently apprised appellant of the precise nature of the charges against him by: (1) specifically referencing R.C. 4731.22(B)(6), (2) including both general and specific allegations as to the 14 patients at issue, (3) listing the names of the drugs and the prescribed dosages, and (4) attaching a "Patient Key" in order for appellant to thoroughly review the 14 patients' medical records. In addition, the notice informed appellant that the board would determine whether to discipline him with regard to the 14 patients because he inappropriately or excessively prescribed Schedule II narcotics to them. (See Notice of Opportunity for Hearing.) This logically includes consideration of dosage frequency, range of pills, and failure to explore other treatment modalities. Further, the record shows that, from January 15, 2009 (the date notice was mailed to appellant) to October 5, 2009 (the date evidentiary hearing commenced), appellant had approximately nine months to prepare his defense and request additional information from the board. The record does not indicate that appellant's counsel moved for a continuance of the October 5, 2009 hearing or that he was not prepared to present appellant's defense. Even if the notice contained some deficiencies, appellant

has not demonstrated any prejudice by failing to indicate what, if anything, he would have done differently in preparation of his defense. Therefore, because appellant had a full and fair opportunity to prepare and present his defense at the disciplinary hearing, we find that no violation of appellant's due process rights occurred.

{¶27} Appellant's fourth assignment of error is overruled.

{¶28} We now address appellant's sixth assignment of error regarding the trial court's finding that appellant's treatment of Patient 11 was below the minimum standard of care as required by law.

{¶29} Appellant argues that the trial court abused its discretion because the record does not support its conclusion that appellant prescribed excessive doses of medication to Patient 11 and/or ignored signs of diversion. In response, appellee argues that appellant immediately doubled Patient 11's dosage of OxyContin and continued to prescribe this high dose even after learning that Patient 11 (1) had three other prescriptions of OxyContin from two other doctors, within two weeks of her appointment with appellant, (2) tested negative for Oxycodone and positive, on two occasions, for Cannabinoids, (3) had been convicted of three drug felonies, and (4) had been suspected by family members of "sell [ing] most of her medications and snort [ing] the rest." Appellee also argues that appellant waived his argument regarding ignoring signs of diversion because he failed to raise it in the trial court.

{¶30} It is well-settled that "[a] party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings." *Jain v. Ohio State Med. Bd.*, 10th Dist. No. 09AP-1180, 2010-Ohio-2855, ¶10. Upon review of the record, we agree that appellant did not raise the argument regarding whether he ignored

Patient 11's possible drug diversion in the trial court; however, appellant did generally raise an argument regarding the board's findings as to Patient 11 and excessive dosing. Therefore, we will address appellant's sixth assignment of error.

{¶31} In the present matter, the board's finding that appellant's conduct fell below the minimum standard of care with respect to his treatment of Patient 11 is supported by reliable, probative, and substantial evidence. On the first office visit, Dr. Reddy testified that appellant doubled Patient 11's dosage of OxyContin from 320 milligrams to 640 milligrams, which he considered to be an "ultra high" dosage. (Tr. 90.) Further, Dr. Reddy stated that, following Patient 11's first office visit, a urine drug test ordered on May 23, 2008 was negative for Oxycodone, the active ingredient in OxyContin. (Tr. 39, 72.) A second urine drug test ordered on June 6, 2008 showed positive for opiods and Cannabinoids. (Tr. 77.) A third urine drug test ordered on July 8, 2008 was also positive for Cannabinoids. (Tr. 78.) Finally, a fourth urine drug test ordered on August 6, 2008 was negative for Lyrica, one of Patient 11's prescribed medications. (Tr. 79.) In addition, Dr. Reddy testified that Patient 11's chart reflected another "red flag," in that a pharmacist sent appellant a letter to inform him that Patient 11 "is selling the drugs," and that Patient 11 had been convicted of three drug-related felonies. (Tr. 79, 80.)

{¶32} Appellant testified that he reviewed the pharmacist's letter relating to the allegation that Patient 11 had sold her medications and also verified Patient 11's convictions for possession of heroin, aggravated trafficking in drugs, and illegal processing of drug documents on the Clermont County Clerk of Courts' website. (Tr. 583.) In spite of this knowledge, the record reflects that appellant did not reduce Patient 11's prescribed dosages or further investigate the possible issue of drug diversion. (Tr. 80-

81.) Based upon Patient 11's medical records, Dr. Reddy concluded that appellant's treatment methods did not meet the minimum standard of care. (Tr. 92.)

{¶33} Based upon the foregoing, we find that the board's order is supported by reliable, probative, and substantial evidence. First, the testimony of Dr. Reddy is reliable because he practices in the area of pain management, and he personally reviewed Patient 11's medical chart. Further, appellant testified that he personally reviewed the letter from the pharmacist regarding possible drug diversion and verified that Patient 11 had been convicted of three drug-related felonies.

{¶34} Second, Dr. Reddy's testimony is probative because it directly addresses the issue regarding prescribing high dosages of pain medication to Patient 11, drug diversion and drug abuse.

{¶35} Finally, Dr. Reddy's testimony is substantial because it has weight, importance, and value in determining whether appellant's treatment of Patient 11 fell below the minimum standard of care. Therefore, the trial court did not abuse its discretion in affirming the board's order suspending appellant's medical license.

{¶36} Appellant's sixth assignment of error is overruled.

{¶37} Because the board had reliable, probative, and substantial evidence for suspending appellant's license to practice medicine with respect to his treatment of Patient 11, we need not address appellant's first, second, third, or fifth assignments of error. See *D.L. Lack Corp. v. Liquor Control Comm.* (Dec. 6, 2010), 10th Dist. No. 10AP-400, ¶18, citing *Our Place, Inc.* at 572. 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 v. State Med. Bd.* (Jun. 15, 2000), 10th Dist. No. 99AP-612.

{¶38} Appellant's first, second, third and fifth assignments of error are moot.

{¶39} Notwithstanding that appellant's first and second assignments of error are moot, we will briefly address appellant's concerns regarding whether, in reaching its decision, the board relied upon expert testimony that was not based on "reliable scientific methodology," and whether the trial court gave undue deference to members of the board. (Appellant's brief, 6, 11.)

{¶40} Appellant contends that Dr. Reddy's expert testimony should be disregarded because it was not based on reliable scientific methodology. Appellant believes that, because Dr. Reddy informally surveyed other physicians at pain conferences regarding their opinions on maximum dosages for OxyContin, Dr. Reddy's testimony regarding high dosages is unreliable. (Appellant's brief, 7.) We note that the record does contain Dr. Reddy's testimony regarding Dr. Reddy's informal surveys of other medical practitioners. However, it also contains testimony that, in reaching his conclusion, Dr. Reddy personally reviewed medical charts for each of the 14 patients, and based upon his own experience as a pain practitioner, along with the information contained in the patients' charts, Dr. Reddy reached the conclusion that appellant's treatment of the 14 patients fell below the minimum standard of care. (Tr. 92 (11), 110-11 (1), 133 (2), 141-42 (3), 149 (4), 162 (5), 163 (6), 164 (7), 166 (8), 169 (9), 178 (10), 185 (12), 186 (13), 190 (14).)

{¶41} Further, regarding appellant's concern that the trial court gave undue deference to members of the board, we note as well that the record demonstrates that

Dr. Reddy's testimony, in and of itself, provides substantial, reliable, and probative evidence that appellant's practices fell below the minimum standard of care and, therefore, the trial court did not abuse its discretion in affirming the decision of the board.

{¶42} Finally, in *Goldfinger Ents., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1172, 2002-Ohio-2770, ¶23, this court stated that "[a]s a practical matter, courts have no power to review penalties meted out by the commission. Thus, we have little or no ability to review a penalty even if it seems on the surface to be unreasonable or unduly harsh." See also *Staschak v. State Med. Bd.*, 10th Dist. No. 03AP-799, 2004-Ohio-4650, ¶50; *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233. Therefore, even if the trial court had found that only one of the board's allegations was supported by reliable, probative, and substantial evidence, this court would not modify the board's sanction to suspend appellant's medical license for 120 days, with all but 30 days stayed, and at least three years of probation.

{¶43} Based upon the foregoing, appellant's fourth, sixth, and seventh assignments of error are overruled, appellant's first, second, third, and fifth assignments of error are moot, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.

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