[Cite as *Mahajan v. State Med. Bd. of Ohio*, 2011-Ohio-6728.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mahendra Kumar Mahajan, M.D.,	:	
		No. 11AP-421
Appellant-Appellant,	:	(C.P.C. No. 10CVF-06-9077)
v.	:	No. 11AP-422
		(C.P.C. No. 10CVF-07-9949)
State Medical Board of Ohio,	:	
		(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2011

Subashi & Wildermuth, *Nicholas E. Subashi*, and *Halli Brownfield Watson*, for appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, Mahendra Kumar Mahajan, M.D. ("Dr. Mahajan"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the decision of appellee, the State Medical Board of Ohio ("board"), to impose probation upon Dr. Mahajan's certificate to practice medicine and surgery in Ohio and order him to meet

certain conditions before probation would terminate. Having concluded that the trial court did not abuse its discretion by affirming the board's order, we affirm.

I. BACKGROUND

{¶2} By letter dated November 14, 2007, the board notified Dr. Mahajan that it intended to determine whether to impose discipline against his certificate to practice medicine and surgery in Ohio. The board based its proposed action on allegations concerning "Patients 1 – 10," as identified in a confidential patient key, in the course of his psychiatric practice from about 2000 to 2006. (The specific allegations are detailed and discussed below.) The board alleged that the acts, conduct or omissions constitute the following:

> 1) "Failure to maintain minimal standards applicable to the selection or administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease," as those clauses are used in R.C. 4731.22(B)(2); and/or
>
> 2) "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," as that clause is used in R.C. 4731.22(B)(6).

{¶3} Upon Dr. Mahajan's request, a hearing examiner of the board held a three-day hearing on January 21, 22, and 23, 2009. During the hearing, the following witnesses testified: Dr. Mahajan, on his own behalf; Robert A. Karp, M.D., an expert testifying on behalf of the board; Thomas Gutheil, M.D., an expert testifying on behalf of Dr. Mahajan; and Daniel S. Polster, M.D., an expert testifying on behalf of Dr. Mahajan. Evidence before the hearing examiner included documentary evidence and the following: a letter from James R. Hawkins, M.D.; a letter from Amita R. Patel; a 2005

consent agreement, by which Dr. Mahajan agreed to probationary terms and conditions concerning a violation of R.C. 4731.22(B)(12); and letters of support for Dr. Mahajan from patients and colleagues.

{¶4} On April 5, 2010, the hearing examiner issued a 110-page report and recommendation. In summary, the hearing examiner made the following findings of fact:

> 1) Adequate medical documentation is an important element in the care of patients, it is necessary for both "medico-legal purposes" and patient safety, and "it minimizes the risk of relying on the fallible memory of a treating physician. * * * [T]he evidence supports a finding that Dr. Mahajan failed to perform and/or document a psychiatric evaluation of Patients 1, 3, 4, 5, 6, 7, 9 and 10." Report and Recommendation 99 (hereinafter, RR __).
>
> 2) There is a lack of evidence that Dr. Mahajan failed to order, review or document baseline or follow-up laboratory evaluations of Patients 1, 3, 4, 5, 6, 7, and 9, or failed to maintain laboratory results for Patients 2 and 8.
>
> 3) The evidence supports a finding that Dr. Mahajan failed to order and/or document therapeutic levels of Depakote for Patients 2 and 8 and failed to order and/or document therapeutic levels of Tegretol for Patient 8.
>
> 4) The evidence supports a finding that, for Patients 1 through 10, Dr. Mahajan failed to document that the relevant diagnostic-manual criteria had been met for any psychiatric diagnosis for which he provided a Diagnostic and Statistical Manual code.
>
> 5) The evidence supports a finding that Dr. Mahajan did not properly document the performance of an initial or ongoing discussion of informed consent regarding diagnoses and medications for Patients 1 through 10.
>
> 6) The evidence is insufficient to support a finding that Dr. Mahajan failed to consistently follow up on medication changes, additions, and deletions for the ten patients. Also, there is insufficient evidence to support a finding that Dr.

> Mahajan inappropriately prescribed medications to the ten patients on an ad hoc basis.
>
> 7) The evidence is insufficient to support a finding that Dr. Mahajan failed to document the absence or presence of adverse effects from medication prescribed to Patients 1, 2, 3, 4, 5, 7, and 8. However, the evidence supports a finding that Dr. Mahajan failed to document the absence or presence of adverse effects from medication prescribed to Patients 6 and 9.
>
> 8) The "evidence overwhelming supports a finding that Dr. Mahajan failed to discuss and/or document" his discussion of tardive dyskinesia for Patients 2, 5, 7, 8, 9, and 10, to whom he had prescribed antipsychotic medication. (RR 103.) Dr. Mahajan also failed to perform or document Abnormal Involuntary Movement examinations for these same patients.

{¶5} The hearing examiner concluded that the findings of fact did not support a conclusion that Dr. Mahajan committed a violation of R.C. 4731.22(B)(2), and certain of the findings failed to support a conclusion that Dr. Mahajan committed a violation of R.C. 4731.22(B)(6). Nevertheless, seven of the findings supported the conclusion that the acts, conduct, and/or omissions reflected in those findings "constitute '[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,' as that clause is used" in R.C. 4731.22(B)(6).

{¶6} The hearing examiner recommended that Dr. Mahajan's certificate to practice medicine and surgery be suspended for an indefinite period of time and not be restored until certain conditions were met. The hearing examiner also recommended that, upon restoration, Dr. Mahajan's certificate be subject to probationary terms and conditions for a period of at least three years.

{¶7} On May 12, 2010, the board held a hearing at which it considered the hearing examiner's report and recommendation. The board issued a final order, which provided that Dr. Mahajan's certificate to practice medicine and surgery in Ohio shall be subject to specified probationary terms and conditions for a period of at least three years. The probationary terms included documentation of Dr. Mahajan's completion of a course or courses on maintaining adequate and appropriate medical records, completion of a report about what he learned from the course(s), the appointment of a monitoring physician, and notification to employers and others concerning the order.

{¶8} Dr. Mahajan appealed the board's order to the trial court. The court issued an 18-page decision in which it affirmed the board's order, with the exception of one probationary term that imposed restrictions upon Dr. Mahajan's travel. Specifically, the trial court concluded that the order, with the exception of the travel-related provision, was supported by reliable, probative, and substantial evidence and was in accordance with law.

II. ASSIGNMENTS OF ERROR

{¶9} Dr. Mahajan filed a notice of appeal to this court. He raises the following assignments of error:

> [1.] The common pleas court committed an error of law and abused its discretion in finding that alleged deficiencies in patient charting may be the basis for a finding that a physician failed to comply with minimal standards of care in violation of R.C. 4731.22(B)(6).
>
> [2.] Even if documentation deficiencies may serve as proof that a physician fell below the standard of care, the conclusion that Dr. Mahajan's care and treatment of these ten patients fell below the standard of care is not supported by reliable, probative, and substantial evidence, and the

> common pleas court abused its discretion in finding that it was.
>
> [3.] The common pleas court erred in affirming numerous erroneous evidentiary rulings made by the Hearing Examiner and by not considering items improperly excluded, redacted, and/or stricken from the administrative record by the Board.
>
> [4.] The common pleas court erred in overruling Appellant's Motion to Dismiss and finding that Appellant has not been deprived of a full and fair record in this matter resulting in prejudice to Appellant, the violation of his due process rights, and the Board's inability to comply with R.C. 119.09.
>
> [5.] The common pleas court erred by not invalidating the Board's Order based upon the Board's failure to comply with Ohio's Open Meetings Act in adopting said Order.
>
> [6.] The Hearing Examiner who presided over the proceedings before the Board was biased, partial, and prejudiced to such a degree that his presence adversely affected the Board's decision.
>
> [7.] Although the common pleas court was correct in finding that the travel restriction contained in the Board's Order is not in accordance with law, it erred in failing to strike this provision and remanding the Order to the Board to revise this term of Appellant's probation.
>
> [8.] The common pleas court erred by failing to award Appellant attorneys' fees pursuant to R.C. 2335.59 and/or other provisions of law, as the Board was not substantially justified in initiating this disciplinary action against him.

III. DISCUSSION

{¶10} 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. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶11} The Ohio Supreme Court has defined 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. (Footnotes omitted.)

{¶12} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals 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 board's order was supported by reliable, probative, and substantial evidence, this court's role is limited 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 whether the board'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.

{¶13} We will address Dr. Mahajan's assignments of error out of order. We begin with the assignments that concern evidentiary and procedural issues.

A. Assignment of Error No. 3

{¶14} In this assignment, Dr. Mahajan contends that the trial court erred by affirming evidentiary rulings made by the hearing examiner. We disagree.

1. Disclosure of the Investigative Report

{¶15} First, Dr. Mahajan contends that the hearing examiner erred by not requiring the board's expert witness, Dr. Karp, to disclose all of his related files. The board's counsel agreed to the disclosure of two of the files Dr. Karp brought with him, but objected to the disclosure of "a handful of documents" in a third file because they included confidential investigation materials under R.C. 4731.22(F)(5). (Tr. 150.) R.C. 4731.22(F)(5) provides that:

> Information received by the board pursuant to an investigation is confidential and not subject to discovery in any civil action.
>
> The board shall conduct all investigations and proceedings in a manner that protects the confidentiality of patients and persons who file complaints with the board. * * *

{¶16} The Supreme Court of Ohio has recognized that several groups and individuals have a privilege of confidentiality in the board's investigative files, including patients, the physician under investigation, and witnesses. *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435, 2000-Ohio-213. The court also has recognized that the board itself holds "its own confidentiality privilege." Id. at 436. However, the board may not "unilaterally waive others' privileges to confidentiality, because the [board] is not the holder of those privileges." Id. Thus, even if Dr. Mahajan were to waive his privilege of confidentiality regarding the investigative files, the board would not be permitted to disclose the files unless other protected persons, including

patients, witnesses, and the board itself, waived the privilege. Dr. Mahajan points to no such evidence of waiver in this record. Therefore, the hearing examiner did not err by precluding the disclosure of materials within Dr. Karp's file that included confidential investigative materials, and the trial court did not err by affirming the hearing examiner's action.

{¶17} The Supreme Court's decision in *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, does not compel a different result. That decision stems from Dr. Mahajan's request for public records held by the board, including communications relating to the board's investigation of him. On mandamus, the Supreme Court held that the board incorrectly redacted from certain documents (1) Dr. Mahajan's name and (2) quotations from a deposition, because he, alone, held and waived the privilege of confidentiality regarding that information. The court did not, however, change its prior recognition that multiple entities hold privileges of confidentiality relating to the board investigation, including witnesses like Dr. Karp and the board itself, and no one entity may waive the privilege for all.

2. Cross-Examination of Dr. Karp

{¶18} Dr. Mahajan also contends that the hearing examiner precluded his counsel from cross-examining Dr. Karp about his communications with board staff, including Mr. David Katko, the investigator, and about any potential influence by board staff. Our review of the hearing transcript, however, indicates that Dr. Mahajan's counsel cross-examined Dr. Karp extensively. While the hearing examiner precluded Dr. Mahajan's counsel from asking for privileged information, the hearing examiner asked Dr. Karp whether he based his "report on anything anyone told you to decide?

Did anyone tell you what your determination should be in your report?" (Tr. 192.) Dr. Karp responded in the negative and said that he is "hired solely for my time and not my opinion." (Tr. 192.) Speaking broadly, he said that on no case had Mr. Katko or anyone else "shaped the substantive conclusions of the report. They are my own." (Tr. 193.)

{¶19} For the reasons we explained above, we agree with the trial court that the hearing examiner properly excluded testimony concerning the contents of the investigation itself, including Dr. Karp's communications as part of that investigation with board staff and counsel. The decisions cited by Dr. Mahajan do not require a different result. See *In re Kralik* (1995), 101 Ohio App.3d 232 (holding that the hearing examiner improperly precluded cross-examination where expert witness had received confidential material improperly from the board and then relied on that material to form opinion); *Dahlquist v. Ohio State Med. Bd.,* 10th Dist. No. 04AP-811, 2005-Ohio-2298 (concluding that appellant had not demonstrated prejudice from hearing examiner's rulings on cross-examination of expert and expressly declining to decide whether rulings were proper).

3. Other Evidentiary Rulings

{¶20} Dr. Mahajan contends that the hearing examiner made several other erroneous evidentiary rulings. First, Dr. Mahajan argues that the hearing examiner improperly precluded Dr. Karp from expressing his opinion about whether Dr. Mahajan had departed from the standard of care and whether Dr. Mahajan's certificate to practice medicine should be suspended or revoked. Even if the hearing examiner erred by doing so, given the board's expertise on these very issues, and Dr. Mahajan's

contention that Dr. Karp's testimony lacked credibility, it is difficult to discern how the lack of testimony by Dr. Karp in this regard caused him prejudice.

{¶21} Dr. Mahajan argues that the hearing examiner erred by not allowing the admission of Exhibit PP, which related to Dr. Mahajan's prior disciplinary action before the board. Dr. Mahajan does not explain why this document could not have been produced at the hearing, how it was relevant to this action or how exclusion of this exhibit caused him prejudice. See also Ohio Adm.Code 4731-13-15(F) (regarding motions to reopen the hearing record).

{¶22} Dr. Mahajan argues that the hearing examiner erred by striking attachments to his brief and motions, including the affidavit of a statistics professor. He attempted to add this new information to the record, however, after the deadlines for exchanging information had long passed, after the hearing was concluded, and after the record had closed. The hearing examiner did not err by excluding it. See Ohio Adm.Code 4731-13-15(F) and 4731-13-18(D)(1) (regarding deadlines for exchange of exhibits and witness lists).

{¶23} Finally, Dr. Mahajan argues that the hearing examiner erred by striking documents relating to alleged misconduct by Mr. Katko. Again, Dr. Mahajan attempted to introduce these documents after the hearing had ended and the record was closed. While Dr. Mahajan argues that the documents were necessary to remedy the hearing examiner's mistaken rulings concerning investigative materials, we have already determined that the hearing examiner did not err by precluding the disclosure of confidential information.

{¶24} For all these reasons, we overrule Dr. Mahajan's third assignment of error.

B. Assignment of Error Nos. 4 and 5

{¶25} In his fourth assignment of error, Dr. Mahajan contends that the trial court erred by not granting his motion to dismiss on the grounds that the board deprived him a full and fair record of the hearing. In his fifth assignment of error, Dr. Mahajan contends that the trial court erred by not invalidating the board's order because the board failed to comply with Ohio's open meetings law, R.C. 121.22. We will address these assignments together.

{¶26} R.C. 121.22(A) requires "public officials to take official action and to conduct all deliberations upon official business only in open meetings." Important for our purposes here, R.C. 121.22(C) provides that the "minutes" of a meeting of a public body, like the board, "shall be promptly prepared, filed, and maintained and shall be open to public inspection." In construing these provisions, the Supreme Court of Ohio defined the word " 'minutes' " in this context to mean " 'a series of brief notes taken to provide a record of proceedings * * *: an official record composed of such notes.' " *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 1996-Ohio-380, fn. 3, quoting Webster's Third New International Dictionary (1986) 1440. In *White*, the court was construing R.C. 121.22(C) and R.C. 305.10, which requires the clerk of the board of county commissioners to keep a record of that board's proceedings. The court "refrain[ed] from laying down specific guidelines, other than the dictate that for public records maintained under R.C. 121.22 and 305.10, full and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision." *White* at 424.

{¶27} Applying these principles here, we conclude that the board's minutes contain sufficient facts and information to permit the public to understand and appreciate the rationale behind its decision to impose probation upon Dr. Mahajan's certificate to practice medicine and surgery in Ohio. The minutes are seven, single-spaced pages in length. They include detailed notes of each speaker's statements, identification of each motion, and the official votes of the board members on each motion. While Dr. Mahajan contends that the minutes do not contain every statement made by board members, having reviewed the minutes and the transcript, we conclude that the minutes are full and accurate. They reflect substantial reasoning and explanation by the board members and certainly reflect enough for us to understand and appreciate their rationale. In particular, given the lengthy summary of statements by board members Dr. Darshan Mahajan and Dr. Steinbergh, we are able to understand fully why the board decided to modify the recommendation of the hearing examiner and impose probation, rather than suspension. See R.C. 119.09 (requiring that, when an administrative agency modifies or disapproves the recommendations of the hearing examiner, it must include in the record the reasons for that modification or disapproval).

{¶28} Although R.C. 121.22(C) only requires the board to prepare and publish minutes of its meetings, Ohio Adm.Code 4731-9-01 allows a party to record, film or photograph a board meeting. That rule provides that the presiding officer of the board, or a designee, shall designate a reasonable location within the meeting room from which the recording may occur. Ohio Adm.Code 4731-9-01(C)(1). The recording equipment may not interfere with any individual's ability to hear, see, and participate in

the meeting or with the board's orderly transaction of business. Ohio Adm.Code 4731-9-01(C)(2).

{¶29} Here, Dr. Mahajan's counsel hired a court reporter to transcribe the board's proceedings, as permitted by Ohio Adm.Code 4731-9-01. Dr. Mahajan contends, however, that the board's general counsel required the court reporter to move from the front of the meeting room to a location in the back of the room where she was unable to hear the entire proceedings. Ohio Adm.Code 4731-9-01 grants to the presiding officer of the board, or a designee, the ability to designate a reasonable location for recording the meeting. The trial court did not abuse its discretion in determining that the board's request to the court reporter was reasonable, given the need to transact board business.

{¶30} Finally, in reaching our conclusion, we take particular issue with Dr. Mahajan's statement that the general counsel's "conduct also violates Dr. Mahajan's due-process rights by destroying, in bad faith, portions of the record essential to appellate review and has impaired his fundamental right of access to the courts." (Appellant's brief, 47.) Dr. Mahajan follows this statement with nothing more than boilerplate law and citations concerning an individual's right of access to the courts. The allegation that any individual, let alone an officer of the court, destroyed public records in bad faith is a serious charge, and one that should not be made off-handedly and without support. There is nothing in the record to indicate that the general counsel destroyed public records. Rather, Dr. Mahajan has merely overstated his argument that the record is incomplete, an argument we have rejected.

{¶31} In summary, the trial court did not abuse its discretion by determining that the board's meeting and minutes complied with R.C. 121.22 and by denying Dr. Mahajan's motion to dismiss. Accordingly, we overrule the fourth and fifth assignments of error.

C. Assignment of Error No. 1

{¶32} In his first assignment of error, Dr. Mahajan contends that charting deficiencies cannot serve as a basis for violations of the standard of care for purposes of R.C. 4731.22(B)(6), and he cites a number of cases he says support that proposition. In doing so, Dr. Mahajan repeatedly characterizes these deficiencies as the sole basis for the board's action, a characterization that is simply untrue. As we discuss below, the board also found, in several instances, that Dr. Mahajan's *treatment* of patients fell below the standard of care.

{¶33} Dr. Mahajan also contends that the hearing examiner assumed that, if Dr. Mahajan did not document an action, then it was not done. Again, Dr. Mahajan's characterization is inaccurate and blurs the distinction between allegations concerning Dr. Mahajan's treatment of his patients and allegations concerning his documentation of that treatment and the reasons for it.

{¶34} Dr. Karp testified at length about what he expects to see in a psychiatric patient medical record, as detailed in the hearing examiner's report and recommendation at pages 8-9. Dr. Karp said: "From a legal, from an ethical, and from a medical view, all we have to base our assessment on a doctor's practice is what is contained in the record." (Tr. 64.) The record, Dr. Karp said, "is for everybody, including the patient. This is so because if a patient has complex medical issues or

psychiatric issues and an emergency arises or they change clinicians, it is critical for their well-being and their care that the interventions that were made are understood in a rational and clear way so that they could either be continued or changed." (Tr. 64-65.)

{¶35} At the hearing, board member Dr. Steinbergh explained that "[t]he medical record is one of the most important things that a physician does beyond the assessment of the patient." (Board Hearing Tr. 13.) Because the record demonstrates "how the physician is thinking" and "what the physician is doing," it is "recognized as a really critical piece of medical care. So you cannot just be providing medical care without an appropriate record." (Board Hearing Tr. 13.) He noted the importance of a good medical record where, for example, a primary care physician and a psychiatrist coordinate care or where one physician takes over for another. "It's acceptable and absolutely demands of a physician to provide and produce an appropriate medical record. And if there isn't one, we don't know what happened." (Board Hearing Tr. 14.)

{¶36} Far from simply assuming that Dr. Mahajan did not perform anything that was undocumented, the board considered the entirety of the medical records, testimony from Dr. Mahajan, and testimony from three experts to determine whether Dr. Mahajan was documenting the treatment of his patients appropriately. Upon determining that, in some respects, there were charting deficiencies, the board conformed its discipline to those deficiencies. Rather than suspend Dr. Mahajan from practice, Dr. Steinbergh proposed, and the board agreed, to impose probation with specific conditions designed to improve Dr. Mahajan's record-keeping. As Dr. Steinbergh explained, Dr. Mahajan "needs to undergo a good medical record course or courses to improve his ability to

produce the record that is recognizable by the medical community." (Board Hearing Tr. 16.)

{¶37} The Supreme Court of Ohio has stated that, "when 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. The reason the General Assembly provided " 'for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of [individuals] 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.

{¶38} The board has authority to adopt rules to carry out the purposes of R.C. Chapter 4731. See R.C. 4731.05(A). The board need not, however, adopt rules concerning "every conceivable act of practice that falls below minimal standards." *Johnson v. State Med. Bd. of Ohio* (Sept. 28, 1999), 10th Dist. No. 98AP-1324. The absence of a specific rule does not, as Dr. Mahajan contends, render board interpretation of the standard of care ad hoc or otherwise invalid.

{¶39} Here, Dr. Karp testified, and the hearing examiner found, that the standard of care applicable to a physician providing psychiatric care to juveniles includes documentation of certain discussions, treatments, and medication regimens, including the following: psychiatric evaluations, therapeutic levels of mood-stabilizing drugs, diagnostic criteria in support of diagnostic-manual diagnoses, informed consent, and for juvenile patients prescribed antipsychotic medication, certain testing and discussions

about tardive dyskinesia. The board agreed and conformed its discipline to its findings. According deference to the board's interpretation of the technical requirements of the practice of medicine, we conclude that the board did not err by doing so.

{¶40} In arguing otherwise, Dr. Mahajan relies on our decision in *Mathew v. State Med. Bd. of Ohio* (Nov. 5, 1992), 10th Dist. No. 92AP-199. In *Mathew*, we reversed a trial court's modification of the penalty imposed by the board against Varughese Mathew, D.O., but affirmed the trial court's conclusion that the board's order was supported by reliable, probative, and substantial evidence. In doing so, we examined two findings of fact by the hearing examiner—one that found Dr. Mathew violated the standard of care by failing to document his reasons for not providing standard post-operative treatment for breast cancer, and another that found he violated the standard of care by failing to discuss treatment options with the patient (identified as patient 4). The hearing examiner based his findings on the opinion of an expert who testified that his opinion might be different if Dr. Mathew had discussed the options with patient 4 and had consulted with other physicians before concluding that she had no treatment options. Because the hearing examiner also found that Dr. Mathew, in fact, had these other conversations, we limited the finding that Dr. Mathew violated the standard of care by failing to involve patient 4 in discussions about treatment options and noted the inconsistency in the findings for the board's evaluation on remand. Nevertheless, we concluded that "the overall board's decision with respect to Dr. Mathew's treatment falling below the minimum standard of care with patients 1, 2 and 4 is supported by reliable, probative and substantial evidence, and is in accordance with law."

{¶41} Although the *Mathew* opinion provides little guidance applicable to this case, it appears generally to support the principle that a physician may violate the standard of care by failing to document certain discussions and evaluations, where the evidence supports that failure. As we discuss below, the board found that Dr. Mahajan failed to have and/or document certain necessary discussions with patients and their families, including discussions about medication regimens and possible side effects.

{¶42} In short, we defer to the board's interpretation of the technical requirements for the practice of medicine and conclude that the board did not err by determining that the standard of care applicable to Dr. Mahajan includes documentation of certain discussions, treatments, and medication regimens. Therefore, we overrule his first assignment of error.

D. Assignment of Error No. 2

{¶43} In his second assignment, Dr. Mahajan contends that, even if charting deficiencies can serve as proof that a physician violated the standard of care, the conclusion that he violated the standard of care is not supported by reliable, probative, and substantial evidence. Within this assignment, Dr. Mahajan raises a number of issues, which we address before turning to the merits.

1. Consideration of Dr. Mahajan's Testimony

{¶44} Dr. Mahajan contends that the hearing examiner erred by disregarding his testimony about his care of patients. Dr. Mahajan cites, in particular, the hearing examiner's conclusion that Dr. Mahajan, who had a busy practice, could not "accurately recall details of visits from years before." (RR 97.) While the hearing examiner did not

disregard Dr. Mahajan's recollections of undocumented events entirely, he afforded them "little weight." (RR 97.)

{¶45} As the trial court stated, a fact-finder is free to believe all, some or none of a witness's testimony. *D'Souza v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-97, 2009-Ohio-6901, ¶17. Given the number of patients Dr. Mahajan saw in a six-year span and the passage of time, the hearing examiner questioned the accuracy of Dr. Mahajan's recollection about actions taken with respect to specific patients. The board accepted the hearing examiner's findings of fact in this respect, and, as the fact-finder, the board was free to do so.

2. Reliability of Dr. Karp's Testimony

{¶46} Dr. Mahajan also questions the hearing examiner's reliance on Dr. Karp's testimony. In his brief, Dr. Mahajan contends that Dr. Karp's expert testimony was unreliable, in part because he lacked the experience to understand Dr. Mahajan's busy, urban practice. He also contends that Dr. Karp made a number of errors in his opinion, and, therefore, his opinions and testimony are not reliable, probative, and substantial evidence on which the board could rely.

{¶47} Just as with the testimony of Dr. Mahajan and the other witnesses, however, the board was free to judge the credibility of Dr. Karp's testimony and afford it weight accordingly. See *Mathew* ("The medical opinions come from the medical experts, and the trier of fact (the board) was entitled to determine the credibility of the witnesses and the weight to be given to their testimony."). The hearing examiner recognized that Dr. Karp's testimony contained mistakes, and the report and recommendation identifies several examples. Taking these mistakes into account, the

hearing examiner found that, "because of inaccuracies in Dr. Karp's reading of some of Dr. Mahajan's medical records, his opinions must be closely examined in conjunction with the medical records." (RR 96.) Overall, however, the hearing examiner found Dr. Karp to be a reliable and objective expert who not only had experience in psychiatry, but also had experience treating both adults and children. Given the hearing examiner's careful consideration of Dr. Karp's credentials, experience, and testimony, as well as the hearing examiner's comparison of Dr. Karp's testimony against the medical records, the trial court did not err in concluding that Dr. Karp's opinions and testimony were reliable, probative, and substantial evidence on which the board could rely.

{¶48} We turn, then, to the specific findings and conclusions at issue.

3. Failure to Complete and/or Document Psychiatric Evaluations

{¶49} The board adopted the hearing examiner's finding that Dr. Mahajan failed to complete and/or document psychiatric evaluations for Patients 1, 3, 4, 5, 6, 7, 9, and 10. In his report and recommendation, the hearing examiner based this finding on Dr. Karp's report and testimony, as well as the medical records, which confirmed the absence of adequate documentation.

{¶50} Dr. Mahajan contends that, while Dr. Karp testified as to the necessary elements of a psychiatric evaluation, he did not testify that each element is always required. We agree. Dr. Karp stated: "I certainly do not expect to see an initial evaluation including all elements as recommended in the practice parameters or guidelines. But I do expect to see some semblance of understanding of the patient's presenting problem, its development over time, sufficient to formulate a reasonable psychiatric diagnosis which then should be associated with an initial and reasonable

treatment plan." (Tr. 42.) Using these parameters, Dr. Karp analyzed the record for each of the ten patients and concluded that, for eight of them, Dr. Mahajan's documentation of a psychiatric evaluation was either absent or deficient. In combination, Dr. Karp's report, his testimony, and the medical records, are reliable, probative, and substantial evidence on which the board could rely to make its findings.

4. Failure to Order and/or Document Therapeutic Levels of Depakote and Tegretol

{¶51} As to Patients 2 and 8, the board adopted the hearing examiner's finding that Dr. Mahajan failed to do the following: (1) order and/or document therapeutic levels of Depakote for Patient 2; (2) order and/or document follow-up therapeutic levels of Depakote for Patient 8; and (3) order and/or document therapeutic levels of Tegretol for Patient 8. Dr. Mahajan disagrees with these findings.

{¶52} As a general matter, Dr. Karp explained that lab work establishing the blood concentration of medication in a patient prescribed mood-stabilizing drugs, like lithium, Depakote, and Tegretol, is important for the following reasons: (1) to establish that effective levels are present; (2) to ensure that harmful levels are not present; and (3) to ensure the patient is taking the medication. (Tr. 103-04.) He said that initial testing would be done to establish blood levels once a patient is stabilized on the medication, typically within a week, and then again, "in the initial year, outpatient, somewhere between once every month to once every three, possibly even four months." (Tr. 106.)

{¶53} Dr. Polster similarly testified that the purpose of testing to establish blood levels for Depakote includes the following: (1) to document the presence of a

therapeutic range of the medication; (2) to ensure the patient is complying with the dosage instructions; and (3) to see if the medication is "affecting the body in any way." (Tr. 896.) When asked how frequently he would send a patient on Depakote for lab tests, he responded: "Once I have a patient on Depakote, on a dosage that I consider stable, I'll send them about every six months to get those things checked." (Tr. 897.)

{¶54} Dr. Mahajan prescribed Depakote to Patient 2 from December 2003 to March 2004. There is no dispute that he did not order lab work to establish blood levels of Depakote for this patient.

{¶55} As noted, Dr. Karp testified generally that testing would normally be done for a patient prescribed Depakote. As for Dr. Mahajan's treatment, Dr. Karp said that "bloodwork" relating to mood stabilizers, including Depakote, was "absent basically" for the patients prescribed these drugs, including Patient 2. (Tr. 104.)

{¶56} Dr. Mahajan testified that lab work was unnecessary for Patient 2. ("Absolutely not, sir. It was not essential." Tr. 431.) He also said that the decision whether or when to do bloodwork is subject to a physician's clinical judgment, and it becomes more important with lithium, Tegretol, and Digoxin hard medicines. (Tr. 432.) Dr. Gutheil testified that Patient 2 stopped taking Depakote before or about the time blood levels would be needed. (Tr. 717-18.)

{¶57} Based on the testimony of Drs. Mahajan, Gutheil, and Polster, the hearing examiner could have concluded that Dr. Mahajan did not violate the standard of care by failing to order lab work for Patient 2, who was on Depakote for about four months. However, Dr. Karp's testimony, as supported by the medical records, was reliable,

probative, and substantial evidence on which the hearing examiner could rely to conclude that Dr. Mahajan's treatment of Patient 2 did violate the standard of care.

{¶58} Dr. Mahajan first prescribed Depakote to Patient 8 during a hospital stay in March 2002, when lab work established blood levels for the drug. He discontinued Depakote during a hospital stay in June 2003, when he prescribed Tegretol. He discontinued Tegretol at an office visit on July 28, 2003. Other than the lab work performed during the hospital stay in March 2002, there was no record of testing to establish or monitor blood levels for Depakote or Tegretol for this patient.

{¶59} As we discussed above, Dr. Karp testified generally about the testing that would normally be done on patients taking Depakote and Tegretol. Again, as to Dr. Mahajan's treatment, he said that "bloodwork" relating to mood stabilizers, including Depakote and Tegretol, was "absent basically" for the patients prescribed these drugs, including Patient 8. (Tr. 104.)

{¶60} Also, as noted, Dr. Polster testified generally about testing relating to Depakote. When asked about Patient 8, for whom Depakote had been prescribed for more than a year, Dr. Polster stated: "I would say that I would at least like to monitor those parameters once a year, and I know practitioners that will monitor them once a year. So I would want those things checked at least yearly." (Tr. 898.)

{¶61} Dr. Gutheil testified that he "had some mild reservations about" Dr. Mahajan's treatment of Patient 8. (Tr. 721.) He noted that Patient 8 was on Depakote "for a significantly long period of time" and on Tegretol "for a moderately short" period of time. (Tr. 721.) "And in both those cases, lab testing would be indicated. Tegretol has a blood risk factor and Depakote has a liver risk factor." (Tr. 721.) He also said that

"the standard of care would require those to be done." (Tr. 721.) He acknowledged some difficulty with Patient 8's compliance with requests for testing, but stated that "[t]he appropriate response would have been to further emphasize the importance and/or discontinue the medication, which of course is risky because then the patient has the untreated symptoms." (Tr. 721.)

{¶62} In his brief, Dr. Mahajan contends that Dr. Gutheil did not testify that Dr. Mahajan's treatment of Patient 8 fell below the standard of care. We agree that Dr. Gutheil was somewhat equivocal on that point. He stated that Dr. Mahajan's failure to order testing fell below the standard of care, then stated that it might not have fallen below the minimum standard, and then concluded by stating that Dr. Mahajan's treatment of Patient 8 deviated from the standard of care. (Tr. 721-23.)

{¶63} The testimony of Dr. Karp was not equivocal, however. He testified generally that testing should be ordered once a patient prescribed Depakote or Tegretol is stabilized and then monitored periodically thereafter, every one to four months. Even Dr. Mahajan, when discussing Patient 2, said that testing becomes more important when Tegretol is prescribed. (See Tr. 432.) Dr. Polster testified that, as to Depakote, he would send a patient for testing every six months. Patient 8 was on Depakote for well over a year.

{¶64} Even if we were to disregard Dr. Gutheil's testimony as to Patient 8 entirely, Dr. Karp's testimony would support the hearing examiner's conclusion that Dr. Mahajan violated the standard of care with respect to his treatment of Patient 8 by failing to order follow-up testing for Depakote and by failing to order testing for Tegretol. Although Dr. Polster does not appear to have reached a conclusion regarding the use of

Tegretol for Patient 8, Dr. Polster's testimony supports the conclusion regarding the use of Depakote for this patient. Accordingly, we conclude that reliable, probative, and substantial evidence supports the hearing examiner's conclusions regarding Patient 8.

5. Failure to Document Diagnostic Criteria

{¶65} The Diagnostic and Statistical Manual ("DSM") was introduced in the 1950's as a way to standardize psychiatric diagnoses. The current version is the Diagnostic and Statistical Manual IV, Text Revised. In general terms, the manual identifies mental disorders, provides corresponding codes for purposes of diagnosis and shorthand communication, and identifies relevant criteria that may support a diagnosis.

{¶66} Dr. Karp testified that, although professional associations recommend that psychiatrists conform to DSM standards in making a diagnosis and identifying the criteria necessary for reaching that diagnosis, "[f]ew psychiatrists outside of academia conform to that recommendation." (Tr. 79.) "But what is commonly done is that we document sufficient criteria, usually not just one, but multiple criteria that the average practitioner would think * * * reasonably reflects the diagnosis that the doctor made." (Tr. 79.)

{¶67} As for diagnoses contained within Dr. Mahajan's records, Dr. Karp's report stated: "The majority of diagnoses are specified as numbers, presumably from the [DSM]. In no case are criteria described matching the designated code and fulfilling [the] criteria for the disorder." (State's Exhibit 12 at 2.)

{¶68} Dr. Mahajan testified that the manual is flexible, its use is controversial, and it does not have the force of law. Dr. Gutheil testified that there was a consistency

between Dr. Mahajan's diagnoses and the other information contained within his treatment records for Patients 1 through 10.

{¶69} The hearing examiner concluded that, while a practitioner is not required to use the DSM as a diagnostic tool, Dr. Mahajan chose to use DSM diagnosis codes. Dr. Mahajan did not, however, consistently identify the relevant criteria necessary for reaching a diagnosis. Dr. Karp's testimony and report, as supported by the medical records, constitute reliable, probative, and substantial evidence and support the board's adoption of the hearing examiner's findings.

6. Failure to Document Informed-Consent Discussions

{¶70} Dr. Karp testified about the importance of having an informed-consent discussion with a patient to make that patient "aware of the treatment that is recommended, the benefits, common, serious, expected side effects of the treatment that is recommended, the alternatives, including no treatment, and the rationale for the specific treatment that is identified." (Tr. 98.) In his report, Dr. Karp stated that there are no indications that "Dr. Mahajan documented an initial, or ongoing, informed consent discussion" concerning his diagnoses or recommended medications for Patients 1 through 10. (State's Exhibit 12 at 3.) Dr. Mahajan testified, however, that he always discusses with each patient or guardian his diagnoses and the medication he prescribes.

{¶71} The hearing examiner found that Dr. Mahajan did not adequately document initial or ongoing informed-consent discussions, and the board adopted this finding. Dr. Karp's report is reliable, probative, and substantial evidence, and it supports this finding.

{¶72} In arguing to the contrary, Dr. Mahajan relies on *Bedel v. Univ. OB/GYN Assoc., Inc.* (1991), 76 Ohio App.3d 742. In *Bedel*, the spouse of a deceased patient brought a medical malpractice suit that alleged the patient had not been adequately informed about the dangers associated with an amniocentesis. The trial court granted summary judgment in favor of the defendants. On appeal, the plaintiff argued that the consent forms did not identify the doctor who performed the procedure and, therefore, failed as informed consents under R.C. 2317.54. The First District Court of Appeals rejected that argument. The court went on to say that, even if the absence of a doctor's identity on the form were relevant to determining liability for the tort of lack of informed consent, the affidavit of one of the defendant doctors said that he informed the patient that a certain doctor would be performing the amniocentesis. The court then said that, because the plaintiff had not offered contrary evidence to dispute the doctor's affidavit and because informed consent can be given orally, "we conclude that the decedent, as a matter of law, was informed of and consented to" the specified doctor's performance of the procedure. Id. at 745. Nevertheless, the court went on to reverse the grant of summary judgment because issues of fact remained as to whether the informing doctor informed the patient of a material risk.

{¶73} *Bedel* has nothing to do with the issues before us in this case, which considers whether Dr. Mahajan should have and did document informed-consent discussions for purposes of determining whether he violated the standard of care under R.C. 4731.22(B)(6). Dr. Mahajan's reliance on *Bedel* in this context is misplaced and does not refute the evidence supporting the finding that he did not adequately document informed-consent discussions.

7. Failure to Document Adverse Effects of Medication

{¶74} The board originally alleged that Dr. Mahajan failed to adequately document the presence or absence of adverse effects for medications prescribed to Patients 1 through 9. Upon review of the medical records, however, the hearing examiner found, and the board adopted the finding, that Dr. Mahajan had failed to adequately document the adverse effects of medication only with respect to Patients 6 and 9. The medical records serve as reliable, probative, and substantial evidence to support the hearing examiner's finding.

8. Failure to Discuss and/or Document a Discussion About Tardive Dyskinesia

{¶75} Dr. Mahajan prescribed antipsychotic medication to Patients 2, 5, 7, 8, 9, and 10. Dr. Karp testified that these medications can cause tardive dyskinesia, or involuntary twitches or jerks, as a side effect. He said that, for patients prescribed these medications, particularly children who take them for a long period of time, it is important to discuss this side effect with the patient or parents "so that they know what to look for, they know what to report and when to report it." (Tr. 113.) Upon reviewing Dr. Mahajan's records, Dr. Karp concluded that Dr. Mahajan did not document an initial or follow-up discussion about tardive dyskinesia for Patients 2, 5, 7, 8, 9, and 10, all of whom were prescribed antipsychotic medications, beyond a generic consent form.

{¶76} Dr. Karp also testified that, for patients prescribed antipsychotic medications, it is important to perform and document, at least annually, an examination known as the abnormal involuntary movement scale, or AIMS, test. Upon reviewing Dr. Mahajan's records, Dr. Karp found no documentation of a base exam for Patients 2, 5,

7, 8, 9, and 10, all of whom were prescribed antipsychotic medications. He found no documentation of an annual exam for Patients 2, 5, 7, 8, and 10.

{¶77} Dr. Gutheil testified that tardive dyskinesia was a significant problem with patients prescribed antipsychotic medications in the 1950's and 60's, but that it was very rarely associated with newer medications. He said that AIMS testing would only be required if a patient developed certain symptoms.

{¶78} With respect to Patient 2, Dr. Polster stated that, in his view, it is important for any patient prescribed an antipsychotic drug to "be monitored for the presence of any abnormal movements that might be consistent with what's called tardive dyskinesia." (Tr. 885.) When asked whether Dr. Mahajan should have conducted a formal AIMS test, Dr. Polster stated: "I think either a formal AIMS test or documentation of a visual monitoring of abnormal movements." (Tr. 886.)

{¶79} The hearing examiner found that "the evidence overwhelmingly supports a finding that Dr. Mahajan failed to discuss and/or document the discussion, either initially or in follow-up, of tardive dyskinesia for Patients 2, 5, and 7 through 10. Further, Dr. Mahajan failed to perform and/or document [AIMS] examinations at baseline or during treatment for Patients 2, 5, and 7 through 10." (RR 103.) Dr. Karp's testimony and report, Dr. Polster's testimony as to Patient 2, and the medical records, together constitute reliable, probative, and substantial evidence to support the hearing examiner's findings, which the board adopted.

9. Conclusion

{¶80} Having concluded that reliable, probative, and substantial evidence supports the hearing examiner's findings and conclusions, and the board's adoption of

those findings and conclusions, we further conclude that the trial court did not abuse its discretion by affirming the board's conclusion that Dr. Mahajan violated the standard of care. Accordingly, we overrule Dr. Mahajan's second assignment of error.

E. Assignment of Error No. 6

{¶81} Dr. Mahajan contends that the hearing examiner was biased, partial, and prejudiced against him. In support, Dr. Mahajan relies on his prior arguments. Having rejected those arguments, we reject his contention that the hearing examiner was biased, partial or prejudiced against him. Therefore, we overrule his sixth assignment of error.

F. Assignment of Error No. 7

{¶82} In his seventh assignment of error, Dr. Mahajan contends that the trial court erred by not striking the travel restriction contained in the board's order after it found that the restriction was not in accordance with law. At oral argument, the parties agreed that this issue is now moot.

G. Assignment of Error No. 8

{¶83} In his eighth assignment of error, Dr. Mahajan contends that the board was not substantially justified in bringing the action against him, and he should be awarded his attorney fees and costs pursuant to R.C. 2335.59. Having overruled Dr. Mahajan's assignments of error, we conclude that the board was substantially justified in bringing the action, and Dr. Mahajan has no grounds to support an award of fees and costs under R.C. 2335.59. Therefore, we overrule this assignment.

IV. CONCLUSION

{¶84} In summary, we conclude that the trial court did not abuse its discretion in concluding that the board's order was supported by reliable, probative, and substantial evidence and was in accordance with law. Accordingly, we overrule Dr. Mahajan's first, second, third, fourth, fifth, sixth, and eighth assignments of error and conclude that his seventh assignment of error is moot. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.