

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Larry Lee Smith, D.O.,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-234
State Medical Board of Ohio,	:	(C.P.C. No. 11CVF-05-6436)
Appellee-Appellee.	:	(ACCELERATED CALENDAR)
Larry Lee Smith, D.O.,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-235
State Medical Board of Ohio,	:	(C.P.C. No. 11CVF-08-9849)
Appellee-Appellee.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on September 27, 2012

Graff & McGovern, LPA, Douglas E. Graff and Levi J. Tkach,
for appellant.

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

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Appellant, Larry Lee Smith, D.O., appeals from a judgment entry of the Franklin County Court of Common Pleas affirming two orders issued by appellee, State

Medical Board of Ohio ("the Board"), permanently revoking appellant's license to practice medicine in Ohio.

{¶ 2} The Board initiated proceedings against appellant by issuing a notice of opportunity for hearing based upon appellant's criminal conviction in Mahoning County Court of Common Pleas of a violation of R.C. 3719.08(D), which governs labeling and packaging requirements of controlled substances. The Board issued a second notice in April 2010, alleging that appellant engaged in sexual misconduct with two of his patients.

{¶ 3} The Board consolidated the two matters and set a hearing date of February 2, 2011. On the first day of the hearing, appellant failed to appear. Counsel for appellant did appear on his behalf and requested a continuance, citing inclement weather that prevented appellant from travelling. The Board opposed a continuance on the grounds that three other witnesses had travelled without difficulty from the same location to testify. One witness testified that he had been on the roads that morning and that driving conditions were acceptable. The hearing officer denied the motion for a continuance on the basis that it would present unwarranted inconvenience to the witnesses who had travelled long distances to attend the hearing and that there was no indication that inclement weather would actually prevent appellant from appearing. The hearing officer then suggested that appellant could participate in the hearing via telephone, but appellant did not respond to his counsel's telephone calls to arrange this.

{¶ 4} At the second day of the hearing, February 24, 2011, appellant again did not appear. Appellant's counsel stated that appellant had not contacted counsel during the intervening period, and had not responded to counsel's repeated attempts to communicate via telephone, fax, or mailings. Counsel nonetheless again requested a continuance which again the hearing officer denied.

{¶ 5} Two female patients testified at the hearing regarding appellant's sexual misconduct. Both testified that they had sought treatment from appellant for their drug addictions, and that he had prescribed Suboxone for treatment of opiate addiction. Both patients described a pattern which appellant abused his professional sway over the patients and administered drugs for them to render them vulnerable to his sexual advances. One patient testified that she eventually reported the incidents to police, who equipped her with a hidden camera for the next visits to appellant's office. This equipment

recorded, over the course of three visits, inappropriate sexual comments by appellant that strongly suggested appellant had engaged in sexual conduct with this patient.

{¶ 6} The hearing officer rendered a report and recommendation finding both patients to be credible and that their testimony was buttressed by appellant's recorded comments during medical visits. The hearing officer also found that court records substantiated appellant's conviction on the separate drug-labeling charge. The hearing officer recommended permanent revocation and the Board accepted the hearing officer's findings of fact and conclusions of law, permanently revoking appellant's license by order dated May 11, 2011.

{¶ 7} During the course of the above proceedings, the Board advised appellant by letter on December 21, 2010 that it would order him to submit to a mental examination. Appellant did not appear for the scheduled examination, and did not contact the examining specialist or the Board to reschedule the exam. Pursuant to R.C. 4731.22(B)(19), the Board may find that failure to submit to a mental evaluation ordered by the Board may constitute an admission of the allegations of unfitness brought against a medical provider. The Board accordingly issued a notice of summary suspension and a further notice of opportunity for hearing based upon appellant's failure to submit to the mental examination.

{¶ 8} This second notice was heard separately from the other charges against appellant. Appellant did appear for the hearing on this issue, and testified that he did not attend the Board-ordered mental examination because he could not afford it and he believed that previous mental examinations confirmed his fitness. The hearing officer determined that appellant's reasons for not attending the mental examination were due to circumstances within appellant's control and that appellant had failed to contact the Board to explain his concerns and submit the results of his prior mental examinations. The hearing officer recommended that appellant's license be revoked on this basis. The Board adopted this second report and recommendation and again revoked appellant's license to practice medicine in Ohio by order issued July 13, 2011.

{¶ 9} Appellant appealed both orders of the Board to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, and the court consolidated the two appeals. Final determination in this matter issued by the common pleas court is a nunc pro tunc

decision and entry dated February 16, 2012. The court found that the Board's orders were supported by reliable, probative, and substantial evidence and in accordance with law, that the Board had not violated appellant's due process rights during the course of the hearings, and that the Board's order requiring appellant to undergo a mental evaluation was reasonable and based on sufficient evidence. The court of common pleas therefore affirmed the Board's orders in all respects.

{¶ 10} Appellant has timely appealed and brings the following assignments of error:

First Assignment of Error: The lower Court erred in affirming the State Medical Board of Ohio's Order because the Order was not in accordance with law as the Board violated Dr. Smith's due process rights by relying on inadmissible evidence, over Dr. Smith's objections.

Second Assignment of Error: The lower Court erred in affirming the State Medical Board of Ohio's demand for a [mental] health evaluation that was unreasonable and not based on sufficient good faith evidence.

{¶ 11} 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*, 63 Ohio St.2d 108, 111 (1980).

{¶ 12} 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., 63 Ohio St.3d 570, 571 (1992). (Footnotes omitted.)

{¶ 13} 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., 63 Ohio St.3d 705, 707 (1992). 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.*, 80 Ohio App.3d 675, 680 (10th Dist.1992). 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*, 5 Ohio St.3d 217, 219 (1983). 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.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 14} We are handicapped in addressing appellant's first assignment of error because appellant's brief on appeal does not specifically set forth the alleged objectionable evidence upon which the Board relied, nor articulated the basis upon which the Board should have excluded the evidence. Pursuant to our examination of the administrative and judicial record in this matter, we can discern that appellant primarily objected in the common pleas court to the Board's reliance on electronically recorded conversations obtained by means of the hidden camera supplied by police and carried by one of the complaining patients on medical visits to appellant's office. As did the common pleas court, we find that these recordings were sufficiently authenticated and could be considered by the hearing officer, particularly at an administrative proceeding in which the rules of evidence do not strictly apply. See, e.g., *Haley v. Ohio St. Dental Bd.*, 7 Ohio App.3d 1, 6, (2d Dist.1982); *Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP-940, 2011-Ohio-3451 ¶ 37.

{¶ 15} We further find that appellant was not denied due process during these proceedings in any other respect. Appellant's counsel did appear, albeit without the assistance of his client at the first hearing, and was allowed wide latitude in cross-examining the witnesses. The hearing officer's decision at the first hearing not to continue the proceedings was reasonable under the circumstances, particularly since appellant was given the opportunity to participate by telephone. Appellant cannot establish deprivation of due process based upon his own failure to communicate with counsel and make himself

available despite counsel's repeated attempts to contact him. Appellant's first assignment of error is accordingly overruled.

{¶ 16} Appellant's second assignment of error is also not well-taken. The Board indisputably has statutory authority to order a mental examination. The Board may take this action against licensee based upon a showing of a "possible violation," or "[i]nability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness[.]" R.C. 4731.22(B)(19). In this case, the Board has both a good-faith basis for concern regarding appellant's mental health and fitness to practice, and had before it clear indications of a "possible violation." Moreover, the common pleas court did not abuse its discretion in upholding the Board's finding that appellant had not established that circumstances beyond his control excused his attendance at the scheduled examination. Appellant asserts that a new examination was not necessary because he had undergone previous mental examinations that could be relied upon in assessing his current fitness to practice. Appellant's prior mental examinations, which were conducted well before the current allegations arose, would not preclude the Board from ordering a current examination in light of the allegations against appellant.

{¶ 17} Finally, we address appellant's vaguely-articulated arguments that the order to submit to a mental examination somehow violates his Fourth Amendment right to be free from unreasonable searches and seizures. Initially, we note that this argument was not raised before the Board and is therefore waived for purposes of subsequent appeal. *Derakhshan v. State Med. Bd.*, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶ 29. We are unable to discern from appellant's argument before this court whether the alleged "seizure" is the taking of his license or some form of restraint arising from the order to submit to a mental evaluation. Assuming either, Ohio law provides that physicians hold a medical license in Ohio pursuant to the appropriate medical oversight of the Board, and are deemed to have given consent to the statutory constraints attendant thereto as long as due process is afforded. *Smith v. Med. Bd. of Ohio*, 10th Dist. No. 11AP-1005, 2012-Ohio-2472. This includes the obligation to submit to an examination when directed to do so in writing by the Board. R.C. 4731.22(B)(19); *Alexander v. Press*, 10th Dist. No. 77AP-233 (Aug. 9, 1977) (examining and upholding constitutionality of equivalent predecessor subsection R.C. 4731.22(B)(16)).

{¶ 18} We find that the court of common pleas did not abuse its discretion in finding that the Board correctly concluded that appellant must submit to a mental evaluation, and could see his license revoked for refusal to do so. Appellant's second assignment of error is overruled.

{¶ 19} In summary, appellant's first and second assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas upholding the orders of the State Medical Board of Ohio are affirmed.

Judgments affirmed.

BRYANT and TYACK, JJ., concur.
