

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ali Khan, M.D.,	:	
Appellant-Appellant,	:	Nos. 14AP-772
v.	:	(C.P.C. No. 13CV-13794)
	:	and 14AP-773
	:	(C.P.C. No. 12CV-12914)
State Medical Board of Ohio,	:	
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 31, 2015

Dinsmore & Shohl, LLP, Eric J. Plinke and William F. Moss,
for appellant.

Michael DeWine, Attorney General, Katherine Bockbrader
and Kyle C. Wilcox, for appellee.

APPEALS from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} This appeal addresses two orders from appellee, the State Medical Board of Ohio ("the Board"), that permanently revoked appellant, Ali Kahn, M.D.'s certificate to practice medicine and surgery. Dr. Kahn is appealing from the September 25, 2014 judgment of the Franklin County Court of Common Pleas affirming the order of the Board dated September 12, 2012, and the order of the Board dated December 11, 2013, both permanently revoking Dr. Kahn's certificate to practice medicine and surgery in Ohio. For the reasons that follow, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} Dr. Kahn obtained his medical degree in 1996 from the Allam Iqbal Medical College in Lahore, Pakistan. From 1996 through 2000, Dr. Kahn practiced as a medical

officer of internal medicine at Mustafa Ali Hospital in Lahore. In July 2001, Dr. Kahn entered a family medicine residency at St. Vincent Mercy Hospital in Toledo, Ohio, which he completed in July 2004. He was first licensed to practice medicine and surgery in Ohio in 2003 and is also licensed in Florida. He is board certified in family medicine.

{¶ 3} Since 2006, Dr. Kahn has been the CEO and Medical Director of Pure M.D. Lasers and Cosmetics in Toledo and Dayton, Ohio.

{¶ 4} On December 12, 2007, the Board issued an order permanently revoking Dr. Kahn's license, but stayed the permanent revocation subject to suspension for 30 days and subsequent probationary terms, conditions, and limitations for at least two years. The 2007 order was based on Dr. Kahn having pled guilty to one misdemeanor count of theft of a credit card of a nurse while he was working in an emergency department. Dr. Kahn did not appeal this order.

{¶ 5} On April 14, 2010, the Board notified Dr. Khan that it proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio based upon alleged violations that included allowing a registered nurse to perform laser skin procedures on two patients; taking delivery of and using non-FDA approved Botox on his patients; reusing single use medical supplies; making false statements in and falsifying a patient's chart; and violating his December 2007 Board Order.

{¶ 6} In the Board's entry of order dated September 12, 2012 (the "First Order"), the Board permanently revoked Dr. Kahn's license to practice medicine in Ohio.

{¶ 7} Dr. Kahn appealed the First Order to the Franklin County Court of Common Pleas. That court affirmed the Board's Order with one exception, and remanded the matter to the Board to reconsider the allegation that Dr. Kahn had improperly delegated a laser procedure to a nurse with respect to one of two patients. Dr. Kahn did not dispute that he improperly delegated a laser procedure to the second patient.

{¶ 8} Dr. Kahn appealed the common pleas court's decision to the Tenth District Court of Appeals and, on November 4, 2013, this court dismissed the appeal for lack of a final appealable order.

{¶ 9} Upon remand, the Board voted there was insufficient evidence to uphold the improper delegation allegation with respect to the one patient, but still voted to

permanently revoke appellant's license based on the remaining findings in the record. Order of December 11, 2013 (the "Second Order").

{¶ 10} Dr. Kahn appealed the Second Order, and the Franklin County Court of Common Pleas consolidated the two cases. The common pleas court determined that Dr. Kahn was not entitled to a second hearing on remand, that the Board fully considered the record, and that the Board was not required to file a transcript of its December 11, 2013 meeting.

II. Assignments of Error

{¶ 11} Appellant appeals from both the First and Second Orders, assigning the following eight errors for our review:

[I.] The trial court erred in affirming the Board's Second Order, finding that the Second Order is supported by the requisite quantum of reliable, probative, and substantial evidence, and is valid despite the fact that the Board failed to provide Dr. Kahn with notice and an opportunity to be heard, and failed to conduct an adjudicatory hearing before a hearing examiner prior to permanently revoking his license to practice medicine, in violation of R.C. 119.06, R.C. 119.07, R.C. 4731.23, Ohio Adm. Code 4731-13-03, and due process.

[II.] The trial court erred in affirming the Board's Second Order, finding that the Second Order is supported by the requisite quantum of reliable, probative, and substantial evidence, and is valid despite the fact that the Board and its new members failed to receive, review, and consider the entire record in Dr. Kahn's case prior to revoking his license to practice medicine for a second time.

[III.] The trial court abused its discretion in relying upon the hearsay evidence of the Board's investigator to conclude that the record contained reliable, probative, and substantial evidence that the Allergan Botox at issue was not approved by the U.S. Food and Drug Administration.

[IV.] The trial court erred in affirming the Board's First Order, finding that Dr. Kahn violated R.C. 4731.22(B)(10) based upon a violation of R.C. 2925.09, concluding that an exception in R.C. 2925.09(A)(3) did not apply to Dr. Kahn's case.

[V.] The trial court erred in affirming the Board's First Order, finding that Dr. Kahn violated R.C. 4731.22(B)(12) based upon a violation of 21 U.S.C. 331(a).

[VI.] The trial court erred in affirming the Board's First Order, finding that Dr. Kahn re-used a liner for Patient 6's liposuction procedure on March 31, 2009 as charged in the Cite Letter.

[VII.] The trial court erred in affirming the Board's First Order, finding that Dr. Kahn violated R.C. 4731.22(B)(15) in regard to the conditions of limitation the Board placed on him.

[VIII.] The trial court erred in affirming the Board's First Order, finding that Dr. Kahn committed the offense of making a false statement in violation of R.C. 4731.22(B)(5), that he violated R.C. 4731.22(B)(12) by committing the offense of tampering with records under R.C. 2913.42, and that he had the requisite mental state to commit either offense.

III. Standard of Review

{¶ 12} In an administrative appeal pursuant to R.C. 119.12, the common pleas court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *McRae v. State Med. Bd. of Ohio*, 10th Dist. No. 13AP-526, 2014-Ohio-667, ¶ 16. The common pleas court's review is a hybrid form of review in which a court appraises all the evidence, giving due deference to the administrative determination of conflicting evidence and credibility conflicts, but reviewing legal questions de novo. *Id.* at ¶ 17.

{¶ 13} Our review is limited to whether the court of common pleas abused its discretion, but on the issue of whether the Board's order was in accordance with law, our review is plenary. *Id.* at ¶ 18.

IV. First Assignment of Error

{¶ 14} In his first assignment of error, Dr. Kahn asserts that he was entitled to a second adjudicatory hearing in front of a hearing examiner before the Board could revoke his license to practice medicine.

{¶ 15} The order of the Board on December 15, 2013 permanently revoking Dr. Kahn's license to practice medicine was an adjudication order within the meaning of R.C. Chapter 119. Under R.C. 119.06, no adjudication order is valid unless an opportunity for a hearing is provided. However, Dr. Kahn was provided an adjudicatory hearing in November 2011, and the Board's proceedings after remand in December 2013 were a continuation of the initial proceedings in 2011.

{¶ 16} The court of common pleas remanded the matter to the Board "for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a 'light based medical device' as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur's treatment of Patient 7." (Decision and Judgment Entry of April 2, 2013, at 10.)

{¶ 17} The Board did not take additional evidence or consider any new matter; instead, it reviewed the background of the proceedings and, based upon the evidence already in the record, recommended the charge be dismissed. The Board then dismissed the allegations concerning Patient 7 and issued a new order based on the remaining findings and conclusions contained in the record. In other words, Dr. Kahn received the best possible outcome from the remand in that the remanded charge was dismissed.

{¶ 18} In *Douglas Bigelow Chevrolet, Inc. v. Gen. Motors Corp.*, 138 Ohio App.3d 841, (10th Dist.2000) ("*Bigelow I*") and *Douglas Bigelow Chevrolet, Inc. v. Gen. Motors Corp.*, 10th Dist. No. 02AP-1156, 2003-Ohio-5942 ("*Bigelow II*"), this court considered a similar issue involving remand under R.C. Chapter 119. In *Bigelow I*, this court remanded a decision by the Motor Vehicle Dealers Board after finding that the hearing officer's conclusions were not supported by the evidence. This court instructed the hearing officer on remand to reconsider the evidence focusing on certain statutory factors. *Id.* at 846. As in this case, the second order was appealed. In *Bigelow II*, we determined that a second hearing was not necessary either under R.C. 119.09 or under a due process analysis because the review on remand was limited to a review and analysis of the record.

{¶ 19} The same is true in this case. Dr. Kahn has failed to show that he was entitled to a second adjudicatory hearing when the purpose of the remand is to reconsider previously submitted evidence. Nor is Dr. Kahn entitled to present additional evidence in mitigation of his sanction. In *Vaughn v. State Med. Bd. of Ohio*, 10th Dist. No. 95APE05-

645 (Nov. 30, 1995), this court held that no second hearing is necessary where the only issue on remand is the appropriate sanction:

In cases involving the revocation of a certificate to practice medicine, generally the interests are great: the state's interest in protecting the public and the physician's interest in maintaining a livelihood. This appeal, however, involves the narrower question of what due process must be afforded a physician when guilt has already been adjudged and only the issue of sanction remains before the board.

We find that, under these circumstances, a physician has no cognizable due process interest in having another opportunity to be heard.

{¶ 20} Because no additional evidence was required for the Board to make its determination in this case, no additional notice or hearing was required. The first assignment of error is overruled.

V. Second Assignment of Error

{¶ 21} In his second assignment of error, Dr. Kahn argues the December 13, 2011 order of the Board is invalid because the Board, including several new members not present at the original hearing, failed to review and consider the entire record before revoking his license.

{¶ 22} R.C. 119.09 does not require the Board to review the hearing transcript and evidence, but does require that the Board's Order be "based on * * * [the examiner's] report, recommendation, transcript of testimony and evidence, or objections of the parties." It does not create a mandatory duty to read the transcript, but states that the Board's decision must be based on the same. *See Lies v. Ohio Veterinary Bd.*, 2 Ohio App.3d 204, 209-10 (1st Dist.1981).

{¶ 23} Here, the minutes of the December 11, 2013 meeting reflect that the Board reviewed the procedural history of the case, summarized the allegations, reviewed in detail the issue and evidence that was being remanded, and discussed the charge before ultimately deciding to dismiss it on the basis of insufficient evidence. Moreover, the Board engaged in further discussion before deciding to permanently revoke Dr. Kahn's license based on the remaining allegations.

{¶ 24} The record reveals that the Board did consider the evidence and based their review and decision on the record. The second assignment of error is overruled.

VI. Third Assignment of Error

{¶ 25} In his third assignment of error, Dr. Kahn asserts that the court of common pleas relied upon the hearsay evidence of the Board's investigator to affirm the finding that Dr. Kahn used Botox that was not FDA approved.

{¶ 26} The allegation of hearsay is being raised for the first time on appeal to this court, and we deem it to be waived. To the extent Dr. Kahn is arguing that the finding was not supported by the evidence, the record supports the common pleas court's determination that the Botox found in Dr. Kahn's office was not labeled or intended for use in the United States, that the boxes were a different color and lacked the label and hologram that indicated FDA approval. We find no abuse of discretion by the court of common pleas in finding reliable, probative, and substantial evidence to support the Board's finding.

{¶ 27} The third assignment of error is overruled.

VII. Fourth Assignment of Error

{¶ 28} In his fourth assignment of error, Dr. Kahn argues that, even if the Botox he administered to patients was unapproved by the FDA, his use of non-approved Botox fell within a statutory exception to the use of non-approved drugs because he reconstituted the powdered Botox with saline.

{¶ 29} R.C. 2925.09, entitled "Sale or use of Drugs not approved by Food and Drug Administration" provides in pertinent part:

(A) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug, other than a controlled substance, that is not approved by the United States food and drug administration, or the United States department of agriculture, unless one of the following applies:

* * *

(3) A licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes.

{¶ 30} Dr. Kahn argues that he combined two drugs, Botox and saline, when he reconstituted powder Botox prior to use. Dr. Kahn argued that saline is a drug because it can be used to rehydrate a patient by increasing a person's fluid volume. The Board rejected this argument reasoning that, as used by Dr. Kahn for his Botox practice, the saline was not being used as a drug, but rather a diluent in order to reconstitute a powder form of the drug so that it could be injected, and not for the purpose of rehydrating the patient. Saline, when used to reconstitute Botox, is not intended to affect the structure or any function of the body as it would need to in order to fit the definition of the term "drug" as used in R.C. 4729.01(E)(3). We agree. The exception in R.C. 2925.09(A)(3) does not apply.

{¶ 31} The fourth assignment of error is overruled.

{¶ 32} VIII. Fifth Assignment of Error

{¶ 33} In his fifth assignment of error, Dr. Kahn contends that the trial court erred in affirming the Board's First Order, finding that Dr. Kahn violated R.C. 4731.22(B)(12) based upon a violation of 21 U.S.C. 331(a). R.C. 4731.22(B)(12) permits the Board to revoke a certificate to practice medicine for the "[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state." 21 U.S.C. 331(a) prohibits "[t]he introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded." A doctor can be convicted of violating 21 U.S.C. 331(a) for bringing non-FDA approved medicine into the United States for distribution to his patients.

{¶ 34} Dr. Kahn argued that he believed the Botox he bought was legitimate and FDA-approved. The hearing officer made a credibility determination that Dr. Kahn's assertions were not convincing and that many factors should have led Dr. Kahn to realize that there was a problem with the product he received from a particular vendor.

{¶ 35} The fifth assignment of error is overruled.

IX. Sixth Assignment of Error

{¶ 36} The Board found that Dr. Kahn reused a single use canister liner during a liposuction procedure. In his sixth assignment of error, Dr. Kahn argues the evidence does not support this determination.

{¶ 37} Dr. Kahn's employee, Ms. Leatherman, testified that she had reused a liner in order to make sure a liposuction patient would not be turned away. Dr. Kahn had told her to find one or she would be fired, so she took a used liner out of the bio-hazard container, dumped its contents in a toilet, rinsed it and gave it to Dr. Kahn for the procedure. She indicated that Dr. Kahn gave her a \$50 bill as a bonus that day for her resourcefulness.

{¶ 38} Dr. Kahn argues that a photograph contradicts Ms. Leatherman's testimony because it does not show the previous patient's initials scribbled out and the second patient's initials written on the liner.

{¶ 39} Once again, we are faced with a credibility determination that the hearing examiner resolved in favor of Ms. Leatherman and against Dr. Kahn. Unless one completely negates the testimony of Ms. Leatherman as fabricated, there is no reasonable explanation for the \$50 bonus. The court of common pleas did not abuse its discretion in finding that reliable, probative, and substantial evidence supported the Board's finding that Dr. Kahn reused a single use liner for a liposuction procedure.

{¶ 40} The sixth assignment of error is overruled.

X. Seventh Assignment of Error

{¶ 41} In his seventh assignment of error, Dr. Kahn argues that he refuted all the charges against him that arose while he was on probation under the 2007 Board order. Resolution of this assignment of error is dependent on this court agreeing with Dr. Kahn's arguments in his preceding assignments of error. Since we agree with the court of common pleas that reliable, probative, and substantial evidence supports the other violations found in this case, the seventh assignment of error is overruled.

XI. Eighth Assignment of Error

{¶ 42} In his eighth assignment of error, Dr. Kahn challenges the Board's findings that he made false, fraudulent, or misleading statements in the course of his practice of medicine. Dr. Kahn argues that the Board failed to prove his statements were false, and failed to prove that he had the requisite intent to mislead or knowingly falsified records.

{¶ 43} R.C. 4731.22(B)(5) defines a "false, fraudulent, deceptive, or misleading statement" as:

[A] misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

{¶ 44} The evidence in the record shows that Dr. Kahn was not present at Pure M.D. Lasers and Cosmetics on the first day of treatment when Patient 4 had a laser skin treatment, and he was not in the room when a second treatment was performed. The treatments resulted in permanent facial scarring of the patient. However, Dr. Kahn made notations in Patient 4's chart indicating he had done both the procedures or they had been done under his supervision. The statements were clearly false and are supported by reliable, probative, and substantial evidence.

{¶ 45} Intent to deceive may be inferred from the surrounding circumstances. *Hayes v. State Med. Bd.*, 138 Ohio App.3d 762, 770 (10th Dist.2000). As the hearing examiner found:

Dr. Kahn's purpose to defraud may be inferred from the circumstances: Dr. Kahn learned that his patient had suffered an injury related to a procedure performed in his office. He would logically have been concerned about a possible lawsuit and, because of his previous contact with the Board, future Board action as well.

(Record and Recommendation, at 46.)

{¶ 46} Here, the court of common pleas did not abuse its discretion when it found the Board's finding that Dr. Kahn made false statements and tampered with records was supported by reliable, probative, and substantial evidence.

{¶ 47} The eighth assignment of error is overruled.

XII. Conclusion

{¶ 48} Having overruled all eight assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LUPER SCHUSTER and HORTON, JJ., concur.
