

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Waleed N. Mansour, M.D.,	:	
Appellant-Appellant,	:	No. 14AP-829
v.	:	(C.P.C. No. 13CVF-13936)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on May 5, 2015

Dinsmore & Shohl, LLP, Eric J. Plinke and Daniel S. Zinsmaster, for appellant.

Michael DeWine, Attorney General, Kyle C. Wilcox and James T. Wakley, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Appellant, Waleed N. Mansour, M.D., appeals from the September 19, 2014 judgment of the Franklin County Court of Common Pleas affirming the December 11, 2013 order of appellee, the State Medical Board of Ohio ("Board"), reprimanding Dr. Mansour and placing his certificate to practice medicine on probation for at least two years. For the reasons that follow, we reverse the judgment of the court of common pleas, and remand the matter to the Board for further consideration.

I. Facts and Procedural History

{¶ 2} Dr. Mansour obtained his medical degree in 1998 from the Ross University School of Medicine. From 1998 to 2001, Dr. Mansour participated in and completed an internal medicine residency at Western Reserve Care/Northside Medical Center. Since July 2001, Dr. Mansour has been the Medical Director of Mansour Medical Associates,

Inc., where he provides occupational medicine services, internal medicine services, and disability evaluation services. Further, since July 2001, Dr. Mansour has been a member of the teaching faculty of the Western Reserve Care System, Department of Internal Medicine. In October of 2001, Dr. Mansour was certified by the American Board of Internal Medicine. Dr. Mansour was initially licensed to practice medicine in Ohio in July of 2000.

{¶ 3} On April 14, 2010, in the Mahoning County Court of Common Pleas, Dr. Mansour was charged with 66 counts of trafficking in drugs, in violation of R.C. 2925.03(A)(2)(C)(2)(c); 18 counts of aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(2)(C)(1)(a); and 2 counts of tampering with evidence, in violation of R.C. 2921.12(A)(2)(B). All of these charges remain pending.

{¶ 4} Dr. Mansour was subsequently contacted by a Board investigator and completed a lengthy series of interrogatories from a Board attorney dated May 24, 2010. Dr. Mansour failed to keep a copy of the executed interrogatories that he provided to the Board.

{¶ 5} In June of 2010, Dr. Mansour submitted his biennial renewal application of his certificate to practice medicine and surgery in Ohio. On that application, Dr. Mansour answered "no" to question 4 that asked whether at any time since signing his last application for renewal, "[h]as any board, bureau, department, agency, or any other body, including those in Ohio other than this board, filed any charges, allegations or complaints against you?" (Emphasis sic.)

{¶ 6} Three years later, Dr. Mansour voluntarily sought an evaluation of his alcohol use at the Lindner Center of Hope on August 19, 2013. Dr. Mansour understood and believed that his circumstances fit within the "one bite rule" which allows impaired licensees who seek and complete treatment with a Board-approved provider to remain in the private sector for monitoring so long as their acts do not result in a criminal conviction or put patients or others at risk of harm.

{¶ 7} On August 23, 2013, the Board received a letter from the Lindner Center of Hope where Dr. Mansour had undergone a three-day evaluation. The Lindner treatment team determined that Dr. Mansour was impaired to practice due to diagnoses of alcohol abuse, pathological gambling, and an adjustment disorder with mixed anxiety and

depressed mood. The treatment team recommended that Dr. Mansour undergo a minimum 28-day stay at a Board-approved residential treatment facility.

{¶ 8} After considering the indictment, the letter from the Lindner Center, and Dr. Mansour's license renewal responses, the Board summarily suspended Dr. Mansour's license on September 12, 2013.

{¶ 9} On September 24, 2013, Dr. Mansour admitted himself to Glenbeigh Hospital, a Board-approved facility that is an affiliate of the Cleveland Clinic. Dr. Mansour underwent a 72-hour evaluation, including a complete history and physical examination, a urine toxicology screen, a psychiatric evaluation and comprehensive biopsychosocial evaluation, including a chemical use history. The treatment team at Glenbeigh found no data to indicate a diagnosis of alcohol abuse or dependence, along with no current evidence of pathological gambling. Therefore, no in-patient treatment was recommended. The team did find evidence to support a diagnosis of major depression. They recommended intensive one-on-one counseling, and Dr. Mansour remained at Glenbeigh for an additional week of assessment and a stabilization period to monitor his adjustment to Lexapro, an anti-depressant medication. Upon his discharge on October 3, 2013, his final Axis I diagnosis was "[e]valuation for chemical dependency, History of Attention deficit disorder, [and] Depressive disorder, not otherwise specified." (Report and Recommendation, at 4.)

{¶ 10} As a result of the summary suspension, Dr. Mansour requested an administrative hearing. He also requested issuance of a subpoena duces tecum for production of his interrogatory responses previously submitted to the Board. The state moved to quash production of Dr. Mansour's own interrogatory responses claiming they were confidential investigatory information under R.C. 4731.22(F)(5). The next day, the hearing examiner granted the state's motion to quash.

{¶ 11} On October 24, 2013, the administrative hearing went forward. The state submitted the Lindner letter of August 23, 2013, but nothing further from the Lindner Center because the center had failed to obtain a waiver of confidentiality from Dr. Mansour. The state also submitted Dr. Mansour's renewal application. A copy of the indictment was proffered for appeal purposes but denied admission into the hearing

record. The parties stipulated that it was considered by the Board in deciding to summarily suspend Dr. Mansour's license. (Tr. 26.)

{¶ 12} Dr. Mansour offered his evaluative records from Glenbeigh, and his treating physician from Glenbeigh testified via telephone that Dr. Mansour was not impaired. As noted in his discharge summary from Glenbeigh, Dr. Mansour denied the allegations of drug trafficking, claiming that his twin brother wrote fraudulent prescriptions on Dr. Mansour's prescription pad.

{¶ 13} With respect to the 2010 license renewal application, Dr. Mansour submitted a written statement in accordance with R.C. 119.07.

{¶ 14} He stated in pertinent part as follows:

3. In 2010, I was contacted by Medical Board Investigator Angelo Kissos and received other correspondence from the Board at that time. I cooperated with investigatory [sic] Kissos, as well as completed a lengthy series of interrogatories, all of which was requested from me prior to the renewal of my medical license. I unfortunately did not keep a copy of the executed interrogatories which I provided to the Board. I did keep a copy of the correspondence and interrogatories requested of me as provided by the Board, which were dated May 24, 2010. Copies of these interrogatories and correspondence are attached and are identified as Respondent's Exhibit D.

4. In terms of my responses to the questions on my renewal application in June 2010, it never occurred to me that the grand jury indictment applied to the question referenced by the Board in its allegations in the notice of summary suspension. I never intended to deceive the Board. Moreover, the Board was aware of the indictment since they had written to me with questions regarding the charges, as well as dispatched Investigator Kissos to meet with me, all prior to my renewal. See Respondent's Exhibit D.

(Appellant's exhibit F.)

{¶ 15} The hearing examiner issued a "Report and Recommendation" on November 6, 2013. In it, the hearing examiner concluded that Dr. Mansour was *not* impaired because of substance abuse in violation of R.C. 4731.22(B)(26) and that he was

not unable to practice by reason of mental or physical illness in violation of R.C. 4731.22 (B)(19).

{¶ 16} However, the hearing examiner concluded that Dr. Mansour had violated R.C. 4731.22(B)(5) by making a false, fraudulent, deceptive, or misleading statement in his license renewal application. The hearing examiner stated:

Dr. Mansour asserted that he had answered "no" to question 4 because he had not believed that an indictment would necessitate an affirmative response, and because he believed that the Board had already been aware of his indictment. Dr. Mansour's assertions are not persuasive, however. The question was clear and unambiguous. If he had had a question concerning whether he should answer in the affirmative, he should have asked the Board investigator or the enforcement attorney who had sent him the interrogatories.

(Report and Recommendation, at 10.)

{¶ 17} The hearing examiner recommended that the Board reprimand Dr. Mansour and place his license on probation for one year.

{¶ 18} Dr. Mansour filed written objections to the report and recommendation. The state moved to strike portions of those objections, claiming that Dr. Mansour included information that was not presented at the hearing, including a reference to his twin brother, whether Dr. Mansour cooperated with the interrogatory requests, when investigator Kissos approached Dr. Mansour, or when the Board was aware of the indictment. On December 5, 2013, the board president granted the state's motion to strike and redacted large portions of Dr. Mansour's written objections.

{¶ 19} At the Board meeting on December 11, 2013, the Board president agreed with the recommended reprimand, but also argued the probationary term should be doubled to at least two years based upon "concerns regarding Dr. Mansour's depression." (Board Minutes of Dec. 11, 2013.) The Board then voted and approved the findings of fact and conclusions of law, and proposed the order with the increased sanction.

{¶ 20} Dr. Mansour appealed the Board's order to the Franklin County Court of Common Pleas. The common pleas court found the Board's order to be supported by

reliable, probative, and substantial evidence and to be in accordance with law. This appeal followed.

II. Assignments of Error

{¶ 21} Dr. Mansour appeals, assigning the following five errors for our review:

[I.] The Court of Common Pleas erred in finding that the Order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence demonstrating intent to deceive and/or mislead, as required by R.C. 4731.22(B)(5).

[II.] The Court of Common Pleas erred in finding that the Order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because the Order imposes discipline due to mental illness despite the Board's conclusion that Dr. Mansour was not in violation of R.C. 4731.22(B)(19).

[III.] The Court of Common Pleas erred in finding that the Order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because the Board's Secretary and Supervising Member improperly and prejudicially considered a multi-count indictment as evidence for the purposes of R.C. 4731.22(G)(1).

[IV.] The Court of Common Pleas erred in finding that the Order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because the Board's hearing examiner improperly quashed Dr. Mansour's request for a subpoena seeking Dr. Mansour's prior interrogatory responses.

[V.] The Court of Common Pleas erred in finding that the Order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because the Board's [sic] improperly redacted portions of Dr. Mansour's written objections to the Board's Hearing Examiner's Report and Recommendation.

III. Standard of Review

{¶ 22} 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 apprises 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.

{¶ 23} 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 and Fourth Assignments of Error

{¶ 24} The first and fourth assignments of error are related and will be discussed together. In his first assignment of error, Dr. Mansour argues there was insufficient evidence in the record from which the Board could have concluded that his license renewal response was intended to deceive or mislead the Board. In his fourth assignment of error, Dr. Mansour contends it was prejudicial error for the Board to quash a subpoena for his interrogatory responses that would have tended to show that Dr. Mansour did not intend to deceive the Board.

{¶ 25} In his written statement to the Board, Dr. Mansour admitted that he made a false statement on his license renewal application because he failed to disclose the grand jury indictment in Mahoning County. But in addition to proving that he made a false statement, the Board must also prove an intent to mislead. *Rajan v. State Med. Bd. of Ohio*, 118 Ohio App.3d 187, 194-95 (10th Dist.1997); *Webb v. State Med. Bd. of Ohio*, 146 Ohio App.3d 621, ¶ 35 (10th Dist.2001); *Coleman v. State Med. Bd. of Ohio*, 10th Dist. No. 06AP-1299, 2007-Ohio-5007, ¶ 12. Intent to deceive may be inferred from surrounding circumstances, such as when a licensee clearly knows something, which he failed to disclose in response to a direct question. *Hayes v. State Med. Bd. of Ohio*, 138 Ohio App.3d 762, 770 (10th Dist.2000), citing *Krain v. State Med. Bd.*, 10th Dist. No. 97APE08-981 (Oct. 29, 1998).

{¶ 26} Here, Dr. Mansour clearly stated "no" to a direct question. But he also submitted his written statement that he did not believe the question applied to a grand jury indictment, words that do not appear in the question, and that may not be readily

apparent to a lay person, even a highly educated person, untrained in the law. Dr. Mansour also stated that he did not intend to deceive the Board.

{¶ 27} The Board did not have to believe Dr. Mansour when he denied any intent to deceive. "[T]he board is not bound to accept a version of the facts that it does not find credible where there is other evidence in the record to the contrary." *Morgan v. Ohio State Med. Bd.*, 10th Dist. No. 98AP-1625 (Sept. 7, 1999). But here, other than Dr. Mansour's statement on the renewal application, there was no other evidence in the record that he intended to deceive the Board.

{¶ 28} Moreover, Dr. Mansour tried to submit evidence of his cooperation with the Board's action regarding the indictment, but his request for a subpoena was quashed. The Board was deprived of the opportunity to view his sworn interrogatory testimony that could have illuminated the issue. Dr. Mansour's interview with an investigator and submission of sworn interrogatories took place shortly before he filed his renewal application. The timing and submission of the interrogatory responses could imply that his answer on the renewal application was a mistake or misinterpretation of the question rather than an intentional attempt to mislead or deceive the Board. Thus, his answers are relevant and material to the issue of intent.

{¶ 29} The subpoena was quashed on the grounds that the answers contained confidential investigatory information under R.C. 4731.22(F)(5). The purpose of that statute is to "protect[] the confidentiality of patients and persons who file complaints with the board." "[T]he confidentiality privilege which attaches to its investigative files logically addresses the privacy rights of several groups: investigation witnesses, patients, physicians under investigation, and any other person whose confidentiality right is implicated by a board investigation. The persons who possess the confidentiality privilege must waive the privilege." *In re Kralik*, 101 Ohio App.3d 232, 236 (1995). " 'Waiver' is defined as a voluntary relinquishment of a known right." *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435 (2000). "Moreover, it is a well-settled general

principle that no party has the power to waive matters that affect third parties, because the holder of the privilege is the only one who has the power to relinquish it." *Id.*

{¶ 30} Here, the information at issue was Dr. Mansour's own response to the Board's interrogatories. As such, the information contained in his answers pertained directly to him as the subject of an investigation, and he was entitled to waive his privilege of confidentiality in order to defend himself. *See State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 504, 2010-Ohio-5995, ¶ 37 ("Nevertheless, the confidentiality provision in R.C. 4731.22(F)(5) may be waived by the holder of the privilege, which in this case is the doctor being investigated.").

{¶ 31} The common pleas court therefore abused its discretion when it found reliable, probative and substantial evidence that Dr. Mansour intended to deceive the Board and, as a matter of law, the Board erred and the trial court erred when it upheld the Board's decision to quash Dr. Mansour's request for a subpoena duces tecum to produce his interrogatory responses.

{¶ 32} The first and fourth assignments of error are sustained.

Second Assignment of Error

{¶ 33} In his second assignment of error, Dr. Mansour contends the Board's order imposed discipline based on mental illness despite a lack of evidence that he was unable to practice according to acceptable and prevailing standards of care by reason of mental illness under R.C. 4731.22(B)(19).

{¶ 34} Here, both the hearing examiner and the Board made findings of fact that there was a lack of evidence that Dr. Mansour violated R.C. 4731.22(B)(19). Nevertheless, the board president persuaded the Board to increase the hearing examiner's proposed sanction of a one-year suspension to a two-year suspension because she had "concerns regarding Dr. Mansour's depression." (Board Minutes of Dec. 11, 2013.)

{¶ 35} The Supreme Court of Ohio's precedent in *Henry's Café, Inc. v. Bd. of Liquor Control Comm.*, 170 Ohio St. 233 (1959), paragraphs two and three of the syllabus, "prohibits a reviewing court from modifying a sanction that an agency has statutory authority to impose if reliable, probative, and substantial evidence supports the agency's order prohibits a reviewing court from modifying a sanction that an agency has statutory

authority to impose if reliable, probative, and substantial evidence supports the agency's order." *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. No. 10AP-419, 2011-Ohio-431, ¶ 57. In *Staschak v. State Med. Bd. of Ohio*, 10th Dist. No. 03AP-799, 2004-Ohio-4650, ¶ 50, this court noted that we are "restricted by R.C. 119.12, which allows a reviewing court to 'reverse, vacate, or modify the order or make such other ruling' only after finding that the order is not 'supported by reliable, probative, and substantial evidence and is in accordance with law.'" *Aida Ent., Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 01AP-1178, 2002-Ohio-2764, ¶ 13, appeal not allowed, 96 Ohio St.3d 1533, 2002-Ohio-5351.

{¶ 36} We are troubled by the Board's decision to increase a proposed penalty for another violation (that of making a false statement) based on no more than one member's "concerns" about a matter that was not the subject of any discipline. Because we are remanding for the Board to take new evidence with respect to the charge of making a false statement, the Board can also re-examine any penalty it may or may not choose to impose at that time.

{¶ 37} Accordingly, we sustain the second assignment of error.

Third Assignment of Error

{¶ 38} In his third assignment of error, Dr. Mansour argues the Board improperly considered the Mahoning County indictment as evidence for purposes of summarily suspending his license. R.C. 4731.22(G) allows the Board to suspend an individual's certificate to practice without a prior hearing if it has been determined that there is clear and convincing evidence that an individual has violated division (B) of R.C. 4731.22, and that the individual's continued practice presents a danger of immediate and serious harm to the public. Dr. Mansour argues that the Board used the pending charges as evidence that led them to find by clear and convincing evidence that he had violated R.C. 4731.22(B)(5), (B)(19) and (B)(26).

{¶ 39} In *Perchan v. State Med. Bd. of Ohio*, 10th Dist. No. 91AP-270 (June 13, 1991), a hearing examiner admitted into evidence a 21-count indictment against a physician who had pleaded guilty to only one count. This court agreed with the physician that admission of a multi-count indictment, in which the physician had been convicted of only one count, was error.

{¶ 40} However, as a result of the Board proceedings in this action, Dr. Mansour's license is no longer under suspension. As such, while it may have been error to consider the indictment as evidence to summarily suspend his license, the issue is now moot.

{¶ 41} Accordingly, we overrule the third assignment of error.

Fifth Assignment of Error

{¶ 42} In his fifth assignment of error, Dr. Mansour argues that portions of his objections to the hearing examiner's report and recommendation should not have been stricken.

{¶ 43} Despite affirmation by the court of common pleas, an examination of the sealed portions of the record shows that the information the state sought to strike was in the record, specifically in the discharge summary from Glenbeigh, admitted into evidence as respondent's exhibit B and Dr. Mansour's own written statement submitted in accordance with R.C. 119.07. Dr. Mansour's interrogatory responses have already been addressed in connection with assignments of error one and four. Thus, it was error for the Board to strike portions of Dr. Mansour's objections, and they should be considered along with his interrogatory responses upon remand.

{¶ 44} The fifth assignment of error is sustained.

IV. Disposition

{¶ 45} Having sustained the first, second, fourth, and fifth assignments of error, we reverse the judgment of the court of common pleas and remand the case to the State Medical Board of Ohio for further proceedings consistent with this decision and in accordance with law. The third assignment of error is rendered as moot.

*Judgment reversed and
cause remanded with instructions.*

BROWN, P.J., concurs.
SADLER, J., concurs separately

SADLER, J., concurring separately.

{¶ 46} Because I agree that Dr. Mansour's fourth assignment of error should be sustained, I concur in the reversal of the judgment of the Franklin County Court of

Common Pleas and subsequent remand for further proceedings. However, I believe this disposition renders moot the remaining assignments of error. Accordingly, I concur separately.