

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILIP ANDREW COBB,)
)
 Petitioner,)
)
 vs.) Case No. 98-1528
)
 DEPARTMENT OF HEALTH, BOARD)
 OF CHIROPRACTIC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Myers, Florida, on July 17, 1998.

APPEARANCES

For Petitioner: Philip Andrew Cobb
18508 Orlando Road
Fort Myers, Florida 33912

For Respondent: Anne Marie Williamson, Attorney
Department of Health
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2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

The issue is whether Petitioner received the proper grades on the November 1997 chiropractic examination.

PRELIMINARY STATEMENT

By letter dated January 5, 1998, Respondent advised Petitioner that he had received failing grades on two parts of the chiropractic licensure examination that he had taken in

November 1997. By letter filed March 18, 1998, Petitioner protested the scoring and requested a formal hearing.

At the hearing, Petitioner called one witness and offered into evidence six exhibits. Respondent called two witnesses and offered into evidence nine exhibits. All exhibits were admitted, and Respondent Exhibits 2-8 and 10 were sealed.

The court reporter filed the transcript on August 3, 1998.

FINDINGS OF FACT

1. Petitioner graduated in 1994 from a chiropractic university. He was licensed to practice in Michigan and saw 100-200 patients daily while in practice there.

2. In November 1997, Petitioner took the Florida chiropractic licensure examination. The November examination consisted of three parts: technique, physical diagnosis, and x-ray interpretation. (A fourth part on Florida law is irrelevant in this case.) A passing grade is 75 on each of the parts, which are graded separately, not cumulatively.

3. Petitioner earned a passing grade of 85.5 on the physical diagnosis part of the November examination. However, he earned failing grades of 60 and 67.6 on the technique and x-ray interpretation parts, respectively.

4. Petitioner suffers from diabetic retinopathy, which resulted in neovascularization of both eyes with a rupture in the left eye. Petitioner was totally blind in this eye for

several months until the blood drained out of it. The residual scar tissue formed a macula, or traction, that created a black spot in the center of Petitioner's vision with the left eye. This condition has not been corrected by surgery, and Petitioner has been left with a permanent blind spot in the field of vision of his left eye.

5. When Petitioner first received his application for the Florida examination, he did not inform Respondent of his visual disability because it does not affect his ability to read x-rays in viewboxes, which, based on past experience, was how Petitioner assumed that the x-rays would be presented.

6. Later, Petitioner learned that the x-rays were presented on slides projected on large screens for all of the candidates taking the examination. At the November 1997 examination, there were three screens for approximately 160 candidates.

7. Two to three months prior to the test date, Petitioner contacted a regulatory specialist for the Board of Chiropractic to obtain the necessary accommodation, which would consist merely of assigning Petitioner a seat in the first row from the screen.

8. When this person did not return Petitioner's calls, he contacted another person who was employed at the Division of Medical Quality Assurance. Trying to help Petitioner, she

suggested that he bring a physician's note to the examination, and the test administrator would seat him up front.

9. Petitioner did as he was told, but when he appeared at the test site, about 30-45 minutes early, he was told at the door that he could not even bring the note inside with him to show the test administrator. Petitioner entered the test room and found that he had been assigned a seat three rows from the back. He tried to explain his situation to a proctor, but was unable to get his seat moved or permission to approach the screen to see the x-rays better, so he proceeded to take the examination.

10. When the x-rays appeared on the screen, Petitioner tried closing his left eye and squinting, but could not see the x-rays sufficiently to interpret them in this timed section of the examination.

11. Respondent's mishandling of Petitioner's timely and reasonable request for an accommodation for this visual disability rendered the scoring of the x-ray interpretation part of the November examination arbitrary and capricious and devoid of logic and reason.

12. Respondent's solution is to offer a free retest for this part of the examination. If there were no basis in the record to imply an accurate score for the x-ray interpretation part of the November examination, then a free retest would be Petitioner's sole remedy.

13. However, if there is a basis in the record to imply an accurate score for the x-ray interpretation part of the November examination, then this is the preferred remedy because, for the reasons set forth in the conclusions of law, this remedy better restores Petitioner to the position in which he should have found himself after taking the November 1997 examination.

14. In this case, it is possible to imply a correct score for the x-ray interpretation part of the November examination due to: 1) the clear nature of Petitioner's disability; 2) the clear results obtained six months later when Petitioner retook the x-ray interpretation part of the examination with no other accommodation besides being seated in the front row; and 3) the absence of any indication in the record that Petitioner enlarged his knowledge of x-ray interpretation between November 1997 and May 1998.

15. In May 1998, Petitioner passed the x-ray interpretation part with a score of 82.3. It is found that Petitioner would have passed the x-ray interpretation part of the November 1997 examination if Respondent had made reasonable accommodation for his disability. It is further found that, eliminating the unreasonably adverse testing conditions at the November examination, Petitioner's proper test score for the x-ray interpretation in the November 1997 examination is 82.3.

16. Petitioner's performance on the May 1998 examination does not inspire as much confidence on the technique part of the examination. Although he raised his score on the latter examination, he still scored only a 70, which is five points below passing. At this latter examination, Petitioner also failed the physical diagnosis part with a score of 73.7, even though he had passed it with an 85.5 six months earlier. This matter is discussed in the conclusions of law.

17. Petitioner's strongest challenge to the technique part of the November examination is confusion concerning an instruction describing the patient as suffering from an "old compression fracture." Petitioner did not perform the manipulative technique, for which he would have received credit, because he was concerned that the fracture might not have healed; he thus performed only a soft tissue massage.

18. There is insufficient ambiguity in the description of an "old compression fracture" to justify Petitioner's caution, especially considering that he did not avail himself of the opportunity to ask questions of his examiners.

19. Petitioner's other challenges to the technique part of the November 1997 examination are without merit.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida

Statutes. All references to Rules are to the Florida Administrative Code.)

21. The standard in challenges to examinations is whether the examination process was compromised by the agency's arbitrary action or action that is devoid of logic and reason. Harac v. Department of Professional Regulation, 484 So. 2d 1333 (Fla. 3d DCA 1986) and State ex rel. Topp v. Board of Electrical Examiners for Jacksonville Beach, 101 So. 2d 583 (Fla. 1st DCA 1958).

22. As an applicant, Petitioner has the burden of proving that the examination process was so compromised. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

23. As already noted, Petitioner has failed to show that he is also entitled to a passing grade on the technique part of the November examination.

24. However, Petitioner has met his burden as to the x-ray interpretation part of the November 1997 examination.

25. Respondent does not strongly contend that the x-ray interpretation part of the November 1997 examination was valid. However, Respondent contends that the only remedy is to allow Petitioner a free retest.

26. The resolution of all examination-challenge cases must carefully account for Respondent's responsibility to administer examinations in order to protect the public from

unskilled practitioners. It is thus typically more difficult to rescore an improperly scored x-ray interpretation than it is to rescore a written examination. However, when the record permits the rescoring of an x-ray interpretation, there is no less reason to do so than there is to rescore an improperly scored written examination.

27. Respondent erroneously contends that Rule 61-11.013(3), Florida Administrative Code, limits the remedy to a free retake. This rule only requires Respondent to provide a free retake when Respondent's negligence invalidates the results of an examination. The de novo nature of this proceeding permits a wider range of remedies than the limited remedy for which Respondent argues.

28. The failure to relate back the passing score on the x-ray interpretation from the May 1998 examination to the November 1997 examination deprives Petitioner of a full remedy that, at the same time, poses no risk to the public because he passed the x-ray interpretation the first time that he could take it under valid conditions. Rule 64B2-11.003(2), Florida Administrative Code, allows partial retakes only if two parts of the examination are passed and limits the number of partial retakes that a candidate may take before he or she has to retake the entire examination.

RECOMMENDATION

It is

RECOMMENDED that the Board of Chiropractic enter a final order awarding Petitioner a passing grade of 82.3 for the x-ray interpretation part of the November 1997 examination, in place of his invalid score of 67.6, so that he will be deemed to have passed the physical diagnosis and x-ray interpretation parts of the chiropractic licensure examination at the November 1997 administration.

DONE AND ENTERED this 26th day of October, 1998, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.