

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADRIAN SAGMAN,)
)
 Petitioner,)
)
 vs.) Case No. 00-1609
)
 DEPARTMENT OF HEALTH,)
 BOARD OF CHIROPRACTIC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on August 31, 2000, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark L. Rosen, Esquire
18250 Northwest 2nd Avenue
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For Respondent: Cherry A. Shaw, Esquire
Department of Health
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to additional credit for the answer he gave in response to Question 21 on the physical

diagnosis portion of the November 1999 chiropractic licensure examination.

PRELIMINARY STATEMENT

On April 5, 2000, Petitioner filed with the Agency Clerk of the Department of Health (Department) a petition requesting a hearing to contest the failing score that he received on the physical diagnosis portion of the November 1999 chiropractic licensure examination.

On April 14, 2000, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge "to conduct a fact-finding hearing pursuant to Sec[ti]on] 120.57(1), Florida Statutes, and to submit a Recommended Order to [the Department]."

As noted above, the hearing was held on August 31, 2000. At the outset of the hearing, the parties announced that the only matter in dispute was the scoring of Petitioner's response to Question 21 on the physical diagnosis portion of the licensure examination.

During the evidentiary portion of the hearing, four witnesses testified: Petitioner; Lawrence Weiner, D.C.; Juan Trujillo; and John Gentile, D.C. In addition to the testimony of these four witnesses, 15 exhibits (Petitioner's Exhibits 1 through 3 and Respondent's Exhibits 1 through 5 and 7 through 13) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that if the parties desired to file proposed recommended orders, they had to do so within 20 days from the date the transcript of the final hearing was filed with the Division. The hearing Transcript (consisting of one volume) was filed with the Division on October 12, 2000.

On October 31, 2000, the Department filed a Proposed Recommended Order, which has been carefully considered by the undersigned. To date, Petitioner has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Petitioner took the chiropractic licensure examination administered in November of 1999.

2. The practical examination consisted of three parts: "technique," "physical diagnosis," and "x-ray interpretation." The minimum passing score for each part was 75.

3. Petitioner passed the "technique" and "x-ray interpretation" portions of the examination; however, he failed the "physical diagnosis" portion of the examination (PD Test), with a score of 68.

4. On this portion of the examination, candidates demonstrated their knowledge of "physical diagnosis" by responding to test questions, in the presence of two examiners,

verbally and/or, where appropriate, by demonstrating on a "patient." Their responses were independently evaluated and graded by the two examiners. A candidate's final score was the average of the two examiners' scores.

5. Prior to the administration of the PD Test, all examiners were provided with instructions regarding their role in the examination process and the standards they should follow in grading the candidates' performance.

6. Candidates were provided with a Candidate Information Booklet (CIB) in advance of the licensure examination. Among other things, the CIB listed, by category ("acupuncture," "physical diagnosis," "technique," and "x-ray") reference materials that could "be used to prepare for the examination." The list was preceded by the following advisement:

The list is not to be considered all-inclusive. Thus, other comparable texts may be used to prepare for the examination.

Under the category of "x-ray" the following "references" were listed:

Eisenburg, Gastrointestinal Radiology- A Pattern Approach, Hagerstown, MD: Lippencott, Second Edition, 1989.

Paul & Juhl, Essentials of Radiologic Imaging, Hagerstown, MD, Lippencott, Sixth edition, 1993.

Taveras & Ferrucci, Radiology: Diagnosis-Imaging-Intervention, Hagerstown, MD: Lippencott, 1986. Five-volume set, loose-leaf renewed in July 1994.

Yocum, T. R., & Rowe, L. J., Essentials of Skeletal Radiology, Baltimore: Williams & Wilkins, First Edition 1986.

Not on the list under "x-ray" or under any other category was Dr. Robert Percuoco's Radiographic Positioning for the Chiropractor (Dr. Percuoco's Publication), the text book used by Dr. Percuoco in the radiology classes he teaches at the Palmer College of Chiropractic in Davenport, Iowa (Palmer). Palmer was the nation's first college of chiropractic, and is accredited by the Council of Chiropractic Education. Petitioner graduated from Palmer and was taught radiology by Dr. Percuoco.

7. Question 21 on the PD Test was an eight-point "diagnostic imaging" question (with no provision for partial credit) that asked the candidates to "demonstrate a Lateral Thoracic view." Among the six items the candidates had to address in answering the question was the central ray.

8. Page 54 of the Dr. Percuoco's Publication describes what, according to the author, needs to be done to obtain a view of the lateral thoracic spine. It provides, in pertinent part, as follows (Dr. Percuoco's Approach):

Center the central ray to the film. The vertical portion of the central ray should pass posterior to the head of the humeri.

9. In responding to Question 21 on the PD Test, Petitioner relied on the foregoing excerpt from Dr. Percuoco's Publication. He told the examiners that the central ray should be centered to

the film and that the vertical portion of the central ray should pass one inch posterior to the head of the humerus.

10. The two examiners evaluating his performance both gave Petitioner an "A" (or no points) for his response to Question 21. In so doing, they acted reasonably and in accordance with the grading instructions they had received prior to the administration of the PD Test.

11. Dr. Percuoco's Approach (upon which Petitioner relied) is not generally accepted in the chiropractic community.

12. A reasonably prudent chiropractor, in taking an x-ray of the lateral thoracic spine, would do what was necessary to have the central ray pass, not "posterior to the head of the humeri," but "approximately 3 inches inferior to [the] sternal angle," as Drs. Yocum and Rowe, two of the most respected radiologists in the country today, instruct in their text, Essentials of Skeletal Radiology, which was one of the reference materials listed in the CIB (Dr. Yocum's and Dr. Rowe's Approach).

12. Dr. Yocum's and Dr. Rowe's Approach yields a more exact and complete view of the lateral thoracic spine than does Dr. Percuoco's Approach.

13. Because Petitioner failed to incorporate Dr. Yocum's and Dr. Rowe's Approach in his response to Question 21, the examiners were justified in determining that Petitioner did not answer all six parts of the question correctly and that he

therefore should be awarded an "A" (or no points) for his response.

CONCLUSIONS OF LAW

14. Any person seeking a license to practice chiropractic in the State of Florida must take and pass the licensure examination. Sections 460.406 and 460.411, Florida Statutes.

15. Such licensure examination must "adequately and reliably measure an applicant's ability to practice [chiropractic.]" Section 456.017(1)(a), Florida Statutes.

16. The Board of Chiropractic (Board) has been statutorily empowered to, "by rule[,] specify the general areas of competency to be covered by each examination, the relative weight to be assigned in grading each area tested, and the score necessary to achieve a passing grade." Section 456.017(1)(b), Florida Statutes.

17. The Board has adopted such a rule. The rule, Rule 64B2-11.003, Florida Administrative Code, provides as follows:

(1) The Board requires the candidate to pass the practical examination developed by the Department of Health, which measures competency in the following subject areas:

(a) X-ray interpretation of chiropractic and pathology films. The subject areas and associated approximate weights for the x-ray examination shall be as follows:

Congenital anomalies and normal skeletal variants	12-25%
Trauma	15-20%
Arthritic disorders	10-15%
Tumors and tumorlike processes	5-10%
Infection	1-5%

Hematological and vascular disorders 1-5%
Nutritional, metabolic, and endocrine
Disorders 1-5%
Chest 1-5%
Biomechanics 5-10%
Alternative 1-5%
Technique 5-10%
Anatomy 5-10%

(b) Technique, which may include manipulation or adjustment of any of the following anatomical areas: the occiput, cervical, thoracic, lumbar, pelvis, ribs, extremities, soft tissue, and the whole body according to the following approximate weights:

Doctor/patient position 25%
Location of segment 25%
Contact point 25%
Line of drive 25%

(c) Physical diagnosis, which may include any of the following: case history, chiropractic examination, general physical examination, orthopedic examination, neurological examination, X-ray technique and diagnosis, laboratory technique and diagnosis, nutrition, differential diagnosis, and clinical judgment according to the following approximate weights:

Orthopedic and neurological 30-35%
Diagnostic imaging 20-25%
Case history and physical 15-20%
Laboratory 5-10%
Diagnosis 15-20%
Clinical judgment 5-10%

(2) A score of 75% on each subject area in subsection (1) shall be necessary to achieve a passing score on the practical portion of the examination outlined in subsection (1). Upon initial examination, an applicant must take the entire practical examination. The applicant must pass at least two (2) of the three (3) subject areas of the practical examination in order to retake any failed subject area. The applicant may retake a failed subject area only twice, upon which

time the applicant must retake the entire practical examination.

(3) In addition to the examinations in subsection (1), the Board also requires the candidate to pass the examination developed and administered by the Department of Health, which measures an applicant's knowledge of Chapters 455, Part II, and 460, Florida Statutes, and the rules promulgated thereunder. A score of 75% shall be necessary to achieve a passing score on this part of the examination.

(4) An applicant who is a diplomate of the American Board of Chiropractic Roentgenology shall not be required to take the portion of the practical examination measuring X-ray interpretation of chiropractic and pathology films. An applicant who is a diplomate of the American Board of Chiropractic Orthopedics shall not be requested to take the portion of the practical examination measuring orthopedic diagnosis.

(5) Upon written request from an applicant who has been approved for examination, the Department shall provide a translated version of the examination for licensure into a language other than English. If no such translated examination exists, however, the Department shall require the applicant to pay the cost of the translation before employing translators to perform the task.

18. A candidate's performance on the practical examination must be evaluated by at least two examiners. Each examiner is required to "independently evaluate the performance of each candidate." The candidate's final score is arrived at by averaging the independent grades of the examiners. Rules 64B-1.006 and 64B-1.008, Florida Administrative Code.

19. Examiners must meet the qualifications prescribed by Rule 64B2-11.007, Florida Administrative Code, which provides as follows:

(1) In order to be eligible to act as an examiner consultant for the licensure examination, the prospective examiner must meet the following criteria:

(a) the prospective examiner must have been actively licensed in the State of Florida as a chiropractor for at least five (5) years;

(b) the prospective examiner must not have had a chiropractic license or other health care license suspended, revoked, or otherwise acted against. If the prospective examiner has had prior disciplinary actions, he or she may apply to the Board for permission to act as an examiner, and shall provide all information pertinent to that determination.

(c) the prospective examiner must not be currently under investigation by the Department, or by any state or federal agency;

(d) effective February 28, 1996, the prospective examiner must have completed not less than 20 additional hours of post graduate training or education beyond the continuing education required for renewal of licensure during the previous biennium;

(e) the prospective examiner must submit a current vita including a list of all post graduate education.

(2) In order to be eligible to act as an examiner consultant for a certification examination, the prospective examiner must meet the criteria established in subsection (1), and in addition, be certified in the area to be examined.

(3) Individuals who meet the qualifications of subsections (1) and (2) of this rule must be certified pursuant to Rule 64B-1.007,

F.A.C. The Department shall select, from the Board's recommended list, a sufficient number of individuals to insure that there will be an adequate pool from which to draw the requisite number of examiners.

20. Examiners are required, by rule, to attend "a standardization session prior to grading to discuss the scoring criteria and standards." Rule 64B-11.008(1)(d), Florida Administrative Code.

21. Pursuant to Rule 64B-1.013, Florida Administrative Code, a candidate who fails to attain a passing score on the chiropractic licensure examination has "the right to review the examination questions, answers, papers, grades, and grading keys" in the presence of a representative of the Department.

22. If the candidate believes that an error was made in the grading of the examination, the candidate may request a hearing, pursuant to Chapter 120, Florida Statutes.

23. Petitioner requested such a hearing in the instant case to contest the failing score (68, seven points below the minimum passing score) he received on the PD Test.

24. The Department granted Petitioner's request for a hearing and referred the matter to the Division for the assignment of an Administrative Law Judge to conduct the hearing Petitioner had requested.

25. At the hearing, Petitioner had the burden of establishing, by a preponderance of the evidence, that his failing score was the product of arbitrary or otherwise improper

or erroneous scoring. See Harac v. Department of Professional Regulation, Board of Architecture, 484 So. 2d 1333, 1338 (Fla. 3d DCA 1986)("Ordinarily one who fails a licensure examination would shoulder a heavy burden in proving that a subjective evaluation by an expert is arbitrary."); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)(1974)("[T]he burden of proof is on the party asserting the affirmative on an issue before an administrative tribunal. . . . 'As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding--that is, [a] preponderance of the evidence. It is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt.'"); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.").

26. Petitioner failed to submit such proof in the instant case.

27. The only question the scoring of which Petitioner disputes is Question 21 on the PD Test. He was given no points for his response to this question. The Department contends that

this is what Petitioner deserved because he failed to correctly answer that part of the question dealing with the central ray (Central Ray Part). 1/ Petitioner, on the other hand, claims that his answer to the Central Ray Part of the question was correct and that, having answered all parts to the question correctly, he should have received eight points for his response to the question (which would have resulted in his receiving a passing grade, 76, on the PD Test).

28. In support of his position, Petitioner presented the testimony of an independent expert witness, Lawrence Weiner, D.C., who has been practicing chiropractic for the past eight years. He also relied on his own testimony, which he was free to do notwithstanding his interest in the outcome of the case. See Martuccio v. Department of Professional Regulation, 622 So. 2d 607, 609-10 (Fla. 1st DCA 1993). The Department countered Petitioner's evidentiary presentation with, among other things, the testimony of its own chiropractic expert, John Gentile, D.C., a knowledgeable practicing chiropractic physician with 20 years more experience than Dr. Weiner. Given Dr. Gentile's impressive credentials, his considerable chiropractic experience, and his apparent candor and lack of bias, the undersigned has credited his expert testimony (concerning the correctness of Petitioner's answer to the Central Ray Part of Question 21 on the PD Test) over the testimony to the contrary of Petitioner and Dr. Weiner (neither of whom has the credentials or the experience that Dr.

Gentile has). Relying on Dr. Gentile's testimony, the undersigned has determined that Petitioner did not answer the Central Ray Part of Question 21 correctly and that Petitioner therefore did not deserve to receive, in view of the grading instructions for the PD Test, any more points than he did for his response to the question.

29. Because the preponderance of the evidence does not establish that Petitioner's failing score on the PD Test was the product of arbitrary or otherwise improper or erroneous grading, Petitioner's challenge to this failing score should be rejected.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered rejecting Petitioner's challenge to the failing score he received on the physical diagnosis portion of the November 1999 chiropractic licensure examination.

DONE AND ENTERED this 7th day of November, 2000, in
Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of November, 2000.

ENDNOTE

1/ The Department does not take the position that Petitioner
answered any other part of the question incorrectly.

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 should be filed with the agency that will issue the final order in this case.