

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
PODIATRIC MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 00-3259PL
)
GEORGE C. P. MCNALLY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided, and a formal hearing was held on October 11, 2000, at the Destin Community Center, in Destin, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Wings S. Benton, Esquire
Agency for Health Care Administration
Office of the General Counsel
Practitioner Regulation-Legal
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: George C. P. McNally, D.P.M., pro se
Post Office Box 5585
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STATEMENT OF THE ISSUE

Should Respondent's license to practice podiatric medicine be disciplined for failure to keep required written medical records, for prescribing or dispensing legend drugs other than in

the course of his professional podiatric practice, for failing to practice as a reasonably prudent podiatric physician, and for practicing beyond the scope of his license?

PRELIMINARY STATEMENT

On June 13, 2000, Petitioner filed an Administrative Complaint against Respondent. On August 14, 2000, Respondent requested a formal hearing for the purpose of disputing the allegations of wrongdoing contained in the complaint. At the formal hearing, Petitioner offered Exhibits 1-26 which were admitted into evidence without objection. Petitioner presented the testimony of Sara Helen Lowe; Lloyd Eugene Richard; Patient B.R.; Patient B.R.'s wife; Barry C. Blass, D.P.M.; and the Respondent. Petitioner also presented the deposition testimony of Dr. Thomas L. Hicks, M.D. and Richard D. Roth, D.P.M. A Transcript was prepared and filed with the Division of Administrative Hearings on October 27, 2000. Both parties timely provided Proposed Recommended Orders which were considered in the preparation of the Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of podiatric medicine pursuant to Section 20.43, Florida Statutes, and Chapters 456 and 461, Florida Statutes. Dr. McNally has been licensed without interruption to practice podiatry in the State of Florida since October 22, 1996. He has

not been the subject of disciplinary action by the Board of Podiatry.

2. Dr. McNally was licensed as a podiatrist in the State of Florida by the Agency for Health Care Administration (AHCA) in October 1996. He was born on June 19, 1969.

3. Ms. Sara Helen Lowe, a pharmacist, is an inspector for AHCA. She conducted a survey of pharmacies in the vicinity of Destin and Ft. Walton area and discovered that Respondent had written multiple prescriptions for legend drugs which were in the name of Patient B.R. She also determined from her survey that Respondent had prescribed the legend drug Phentermine for six of his patients.

4. A legend drug is a drug for which a prescription is required and includes Schedule II controlled substances under Chapter 893, Florida Statutes. A Schedule II controlled substance is a pharmaceutical which has medical uses and also has a potential for being abused.

5. Mrs. B.R. is the wife of Patient B.R. She was aware that her husband received numerous prescriptions from Dr. McNally for multiple drugs including oxycodone and methadone in 1998 and 1999. Mrs. B.R. was aware that her husband had an open wound on his foot for several years. She was also aware that he suffered chronic and severe pain from this condition.

6. Mrs. B.R. was concerned about the amount of drugs being consumed by Patient B.R. and discussed this matter with Dr. McNally. During this conversation, Dr. McNally told her that, "B.R. was in chronic pain, and that the amount of medication that B.R. took was basically B.R.'s problem."

7. Mrs. B.R. was angry with regard to the amount and type of drugs which were prescribed by Dr. McNally. However, she thought that during this time his foot wound was improving.

8. Mrs. B.R. was aware that Dr. McNally brought drugs to patient B.R.'s hospital room when patient B.R. was hospitalized in November of 1998.

9. Mrs. B.R. was aware that her husband was hospitalized on an emergency basis for an overdose of Tegrital, a drug designed to combat seizures. This drug was not prescribed by Dr. McNally. It was prescribed by another doctor.

10. The pain that patient B.R. suffered caused a hardship in Mrs. B.R.'s home but she preferred that he take the pain medication rather than see him suffer.

11. Patient B.R. lives in Destin with his wife. He is receiving disability payments due to a hip replacement, a knee replacement, and an ulcer on his right foot.

12. In an effort to relieve the pain in B.R.'s foot Respondent prescribed Oxycodone, Endodan, Endocet, Methadone, Roxicet, Roxiprin, Percocet, Oxycontin, Morphine Sulfate Er, MS

Contin, Oramorph SR, and Roxicodone. All of these are forms of oxycodone, methadone, or morphine, alone, or in combinations with acetaminophen. Dr. McNally prescribed approximately 8,705 units of oxycodone, 250 units of methadone, and 510 units of morphine for patient B.R. during the eighteen-month period he treated him. These drugs were prescribed to him subsequent to his first visit to Dr. McNally in 1997. All of the foregoing drugs are Schedule II controlled substances pursuant to Chapter 893, Florida Statutes.

13. Patient B.R. obtained prescriptions during office visits and by telephoning Dr. McNally. When B.R. called Dr. McNally the doctor would ask him what drugs he wished to have and B.R. would tell him. Dr. McNally would then provide the prescription to a pharmacy telephonically. On at least one occasion the prescription was left inside the screen door of Dr. McNally's dwelling for Patient B.R. to pick up.

14. Office visits were on some occasions made at the offices of Dr. Haire from which Dr. McNally occasionally practiced. During office visits Dr. McNally would sometimes take B.R.'s temperature. He checked B.R.'s vital signs approximately every six months.

15. Patient B.R. got prescriptions from Dr. McNally when Dr. McNally was on an extended trip to Europe in early 1998 or 1999.

16. While Patient B.R. was a patient in the local hospital, Dr. McNally brought him drugs because the pain medication provided by the hospital was inadequate. Dr. McNally brought the drugs to his hospital room four or five times. He bought these drugs with patient B.R.'s credit cards. Patient B.R. was in the hospital November 9 through 17, 1998.

17. Dr. McNally submitted insurance claims for patient B.R. for a portion of the time he was treating patient B.R. but eventually stopped.

18. Patient B.R. stopped seeing Dr. McNally. Subsequently, a therapist, Sherry Levitis, recommended that patient B.R. attend a pain management center in New Orleans. As a result of his attendance there he experienced a decrease in needle-like pains. The pain management succeeded in getting B.R. to gradually reduce the amount of pain-killing drugs that he was ingesting.

19. Patient B.R. never received any drug rehabilitation. The pain management clinic taught him that he could get by without the aid of drugs.

20. Patient B.R. went to different pharmacies to have his prescriptions filled because he thought they would question the amount if he received too many drugs from the same business. He was advised by Dr. McNally to avoid making frequent visits to the same pharmacy.

21. Patient B.R. never shared the drugs he obtained with others.

22. The use of these drugs changed patient B.R.'s personality and caused domestic difficulties. He became dependent on the drugs. Buying the drugs was a financial strain.

23. At the time of the hearing patient B.R. still was suffering from the ulcer on his right foot. Though he has had surgery on the ulcer three times, it has not healed.

24. Patient B.R. believes his emergency trip to the hospital was the result of his taking Tegrital which is an anti-seizure medicine. He believes he should have coordinated the taking of this medicine with Dr. McNally and that his failure to do so was the cause of the medical event which resulted in emergency hospitalization. The medical doctor who prescribed the Tegrital never asked him if he was taking other medications.

25. Numerous efforts were made by Dr. McNally to address patient B.R.'s foot condition and the resultant pain, including surgery, orthotics, and pain management efforts.

26. The drugs prescribed by Dr. McNally enabled patient B.R. to get off of his couch and live a more normal life. Patient B.R. had better results in addressing his pain and treating his ulcer with Dr. McNally than with any other doctor.

27. At the insistence of Petitioner, Dr. McNally supplied to Petitioner what he claimed to be patient records in the case of B.R. Petitioner believed these records to be phony.

28. Dr. McNally prescribed Phentermine to patients and asserted that he believed it would enhance circulation in the lower extremities.

29. Dr. McNally has been out of the country often and has prescribed drugs for patients in the United States while he was physically located in Italy. Dr. McNally prescribed drugs for patient B.R. while in Europe. He provided patient B.R. with numerous prescriptions for limited amounts because he did not want him to have too many drugs in his possession at once.

30. Dr. McNally, at the time of the hearing, was not accepting new patients but was continuing to treat some old ones. He no longer carries malpractice insurance.

31. Dr. McNally claimed that the medical records in the case of patient B.R., records which he supplied to ACHA at ACHA's request, were prepared by him either at the time of patient B.R.'s visits, a few days after a visit, or several days after a visit.

32. Dr. McNally used the word "analgesic" when preparing records on patient B.R. He did not enter the actual names of the drugs. "Analgesic" could encompass all drugs which relieve pain.

33. Dr. McNally turned to pharmaceuticals in B.R.'s case because he had tried all available alternative treatments without success.

34. Dr. McNally prescribed drugs for the benefit of patient B.R. in the belief that he was doing what was best for his patient.

35. Barry C. Blass, D.P.M., testified. He is an expert in the field of podiatry.

36. Dr. Blass reviewed the evidence with regard to Dr. McNally and his treatment of patient B.R. and with regard to Dr. McNally's prescriptions of Phentermine for six patients.

37. The pain-relieving drugs prescribed by Dr. McNally for B.R. were far in excess of an amount which would be appropriate. The amounts of legend drugs prescribed were about double that permitted by the instructions contained on the container.

38. Dr. Blass reviewed 229 pages of office notes addressing the treatment of patient B.R. which purported to encompass the period January 2, 1998 through September 29, 1999. Almost all of the notes were identical with the exception of the dates. For the notes to be legitimate, patient B.R. would have had to visit Dr. McNally every day during October 1998 and almost everyday on several other months.

39. It is a deficiency for a physician to fail to note on office notes that a patient has been prescribed legend drugs.

The standard of care requires a physician to sign office notes. Respondent did not sign his notes. Additionally, the office notes were inconsistent with the hospital records of B.R., in that they indicated treatment in Dr. McNally's office when in fact B.R. was on those dates resident in a hospital.

40. The office notes provided by the Respondent were manufactured, are not authentic, were not prepared at or near a time of an actual office visit, if there was an office visit, and are not, therefore, actual medical records addressing the treatment of patient B.R.

41. It is inappropriate for a physician to bring drugs into a hospital for the use of a hospitalized patient.

42. Phentermine is a diet drug which has no podiatric uses and therefore should not be prescribed by a podiatrist. Phentermine is usually prescribed as a remedy for exogenous obesity.

43. Thomas L. Hicks, M.D., is an expert in the field of medicine. His testimony was provided by deposition.

44. Dr. Hicks reviewed the medical records supplied by Dr. McNally, and provided expert opinions based on that review. It is inappropriate for a podiatrist to prescribe Phentermine. Respondent's prescriptions for Phentermine were unsafe and in excess of the customary dosages recommended by the manufacturer.

By writing these prescriptions, Dr. McNally practiced outside of the scope of his license.

45. The amount of Schedule II drugs prescribed for patient B.R. was inappropriate, dangerous, and not justified by the medical records. Dr. McNally wrote the prescriptions for patient B.R. at very frequent intervals which, while peculiar, did not violate the Practice Act. Usually when writing prescriptions for chronic pain a physician prescribes for a longer period of time.

46. Richard D.Roth, D.P.M., testified. He is an expert in the field of podiatric medicine.

47. Dr. Roth reviewed the medical records supplied by Dr. McNally. The prescribing of Phentermine by Dr. McNally was outside of the scope of his license and was potentially dangerous.

48. Dr. McNally's treatment notes were inadequate in that, for example, they do not describe the exact location, size, or depth of an ulcer, among other things. Neither do they describe the types of analgesics prescribed even though massive doses of narcotic analgesics were prescribed. Dr. McNally's records in the case of patient B.R. are grotesquely incomplete. Most of the notes provided by Dr. McNally were canned notes generated by a computer.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes.

50. Section 461.013(1)(l), Florida Statutes, provides the following ground for disciplinary action:

Failing to keep written medical records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, and test results.

51. Section 461.013(1)(o), Florida Statutes, provides the following ground for disciplinary action:

Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances, other than in the course of the podiatric physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the podiatric physician's professional practice, without regard to her or his intent.

52. Section 461.013(1)(s), Florida Statutes, provides the following ground for disciplinary action:

. . . [T]he failure to practice podiatric medicine at a level of care, skill, and treatment which is recognized by a reasonably prudent podiatric physician as being acceptable under similar conditions and

circumstances. The board shall give great weight to the standards for malpractice in s. [766.102](#) in interpreting this section. As used in this paragraph, "repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of \$10,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the podiatric physicians. As used in this paragraph, "gross malpractice" or "the failure to practice podiatric medicine with the level of care, skill, and treatment which is recognized by a reasonably prudent similar podiatric physician as being acceptable under similar conditions and circumstances" shall not be construed so as to require more than one instance, event, or act.

53. Section 461.013(1)(u), Florida Statutes, provides the following ground for disciplinary action:

Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that she or he is not competent to perform.

54. The material allegations set forth in the Administrative Complaint must be proven by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292(Fla. 1987). In this case the allegations of the complaint have been proven by clear and convincing evidence.

55. Rules 64B18-14.002(2)(m), (p), (t), and (v), Florida Administrative Code, set forth the range of penalties which may be imposed upon Respondent for violations of Sections 461.013(1)(l), (o), (s), and (u), Florida Statutes. The guidelines for the four alleged violations contain penalties ranging from reprimand to revocation and provide for fines of \$250 to \$1,000.

56. Rule 64B18-14.003, Florida Administrative Code, provides for the following aggravating circumstances which may affect the quantity of the penalty and the factors which bear on this case have been duly considered in formulating the recommendation. The factors are:

- (1) The severity of the offense;
- (2) The danger to the public;
- (3) The number of repetitions of the offense;
- (4) The length of time since the violation when no further complaints have been made against the licensee;
- (5) The number of times the licensee has been previously disciplined by the Board;
- (6) The length of time the licensee has practiced without having any disciplinary action taken;
- (7) The damage to a patient caused by the violation;
- (8) Any efforts of rehabilitation by the licensee;
- (9) The licensee's actual knowledge of the violation;
- (10) Attempts by the licensee to correct or stop the violation, or the refusal of the licensee to correct or stop the violation;
- (11) Related violations by the licensee in Florida or in another jurisdiction, including

- findings of guilt or innocence, penalties imposed and penalties served;
- (12) The degree to which the licensee was involved in the violation;
 - (13) The degree to which the licensee benefited from the violation;
 - (14) The cost of the disciplinary action.

57. In considering the penalty to be recommended several of the factors listed in Rule 64B18-14.003, Florida Administrative Code, should be considered. These include the fact that the offenses are serious offenses, the potential danger to the public from Respondent's actions was great, and the prohibited activities occurred many times over a substantial period of time. It is particularly disturbing that he presented manufactured medical notes to ACHA. On the other hand, there was no evidence that anyone was actually harmed. Dr. McNally is a relatively young person who has been practicing podiatry for only four years, he believed that what he was doing was in the best interests of his patients, and he received no benefit from the violation.

RECOMMENDATIONS

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the Board of Podiatric Medicine enter a final order finding that the Respondent, George C. P. McNally, failed to keep required medical records during the period January 2, 1998

through September 29, 1999, in violation of Section 461.013(1)(1), Florida Statutes; that the Respondent prescribed legend drugs other than in the course of his professional podiatric practice during the period January 1988 through August 1999, in violation of Section 461.013(1)(o), Florida Statutes; that Respondent failed to practice as a reasonably prudent podiatric physician during the period January 2, 1998 through September 29, 1999, in violation of Section 461.013(1)(s), Florida Statutes; and that Respondent practiced beyond the scope of his license during the period January 1988 through August 1999, in violation of Section 461.013(1)(u), Florida Statutes. It is recommended that Respondent's license to practice podiatric medicine be suspended for a period of six months, that he pay a \$2,000 fine, and that he pay for the cost of the investigation and prosecution. The cost of investigation and prosecution shall be assessed at the time the matter is presented to the Board of Podiatric medicine.

DONE AND ENTERED this 9th day of November, 2000, in
Tallahassee, Leon County, Florida

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of November, 2000.

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.