

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFREY FISHER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 02-4829  
 )  
 DEPARTMENT OF HEALTH, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on March 11, 2003.

APPEARANCES

For Petitioner: A. S. Weekley, Jr.  
Holland & Knight LLP  
Post Office Box 1288  
Tampa, Florida 33602

For Respondent: Cassandra Pasley  
Senior Attorney  
Office of the General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to a passing score on the clinical examination of the July 2002 optometry licensure examination.

PRELIMINARY STATEMENT

By Petition for Formal Proceedings filed November 12, 2002, Petitioner alleged that he took the optometry licensure examination on July 28, 2002, for which a passing score was 75. Petitioner alleged that Respondent initially informed him that his score was 73.10, but later admitted that his score should have been 74.10. Petitioner noted several instances in which the two examiners assigned him passing and failing scores, or substantially divergent scores, for the same item. Petitioner alleged that proper grading of these items would have resulted in him earning a passing score on the examination.

At the hearing, Petitioner called two witnesses and offered into evidence three exhibits: Petitioner Exhibits B, C, and D-4. Respondent called three witnesses and offered into evidence no exhibits. The parties jointly offered 13 exhibits: Joint Exhibits 1-13. All exhibits were admitted. Pursuant to Section 456.014(2), Florida Statutes, the Administrative Law Judge sealed the following exhibits: Joint Exhibits 3-5, 8, and 13.

The court reporter filed the transcript on March 31, 2003. The parties filed their proposed recommended orders on April 10, 2003.

## FINDINGS OF FACT

1. Petitioner earned a bachelor of science degree in mathematics from Baylor University in 1978 and a doctor of optometry degree from the University of Houston in 1982. He subsequently became licensed to practice optometry in West Virginia and Texas. After practicing for years in West Virginia, Petitioner practiced for 13 years in Texas before moving to Florida in June 1999.

2. In July 2002, Petitioner took the clinical examination portion of the optometry licensure examination. To obtain a license, a candidate must pass this portion of the examination, as well as the portions pertaining to pharmacology and ocular disease and Florida laws and rules. Petitioner has already passed these other portions, so the clinical examination is what he must pass to earn a Florida license.

3. The clinical examination is a practical examination in which a candidate must demonstrate specific procedures. Respondent selects the procedures to be demonstrated on the basis of their importance to the practice of optometry.

4. Respondent scores the clinical examination by averaging the scores of two examiners, who score the candidate's work independent of each other. The clinical examination is divided into two sections, and a different pair of examiners score each section.

5. An examiner must be a Florida-licensed optometrist for at least three years prior to the examination. The examiner may not be under investigation or have been found to have violated Chapter 456 or 463, Florida Statutes. Prior to performing their duties, examiners must attend a standardization program, at which they are trained in identifying the skills to be examined and the standards to be applied. All of the examiners for a specific examination date attend the same standardization program, at which Respondent's coordinators present several hundred slides showing correct and incorrect procedures and answer any questions that examiners may have.

6. In general, Petitioner challenges the work of one of Respondent's staff in rescoring his examination and calculating his score as 74.10. Although still not a passing grade, 74.10 is one point closer to passing than was his originally reported score of 73.10. However, this staffperson rechecked her work and later confirmed that 73.10 was the correct score.

7. At the hearing, Petitioner specifically challenged Questions 33(b), 33(c), 35(b), 37(a), and 38(b). These questions are all from the same section of the examination, so the same two examiners scored each of them.

8. In Questions 33(b) and (c), the candidate must perform tonometry on a nondilated eye and demonstrate the proper mires width and correct mire alignment, respectively. For Question

33(b), Examiner 143 gave Petitioner no credit, noting that the mires width was "too thin," and Examiner 242 gave Petitioner no credit, noting that the mires width was "too thin" and there was "not enough flourescein." For Question 33(c), Examiner 143 gave Petitioner no credit, noting that the mires were "no [sic] aligned," and Examiner 242 gave Petitioner no credit, noting that the "mires [were] off."

9. Petitioner has failed to prove error in either score. For Question 33(b), both examiners found the same condition. The candidate, not the examiner, as Petitioner claimed, is responsible for adding flourescein. Insufficient flourescein would leave the mires too thin. Examiner 242's additional note explains the source of Petitioner's error in Question 33(b). Petitioner's argument that he could still obtain a proper ultimate reading despite insufficient flourescein and thin mires lines misses the point of the question, which is to determine if candidates can take the conventional steps toward the ultimate objective of estimating intraocular pressure.

10. For Question 33(c), both examiners drew similar pictures showing that Petitioner's mires lines were misaligned. Petitioner produced no evidence to the contrary. His argument that he could not have answered Question 34 correctly without solving Question 33(c) misses the point of Question 34, which is merely to determine if a candidate can accurately read a dial.

11. For Question 35(b), the candidate must demonstrate proper illumination of an inferior angle of the eye. Examiner 242 gave Petitioner credit, but Examiner 143 gave Petitioner no credit, noting "poor lighting." It is entirely possible that Examiner 242, who was first to examine the demonstrated angle, found adequate lighting, but, due perhaps to patient movement with no readjustment, Examiner 143 found inadequate lighting. In this procedure, only one examiner can check the angle at a time.

12. For Question 37(a), the candidate must determine the presence of iris processes by showing the correct response and clear focus. Examiner 242 gave Petitioner credit, noting that Petitioner "repositioned [patient] and got focus of angle and answered correctly," but Examiner 143 gave Petitioner no credit, noting "no view or focus." As noted by Examiner 242, Petitioner had to reposition the patient and did so to earn credit for this item. Evidently, Petitioner failed to do so for Examiner 143.

13. For Question 38(b), the candidate must demonstrate the specified angle of the eye with proper illumination. Examiner 242 gave Petitioner credit, but Examiner 143 gave Petitioner no credit, noting "no view of angle." Again, the most likely reason for the loss of a view was patient movement without an accompanying readjustment of the focus.

14. Petitioner has failed to prove that he is entitled to any additional points for the clinical examination portion of the optometry licensing examination that he took in July 2002.

CONCLUSIONS OF LAW

15. 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.)

16. As an applicant, Petitioner has the burden of proving the material allegations. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

Petitioner must show that the scoring was arbitrary and capricious. Espinoza v. Department of Business and Professional Regulation, 739 So. 2d 1250 (Fla. 3d DCA 1999).

17. Petitioner has not shown that the scoring process or the scoring itself was arbitrary or capricious. Rule 64B-1.006(2) provides that two examiners shall independently score practical or clinical examinations and their scores shall be averaged. Respondent has followed this procedure, which obviously contemplates the possibility of some discrepancy between scorers. Further, logical explanations exist regarding apparent discrepancies, and, for these questions, the more likely source of error was Petitioner, not his examiners.

RECOMMENDATION

It is

RECOMMENDED that the Board of Optometry enter a final order dismissing Petitioner's challenge to the clinical examination portion of the July 2002 optometry licensure examination.

DONE AND ENTERED this 23rd day of April, 2003, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of April, 2003.

COPIES FURNISHED:

Joe Baker, Jr., Executive Director  
Board of Optometry  
Department of Health  
4052 Bald Cypress Way, Bin C07  
Tallahassee, Florida 32399-1701

William W. Large, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701



A. S. Weekley, Jr.  
Holland & Knight LLP  
Post Office Box 1288  
Tampa, Florida 33602

Cassandra Pasley  
Senior Attorney  
Office of the General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1703

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.