

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 10-0824PL
)
CARLOS S. CONTRERAS, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on March 19, 2010, by video teleconference between Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Ephraim D. Livingston
Assistant General Counsel
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Craig A. Brand, Esquire
2816 East Robinson Street
Orlando, Florida 32083

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Carlos S. Contreras, M.D., violated Section 458.331(1)(c), Florida Statutes (2008), as alleged in the Administrative Complaint,

filed with Petitioner, the Department of Health, on August 31, 2009, in DOH Case Number 2008-14221, and, if so, what disciplinary action should be taken against his license to practice medicine in the State of Florida.

PRELIMINARY STATEMENT

On or about August 31, 2009, the Department of Health filed a one-count Administrative Complaint against Carlos S. Contreras, M.D., an individual licensed to practice medicine in Florida, before the Board of Medicine, in which it alleged that Dr. Contreras had violated Section 458.331(1)(c), Florida Statutes (2008). Dr. Contreras executed an undated Election of Rights form in which he disputed the allegations of fact contained in the Administrative Complaint and requested a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes. On or about September 28, 2009, Respondent filed a Response to Administrative Complaint.

On February 16, 2010, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned the case to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2009). The matter was designated DOAH Case Number 10-0824PL and was assigned to the undersigned.

On February 23, 2010, a Notice of Hearing was entered scheduling the final hearing to be held in Miami, Florida, on

March 19, 2010. On March 12, 2010, an Amended Notice of Hearing by Video Teleconference was entered. The Amended Notice modified the Notice of Hearing by scheduling the hearing to be conducted by video teleconference between sites in Miami and Tallahassee.

On March 17, 2010, the parties filed a Joint Pre-Hearing Stipulation which contains "facts which are admitted." Those facts have been included in this Recommended Order.

At the final hearing, Petitioner had three exhibits admitted. Respondent presented the testimony of Joseph Rosenbaum, Esquire, counsel for Dr. Contreras in the criminal proceedings at issue in this case.

On April 6, 2010, a Notice of Filing Transcript was entered informing the parties that the Transcript had been filed and that their proposed recommended orders were to be filed on or by April 12, 2010. Petitioner filed Petitioner's Proposed Recommended Order timely. Respondent filed Respondent's Proposed Recommended Order the morning of April 13, 2010. It does not appear that the late filing of Respondent's Proposed Recommended Order prejudiced Petitioner. Therefore, the post-hearing proposals of both parties have been fully considered in rendering this Recommended Order.

All references to Florida Statutes in this Recommended Order are to the 2008 version, unless otherwise indicated.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat.

2. Respondent, Carlos S. Contreras, M.D., is, and was at all times material to this matter, a physician licensed to practice medicine in Florida pursuant to Chapter 458, Florida Statutes, having been issued license number 43908, on or about May 19, 1984.

B. Indictment and Conviction of Dr. Contreras.

3. On or about June 2, 2008, Dr. Contreras was indicted in United States of America v. Carlos Contreras and Ramon Pichardo, United States District Court, Southern District of Florida, Case No. 08-20443 CR - Moreno (hereinafter referred to as the "Indictment").

4. Generally, the Indictment alleges that Dr. Contreras was involved in a conspiracy to submit fraudulent claims to Medicare for purported Human Immunodeficiency Virus infusion therapy.

5. As it relates to Dr. Contreras, the Indictment was predicated, in part, upon the following "General Allegation":

6. C.N.C. Medical Corp. ("CNC Medical") was a Florida corporation, purportedly doing business at 1393 S.W. 1st Avenue, Suite #320, Miami, Florida. . . . CNC Medical was a medical clinic that purported to specialize in treating patients with HIV by providing infusion therapy. From in and around November 2002 through in or around April 2004, approximately \$6.8 million in claims were submitted to the Medicare program for HIV infusion services allegedly rendered at CNC Medical.

7. Defendant **CONTRARES**, a resident of Miami-Dade County, was a medical doctor who purported to order and provide HIV infusion services to Medicare beneficiaries at CNC Medical. **CONTRERAS** was also the president, director, and registered agent of CNC Medical.

6. Relevant to this matter, Count 2 of the 12-Count Indictment charged Dr. Contreras with conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349

7. On or about September 11, 2008, Dr. Contreras entered into a Plea Agreement in which he pled guilty to Count 2 of the Indictment, thereby admitting that he was guilty of "knowingly and willfully conspiring with others to execute a scheme and artifice to defraud and to obtain by means of materially false and fraudulent pretenses, representations, and promises money owned by, and under the custody and control of a health care benefits program (as defined as [sic] in Title 18, United States

Code, Section 24(b)), in violation of Title 18, United States Code, Section 1347."

8. On the same date that the Plea Agreement was executed, Dr. Contreras, along with his legal representative, executed and acknowledged the following "Agreed Factual Basis for Guilty Plea":

Beginning in approximately November 2002, and continuing through approximately April 2004, the defendant, Dr. Carlos Contreras ("Contreras"), willfully conspired with his co-defendants, Ramon Pichardo, Carlos Benitez, Luis Benitez, Thomas McKenzie, and others to commit health care fraud, in violation of 18 U.S.C. § 1349. Medicare is a "health care benefit program" of the United States, as defined in 18 U.S.C. § 24. Furthermore, Medicare is a health care benefit program affecting commerce.

Contreras was a medical doctor and owned a medical clinic named CNC Medical Corp. ("CNC"). At CNC, Contreras also employed Dr. Ramon Pichardo. CNC purported to specialize in treating patients with Human Immunodeficiency Virus ("HIV"). From approximately November 2002 through approximately April 2004, Contreras approved approximately \$6.8 million worth of fraudulent medical bills, signed documents containing false information about treatments purportedly provided to HIV patients, and approved medically unnecessary treatments. As a result of Contreras' conduct, the Medicare Program ("Medicare") paid approximately \$4.2 million worth of fraudulent bills to CNC and Contreras.

CNC was a Florida corporation purportedly doing business at 1393 S.W. 1st Street, Suite #320, Miami, Florida. Corporate records display a business address of 1383 S.W. 1st

Street, Suite #320, Miami, Florida. From approximately November 2002 through approximately April 2004, CNC billed the Medicare Program approximately \$6.8 million under Contreras' Medicare provider number, and actually received approximately \$4.2 million in payments. Contreras signed checks drawn on CNC bank accounts and would use these checks to transfer funds to various corporate entities owned and controlled by Carlos and Luis Benitez, and others. In total, Contreras transferred approximately \$1.7 million dollars [sic] to the Benitez brothers.

In or about November 2002, Contreras agreed with his co-conspirators, including Dr. Ramon Pichardo, Carlos Benitez, Luis Benitez, and Thomas McKenzie, to accept HIV patients at CNC and to allow fraudulent bills to be submitted to the Medicare Program under his provided number. Co-conspirators Carlos Benitez and Luis Benitez agreed to provide the staff necessary to operate CNC as an HIV infusion clinic, the Medicare patients that CNC would utilize to bill to the Medicare program, and the transportation for the HIV patients, in return for a share of CNC's profits. At that time, Contreras knew that CNC would need to pay kickbacks to the patients who visited the clinics, and that the CNC would bill Medicare for HIV infusion services three times a week, for up to three months, for each patient.

Contreras's primary job at the CNC was to see patients, sign medical records, and approve expensive and medically unnecessary HIV infusion treatments. Prior to purportedly treating HIV patients at CNC, Contreras worked at one other Benitez controlled HIV infusion therapy clinic, named AH Medical Office, Inc. At th[is clinic], he learned from the Benitez brothers and McKenzie how to make medical records appear legitimate and how to

authorize treatments and sign medical analysis and diagnosis forms for HIV patients, without regard to medical necessity or the patients' particular ailments. Contreras authorized and approved the use of the drug WinRho (also known as Rho D), along with a mix of various vitamin supplements for most HIV patients he was seeing, knowing that the HIV patients did not need WinRho.

. . . .

9. The Agreed Factual Basis for Guilty Plea executed by Dr. Contreras contained the following acknowledgement just above his signature:

The preceding statement is a summary, made for the purpose of providing the Court with a factual basis for my guilty plea to the charges against me. It does not include all of the facts known to me concerning criminal activity in which I and others engaged. I make this statement knowingly and voluntarily and because I am in fact guilty of the crimes charged.

10. On or about November 20, 2008, Dr. Contreras entered a plea of "guilty" to Count 2 of the Indictment. The court adjudicated him guilty, dismissed the other charges, and sentenced Dr. Contreras consistent with the Plea Agreement. At the time of the final hearing of this matter, Dr. Contreras was in the custody of the United States Bureau of Prisons serving a 37-month sentence.

11. Based upon the admissions contained in the Agreed Factual Basis for Guilty Plea quoted in Finding of Fact 8, it is

clear that the crime for which Dr. Contreras' was adjudicated guilty involved a conspiracy in which he actually engaged in health care fraud, and not just a plan to do so.

C. The Relationship of Dr. Contreras' Convictions to the Practice of Medicine.

12. In light of Dr. Contreras' guilty plea to Count 2 of the Indictment and his acknowledgement of the Agreed Factual Basis for Guilty Plea, there is no doubt that Dr. Contreras engaged in the activities outlined in the Agreed Factual Basis for Guilty Plea. It is also clear that all of those activities related to the practice of medicine.

13. As the Department points out in Petitioner's Proposed Recommended Order, "[b]ut for Respondent's license to practice medicine in the state of Florida, he would not have been able to commit the crimes [sic] for which he pled guilty. It was his license to practice medicine that allowed him to work as a physician at CNC Medical Corp., to obtain a [Medicare] provider number, to see patients, to sign medical records, to approve expensive and medically unnecessary HIV infusion treatments and to fully participate in the Medicare program. The foregoing activities were made possible and were a direct result of his status as a licensed Florida physician." Without his license to practice medicine, there could have been no conspiracy to commit health care fraud.

14. Dr. Contreras relies upon a number of "facts" in support of his argument that the crime for which he pled guilty does not relate directly to the practice of medicine:

a. First, Dr. Contreras argues that the crime involved "conspiracy" to commit health care fraud rather than the actual act of health care fraud. Even if technically correct, the Agreed Factual Basis for Guilty Plea clearly outlines activities involving medical care necessary for the conspiracy to exist. Additionally, but for his license to practice medicine, there would have been no conspiracy;

b. Secondly, Dr. Contreras points out that no restrictions were placed on his practice of medicine or his involvement in the Medicare Program or the Medicaid Program in the Plea Agreement. While correct, the emphasis of the criminal matter was on Dr. Contreras' activities relating to defrauding the United States government of millions of dollars, rather than his activities as a physician. The government's interest was a financial one and, therefore, it correctly left his actual practice of medicine to the governmental agencies charged with the responsibility of regulating the practice of medicine;

c. Thirdly, Dr. Contreras points out that the Plea Agreement makes no mention of any breach of the physician-patient relationship. Again, the emphasis of the criminal

matter was on Dr. Contreras' efforts to "steal" government funds rather than the quality or lack thereof of his medical care; and

d. Finally, Dr. Contreras relies upon the testimony of Joseph S. Rosenbaum, Esquire, who represented Dr. Contreras in the criminal matter. According to Dr. Contreras, Mr. Rosenbaum's testimony was presented in order to "explain the meaning of the documents and background (facts) of the underlying criminal case." According to Mr. Rosenbaum, Dr. Contreras was "'duped'" and "'used' by unscrupulous businessmen more clever and ruthless than the Respondent." Mr. Rosenbaum's testimony, for which little in the way of predicate was offered, is rejected as contrary to the facts stipulated to by Dr. Contreras quoted in Finding of Fact 8.

15. The crime for which Dr. Contreras was convicted is a crime that "directly relates to the practice of medicine."

CONCLUSIONS OF LAW

A. Jurisdiction.

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 456.073(5), Florida Statutes (2009).

B. The Charges of the Administrative Complaint.

17. Section 458.331(1), Florida Statutes, authorizes the Board of Medicine (hereinafter referred to as the "Board"), to

impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

18. In its Administrative Complaint, the Department has alleged that Dr. Contreras has committed the act described in Section 458.331(1)(c), Florida Statutes.

C. The Burden and Standard of Proof.

19. The Department seeks to impose penalties against Dr. Contreras, through the Administrative Complaint, that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Contreras violated Section 458.331(1)(c), Florida Statutes, by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes (2009)("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

20. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

D. Section 458.331(1)(c), Florida Statutes.

21. Section 458.331(1)(c), Florida Statutes, defines the following disciplinable offense:

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.

In the Administrative Complaint, the Department alleges that Dr. Contreras violated Section 458.331(1)(c), Florida Statutes,

when he was adjudicated guilty of conspiracy to commit health care fraud.

22. The evidence has clearly and convincingly proven that Dr. Contreras has been convicted of a crime that relates to his practice of medicine as alleged in the Administrative Complaint and described in the Findings of Fact. Dr. Contreras' license to practice medicine constituted the foundation of his adjudication of guilt for conspiracy to commit health care fraud. It was his license to practice medicine that allowed him to work as a physician at CNC Medical Corp., to obtain a Medicare provider number, to see patients, to sign medical records, to approve expensive and medically unnecessary HIV infusion treatments and to fully participate in the Medicare program. Without his license to practice medicine, there could have been no conspiracy to commit health care fraud. These were the facts that formed the bases for Dr. Contreras' guilty plea and adjudication of guilt, and they clearly related to his practice of medicine.

23. The evidence proved clearly and convincingly that Dr. Contreras violated Section 458.331(1)(c), Florida Statutes.

E. The Appropriate Penalty.

24. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority under Section 458.331, Florida Statutes. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

25. The Board's guidelines for a violation of Section 458.331, Florida Statutes, are set out in Florida Administrative Code Rule 64B8-8.001. As it relates to Dr. Contreras' violation of Section 458.331(1)(c), Florida Statutes, Florida Administrative Code Rule 64B8-8.001(2)(c) provides the following penalty range for a first time violation:

From probation to revocation or denial of the license, an administrative fine ranging from \$1,000.00 to \$10,000.00, and 50 to 100 hours of community service.

For a crime related to health care fraud in dollar amounts in excess of \$5,000.00, the penalty range provided in Florida Administrative Code Rule 64B8-8.001(2)(c)1. is "[r]evocation or in the case of application for licensure, denial of licensure and a fine of \$10,000.00."

26. Florida Administrative Code Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following

aggravating and mitigating circumstances are to be taken into account:

- (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
- (b) Legal status at the time of the offense: no restraints, or legal constraints;
- (c) The number of counts or separate offenses established;
- (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
- (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
- (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
- (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.
- (h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
- (i) Any other relevant mitigating factors.

27. Taking into consideration the foregoing aggravating and mitigating circumstances, the Department's requested penalty is consistent with the Board's penalty guidelines.

RECOMMENDATION

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

RECOMMENDED that the a final order be entered by the Board of Medicine finding that Carlos S. Contreras, M.D., has violated Section 458.331(1)(c), Florida Statutes, as described in this Recommended Order, permanently revoking his license to practice medicine in Florida, and imposing a fine of \$10,000.00.

DONE AND ENTERED this 22nd day of April, 2010, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
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 22nd day of April, 2010.

COPIES FURNISHED:

Ephraim D. Livingston, Esquire
Department of Health
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399-3265

Craig Brand, Esquire
Brand Law Firm, P.A.
2816 East Robinson Street, Second Floor
Orlando, Florida 32802

Larry McPherson, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265

Dr. Ana M. Viamonte Ros, Secretary
Department of Health
4052 Bald Cypress Way, Bin A00
Tallahassee, Florida 32399-1701

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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 these cases.