

STATE OF FLORIDA  
BOARD OF MEDICINE

Final Order No. DOH-13-1729-~~FOF~~-MQA  
FILED DATE AUG 26 2013  
Department of Health  
By Brad Sanders  
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

**FILED**

2013 AUG 28 AM 10 53

vs.

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DOH CASE NO.: 2011-08787  
DOAH CASE NO.: 13-1205PL  
LICENSE NO.: ME0076635

JAMES ALEXANDER COCORES, M.D.,

Respondent.

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on August 2, 2013, in Deerfield Beach, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by Jennifer Friedberg, Assistant General Counsel. Respondent was present and represented by Sean Ellsworth, Esquire and Anthony Vitale, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

### RULING ON RESPONDENT'S EXCEPTIONS

The Board reviewed and considered the Respondent's Exceptions to the Recommended Order and ruled as follows:

1. Respondent's first exception is hereby denied for the reasons set forth by the Petitioner in its written response to the exception and because the Board does not have substantive jurisdiction over evidentiary matters, and therefore, does not have the authority to make evidentiary rulings.

2. Respondent's second exception is hereby denied for the reasons set forth by the Petitioner in its written response to the exception and because the Board does not have substantive jurisdiction over evidentiary matters, and therefore, does not have the authority to change factual or legal findings which involve the admissibility of evidence into evidentiary hearing.

### RULING ON PETITIONER'S EXCEPTIONS

The Board reviewed and considered the Petitioner's Exceptions to the Recommended Order and ruled as follows:

1. Petitioner's exceptions to paragraphs 61, 63, 64 and 65 all revolve around the ALJ's mistaken belief that a Respondent cannot be found to have violated both s. 458.331(1)(t), F.S.; malpractice violation, and s. 458.331(1)(q), F.S.; prescribing, dispensing, administering, mixing, or otherwise preparing a

legend drug, including any controlled substance, other than in the course of the physician's professional practice.

Section 458.331(1)(q) reads in part as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the 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 physician's professional practice, without regard to his or her intent.

For some unclear reason the ALJ, when citing to s. 458.331(1)(q), quotes the first sentence but ignores the second portion of charge. Based on this partial reading the ALJ then seems to conclude that if a physician respondent committed medical malpractice when he or she inappropriately prescribed drugs, he or she was clearly practicing medicine when the offending act occurred, and therefore, cannot be found to have been prescribing outside the course of the physician's professional practice in violation of s. 458.331(1)(q).

The second sentence of s. 458.331(1)(q) makes it clear that it is presumed that prescribing, dispensing, administering, mixing, or otherwise preparing any legend drug inappropriately

or in excessive or inappropriate quantities is not in a patient's best interest and by definition "not in the course of the physician's professional practice." In other words, if you are prescribing drug in excessive or inappropriate quantities, it is presumed you are prescribing outside of the course of the physician's professional practice." This provision does not require that you show that physician respondent was a street corner drug dealer or handing prescriptions out of his or her garage, or partaking in some sort of nefarious drug crime. All you have to show is that he or she was inappropriately prescribing, and thus, based on the statute, is presumed to be done outside of the course of the physician's professional practice.<sup>1</sup>

When s. 458.331(1)(q) is read in its entirety and given its full reading, s. 458.331(1)(q) and (t) charges are not mutually exclusive. The board has clearly and consistently endorsed this reading of the two statutes and this reading has been upheld by Florida courts in *Scheininger v. Department of Professional Regulations*, 443 So.2d 387 (Fla. 1<sup>st</sup> DCA 1983) and *Waters v. Department of Health*, 962 So.2d 1011 (Fla. 3d DCA 2007).

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<sup>1</sup>The respondent is allowed of course to attempt to rebut the presumption that the inappropriate prescribing was done outside of the course of the physician's professional practice.

In addition, since the Board is the agency charged with enforcing both statutory provisions, the Board's interpretation is entitled to great deference. *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002); *Miles, Jr. v. Florida A and M University and the Board of Regents*, 813 So. 2d 242 (Fla. 1<sup>st</sup> DCA 2002). Given such, the Board believes that its conclusion of law is as reasonable or more reasonable than the ALJ's in this matter and hereby grants the exceptions for the reasons set forth by the Petitioner in its written presentation.

#### FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference and as amended by the approved exceptions.<sup>2</sup>

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<sup>2</sup> Even though the Board approved the Petitioner's exceptions, it did not provide substitute findings and did not impose any additional penalties for a s. 458.331(1)(q) violation.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be REJECTED. The Board found mitigating circumstances for a reduction of the penalty recommended by the Administrative Law Judge. Specifically, the Board finds that Respondent has been practicing medicine for 30 years with no prior discipline. Additionally, the Board considered the positive testimony of Respondent's patients.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay an administrative fine in the amount of 10,000.00 to the Board within 30 days from the date the Final Order is filed. Said fine shall be paid by money order or cashier's check.

2. Respondent shall document completion of the Laws and Rules course sponsored by the Florida Medical Association (FMA) within one year from the date the Final Order is filed.

3. Respondent's license is **permanently** restricted as follows: Respondent is prohibited from ordering, prescribing and/or dispensing controlled substances.

4. Respondent's license to practice medicine in the State of Florida is hereby **SUSPENDED** for a period of one (1) year with

Respondent receiving credit for the 6 months he has already served under the Department of Health's emergency suspension order.

5. Following the period of suspension, Respondent shall be placed on probation for a period of five (5) years subject to the following terms and conditions:

a. Respondent shall appear before the Board's Probation Committee at the first meeting after said probation commences, at the last meeting of the Probation Committee preceding termination of probation, triannually, and at such other times requested by the Committee. Respondent shall be noticed by Board staff of the date, time and place of the Board's Probation Committee whereat Respondent's appearance is required. Failure of the Respondent to appear as requested or directed shall be considered a violation of the terms of probation, and shall subject the Respondent to disciplinary action. Unless otherwise provided in the Final Order, appearances at the Probation Committee shall be made triannually.

b. Respondent shall not practice except under the indirect supervision of a **BOARD CERTIFIED** physician fully licensed under Chapter 458 to be approved by the Board's Probation Committee. Absent provision for and compliance with the terms regarding temporary approval of a monitoring physician set forth below, Respondent shall cease practice and not practice until the

Probationer's Committee approves a monitoring physician. Respondent shall have the monitoring physician present at the first probation appearance before the Probation Committee. Prior to approval of the monitoring physician by the committee, the Respondent shall provide to the monitoring physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the monitoring physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the monitoring physician by the Committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed monitoring physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a monitoring physician is incorporated herein. The responsibilities of a monitoring physician shall include:

- (1) Submit quarterly reports, in affidavit form, which shall include:
  - A. Brief statement of why physician is on probation.
  - B. Description of probationer's practice.
  - C. Brief statement of probationer's compliance with terms of probation.



D. Brief description of probationer's relationship with monitoring physician.

E. Detail any problems which may have arisen with probationer.

(2) Be available for consultation with Respondent whenever necessary, at a frequency of at least once per month.

(3) Review 20% of Respondent's patient records selected on a random basis at least once every month. In order to comply with this responsibility of random review, the monitoring physician shall go to Respondent's office once every month. At that time, the monitoring physician shall be responsible for making the random selection of the records to be reviewed by the monitoring physician.

(4) Report to the Board any violations by the probationer of Chapter 456 and 458, Florida Statutes, and the rules promulgated pursuant thereto.

c. In view of the need for ongoing and continuous monitoring or supervision, Respondent shall also submit the curriculum vitae and name of an alternate supervising/monitoring physician who shall be approved by Probation Committee. Such physician shall be licensed pursuant to Chapter 458, Florida Statutes, and shall have the same duties and responsibilities as specified for Respondent's monitoring/supervising physician during those periods of time which Respondent's

monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct supervision of the alternate supervising physician, Respondent shall so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

d. CONTINUITY OF PRACTICE

(1) TOLLING PROVISIONS. In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the active practice of medicine in the State of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the State of Florida. Respondent shall notify the Compliance Officer 10 days prior to his/her return to practice in the State of Florida. Unless otherwise set forth in the Final Order, the following requirements and only the

following requirements shall be tolled until the Respondent returns to active practice:

(A) The time period of probation shall be tolled.

(B) The provisions regarding supervision whether direct or indirect by the monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

(2) ACTIVE PRACTICE. In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Respondent may be required to appear before the Board and demonstrate the ability to practice medicine with reasonable skill and safety to patients prior to resuming the practice of medicine in the State of Florida.

RULING ON MOTION TO ASSESS COSTS

At the request of the Petitioner, the Board tabled consideration of the costs in this matter to a future meeting.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

DONE AND ORDERED this 23<sup>rd</sup> day of August,

2013.

BOARD OF MEDICINE

Crystal A Sanford

Allison M. Dudley, J.D., Executive Director  
For Zachariah P. Zachariah, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to JAMES ALEXANDER COCORES, M.D., 5301 N. Federal Highway, Suite 200, Boca Raton, Florida 33487; to Sean Ellsworth, Esquire, 420 Lincoln Road, Suite 601, Miami Beach, Florida 33139; and Anthony Vitale, 2333 Brickell Avenue, Suite A-1, Miami, Florida 33029; to Todd P. Resavage, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Doug Sunshine, Department of Health, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399-3253 this 26<sup>th</sup> day of August, 2013.

Brygel Sanders

**Deputy Agency Clerk**

James A. Cocores, M.D.  
5301 N. Federal Hwy., Ste. 200  
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