

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH-16-2581-^{FOF}-MQA

FILED DATE **DEC 29 2016**
Department of Health
By: *Amy R. Carrington*
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2013-08450
DOAH CASE NO.: 15-5043PL
LICENSE NO.: ME0080412

KENNETH WOLINER, M.D.,

Respondent.

DIVISION OF
ADMINISTRATIVE HEARINGS

2016 DEC 30 PM 2:39

FILED

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board of Examiners) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on November 3, 2016, in Jacksonville, 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 Kristin Summers, Assistant General Counsel, and Louise Wilhite St. Laurent, Deputy General Counsel. Respondent was present and represented by George F. Indest, III, Esquire, Lance O. Leider, Esquire, and Bennett M. Miller, 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 EXCEPTIONS

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

1. Respondent's Exception II.A., titled "Improper Admission of Expert Testimony" is denied because the Board does not have substantive jurisdiction over evidentiary matters.

2. Respondent's Exception II.B., titled "The ALJ Erroneously Permitted Use of an Illegally Made Oral Recording at the Hearing" is denied because the Board is without substantive jurisdiction to rule on evidentiary issues.

3. Respondent's Exception III titled "Specific Exception to the ALJ's Findings of Fact" is a twofold exception. The first is a standing exception to the admissibility of any of the testimony offered by the mother of patient S.S. Such exception is denied because the admissibility of testimony is an evidentiary matter over which the Board lacks substantive jurisdiction.

The second part of the exception is also a standing exception to any finding of fact based on patient S.S.'s medical

records on the grounds that the records constitute inadmissible hearsay. Such exception is also denied because the determination as to whether evidence constitutes inadmissible hearsay is an evidentiary matter over which the Board lacks substantive jurisdiction.¹

4. Respondent's Exception to Paragraph 5 is denied based upon the reasons stated by the Petitioner. Specifically, this is an evidentiary issue over which the Board has no jurisdiction and there is competent substantial evidence in the record to support the ALJ's findings.

5. Respondent's Exception to Paragraph 9 is denied based upon the reasons stated by the Petitioner. Specifically, this is an evidentiary issue over which the Board has no substantive jurisdiction and there is competent substantial evidence in the record to support the ALJ's findings.

6. Respondent's Exception to Paragraph 22 is denied based upon the reasons stated by the Petitioner. Specifically, this is an evidentiary issue over which the Board has no jurisdiction and there is competent substantial evidence in the record to support the ALJ's findings.

¹On page 48 of the transcripts of the proceedings this exception is incorrectly referred to as being within the second part of exception II.B. titled "The ALJ Erroneously Permitted Use of an Illegally Made Oral Recording at the Hearing." The exception was actually within the second part of Exception III titled "Specific Exception to the ALJ's Findings of Fact."

7. Respondent's Exception to Paragraph 28 is denied based upon the reasons stated by the Petitioner. Specifically, this is an evidentiary issue over which the Board has no jurisdiction and there is competent substantial evidence in the record to support the ALJ's findings.

8. Respondent's Exception to Paragraph 32 is denied based upon review of the record and the Petitioner's response.

9. Respondent's Exception to Paragraph 43 is denied based upon review of the record and the Petitioner's response.

10. Respondent's Exception to Paragraph 45 is denied based upon review of the record and the Petitioner's response.

11. Respondent's Exception to Paragraph 47 is denied based upon the written and oral comments set forth by the Petitioner.

12. Respondent's Exception to Paragraph 49 is denied based upon the written and oral comments set forth by the Petitioner.

13. Respondent's Exception to Paragraph 84 is denied because this is an evidentiary issue over which the Board has no jurisdiction.

14. Respondent's Exception to Paragraphs 86-88 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written and oral responses set forth by the Petitioner.

15. Respondent's Exception to Paragraph 90 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written and oral responses set forth by the Petitioner.

16. Respondent's Exception to Paragraph 93 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written and oral responses set forth by the Petitioner.

17. Respondent's Exception to Paragraph 95 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written and oral responses set forth by the Petitioner.

18. Respondent's Exception to Paragraph 97 (which Respondent stated on the record is actually Paragraph 96 - see p. 52 of transcript) is denied based upon the written and oral responses set forth by the Petitioner.

19. Respondent's Exception to Paragraph 98 is denied based upon the written and oral responses set forth by the Petitioner.

20. Respondent's Exception to Paragraph 100 is denied based upon the written and oral responses set forth by the Petitioner.

21. Respondent's Exception to Paragraph 104 is denied based upon the written and oral responses set forth by the Petitioner.

22. Respondent's Exception to Paragraph 105 is denied because the Board is without authority to reweigh the evidence and based upon the written and oral responses set forth by the Petitioner.

23. Respondent's Exception to Paragraph 106 is denied because the Board is without authority to reweigh the evidence and based upon the written and oral responses set forth by the Petitioner.

24. Respondent's Exception to Paragraph 107 is denied based upon the written and oral responses set forth by the Petitioner.

25. Respondent's Exception to Paragraph 108 is denied based upon the written and oral responses set forth by the Petitioner.

26. Respondent's Exception to Paragraph 109 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written responses set forth by the Petitioner.

27. Respondent's Exception to Paragraph 111 is denied based upon the written and oral responses set forth by the Petitioner.

28. Respondent's Exception to Paragraph 113 is denied based upon the written and oral responses set forth by the Petitioner.

29. Respondent's Exception to Paragraph 116 is denied because this is an evidentiary issue over which the Board has no

jurisdiction and based upon the written and oral responses set forth by the Petitioner.

30. Respondent's Exception to Paragraph 117 is denied based upon the written and oral responses set forth by the Petitioner.

31. Respondent's Exception to Paragraph 119 is denied based upon the written responses set forth by the Petitioner.

32. Respondent's Exception to Paragraph 120 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written responses set forth by the Petitioner.

33. Respondent's Exception to Paragraph 122 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written responses set forth by the Petitioner.

34. Respondent's Exception to Paragraph 123 is denied based upon the written responses set forth by the Petitioner.

35. Respondent's Exception to Paragraph 125 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the written responses set forth by the Petitioner.

36. Respondent's Exception to Paragraph 126 is denied because this is an evidentiary issue over which the Board has no

jurisdiction and based upon the written responses set forth by the Petitioner.

37. Respondent's Exception to Paragraph 127 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the oral and written responses set forth by the Petitioner.

38. Respondent's Exception to Paragraph 131 is denied based upon the written and oral responses set forth by the Petitioner.

39. Respondent's Exception to Paragraph 132 is denied based upon the written and oral responses set forth by the Petitioner.

40. Respondent's Exception to Paragraph 133 is denied based upon the written and oral responses set forth by the Petitioner.

41. Respondent's Exception to Paragraph 136 is denied based upon the written and oral responses set forth by the Petitioner.

42. Respondent's Exception to Paragraphs 138-141 is denied because this is an evidentiary issue over which the Board has no jurisdiction and based upon the oral and written responses set forth by the Petitioner.

43. Respondent's Exception to Paragraph 143 is denied based upon the oral and written responses set forth by the Petitioner.

44. Respondent's Exception to Paragraph 144 is denied based upon the oral and written responses set forth by the Petitioner.

45. Respondent's Exception to Paragraph 145 is granted in part and denied in part. The Board finds that Respondent did not practice outside his scope of practice as a matter of law. Respondent's scope of practice is medicine, not oncology. Thus, the Board grants the exception to the extent that the Respondent did not practice outside his scope of practice. The Board also finds that its conclusion of law is a more reasonable conclusion than that of the ALJ set forth in paragraph 145 of the Recommended Order.

To the extent that Respondent performed professional responsibilities that he was not competent to perform by training and experience, that is, rejecting the HL diagnosis, the exception is denied based upon competent substantial evidence in the record.

46. Respondent's Exception to Paragraphs 149-153 is denied based upon the written and oral responses set forth by the Petitioner.

47. Respondent's Exception to Paragraph 155 is denied based upon the written and oral responses set forth by the Petitioner.

48. Respondent's Exception to Paragraphs 163 and 164 is denied. The Board finds that the ALJ's conclusions of law set forth in paragraphs 163 and 164 are reasonable conclusions based upon the applications of the fact to the law.

49. Respondent's Exception to Paragraph 166 is denied based upon the oral and written responses set forth by the Petitioner.

50. Respondent's Exception to Paragraph 168 is denied based upon the written responses set forth by the Petitioner.

51. Respondent's Exception to Paragraph 169 is denied based upon the oral and written responses set forth by the Petitioner.

52. Respondent's Exception to Paragraph 170 is denied based upon the oral and written responses set forth by the Petitioner.

53. Respondent's Exception to Paragraph 171 is denied based upon the oral and written responses set forth by the Petitioner.

54. Respondent's Exception to Paragraph 172 is denied based upon the oral and written responses set forth by the Petitioner.

55. Respondent's Exception to Paragraph 173 is denied based upon the oral and written responses set forth by the Petitioner.

56. Respondent's Exception to Paragraph 174 was withdrawn at the hearing by the Respondent.

57. In paragraphs 99-108 of the Recommended Order the ALJ and the Board found that the standard of care required the Respondent to refer patient S.S. to an oncologist/hematologist for appropriate treatment and Respondent failed to do so. Similarly, in paragraphs 109-115 of the Recommended Order the ALJ and the Board found that the standard of care required the Respondent to educate or counsel patient S.S. on the risks,

including death, of foregoing potentially life saving treatment and Respondent failed to do so. Section 458.331(1)(m), Florida Statutes, does not require a physician to document something he or she did not do. Therefore, Respondent's Exception to paragraphs 175-178 is granted to the extent that it is not a violation of Section 458.331(1)(m), Florida Statutes, to fail to document something that the physician failed to do. The Board also finds that its conclusion of law is a more reasonable conclusion than that of the ALJ set forth in paragraphs 175 -178 of the Recommended Order.

To the extent that Respondents exceptions to paragraphs 175-178 address evidentiary issues, they are rejected.

58. Respondent's Exception to Paragraph 180 is denied based upon the oral and written responses set forth by the Petitioner.

59. Respondent's Exception to Paragraph 182 is denied based upon the oral and written responses set forth by the Petitioner.

60. Respondent's Exception to Paragraph 183 is denied based upon the written responses set forth by the Petitioner.

61. Respondent's Exception to Paragraph 184 is granted in part and denied in part. The Board finds that Respondent did not practice outside his scope of practice as a matter of law.

Respondent's scope of practice is medicine, not oncology. Thus, the Board grants the exception to the extent that the Respondent

did not practice outside his scope of practice. The Board also finds that its conclusion of law is a more reasonable conclusion than that of the ALJ set forth in paragraph 184 of the Recommended Order.

To the extent that Respondent performed professional responsibilities that he was not competent to perform by training and experience, that is, rejecting the HL diagnosis, the exception is denied based upon competent substantial evidence in the record.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the modifications set forth above to paragraph 145 of the Recommended Order.

2. There is competent substantial evidence to support the findings of fact as modified.

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 with the modifications set forth above to paragraphs 175-178 and 184 of the Recommended Order.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be ACCEPTED. WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay an administrative fine in the amount of \$16,000.00 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 provide repayment in the amount of \$2,990.00 to the estate of S.S.

3. Respondent's license to practice medicine in the State of Florida is hereby REVOKED.

RULING ON MOTION TO BIFURCATE AND RETAIN JURISDICITON ON COSTS

The Board reviewed the Petitioner's Motion to Bifurcate and Retain Jurisdiction on Costs and GRANTED the Petitioner's motion.

RULING ON RESPONDENT'S MOTION FOR STAY

At the hearing in this matter counsel for the Respondent made an *ore tenus* motion to stay the penalty imposed in this matter and the Board voted to DENY the Respondent's motion.

(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 29th day of December,

2016.

BOARD OF MEDICINE

Claudia Kemp

Claudia Kemp, J.D., Executive Director
For Sarvam TerKonda, M.D., Chair

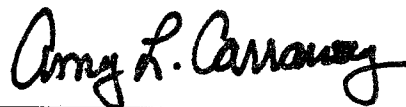
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 ^{certified} U.S. Mail to KENNETH WOLINER, M.D., 9325 Glades Road, #104, Boca Raton, Florida *CK*

33434; to George F. Indest, III, Esquire, and Lance O. Leider, Esquire, The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32303; and Bennett M. Miller, Esquire, Dunn & Miller, P.A., 215 E. Tharpe Street, Tallahassee, Florida 32303; to Mary Li Creasy, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; by email to Louise Wilhite-St. Laurent, Deputy General Counsel, Department of Health, at Louise.Stlaurent@flhealth.gov; and by email to Edward A. Tellechea, Chief Assistant Attorney General, at Ed.Tellechea@myfloridalegal.com this 29th day of December, 2016.



Deputy Agency Clerk

Certified Article Number

9414 7266 9904 2090 7600 05

SENDERS RECORD

|||||
Kenneth Woliner, M.D.,
9325 Glades Road
#104
Boca Raton, FL 33434