

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

BOARD OF REGISTRATION
IN MEDICINE

Adjudicatory Case No. 2013-033
(RM-13-383)

In the Matter of)
)
)

JAMES DAVID FENN, M.D.)
_____)

Amended Final Decision and Order

This matter originally came before the Board of Registration in Medicine (the "Board") for final disposition on the basis of the Administrative Magistrate's Order of Default Recommended Decision ("Recommended Decision"), dated October 8, 2013. The Administrative Magistrate recommended that "allegations 2-10 of the Statement of Allegations relative to alleged license renewal fraud be established for purposes of this proceeding." Complaint Counsel filed a Motion to Correct the Recommended Decision, requesting that "the part of the Recommended Decision that states 'allegations 2-10' be changed to 'allegations 2-14.'" Complaint Counsel's Motion to Correct the Recommended Decision also requested "that the Board add a conclusion of law finding that Respondent violated G. L. c. 112, § 5, ninth par. (a) and 243 CMR 1.03(5)(a)1 by fraudulently procuring his renewal."¹ On February 19, 2014, the Board issued a Final Decision and Order ("Final Decision") revoking Dr. James David Fenn's (the "Respondent") license to practice medicine.²

The Respondent appealed the Board's Final Decision to a single justice of the Massachusetts Supreme Judicial Court. In her Order, Justice Geraldine Hines "remanded [this matter] to the board for reconsideration of the appropriate sanction to impose." Fenn v. Board of Registration in Med., No. SJ-2014-0109, slip op. at 1 (Sup. Jud. Ct. for Suffolk County December 22, 2014) (Hines, J., single justice). Justice Hines wrote that she was unable to determine whether the revocation of the Respondent's license to

¹ The Board allowed both of Complaint Counsel's requests.

² The Board's Final Decision dated February 19, 2014 is attached to this Amended Final Decision and Order and is incorporated by reference.

practice medicine was arbitrary or capricious “because the Board has not sufficiently explained the reasons justifying its recommended sanction in this case and the reason for departing from the typical sanctions issued in such cases (including imposing a fine and a reprimand or suspension of some duration).” *Id.* at 1-2. Justice Hines instructed the Board to “conduct a hearing at which [the Respondent] shall be heard only on the issue concerning the appropriate sanction and any applicable mitigating factors that may impact the sanction.” *Id.* at 2.

The Board has considered the Recommended Decision, Justice Hines’s Opinion, Petitioner’s Memorandum on Disposition Following Remand by a Single Justice of the Supreme Judicial Court, Respondent’s Memorandum on Disposition³ and Petitioner’s Response to the Respondent’s Memorandum on Disposition.⁴ On April 2, 2015, the Board heard from the parties. After full consideration of these documents and the parties’ oral presentations, the Board replaces the Sanction portion of the Final Decision dated, February 19, 2014, and replaces it with the following:

Sanction

The Respondent has violated G. L. c. 112, § 5, ninth par. (a) and 243 CMR § 1.03(5)(a)1 by listing his business address on his Renewal Application as Berkshire Medical Center in Pittsfield, Massachusetts, and incorrectly answering questions number 17(a) (charged with a criminal offense since last renewal), 17(c) (any pending criminal charges), and 18(c) (investigation by any other state medical board) on his Renewal Application.⁵

A. Precedent

Truthfully answering the questions asked on a licensing application is of the utmost importance because the Board “depends on the integrity and honor of [licensure and] relicensure applicants and, indeed, any lapse in this fundamental element of the

³ Attached to the Respondent’s Memorandum on Disposition is the Affidavit of James D. Fenn, M.D.. The Board accepts this affidavit only on the issue of sanction.

⁴ Attached to the Petitioner’s Response to the Respondent’s Memorandum on Disposition is a 1994 Consent Order approved by the Virginia Board of Medicine and a 2010 Consent Order approved by the North Carolina Medical Board. The Board accepts these Consent Orders only on the issue of sanction.

⁵ The Respondent failed to disclose on his Renewal Application that he had been: (1) arrested and charged with driving while impaired; (2) arrested and charged with Assault on a Female; and (3) required by the North Carolina Medical Board to undergo a “comprehensive evaluation and examination by a substance use assessment center.” The Respondent also falsely listed Berkshire Medical Center as his business address on this Renewal Application.

process is a basic threat to the reasonably prompt and fair physician licensure system in the Commonwealth.” In the Matter of John R. Knight, M.D., Board of Registration in Medicine, Adjudicatory Case No. 85-26-GR (Final Decision and Order, December 10, 1986). When a physician falsely answers a question on a licensing application, the physician deprives the Board of the opportunity to review his or her record and determine whether he or she should be licensed to practice medicine in Massachusetts. In the Matter of Irina Z. Agronin, M.D., Board of Registration in Medicine, Adjudicatory Case No. 02-06-DALA (Final Decision and Order, August 21, 2002).

Depending on the facts and circumstances of each case, the Board has imposed a variety of sanctions when a physician has fraudulently procured his or her license to practice medicine.

A reprimand and a fine are usually imposed when a physician falsely answers an application question concerning criminal matters. In the Matter of Peter Gherardi, M.D., Board of Registration in Medicine, Adjudicatory Case No. 2008-030 (Consent Order, August 20, 2008) (physician reprimanded and fined \$5,000 for failing to disclose an arrest on his limited license application and his initial full license application, and for failing to disclose a subsequent arrest on a renewal application); In the Matter of Samuel B. Wilson, M.D., Board of Registration in Medicine, Adjudicatory Case No. 2007-023 (Consent Order, May 16, 2007) (physician reprimanded and fined \$2,500 for disclosing only one of two operating under the influence arrests on renewal application); and In the Matter of Irene Goranitis, M.D., Board of Registration in Medicine, Adjudicatory Case No. 97-27-DALA (Consent Order, December 17, 1997) (physician reprimanded and fined \$5,000 for failing to disclose one arrest on her initial full application and first renewal application; failing to disclose a second arrest on her 1991 renewal application; failing to disclose her resignation from a health plan on her 1995 renewal application; and failing to report hospital disciplinary action on her 1997 renewal application).

In In the Matter of Michael G. Ciborski, M.D., the Board fined Dr. Ciborski \$10,000 and indefinitely suspended his license to practice medicine because Dr. Ciborski had falsely certified on four renewal applications that he was board-certified and misrepresented his credentials on an application to reappointment at a hospital. Board of Registration in Medicine, Adjudicatory Case No. 99-18-XX (Consent Order, August 25,

1999).⁶ In In the Matter of Alfred L. Weber, M.D., the Board fined Dr. Weber \$5,000, reprimanded his license and indefinitely suspended his license with leave to petition to stay the indefinite suspension after three months. Board of Registration in Medicine, Adjudicatory Case No. 95-24-DALA (Consent Order, February 22, 1995).⁷ In In the Matter of Praveen N. Adhyapak, M.D., the Board revoked Dr. Adhyapak's license to practice medicine because he failed to disclose multiple criminal arrests on three renewal applications and one lapsed license application. Board of Registration in Medicine, Adjudicatory Case No. 2005-033 (Final Decision and Order, December 7, 2005).

In In the Matter of Marcelo Mora, M.D., Dr. Mora failed to disclose on two separate renewal applications that the Georgia Composite Medical Board had disciplined him for substance abuse and failed to disclose on one renewal application that the Mississippi State Board of Medical Licensure had disciplined him for substance abuse. Board of Registration in Medicine, Adjudicatory Case No. 93-9-DALA (Final Decision and Order, November 17, 1993). Based on its finding that Dr. Mora fraudulently procured his renewal licenses, the Board reprimanded his license, fined him \$5,000, and placed Dr. Mora on probation. The "sole term of such probation [being] that [Dr. Mora] is prohibited from practicing medicine in Massachusetts unless granted permission to do so by the Board. Any such petition to practice in Massachusetts shall be accompanied by a psychiatric and physical evaluation, acceptable to the Board, and performed within 30 days of [Dr. Mora's] petition. If [Dr. Mora] so petitions the Board, the Board may require [Dr. Mora] to enter a probationary agreement subject to restrictions as are deemed appropriate by the Board, including a requirement for additional treatment and monitoring."

⁶ Dr. Ciborski was permitted to petition for a stay of the indefinite suspension after payment of the fine, amendment of the false Board renewal answers, correction of all medical staff privilege and reappointment applications, and completion of 100 hours of community service.

⁷ Dr. Weber failed to disclose one O.U.I. arrest on his 1987 renewal application and failed to disclose two O.U.I. arrests on his 1989 renewal application. As a result of these nondisclosures, in 1992 Dr. Weber entered into an Assurance of Discontinuance in which his license was censured and he was fined \$2,500. Dr. Weber failed to disclose this discipline on his renewal application to the New Hampshire Board of Medicine. In 1993, Dr. Weber was convicted of a new O.U.I. offense, which he disclosed on his 1993 renewal application; however he failed to disclose that he had also been charged with two counts of threatening to commit a crime and inaccurately portrayed the circumstances surrounding his O.U.I. arrest and conviction. Dr. Weber was disciplined for being convicted of a crime, engaging in a pattern of conduct that has the capacity to deceive, and because he was disciplined by the New Hampshire Board of Medicine for fraudulently procuring his renewal license (failed to disclose the Assurance of Discontinuance).

B. Mitigating Factors

The Respondent has identified three mitigating factors. See, In the Matter of Richard L. McDowell, M.D., Board of Registration in Medicine, Adjudicatory Case No. 88-50-SU (Final Decision and Order, June 20, 1990) (Board considered physician's personal circumstances in rendering the sanction). The first mitigating factor presented was that the Respondent "was undergoing the stress of cancer treatment in January 2013 when the Board proceedings were underway." The Respondent underwent surgery in January 2013 and then had "follow up care." Second, during the DALA proceedings, in June 2013, the Respondent's wife separated from him and he lost custody of his children which caused him "stress and personal turmoil." Finally, the Respondent explains that he has been out of work for "nearly three years now and is under significant financial distress as a result."

The Board considered these mitigating factors in determining this sanction.

C. Analysis

The factual circumstances presented in this matter are not directly analogous with any of the previously cited cases suspending or revoking a physician's license to practice medicine. Unlike Dr. Cibroski and Dr. Adhyapak, the Respondent's false application answers were not placed on four applications over the span of at least ten years. Unlike, Dr. Weber, the Respondent has not failed to disclose numerous arrests for alcohol related motor vehicle offenses on multiple applications.⁸

The Respondent's conduct, however, is more severe than the cases in which the Board has reprimanded a physician's license and fined the physician. The Respondent failed to disclose on his Renewal Application two arrests—including one arrest for driving while impaired—that occurred within three-and-one-half months of each other. The Respondent further failed to disclose that, just over one month after the Respondent was arrested for the second time, the North Carolina Board required him to "submit himself for a comprehensive evaluation and examination by a substance abuse assessment center." The Respondent's failure to disclose this information deprived the Board of the opportunity to determine whether the Respondent should have been relicensed to practice Medicine in Massachusetts. In light of the seriousness of the

⁸ The Respondent failed to disclose multiple matters on his 2012 Renewal Application.

information that the Respondent failed to disclose to the Board and the fact that just two years before this incident he had been disciplined by the North Carolina Board for falsely answering an application question regarding the Virginia Consent Order, his conduct does not support the imposition of a mere fine and a reprimand of his license to practice.

The Respondent's conduct, although not directly analogous, has some similarities to the conduct sanctioned in In the Matter of Marcelo Mora, M.D.. The Respondent failed to inform the Board that he had been arrested twice since he last renewed his license. One of the Respondent's arrests, driving while impaired, was alcohol related. Additionally, the Respondent failed to inform the Board that the North Carolina Board ordered that he submit himself for a comprehensive evaluation and examination by a substance use assessment center. By providing false information concerning his criminal record and the North Carolina board investigation, the Respondent denied the Board the opportunity to determine whether he had a substance abuse problem and, therefore, whether he could safely practice medicine in Massachusetts.

The Respondent's failure to disclose his arrests and North Carolina Board investigation on his 2012 Renewal Application is concerning when viewed in isolation; however, his conduct is significantly more concerning based on his history. On his 2010 application for licensure in North Carolina, the Respondent "failed to answer a question correctly on [the application] . . . which requested information pertaining to [the Virginia Consent Order], although [the Respondent] provided this information elsewhere in his application[.]"

The Board hereby terminates the Respondent's Voluntary Agreement Not to Practice, and INDEFINITELY SUSPENDS the Respondent's license to practice medicine retroactive to February 19, 2014, the date the Board issued the Final Decision. The Respondent may petition to stay the suspension. Prior to petitioning to stay the suspension, the Respondent must: (1) undergo a skills assessment evaluation; (2) undergo an neuropsychological evaluation; (3) submit to an assessment by Physician Health Services; and (4) execute any mutual releases necessary to allow Board staff to communicate with and receive documentation from the entities conducting the skills assessment, neuropsychological evaluation, and Physician Health Services. Any stay of the suspension is conditioned upon the Respondent's entry into a five (5) year Probation Agreement. The Probation Agreement shall include, but not be limited to, the following

terms and conditions: (1) The Respondent must comply with the recommendations identified in the skills assessment evaluation, the neuropsychological evaluation, and the Physician Health Services evaluation; (2) The Respondent must obtain a Board-approved practice plan and practice location; and (3) any other terms or requirements the Board deems appropriate at that time.

The Respondent shall provide a complete copy of this Final Decision and Order, with all exhibits and attachments, within ten (10) days by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in- or out-of-state hospital, nursing home, clinic, other licensed facility, or municipal, state, or federal facility at which he practices medicine; any in- or out-of-state health maintenance organization with whom he has privileges or any other kind of association; any state agency, in- or out-of-state, with which he has a provider contract; any in- or out-of-state medical employer, whether or not he practices medicine there; the state licensing boards of all states in which he has any kind of license to practice medicine; the Drug Enforcement Administration – Boston Diversion Group; and the Massachusetts Department of Public Health Drug Control Program. The Respondent shall also provide this notification to any such designated entities with which he becomes associated for the duration of this suspension. The Respondent is further directed to certify to the Board within ten (10) days that he has complied with this directive.

The Board expressly reserves the authority to independently notify, at any time, any of the entities designated above, or any other affected entity, of any action it has taken.

The Respondent has the right to appeal this Final Decision and Order within thirty (30) days, pursuant to G. L. c. 112, § 64 and G. L. c. 30A, §§ 14, 15.

A handwritten signature in dark ink, appearing to read 'M. S. Henry', with a long, sweeping flourish extending to the right.

Michael Henry, M.D.
Secretary

Date: April 16, 2015