

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

MA-Board of Registration in Medicine,
Petitioner

v.

Docket No. **RM-14-78**

Dated: **AUG - 3 2015**

Mark M. O'Connell, M.D.,
Respondent

Appearance for Petitioner:

Jean M. O'Brien, Esq.
Gloria Brooks, Esq.
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Mark M. O'Connell, M.D., *pro se*
18 Center Street, rear
Rumson, NJ 07760-1748

Administrative Magistrate:

Sarah H. Luick, Esq.

RECOMMENDED DECISION

MA-Board of Registration in Medicine's Motion for Summary Decision

On February 21, 2014, the Petitioner, MA-Board of Registration in Medicine (MA-Board), issued a Statement of Allegations (Ex. A.) ordering the Respondent, Mark M. O'Connell, M.D., who holds a Massachusetts license, to show cause why he should not be disciplined for having been disciplined in another jurisdiction by the proper licensing authority, New Jersey State Board of Medical Examiners (NJ-Board), for reasons substantially the same as

those set forth in M.G.L. c. 112, § 5 or 243 CMR 1.03(5). On that same date, the MA-Board referred the matter to the Division of Administrative Law Appeals (DALA). (Ex. A.)

The Respondent filed his Answer to the Statement of Allegations on or about March 11, 2014. (Ex. B.) In his Answer, the Respondent admitted the NJ-Board suspended his license to practice medicine and surgery on June 25, 2012 when an Interim Consent Order was issued. (Ex. E.) The Respondent agreed that he engaged in conduct that violated the terms of a NJ-Board Consent Order he was under, and engaged in other conduct that the NJ-Board found in violation of the statutes and regulations pertinent to New Jersey licensed physicians. The NJ-Board's Interim Consent Order allowed for further proceedings, and those occurred when the Respondent met in front of a NJ-Board committee. The MA-Board's Statement of Allegations relied only upon this Interim Consent Order to support its claim that the Respondent's conduct in New Jersey subjects him to possible discipline by the MA-Board. Upon receipt of the Respondent's Answer that addressed the course of events leading up to the June 25, 2012 Interim Consent Order as well as the course of events after it, the MA-Board filed a Motion to Amend the Statement of Allegations, which was allowed on April 17, 2014. (Ex. D.) The Amended Statement of Allegations now included the NJ-Board's Final Consent Order of April 24, 2013 about the Respondent's conduct. (Ex. F.)

A Pre-Hearing Conference at DALA was scheduled for April 4, 2014. The Respondent did not appear and was issued an Order to Show Cause. As a result of his response, another Pre-Hearing Conference was scheduled for May 20, 2014, continued by agreement of the parties to May 23, 2014 when it was held. The Conference included a discussion about how the case would proceed. The parties were going to file a stipulation agreement and/or the MA-Board was going to file a Motion for Summary Decision. The Respondent appreciated that the NJ-Board's

Final Consent Order was not going to be re-litigated before DALA. The Respondent's ability to present mitigating evidence was discussed. The parties were ordered to file a series of Joint Status Reports thereafter.

By order to the parties of February 25, 2015, the Respondent was given until March 31 2015 to decide if he wanted an in-person hearing to present his mitigating evidence, and if so, both parties had until April 17, 2015 to file with me all documents each side would be relying upon as well as offers of proof regarding each side's witnesses, if any, besides the Respondent. If the Respondent waived the in-person hearing, then once I received each side's documentary evidence I would provide the parties with the opportunity to file objections to admission of the documents and also to file briefs. (Ex. G.) By letter of March 27, 2015, the Respondent decided to waive the in-person hearing. (801 CMR 1.01(10)(c).) (Ex. H.) On or about May 28, 2015, the MA-Board filed a Motion for Summary Decision. (Ex. K.) The Respondent did not file any objections specific to the Motion for Summary Decision, but his filings addressed mitigation and his arguments regarding any discipline the MA-Board might consider. That evidence consists of his written statement of May 15, 2015 titled, "Mitigating Factors and Relevant Documents." (Ex. J.) The MA-Board's Motion for Summary Decision did not include any further documents.

All these documents, marked Exhibits A – K, are in evidence for purposes of deciding the Motion for Summary Decision.¹ In addition, I take Administrative Notice of the prior

¹ Ex. A is the Statement of Allegations and Order of Reference to DALA. Ex. B is the Respondent's Answer to the Statement of Allegations. Ex. C is the Respondent's "Response" of July 17, 2013 to the NJ-Board. Ex. D is the MA-Board's Motion to Amend the Statement of Allegations. Ex. E is the Interim Consent Order from June 2012. Ex. F is the Final Consent Order from April 2013 which includes the "Directives" document addressing procedures when a licensee is disciplined or if the license is surrendered. Ex. G is the Order to the parties of February 25, 2015. Ex. H is the Respondent's March 27, 2015 waiver of a hearing. Ex. I is Consent Order Granting Restricted License from April 2014. Ex. J is the Respondent's mitigating evidence. Ex. K is the MA-Board's Motion for Summary Decision from May 2015.

disciplinary matter that was before the MA-Board involving the Respondent: *MA-Board of Registration in Medicine v. Mark M. O'Connell, M.D.*, RM-97-633 (Recommended Decision on Motion for Summary Decision, September 18, 1997; Final Decision & Order, December 17, 1997; and, Probation Agreement, January 21, 1998). (Ex. L, for identification.) The record closed June 1, 2015.

Findings of Fact

Based on the evidence in the administrative record, I make the following findings of fact:

1. Mark M. O'Connell, M.D., born in 1954, is a graduate of Case Western Reserve Medical School. He was licensed to practice medicine in Massachusetts in 1986 under #56464. He was also licensed to practice medicine in Pennsylvania and in New Jersey. He was Board certified in Internal Medicine in 1990 with re-certification in 2001, certified in Cardiovascular Medicine in 1995 with re-certification in 2006, and held a specialty in Invasive Cardiology with a Board certification in Interventional Cardiology in 1999. (Exs. A, B & J.)

2. Dr. O'Connell was disciplined in 1993 by the MA-Board for his personal abuse of drugs and subsequent relapses. The MA-Board issued a Statement of Allegations in April 1997. After a hearing on the MA-Board's subsequent Motion for Summary Decision, the MA-Board issued a Final Decision & Order on December 17, 1997. Dr. O'Connell was reprimanded by the MA-Board with orders that he enter into an out-of-state Probation Agreement. Dr. O'Connell was prohibited from practicing medicine in Massachusetts without the prior approval of the MA-Board. This approval was conditioned upon documentation that Dr. O'Connell had five years of successful recovery from his chemical dependency, or that he was in chemical dependency treatment with monitoring. Dr. O'Connell entered into this Probation Agreement. (Ex. L, for identification.)

3. In and around 2003, Dr. O'Connell petitioned the MA-Board to change the status of his license to inactive out-of-state. He missed the renewal deadline in 2011 and was given a lapsed license status. He now also lacks an active Pennsylvania license to practice. (Exs. A, B & J.)

4. Dr. O'Connell was practicing medicine in New Jersey when he became subject to discipline by the NJ-Board for abuse of drugs. Thereafter, he became subject to a February 28, 2011 Consent Order of the NJ-Board. Upon satisfaction of various conditions contained in the Order that included satisfying drug abuse treatment and monitoring, Dr. O'Connell was allowed to return to the practice of medicine in New Jersey under a restricted license. One of the conditions he needed to satisfy was to inform the NJ-Board where he would be practicing medicine before starting new employment. Dr. O'Connell did not do this before he began working as a physician at the Advanced Urgent Care Clinic in Lawrenceville, NJ. He waited about four months before informing the NJ-Board in February 2012 that he was practicing medicine at the Clinic. And, while working in this job, he lacked a proper Controlled Dangerous Substances (CDS) registration number and a Drug Enforcement Administration (DEA) registration number, both required to prescribe CDS medications. He had applied to DEA for a registration number, and expected to receive it without delay due to the reinstatement of his license to practice, but he lacked it upon commencing this employment. His CDS registration number was not valid because it did not cover, as required, his work at this Clinic. Dr. O'Connell did not realize that the CDS registration number had that requirement. (Exs. B, C, E, F, I & J.)

5. On June 20, 2012, the Enforcement Bureau of the New Jersey Division of Consumer Affairs inspected the Advanced Urgent Care Clinic. Dr. O'Connell was always the only licensed

practicing physician at this Clinic that was owned by a physician who was not working on-site and who, unbeknownst to Dr. O'Connell, did not have a current New Jersey license to practice. (Exs. B, E, F, I & J.)

6. At this June 20, 2012 enforcement visit, Dr. O'Connell acknowledged to the inspectors that he had dispensed CDS medications that had been stored at the Clinic, and that he had allowed Clinic staff to telephone in CDS prescriptions for Clinic patients to their pharmacies using the Clinic owner's name and DEA number. The inspectors also found at the Clinic, expired and unlabeled CDS medications. These medications were found stored in a locked cabinet, but had recently been kept in an unlocked cabinet at the Clinic. The inspectors understood from what Dr. O'Connell told them in response to their questioning of him, that he felt he had no control over how the CDS medications were stored, and that he had prescribed CDS medication to his patients in amounts that he knew were larger than permitted. (Exs. B, C, E & J.)

7. On June 25, 2012, Dr. O'Connell agreed to the following NJ-Board provisions in an Interim Consent Order: an immediate surrender of his New Jersey license to practice thereby causing an immediate temporary suspension of his license pending a hearing before the NJ-Board and its further order; ceasing and desisting from practicing medicine in New Jersey; complying with the detailed "Directive for Physicians who are Disciplined or whose Surrender of Licensure has been Accepted by the Board"; returning his original CDS registration to the NJ-Board; and, immediately advising DEA of this Order. The Order stipulated:

[The] entry of this Interim Consent Order is without prejudice to action, discipline, investigation or restrictions upon any reinstatement," and "entry of this ... Order shall not be deemed an admission ... of any of the criminal activity referenced ... and shall not constitute a waiver of any defenses ... with reference to the criminal charges.

(Ex. E.)

8. The NJ-Board found Dr. O'Connell had engaged in conduct at the Advanced Urgent Care Clinic that was dishonest, fraudulent, deceptive, involving misrepresentations, false promises or pretenses in violation of the statutes and regulations he was held to obey as a licensed New Jersey physician. The NJ-Board noted as significant, Dr. O'Connell's previous disciplinary matters from 1997 due to allegations of substance abuse and misconduct including; the February 25, 2011 Order he was under that permitted him to return to the practice of medicine with a restricted license, and his misconduct uncovered on June 20, 2012 that included violation of the February 25, 2011 Order, all of which that led to the June 25, 2012 Interim Consent Order. On January 23, 2013, Dr. O'Connell appeared before a NJ-Board preliminary evaluation committee and was given an opportunity to address the events and circumstances that culminated in the Interim Consent Order. At this session, he was found to be "truthful and contrite." He admitted that he began working at the Advanced Urgent Care Clinic without first obtaining the approval to do so of the NJ-Board. He explained that the misconduct found was done "out of desperation and/or fear of termination of employment." This committee of the NJ-Board was not able to verify that Dr. O'Connell had been "clean and sober throughout this incident from June 2012 because he has not been participating in a drug abuse treatment and monitoring program." After appearing before this NJ-Board committee, Dr. O'Connell re-entered the drug abuse treatment and monitoring program. He remained compliant with the program thereafter. (Exs. B, C, E, F & J.)

9. On April 24, 2013, the NJ-Board issued a Final Consent Order that Dr. O'Connell signed his agreement to fulfill. His license was suspended for at least one year from June 25, 2012, with a further review and order after that to be issued by the NJ-Board. His suspension

continued until a further order was issued by the NJ-Board following his appearance before a NJ-Board committee meeting after June 25, 2013, at which time he needed to “verify ninety (90) days of sobriety through ongoing treatment,” and show proof that he complied with the “Directives” document addressed within the Interim Consent Order. The parties stipulated that this Order was without prejudice to further action taken by the NJ-Board, the NJ Attorney General, “the Drug Control Unit, the Director of the Division of Consumer Affairs or other law enforcement entities resulting from ... [his] conduct prior to the entry of this Order.” Dr. O’Connell acknowledged that he was informed of his right to counsel to represent him in this matter and that he waived that right. (Ex. F.)

10. Dr. O’Connell produced a written statement addressing the issues relating to his employment at Advanced Urgent Care Clinic. His first response was written August 5, 2012 for the Pennsylvania Medical Board. He then revised the response on February 17 and July 17, 2013 for the NJ-Board. (Exs. C & J.)

11. In his July 17, 2013 written statement, Dr. O’Connell explained how he believed the June 20, 2012 event at the Advanced Urgent Care Clinic was like a “raid” being carried out, causing him to be “shocked and bewildered.” He acknowledged “there were many aspects of the day-to-day operation of the Clinic ... where there was room for improvement ... but ... [he] never imagined these problems as being severe enough to involve the DEA.” He was aware that many of these problems had been in place for a long time. He emphasized that by the time this event occurred he “hadn’t used illicit narcotics for over five years.” He felt overwhelmed being “given document after document to sign.” He appreciated that the focus of the inspection was,

the Clinic’s prescribing, dispensing, and storage of the Schedule III and IV ... controlled substances kept on-site, ... [with] the Clinic’s handling of these medications ... sloppy, careless, and poorly-documented ... [and] that ... [he] was

the person who was going to be held responsible ... not the Clinic's owner ... who had set up the Clinic's policies and practices.

(Exs. C & J.)

12. In the written response, Dr. O'Connell addressed the allegation that he "was trying to dispense large quantities of these medications to patients who didn't really need them." He denied this had happened, and that "[d]ispensing these class III and IV medications was a very small part of the daily operation of this Clinic." He explained that a very small amount of these medications were ever dispensed with "the rationale being that this would hold ... [the patients] for the 24-48 hours it would take [them] ... to get to see either a specialist or their primary who could continue the medication if necessary." (Exs. C & J.)

13. In his written response, Dr. O'Connell mentioned that the claim that he was in charge or ran the Clinic was misleading. If the operation of the Clinic was "irregular, and in some cases illegal, [such as the] drug inventory maintenance and storage policies," these matters were controlled by the office manager and the Clinic's owner. Dr. O'Connell explained that he had very infrequent discussions with the owner with most directives "channeled through the various office managers." Dr. O'Connell understood it was not his job "to get involved in [office] policy." (Exs. C & J.)

14. Dr. O'Connell explained in his written response that during this time period, he was desperate "to have a regular paying job working as a physician, (preferably with no administrative duties,) something ... [he] hadn't had in five years." Although aware of likely "irregularities," Dr. O'Connell thought he had no choice but to work with them because he "was running out of money very quickly and this was ... [his] only job offer ... [He] vowed that ... [he] would do whatever it took, short of criminal behavior," to be employed. At the time he got back his medical license and CDS registration in February 2011, he still had ongoing restrictions

such as the monitoring of his drug use with twice per week random drug testing and ongoing treatments. He “applied for a new DEA registration ... usually a simple and straightforward procedure taking a month or two ... but ... [his] forms kept getting misplaced.” Dr. O’Connell continued to wait for his DEA registration, and agreed to work at half the hourly rate until he received it. He expected to receive it at any time. Dr. O’Connell was aware that the physician-owner had purchased some of the CDS medication being stored using his (the owner’s) own DEA number. Dr. O’Connell felt his CDS number was valid, not realizing it had to be issued for his work at the Advanced Urgent Care Clinic. He believed what he was doing in dispensing the CDS medication to Clinic patients “was analogous to a nurse dispensing small amounts of medications at ... [Dr. O’Connell’s] discretion with a doctor’s ‘prn’ order authorizing this.” He knew he “was bending the rules but it seemed like just technicalities and, most importantly, the paychecks would keep coming.” Dr. O’Connell wrote that this dispensing practice was not done frequently, “maybe once every two weeks and no one was ever forced to do this against their will ... I didn’t think too much about it.” He also “took comfort from the fact that we were dealing with such small amounts of medications ... that were all relatively low-level controlled substances.” He did not believe any patient had been harmed as a result of his lacking the DEA number and the proper CSD number, and that he had tried to secure a DEA number in connection with working at the Clinic. (Exs. C & J.)

15. In his written response, Dr. O’Connell discussed his need for a job with health insurance because he had developed,

a rare complication of ... Parkinson’s Disease ... called Camptocormia, a movement disorder with a truncal dystonia causing me to be bent over at the waist both forward and to the right when standing ... [leading] to a severe gait abnormality, acquired lumbar scoliosis, and chronic left lumbar muscle strain back pain as your cerebellum tries to compensate for the upper-body tilting abnormality ... [then experienced] being almost asymptomatic ... with low-dose

medication to being semi-disabled in a matter of months ... worried that if it continued to get worse ... [he] would end up in a wheelchair ... Luckily, it finally stabilized ... has steadily improved with decreasing pain ... The evaluations, consultations, and testing for this came to around \$6,000.

(Exs. C & J.)

16. In his written response, Dr. O'Connell acknowledged a lapse of judgment in not having his Clinic job,

prescreened or evaluated by the Board before starting to work there which was a condition of the consent agreement ... [For] a number of reasons, the full implications of the "pre" part of the word "pre-approval" just didn't sink in.

He apologized for his failure to notify the NJ-Board prior to and not just four months after starting this job. He concluded his written response by noting;

I am actually regarded as a skillful, responsible, conscientious, and compassionate physician who has never had any malpractice actions ... until now, any complaints made ... by my patients, colleagues or staff regarding my practice of medicine.

(Exs. C & J.)

17. On February 21, 2014, the MA-Board issued a Statement of Allegations to Dr. O'Connell that relied on his conduct while at the Advanced Urgent Care Clinic that led to receipt of discipline imposed by the NJ-Board. The MA-Board referenced Dr. O'Connell's prior discipline matter concerning his drug abuse from 1997, and attached the NJ-Board's Interim Consent Order from February 2012. The legal grounds for possible discipline under Massachusetts statutes and regulations, were based on Dr. O'Connell's New Jersey conduct. The Statement of Allegations states that a Massachusetts licensed physician "disciplined in another jurisdiction in any way by the proper licensing authority for reasons substantially the same" as those found in pertinent Massachusetts statutes and regulations, may be disciplined for conduct placing into questions his "competence to practice medicine, including but not limited to gross

misconduct in the practice of medicine, or practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions.” (Ex. A.)

18. Dr. O’Connell filed an Answer to the Statement of Allegations dated March 11, 2014. He agreed that his New Jersey license to practice was suspended by the June 25, 2012 Interim Consent Order, and that he had signed his agreement to engaging in conduct that formed the basis for the suspension. But, he emphasized that by its terms, the Interim Consent Order was in place “pending a hearing of the ... [NJ-Board],” and that his signing the Interim Consent Order “does not constitute a signed confession and ‘shall not be deemed an admission ... of any criminal activity referenced herein’.” He answered that the claims of misconduct were “unproven allegations” against him and are “presented out of context without any consideration of any possibly mitigating circumstances.” He asked that the MA-Board “not base its decision solely on this one document.” He included with his Answer the written statement he produced in July 2013 for the NJ-Board called “Responses, Corrections, and Clarifications.” Dr. O’Connell further answered that in October 2013, he went before a preliminary evaluation committee of the NJ-Board about the suspension, and noted that the committee “recommended reinstatement” of his license with some restrictions, followed by the NJ-Board agreeing to this re-instatement in January 2014. He included with his Answer a copy of “Consent Order Granting Restricted License” from February 2014 to be finalized within April 2014. He presented the three violations he understood he committed with mitigating evidence concerning each violation, and noted that none of the violations involved “competence in the actual practice of medicine or patient care” or drug abuse:

- 1.) That I neglected to obtain prior approval from the ... [NJ-Board] for my new Job ... [I] forgot but then did notify the Board four months later.

- 2.) Dispensed controlled dangerous drugs without a valid state CDS or federal DEA registration, or, ... in my version, dispensed to appropriate patients small amounts of legally acquired Schedule III ... or Schedule IV ... medications with a valid CDS whose address I had neglected to update while awaiting the mysteriously delayed arrival of my new DEA registration which I'd been told repeatedly by phone was "in the mail".
- 3.) On four or five occasions instructed office staff to phone in Phentermine renewals to pharmacies, at the request of patients whose insurance plans covered the medication, using the name and DEA# of my physician/employer who owned the Urgent Care Center even though he hadn't seen the patients and didn't have a New Jersey medical license. In my version, I conceded that this represented a serious lapse of judgment but I wanted to point out that this strategy was suggested by my employer and that no one suspected that he didn't have a NJ medical license and everyone assumed that you had to have one in order to run an urgent care center in New Jersey.

(Exs. B & C.)

19. The MA-Board filed a Motion to Amend the Statement of Allegations to include the Final Consent Order of April 24, 2013 that Dr. O'Connell signed with the NJ-Board and that he referred in his Answer to the Statement of Allegations. The Motion was allowed on April 17, 2014. (Exs. D & F.)

20. The NJ-Board's Final Consent Order contains the following provisions:

1. Respondent's license to practice medicine and surgery in New Jersey is suspended for a minimum of one (1) year pending further order of the Board. The term of this suspension from practice is retroactive to June 25, 2012. No credit for the active suspension period shall be given for any period of time during which Respondent engages in medical practice in any jurisdiction or state.
2. Respondent's suspension from practice shall continue until further order of the Board following an appearance by Respondent before a committee of the Board after June 25, 2013. Respondent shall not request an appearance before a committee of the Board unless and until he can verify ninety (90) days of sobriety through ongoing treatment with the PAP [Professional Assistance Program].

3. Respondent shall comply with the "Directive" attached hereto ... which is incorporated herein by reference.²
4. The parties hereby stipulate that entry of this Order is without prejudice to further action by this Board, the Attorney General, the Drug Control Unit, the Director of the Division of Consumer Affairs or other law enforcement entities resulting from Respondent's conduct prior to the entry of this Order.
5. Respondent has been specifically informed of his right to retain an attorney to represent him in this matter. Respondent acknowledges that he has been advised of his right to counsel, has waived that right and voluntarily enters into this Consent Order.

(Ex. F.)

21. In April 2014, the NJ-Board and Dr. O'Connell signed and agreed to "Consent Order Granting Restricted License" that resolved the disciplinary matter growing out of the June 20, 2012 visit to the Advanced Urgent Care Clinic. The Order contains the following provisions:

1. Respondent's license to practice medicine and surgery in New Jersey shall be reinstated with restrictions, subject to the terms and conditions of this Consent Order.
2. For the duration of his license, Respondent shall practice medicine and surgery solely in a group practice, hospital or institutional setting pre-approved by the Board.
3. For the duration of his license, Respondent shall notify the Board in writing of the name, address and telephone number of each entity or practice where he practices medicine and surgery prior to beginning such practice, including any change in employment or periods when he is working in a field other than medicine.
4. Respondent shall register with the Physician's Monitoring Program for so long as he retains his medical license in the State of New Jersey.
5. Respondent shall remain in the Professional Assistance Program for so long as he maintains his medical license in the State of New Jersey. If the Professional Assistance Program recommends termination of his participation in the Program, Respondent may petition the Board to terminate this requirement.

² This is the same detailed "Directives" document with which he was required to comply with by the Interim Consent Order.

6. Respondent shall maintain absolute abstinence from all psychoactive substances, including alcohol, unless prescribed by a treating physician for a documented medical condition with immediate written notification to the Medical Director of the Professional Assistance Program. Respondent's associates or family members shall not be considered treating physicians for the purpose of prescribing psychoactive drugs.
7. Respondent shall submit to random twice weekly urine monitoring for the first six (6) months following return to the practice of medicine and surgery. After six (6) months, urine monitoring shall be random and at a frequency determined by the Director of the Professional Assistance Program.
8. Respondent shall participate in monthly face-to-face visits with a representative of the Professional Assistance Program for the first three (3) months following his return to practice, followed by meetings every two (2) months for the remainder of the first year of his return to practice. Thereafter, meetings shall be at a frequency determined by the Director of the Professional Assistance Program.
9. The Professional Assistance Program shall provide the Board with quarterly status reports regarding Respondent's participation in his recovery program, with immediate notification (within forty eight (48) hours of awareness of occurrence) of evidence of any relapse or noncompliance with any of the terms of the within Consent Order.
10. Respondent shall be followed by his neurologist regarding treatment of his Parkinson's Disease who shall provide quarterly reports to the Professional Assistance Program. Dr. O'Connell shall make his best efforts to insure the timely delivery of these reports. Delay on the part of the neurologist shall not be deemed a deviation for purposes of paragraph 14 below.
11. The Board and the Attorney General will have full and complete access to any communications between Respondent and the Professional Assistance Program and between Respondent and his treating physicians, and will have full and complete access to any reports, recommendation or evaluations issued by these entities, including but not limited to the release of the medical reports and evaluations. Respondent hereby authorizes the Professional Assistance Program and his treating physicians to provide copies of any recommendation, evaluations, or reports to the Board and to the Attorney General simultaneously with their provision to Respondent. In addition, the Board its agents and employees, including but not limited to the Medical Director may communicate directly with these individuals from time to time with regard to Respondent's evaluation or participation.

12. Respondent specifically acknowledges that any recommendations, evaluations, or reports issued by the Professional Assistance Program or his treating physicians may be introduced during the course of any future disciplinary proceedings.

The Order at #13 contains a provision addressing the Board's concern should Dr. O'Connell practice Invasive Cardiology, in light of his Parkinson's Disease. It lists numerous requirements for him to fulfill. The Order continues with further provisions:

14. Any deviation from the terms of this Order without the prior written consent of the Board shall constitute a failure to comply with the terms of this Order. Upon receipt of any reliable information indicating Respondent has violated any term of this Order, including but not limited to a confirmed positive urine, a relapse into the use of alcohol or psychoactive substance without the approval of a treating physician for medical indication, Respondent's license shall be automatically suspended by the Board, said suspension shall be deemed a permanent suspension (i.e. revocation) of Respondent's medical license, with prejudice to any reapplication.
15. Respondent shall have the right to apply for removal of the automatic suspension upon written application to the Executive Director of the Board or his designee. Respondent shall be granted an opportunity to present evidence limited to a showing that the information the Board relied upon was false.

(Ex. I.)

Conclusion and Recommended Ruling

The MA-Board may discipline a physician who has been disciplined by the proper licensing authority in another state for reasons that are "substantially the same" as those set forth in G.L. c. 112, § 5 and 243 CMR 1.05(5). The MA-Board has authority to discipline the physician based solely on the other state's actions against the physician when the same misconduct if done in Massachusetts would be grounds for physician discipline. 243 CMR 1.03(5)(a)12. The conduct underlying the NJ-Board discipline matters only on the issue of whether or not the reasons for the discipline is "substantially the same" as the reasons that authorize the MA-Board to discipline a physician. It does not matter whether the other state

imposed discipline following a hearing or via a Settlement Agreement/Consent Order. *Ramirez v. Board of Registration in Medicine*, 441 Mass. 479, 482-483 (2004); *Anusavice v. Board of Registration in Dentistry*, 451 Mass. 786, 798 (2008). There is no need to re-litigate the underlying facts in the proceeding before the MA-Board. *Haran v. Board of Registration in Medicine*, 398 Mass. 571, 575 (1986).

The conduct that the NJ-Board disciplined Dr. O'Connell for is conduct that the MA-Board could discipline him for had that conduct occurred in Massachusetts. The findings show that Dr. O'Connell was found to have engaged in misconduct by failing to fulfill the terms of his restricted license by not timely informing the NJ-Board he was taking the job at the Clinic, having an improper CDS number and no DEA number but still prescribing Schedule III and IV medications, and having CDS medications mislabeled or expired and improperly stored. This is conduct that the MA-Board has disciplined physicians for. (See MA-Board's Motion for Summary Decision, Ex. K at pgs. 2 & 3.) I recommend that the MA-Board's Motion for Summary Decision be allowed as a matter of law.

The findings are based on admissions Dr. O'Connell has made in his Answer to the Statement of Allegations, in his mitigating evidence, and within the NJ-Board Orders that he agreed to. Dr. O'Connell does not dispute he engaged in the conduct for which he was disciplined by the NJ-Board. They serve as a sufficient basis for the MA-Board to impose discipline. There is no genuine dispute about any material facts. The findings support the MA-Board's Statement of Allegations that Dr. O'Connell engaged in conduct that places into question his competence to practice medicine and is guilty of misconduct in the practice of medicine in violation of G.L. c. 112, § 5(c) and 243 CMR 1.03(5)(a)3.

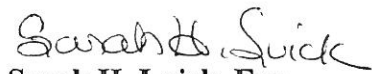
The findings also include information that Dr. O'Connell wants the MA-Board to consider as mitigating factors against disciplining him for his conduct in New Jersey. For instance, Dr. O'Connell contends that nothing in the NJ-Board's discipline involves a determination that he suffered a relapse of his substance abuse problem. Dr. O'Connell contends that he provided only small Schedule III and IV prescriptions as a bridge for patients to then treat with their specialists or with their primary care physicians. He acknowledges that on June 20, 2012, he signed admissions about his conduct that included overprescribing CDS medications to patients when he denies he actually did that. He maintains that subsequent NJ-Board Orders do not specifically address this point. He also maintains as a mitigating factor, that he did not intentionally prescribe Schedule III and IV CDS medications knowing he lacked a proper CDS number. He believed that his current CDS number covered his prescribing at the new job at the Clinic. He acknowledges that he had no DEA number when he did this prescribing, but he understood that he would be receiving it soon and yet never heard from the DEA for reasons unknown. He was wrong, but he assumed that the Clinic's owner held a license to practice in New Jersey; that this was a likely requirement for operating a clinic in New Jersey. Dr. O'Connell acknowledges his failure to fulfill completely the terms of the restricted license to practice included his failure to secure the approval of the NJ-Board to work at the Advanced Urgent Clinic before starting employment there. He offers for consideration by the MA-Board, the fact that he his Parkinson's Disease was expensive to treat, and that he had a great need for employment with health insurance during the time period around June 2012.

The MA-Board is not bound by a DALA recommendation as to sanction, *Fisch v. Board of Registration in Medicine*, 437 Mass. 128, 139-40 (2002); *Herridge v. Board of Registration in Medicine*, 420 Mass. 154, 166-67 (1995); *Waisbren v. Board of Registration in Medicine*, 418

Mass. 756 (1994). The findings show very specific requirements and restrictions Dr. O'Connell is now subject to in practicing medicine in New Jersey as found in the April 2014 Final Consent Order. These requirements and restrictions demonstrate that the state where Dr. O'Connell engaged in the misconduct, is allowing him to continue to practice albeit with numerous periodic reports to file, with work in only particular kinds of practices, with routine substance abuse (urine) tests and monitoring, and with supervision when practicing medicine, particularly if Dr. O'Connell engages in Invasive Cardiology practicing. I also find that Dr. O'Connell in his mitigating evidence and in his Answer to the Statement of Allegations to be acknowledging his wrongdoing, but explaining why the conduct occurred. I find no evidence in the record to show he had lapsed into drug abuse at the time he was disciplined in New Jersey.

I recommend that the MA-Board allow the Motion for Summary Decision, and I leave to the MA-Board's discretion what discipline, if any, is appropriate.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Sarah H. Luick, Esq.

Administrative Magistrate

Dated: AUG - 3 2015