

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

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STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MEDICAL EXAMINERS
DOCKET NO. H-83-5166

In the Matter of the Suspension or Revocation of the License of)	
)	Administrative Action
GARY L. DANKNER, D.C. License No. 1481)	FINAL DECISION
)	AND
To Practice Chiropractic in the State of New Jersey)	ORDER

This matter was brought before the New Jersey State Board of Medical Examiners on the complaint of Irwin I. Kimmelman, Attorney General of New Jersey, by Joan D. Gelber, Deputy Attorney General, which was filed with the Board of Medical Examiners on January 18, 1984. That complaint charged respondent with having engaged in the use of misrepresentation and fraud in violation of N.J.S.A. 45:1-21(b), repeated negligence, in violation of N.J.S.A. 45:1-29(d) and professional misconduct in violation of N.J.S.A. 45:1-21(e), as well as failing to maintain appropriate patient records in violation of N.J.A.C. 13:35-6.12. The matter was referred to the Office of Administrative Law on February 9, 1984. Hearings were held before Sybil R. Moses, Administrative Law Judge, on July 9, 10, 12, 13, October 22, 23, 24, 25, 26, November 20, December 5, 6, and 7, 1984, at which respondent was represented by Steven I. Kern, Esq. Judge Moses' initial decision was issued on May 13, 1985, and is incorporated by reference, as if fully set forth herein. Exceptions to that initial decision were

filed by respondent's counsel on June 14, 1985. Complainant's exceptions were filed on May 22, 1985, as supplemented by a letter of May 24, 1985. After due consideration of the Administrative Law Judge's decision, transcripts, exhibits, exceptions and arguments of counsel, the Board makes the following findings of fact and conclusions of law.

CREDIBILITY FINDINGS

The Board specifically accepts Judge Moses' findings with regard to the credibility of witnesses. Like Judge Moses, we expressly reject respondent's challenges to the credibility of Drs. Litterer and Fasulo (RE-17) * and his contention that "there is some sort of a 'conspiracy' between Drs. Litterer and Fasulo and members of the Board of Medical Examiners, especially Dr. McCutcheon."

FINDINGS OF FACT

The Board adopts all of the findings of facts set forth in Judge Moses' initial decision, including her findings with respect to credibility as if they were fully set forth herein.

CONCLUSIONS OF LAW

The Board adopts virtually all of Judge Moses' conclusions of law with respect to the counts in which the State prevailed. Moreover, the Board will not disturb Judge Moses' recommendation to dismiss Counts III, IV, VIII and IX. With respect to Count III, wherein it was alleged that respondent had charged excessive fees, we concur with Judge Moses' conclusion that the fee charged, twenty-five (\$25) dollars per office visit, was at the "high end of the acceptable range

*RE - shall refer to respondent's exceptions filed herein.

of fees for treatment" (ALJ Decision, Page 30) but was "not manifestly unconscionable or overreaching." (ALJ Decision, Page 39).

With respect to Count I, we do, however, disagree with the Administrative Law Judge's conclusion that no basis for disciplinary action exists pursuant to N.J.S.A. 45:1-21(b). Judge Moses concludes complainant failed to establish Dr. Dankner's intent to defraud, though conceding that such intent was both "suspected and implied." (ALJ Decision, Page 36). In reaching this decision, Judge Moses finds that the State failed to establish the elements which she believes to be required for a finding of fraud. Those elements include intent. Without reaching the question as to whether intent is a requisite element for a finding of a violation of N.J.S.A. 45:1-21(b), we think it evident that such intent was established in the present matter. Indeed, Judge Moses at Page 50 of her decision states: that Dr. Dankner "has engaged in a pattern of conduct which reveals an intent to overstate and grossly magnify the diagnoses of injuries to the patients he treated." At Page 45, she likens "Dr. Dankner's actions in overstating diagnoses and in encouraging excessive visits" to the "falsification of time sheets." While she finds that such conduct demonstrates a lack of the requisite good moral character required of licensees of the Board, she declines to find that the same actions constitute misrepresentation. We disagree.

DISPOSITION AND ORDER

Based on our review of the ALJ's decision, and in consideration of the arguments of counsel, and our assessment of the record itself, we modify the disposition and order made by the Administrative Law Judge in her initial decision as follows:

The Board concurs that the public interest will be served by the imposition of a period of suspension of Dr. Dankner's license to practice chiropractic. Judge Moses had recommended that Dr. Dankner's license be suspended for a period of eighteen (18) months; the first four (4) months of which would have been served as an active suspension and the remaining fourteen (14) months, probation. Because the Board has relied on Judge Moses' finding that Dr. Dankner "engaged in a pattern of conduct which reveals an intent to overstate and grossly magnify the diagnoses of injury" in concluding that Dr. Dankner has engaged in misrepresentation in violation of N.J.S.A. 45:1-21(b), we believe that a more substantial period of active suspension is in order. Accordingly, we have determined that Dr. Dankner's license shall be suspended for a period of one (1) year, the first six (6) months of which shall be served as an active suspension.

We concur with Judge Moses that the imposition of civil penalties are warranted, though we differ with her with respect to the amount to be assessed, and on the manner in which those penalties should be calculated. Judge Moses had recommended the assessment of ten thousand (\$10,000) dollars in penalties, based on her theory that the State had proven a violation of four separate statutory regulatory citations and that the maximum penalty should attach. We hereby assess penalties as follows: Count I, one thousand (\$1,000) dollars, Count II, one thousand (\$1,000) dollars, Count IV, one thousand (\$1,000) Dollars, Count VI, one thousand (\$1,000) dollars. While we believe we are authorized by N.J.S.A. 45:1-25 to impose a civil penalty of twenty-five hundred (\$2500) for each count, we have chosen to impose

less than the maximum penalty in view of the substantial costs, which we believe should properly be borne by the respondent in this matter.

We reject Judge Moses' construction of N.J.S.A. 45:1-25 which would preclude the Board from assessing additional penalties for violations of the same statute. As the Supreme Court of New Jersey recognized in In re DeMarco, 83 N.J. 25 (1980), the Board is authorized to impose multiple penalties for multiple instances of gross malpractice. Thus, Judge Moses' reliance on In re Suspension of Wolfe, 160 N.J. Super. at 121, 122 (App. Div. 1978), decided prior to DeMarco, appears misplaced. The logic of the DeMarco court seems to apply with equal force to the present matter. The Board must be in a position to impose sanctions which corrolate to the extent as well as the severity of a violation so that it may effectively deter licensees from engaging in wrongful conduct.

We do concur with Judge Moses in holding that the Board has the authority to assess costs attributable to the investigation and prosecution of this matter. We reject respondent's arguments to the contrary, and revise the cost figure as cited in Judge Moses' decision to include the costs of transcripts in this matter.

Finally, we concur with Judge Moses that there is a need for Dr. Dankner to undertake a re-education program. Specifically, we direct him to take and successfully complete a course in chiropractic diagnosis of at least one semester's duration at a recognized school of chiropractic approved by the Board.

Accordingly, we modify the order as presented in the initial decision as follows, and on this 11th day of September, 1985,

IT IS ORDERED:

1. Respondent's license to practice chiropractic in the State of New Jersey is hereby suspended for one (1) year effective on the date of entry of this order, the first six (6) months of which shall be an active suspension, and the remaining six (6) months of which shall be stayed, if all other terms of the within order are met. During the period of active suspension, respondent shall be enjoined and restrained from the practice of chiropractic pursuant to the terms of this order. The terms of the annexed document entitled "Future Activities of Medical Board Licensee Who Has Been Disciplined" are incorporated herein and made applicable to respondent during the period of active suspension of licensure.

2. Respondent shall surrender his Engrossed Certificate and current Registration to the Board of Medical Examiners within ten (10) days of the entry of this order.

3. Upon the completion of the period of active suspension, respondent shall be required to appear before the Board or a committee of the Board for the purpose of conducting a status conference.

4. Respondent shall pay to the Board of Medical Examiners penalties in the amount of four thousand (\$4,000) dollars and costs in the amount of eleven thousand nine hundred and sixteen dollars and twenty cents (\$11,916.20), which payment shall be made within thirty (30) days of the entry of this order or in accordance with an installment plan as the Board office may authorize, spreading the payments over no more than two (2) years. Payments shall be made by money order or

certified check payable to the State of New Jersey. Failure to pay any installment in accordance with the plan authorized shall render the entire balance due and owing and may subject the respondent to additional disciplinary sanctions.

5. Prior to respondent's resumption of active practice, he shall demonstrate to the Board that he has successfully completed a course in chiropractic diagnosis of at least one semester's duration at a recognized school of chiropractic approved by the Board.

6. Failure of respondent to comply with the terms of this order shall constitute grounds for the imposition of additional disciplinary sanctions against him, including, but not limited to, a vacation of the stayed portion of the suspension or revocation of his license to practice chiropractic.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: Edward W. Luka, M.D.
Edward W. Luka, M.D.
President