FILED

January 12, 2013
NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF SUSPENSION OR REVOCATION OF THE LICENSE OF **DIONE WILLIAMS, M.D.** **LICENSE NO. 25MA04572300** TO PRACTICE MEDICINE AND SURGERY IN THE STATE OF NEW JERSEY	**Administrative Action** **ORDER VACATING OCTOBER 11, 2012 CONSENT ORDER**

This matter was opened to the New Jersey State Board of Medical Examiners ("the Board") upon the filing of a Motion in Aid of Litigant's Rights by the Attorney General of New Jersey, Deputy Attorney General David M. Puteska appearing, on November 28, 2012. The Attorney General sought to vacate a consent order entered on October 11, 2012 in resolution of a matter that came to the Board's attention when a malpractice settlement was reported involving respondent Dione Williams, M.D. following the death of a nineteen-year-old patient, A.Q., after a tonsillectomy respondent performed in September of 2009.

The Attorney General maintained that newly discovered evidence revealed respondent had not testified truthfully before the Board's Medical Practitioner Review Panel ("the Panel") on February 17, 2012. Inasmuch as the October 11, 2012 consent order was premised to a large extent on the Board's reliance on respondent's sworn testimony, and as the misrepresentations alleged are significant,

CERTIFIED TRUE COPY

and as the Board should be able to rely on the truthfulness of a licensee's sworn testimony in a Board proceeding, the State urged that the consent order be set aside and the matter re-opened to permit further investigation to ascertain the full extent of respondent's misconduct and resolve this matter in a manner commensurate with the facts and adequately protective of the public.

The Board having considered the State's submissions and those of respondent's attorney, Michael J. Keating, Esq., and oral argument on January 9, 2012, the Board finds that respondent engaged in material misrepresentation when offering sworn testimony before the Panel, and grants the State's motion. In providing this relief, the Board recognizes that the vacation of a consent order is extraordinary. However, respondent's misrepresentations were significant, going to the heart of the Board's statutorily imposed mission of protecting the public, since it concerned the extent of the danger represented to the public by respondent's conduct. Consequently, the misrepresentation affected both the breadth of the Board's investigation of that conduct and the terms of settlement reached.

The background of this matter is as follows: in April of 2011, the Board received notice of a $1,000,000 malpractice payment on behalf of Dr. Williams following the death of patient A.Q., a 19-year-old upon whom Dr. Williams performed a tonsillectomy on

September 1, 2009. Dr. Williams is a Board certified otolaryngologist. Following respondent's testimony before the Panel, and a review of the matter, a consent agreement was reached which included a reprimand, a $5,000.00 civil penalty, and imposition of costs of $768.41 and attorney's fees of $6,475.00. An eight month period of probation was also imposed, and Dr. Williams was required to complete courses in record keeping, communications, sleep apnea, the evaluation and treatment of asthma, and the administration of post-operative analgesics.

Much of the information on which the consent order was based was derived from respondent's sworn testimony on February 17, 2012 before the Panel. The Attorney General alleged in its submissions and oral argument that respondent had been untruthful in her testimony before the Panel in essentially three respects:

1) Respondent testified that after a Food and Drug Administration Advisory issued a warning in 2004 about the use of Fentanyl post-surgery,[1] she may have used a Fentanyl patch in the post-operative setting once (and then only for cancer patients). She testified:

> I had some experience using Fentanyl patches before 2004 when the physician advisory came out that this was not

[1]On July 15, 2005, the Food and Drug Administration (FDA) issued a Public Health Advisory warning against the use of Fentanyl patches in treating post-operative pain. (Rb3) In her testimony before the Board, Dr. Williams, apparently in error, referred to the Advisory as issuing in 2004.

> always appropriate in a post-operative setting. Then after 2004, I used it maybe once. And then I really stopped using it really for post-operative care and kind of reserved it for my patients who had cancer and who had some long-term opiate use. [Pb4[2], Exhibit 2, Panel transcript at p.13, l.12 to 20.)

Newly provided deposition testimony from nurse Joan Jones, R.N., however, indicates that respondent "typically" used Fentanyl post-surgery following routine tonsillectomies and microlaryngoscopies (Pb7). Moreover, in a reply brief dated December 28, 2012, the State provided documentation that respondent utilized Fentanyl patches for post-surgery pain relief 19 times in the years 2007-2009 alone, and ten of those cases involved tonsillectomies. This was revealed from medical records that were subpoenaed on December 12, 2012 from East Orange General, and did not include records prior to 2007, which had been archived and were not immediately available.

2) Respondent testified before the Panel that she discharged A.Q. from East Orange General Hospital (rather than keeping her there overnight) partly because A.Q.'s mother[3] preferred to have

---

[2] Pb = Petitioner's brief dated November 28, 2012.
Rb = Respondent's brief dated December 10, 2012
Prb = Petitioner's reply brief dated December 28, 2012

[3] A.Q.'s mother is named Nancy Williams. To avoid confusion, she is referred to as "A.Q.'s mother."

A.Q. recover at home. Newly supplied deposition testimony by A.Q.'s mother indicated that A.Q.'s mother had urged Dr. Williams to let A.Q. stay overnight at the hospital, and Dr. Williams dismissed her concerns. (Pb6). There were also discrepancies in respondent's account and that of A.Q.'s mother as to what happened when A.Q.'s mother drove by respondent's medical office on the way home from the hospital and unsuccessfully sought to have respondent examine A.Q. (Pb8-9).

3) There was conflicting sworn testimony as to when Dr. Williams first learned of A.Q.'s allergy to morphine. Dr. Williams claimed that she learned of it on the day of surgery, September 1, 2009. (Pb3). A.Q.'s mother, in sworn deposition testimony indicated that she told respondent about her daughter's allergy months before the surgery, and because of her concern called respondent's office frequently in the course of the weeks leading up to the surgery, but was never called back. (Pb6).

In response to the Attorney General's motion, as well as in oral argument before the Board, counsel for respondent contended that vacation of the settlement agreement, which had been proposed by the State, accepted by Dr. Williams and approved by the Board, was unwarranted, and a violation of principles of fundamental fairness. (Rb7-8). Respondent maintained that setting aside the terms of such a settlement is inappropriate "absent extraordinary circumstances such as fraud or duress." (Rb8, citing Pascarella v.

Bruck, 190 N.J. Super. 188, certif. denied, 94 N.J. 600 (1983). Respondent argued that the discrepancies in testimony between A.Q.'s mother and Dr. Williams are minor in nature, "common in medical malpractice cases [where] the parties often have a different recollection of events," and that nurse Jones's testimony is unclear and an insufficient basis on which to vacate the settlement.

Respondent also asserted that the State incorrectly implied that the Medical Practitioner Review Panel was unaware of the 2005 FDA Public Health Advisory, and a later 2009 Advisory. (Rb7). The responsive brief argued that transcripts of the February 27, 2012 proceeding demonstrate that Panel members were aware of the 2009 Advisory and the "black box" warning. (Rb8).

At oral argument on January 9, 2012, the parties reiterated earlier arguments presented in their submissions. In addition, DAG Puteska pointed out that East Orange General Hospital had not yet fully complied with the subpoena for records, and medical records from 2004 through 2006 may provide additional documentation of respondent's use of the Fentanyl patch for post-surgery pain relief, even though the PDR for those years warned that the Duragesic patch was contraindicated for that purpose.

Respondent's attorney, Michael J. Keating, Esq., stressed the importance of the principle of finality, and the binding nature of

settlements, summing up succinctly: "A deal is a deal." He stated that Dr. Williams was a busy surgeon, and that the 19 instances in which she utilized the Fentanyl patch were not indicative of a "routine practice," since they involved only a small proportion of her cases. In addition, he cited confusion caused by respondent's testimony about an FDA Public Health Advisory that (she told the Panel) issued in 2004. There were actually two FDA advisories, one that issued in 2005, and one in 2009. Mr. Keating argued that when Dr. Williams testified that she had used the Fentanyl patch "only once" since the issuance of the 2004 advisory, she actually meant since the 2009 advisory.

DISCUSSION

New Jersey's Supreme Court has held that "absent legislative restriction, administrative agencies have the inherent authority to reopen and modify previous orders." Skulski v. Nolan, 68 N.J. 179, 195 (1975) (citing cases). This authority may be invoked to "'serve the ends of essential justice,'" but it must be exercised reasonably, and reasonable diligence is required. Ibid. (Citations omitted). Courts have held it "axiomatic. . . that a party cannot appeal from a judgment or order to which he consented." Bass ex rel. Will of Bass v. DeVink, 336 N.J. Super. 450, 455 (App. Div.), certif. denied, 168 N.J. 292 (2001) (citing cases). A party to a consent order may, under certain circumstances, challenge such orders; however, "[i]f a settlement agreement is achieved through

coercion, fraud, undue pressure, or unseemly conduct...the settlement agreement must be set aside." Brudage v. Estate of Camambio, 195 N.J. 575, 601 (2008) (citation omitted).

In Nolan v. Lee Ho, 120 N.J. 465 (1990), where a trial court had vacated a settlement agreement on the basis of the plaintiff's having "'knowingly perpetrated a deception'" in an interrogatory response, New Jersey's Supreme Court found that the issue as to whether the trial court erred hinged upon whether the plaintiffs had concealed a material fact. 120 N.J. at 470-72. According to the Court, an equitable fraud analysis was appropriate in the matter, i.e., whether a material misrepresentation had been made "with intent that it be relied on, coupled with actual detrimental reliance." Id. at 472 (citing Jewish Center of Sussex County v. Whale, 86 N.J. 619, 625 (1981).

Applying the law to this matter, the crucial inquiry is whether Dr. Williams provided false testimony to the Board; whether the testimony was material to the matter at issue; whether the State and the Board reasonably relied on that testimony; and whether the State acted with reasonable diligence upon receipt of the new evidence.

The Board finds that misrepresentation is clearly apparent in connection with Dr. Williams's testimony about her administration of Fentanyl. The testimony of nurse Joan Jones that Dr. Williams was the only physician at East Orange General Hospital to utilize

the Fentanyl patch for control of post-surgery pain, and that this was her "typical" practice, is in clear conflict with respondent's testimony that she did so "maybe once" since 2004, reserving Fentanyl for use with cancer patients. While the conflict in testimony does not necessarily establish that Dr. Williams testified falsely, the Board finds that East Orange Hospital medical records dating from 2007 to 2009 demonstrate that respondent used the Duragesic patch for post-surgery pain relief on at least nineteen (19) occasions in routine cases. This corroborates the nurse's testimony and clearly demonstrates that respondent's testimony before the Panel was not truthful. The explanation offered by Respondent's attorney, without a certification of respondent or other supports, that respondent meant that she had used Fentanyl only once after the issuance of the 2009 advisory, does not make sense in the context of the testimony as a whole.

Moreover, the misrepresentation involved is unquestionably material to the misconduct that had been under investigation at the time of the Panel inquiry. The extent to which, over a period of years, respondent engaged in a dangerous practice subject to FDA Public Health Advisories and a black box warning in the PDR, is patently material as to the extent of the misconduct engaged in, an important consideration in terms of the Board's obligation to protect the public. The lack of judgment indicated by respondent's

regular use of the Fentanyl patch post-surgery implicates significant public safety concerns.

The two other issues raised by the State - the post-surgery dealings between Dr. Williams and A.Q.'s mother, and whether Dr. Williams learned of A.Q.'s allergy to morphine months prior to surgery, or on the day of surgery - merely serve to bolster the material misrepresentation involving use of the Fentanyl patch after FDA advisories and warnings had issued, and we do not ground this Order on those conflicting sworn statements independently. We would not reopen this matter based on these discrepancies alone. However, in light of respondent's misrepresentation as to her practice of utilizing Fentanyl post-surgery, the issue of whether respondent testified dishonestly as to these other issues also warrants further scrutiny.

The Board further finds that the State has acted with reasonable diligence in this matter. According to the State, the new evidence was first provided to DAG Puteska on November 19, 2012. The consent order had been entered on October 11, 2012. The Motion in Aid of Litigant's Rights was filed on November 28, 2012, less than two weeks after the new evidence was received. Additionally, the State subpoenaed records on December 12, 2012 which corroborate nurse Joan Jones's sworn testimony. The Board finds that the State's actions following receipt of the new evidence demonstrate reasonable diligence.

Moreover, the Board's reliance upon respondent's testimony when it resolved this matter by consent order was likewise reasonable. The Board properly expects its licensees to provide truthful testimony when questioned about their professional conduct, and should be able to rely upon that testimony. Had the Board been aware, however, that respondent's use of Fentanyl post-surgery was not an isolated occurrence, but had been repeated on multiple occasions, the Board would have investigated the matter more thoroughly, and/or would have resolved the matter in a more protective manner.

The Board finds that the State has met its burden of demonstrating by a preponderance of the credible evidence, or even by the standard of clear and convincing evidence, that respondent's testimony before the Panel was untruthful as to the extent to which she utilized Fentanyl post-surgery; that the lack of truthfulness concerned material issues; that the testimony was given with the intention that it be relied upon, and that the Board did in fact rely upon it. The Board further finds that the other issues raised by conflicting sworn statements warrant further investigation.

We therefore vacate the consent order so that the Board may further investigate this matter. In the event that the Board takes further action, respondent shall have an opportunity to respond as contemplated pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Accordingly,

IT IS, ON THIS 12 **DAY OF** January **, 2013,**

HEREBY ORDERED:

1. The Consent Order filed on October 11, 2012 is hereby vacated to permit additional investigation.

2. The Board shall refund to respondent any payments made pursuant to the terms of the vacated consent order.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: George J. Scott DO. FACOFP

George J. Scott, D.P.M., D.O.
Board President