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NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

STATE OF NEW JESERY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
OAL DOCKET NO. BDS 01663-10

In the matter of the Suspension
Or Revocation of the License of:

MAGDY ELAMIR, M.D.

To Practice Medicine and Surgery
in the State of New Jersey

FINAL ORDER

Overview

This matter was returned to the New Jersey State Board of Medical Examiners (the "Board") on August 26, 2014, upon the issuance of a 60 page Initial Decision ("ID") by Administrative Law Judge ("ALJ") Ken R. Springer. ALJ Springer's opinion, in turn, was entered following a fourteen day trial at the Office of Administrative Law ("OAL") on nonconsecutive hearing dates between March 10, 2014 and May 28, 2014.

In the ID, ALJ Springer concluded that respondent Magdy Elamir, M.D., on nine distinct occasions, wrote prescriptions for controlled dangerous substances ("CDS") to patients who were, in fact, cooperating witnesses participating in a criminal investigation of Dr. Elamir's practice. In each instance, ALJ Springer found that Dr. Elamir wrote prescriptions for Percocet and Xanax (and on one occasion for Advair, a drug used to treat asthma

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with a known high street value) based on nothing more than his "patient's" oral request. Additionally, in each instance, Dr. Elamir acted without first conducting any evaluation or examination to determine whether the "patient" had any actual need for the CDS he prescribed, and without maintaining any semblance of a medical record for the visit. ALJ Springer concluded that Dr. Elamir's prescribing of highly addictive drugs, without any legitimate medical purpose, was "reprehensible" conduct which had been established by "overwhelming proofs." ID, p. 38-39.

ALJ Springer further found that Dr. Elamir's medical records were repeatedly incomplete and illegible; that Dr. Elamir inflated coding for office visits, to include having reported on one day alone that he treated 44 cases of "moderate to high severity;" and that he violated provisions of the Codey Act, N.J.S.A. 45:9-22.5 by making illegal referrals of patients to health care services - namely, imaging facilities - in which he had an ownership interest.[1] Based on those findings and related conclusions of law, ALJ Springer recommended that the Board revoke Dr. Elamir's license, assess a $100,000 civil penalty, $90,000 of which was to be for violations related to illegal prescribing and

[1] ALJ Springer also found that, in treating patient T.C., Dr. Elamir substantially deviated from standards of medical care when he continued to prescribe lithium without monitoring T.C.'s lithium blood levels, thyroid tests and kidney functioning. ALJ Springer did not, however, conclude that any deviations from standards of care in respondent's treatment of T.C. rose to a level that would support a finding of "gross" or "repeated" malpractice. ID, p. 44.

the remaining $10,000 of which was for recordkeeping and upcoding violations (ALJ Springer recommended that the Board waive penalties for any violations of the Codey Act), and assess all costs incurred in the investigation and prosecution of this matter.

We agree with, and unanimously adopt in their entirety, all findings of fact and conclusions of law set forth in ALJ Springer's ID. We also fully agree with and adopt his conclusion that the "egregious nature of the totality of [Dr. Elamir's] conduct" forcefully supports the entry of an Order revoking his medical license. ID p. 45. Finally, we adopt ALJ Springer's recommendations that Dr. Elamir be assessed a civil penalty of $100,000 and that he be assessed the costs of investigation and prosecution in this matter, however fix the amount of costs assessed at $169,009.40.[2] We set forth below a summary of the procedural history of this matter (focused only on events that have occurred subsequent to the issuance of the ID) and additional explanation of the basis for the determinations we herein make.

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[2] The Attorney General initially sought a cost award to include an attorneys' fee of $241,300, however, for reasons that will be set forth herein, we limit the assessment of attorneys' fees to $120,650.

Procedural History

As noted above, ALJ Springer's ID was dated and filed with the Board on August 24, 2014. On September 22, 2014, an Order extending the time for the Board to decide whether to adopt, modify or reject that decision for an additional forty-five days, specifically through November 24, 2014, was entered by Acting Director and Chief Administrative Law Judge Laura Sanders. The Order was entered to allow the Board to conduct an additional hearing on November 11, 2014.

In lieu of filing specific exceptions to ALJ Springer's opinion, respondent filed a short letter dated September 29, 2014 advising that he was taking "exception" to all of ALJ Springer's initial decision other than his findings regarding inappropriate medical record-keeping in violation of N.J.A.C. 13:35-6.5. Dr. Elamir relied solely on a post-hearing brief, dated July 11, 2014, that he had filed at the OAL prior to the issuance of the ID.[3]

Deputy Attorney General Mendoza submitted a reply brief dated October 17, 2014, urging the Board to reject Dr. Elamir's

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[3] We fully agree with the Attorney General's contention that respondent's exceptions failed to comport to the requirements of N.J.A.C. 13:35-6.5, which require not only the identification of specific findings of fact, conclusions of law or dispositions to which exception is sought, but also specific proposals in lieu of or in addition to those reached by the ALJ and supporting reasons. Given that respondent relied on a brief filed at the OAL before ALJ Springer's ID issued, it is clear that his "exceptions" were procedurally defective. Nonetheless, as discussed herein, we did consider respondent's submissions and the oral arguments advanced by Mr. Gorrell on November 11, 2014, however have concluded that there is no basis to modify or overturn any of the determinations made by ALJ Springer.

exceptions and to instead adopt all findings of fact and conclusions of law reached by ALJ Springer. She urged the Board to further adopt ALJ Springer's recommendations that Dr. Elamir's license be revoked and that he be assessed all costs of investigation and prosecution, but suggested that the Board reject the ALJ's recommendation that a $100,000 penalty be assessed and instead assess a penalty of $370,000.

On November 12, 2014, the Board heard oral argument on the filed exceptions and conducted a hearing on penalty at which respondent was afforded an opportunity to present mitigation evidence.[4] Respondent appeared at that hearing, represented by Brach Eichler, LLC, Joseph Gorrell, Esq. appearing. Deputy Attorney General Kathy Mendoza appeared for Complainant John Hoffman, Acting Attorney General of New Jersey.

In oral arguments, Mr. Gorrell urged the Board to reject ALJ Springer's findings, or remand the matter back to OAL for additional hearings, based on what he described to be a "grossly unfair" procedure at the OAL. Specifically, Mr. Gorrell claimed

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[4] Prior to November 11, 2014, the parties were explicitly advised in writing that the Board would initially afford each party twenty minutes to supplement their written exceptions with oral argument, and that the Board would then deliberate and decide whether to adopt, modify or reject any or all of the ID. Further, the parties were advised that, in the event the Board sustained, in whole or in part, ALJ Springer's recommendations that the Board find cause for disciplinary action against Dr. Elamir, the Board would proceed immediately to conduct a hearing on penalty. Dr. Elamir was further specifically advised that he could then present evidence, to include witness testimony, for the Board to consider in mitigation of penalty.

that it was unfair that Dr. Elamir had only been provided with notice regarding "new cases" (i.e., cases involving patients other than the three patients who had been specifically identified in the complaint as patients who allegedly were able to obtain illegal prescriptions from Dr. Elamir) some four years after the complaint was initially filed. Mr. Gorrell additionally claimed that ALJ Springer's ruling disallowing the use of "transcriptions" of medical records prepared by Dr. Elamir was a grossly unfair and prejudicial ruling, which he claimed essentially precluded Dr. Elamir from presenting a defense. Finally, Mr. Gorrell suggested that ALJ Springer erred when he concluded that the State's expert, Dr. Holland, was a more credible expert witness than defense expert Dr. Rosenbaum, based on Dr. Holland's admission at trial that he did not treat a patient population similar to that treated by Dr. Elamir and his concession that he knew nothing about treatment of patients with Suboxone.

DAG Mendoza urged the Board to adopt the ID in its entirety. Addressing respondent's claims regarding Dr. Elamir's record transcriptions, she urged the Board to conclude that ALJ Springer had properly recognized that what Dr. Elamir prepared were not "transcriptions," but rather "self-serving" and "untrustworthy" reconstructions or summaries of otherwise illegible medical records. DAG Mendoza pointed out that both the State's expert witness and respondent's expert witness had not been able to

decipher Dr. Elamir's "scribbles", and she urged the Board to conclude that the exclusion of Dr. Elamir's summaries of those records was entirely appropriate. DAG Mendoza thereafter urged the Board to conclude, as had ALJ Springer, that the State had presented overwhelming evidence of respondent's guilt.

Following deliberations in closed session, we returned to open session and announced our decision to adopt, in their entirety, all findings of fact and conclusions of law in ALJ Springer's ID. We then conducted a hearing limited to the issue of penalty.[5] Dr. Elamir testified on his own behalf and asked that the Board consider his prior good works over his entire 25 year career, which he stated included taking uncompensated hospital call and having consistently accepted indigent and Medicaid patients that no other physician would take. He further implored the Board to recognize that he had acquired a CAT scan and an MRI solely to enhance his practice and for the benefit of his patients, and that he similarly became certified to prescribe Suboxone in 2006 in an effort to help patients with narcotic addiction. Dr. Elamir

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[5] Dr. Elamir's counsel requested that the Board adjourn the hearing on penalty, stating that two physicians who he had planned to call to offer mitigation testimony on behalf of Dr. Elamir were unable to attend the hearing. We denied that application for the following reasons: 1) respondent had been provided written notice that the Board would conduct a hearing on penalty on November 12, 2014, and thus should have confirmed any proposed witness availability or requested an adjournment in advance of the scheduled date; and 2) because it would have then been impossible to reschedule a hearing in time to comply with the OAL's Order extending the final date for Board action through November 24, 2014. We also noted that respondent could have offered certifications from any witnesses who were unavailable, but did not do so.

implored the Board not to base any decision on penalty on his admitted "mistakes," and to instead allow him to return to practice.

In summations, DAG Mendoza suggested that the constellation of findings made by ALJ Springer, to include record-keeping violations for ten independent patients and upcoding of 44 separate patient encounters on October 19, 2009, should support a far greater civil penalty assessment than had been recommended by ALJ Springer. DAG Mendoza specifically asked the Board to impose penalties for each of the ten recordkeeping violations, and for each of the forty-four patient visits that were upcoded on a single day. In his summation, Mr. Gorrell suggested that Dr. Elamir had been forthright about his mistakes and recognized the inadequacy of his recordkeeping, and urged the Board to afford Dr. Elamir a chance to demonstrate his ability to practice competently and appropriately.

Determination to Adopt Findings of Fact and Conclusions of Law

On review of the hearing record below, we are fully satisfied that good cause exists to adopt, in their entirety, all of the findings of fact and conclusions of law made by ALJ Springer. ALJ Springer carefully and exhaustively summarized the evidence presented below, and explained the bases and reasons for the conclusions of law he made. We find ALJ Springer's opinion to be logical and persuasive, and in all respects fully supported by the evidential record below.

We reject respondent's suggestion that the Board should presently remand this case back to the OAL for further hearings to remediate claimed procedural unfairness. Respondent clearly had notice, in advance of trial, of the charges against him, to include notice of the patients whose records were to be the subject of the proceedings, and respondent presented a thorough defense over the fourteen hearing dates. While it is the case that this matter remained in inactive status for a period of approximately three years while criminal charges were pending, the case was restored to the active hearing calendar after Dr. Elamir was sentenced criminally on May 24, 2013 and trial did not thereafter commence until March 2014. We are satisfied that respondent in fact had sufficient notice of the charges against him, as well as of the identity of specific patients whose care or records were to be

considered below in support of those charges, with adequate lead time prior to the start of the hearing.

We further reject respondent's claim that we should overturn ALJ Springer's decision to exclude from evidence Dr. Elamir's typewritten "summary" of recollections, and his suggestion that we should remand the case back to the OAL for further hearings upon entry of that document. ALJ Springer pointed out that the excluded document was created more than four years after the fact, and characterized it as "self-serving," "untrustworthy" and "unreliable". See ID p. 23. Respondent has not offered any legal basis to support his claim that the decision to exclude the document was in error. Further, we point out that an abundant predicate existed to support ALJ Springer's findings regarding Dr. Elamir's recordkeeping violations.[6] Finally, we find no reason to disturb ALJ Springer's credibility determinations focused upon the two expert witnesses who testified below.

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[6] Even were we to assume that the excluded document in fact included rote "transcriptions" of Dr. Elamir's medical records, it is entirely unclear to us how that document's introduction would have in any way changed any of the findings made by ALJ Springer. As noted above, there is overwhelming evidence in the record below to support all of ALJ Springer's findings, particularly regarding the lynchpin charges of indiscriminate prescribing of CDS. Further, despite the procedural objection, Dr. Elamir has admitted to recordkeeping violations, and indeed did not even contest those findings in his written or oral exceptions.

Penalties and Cost Assessments

We unanimously agree with and adopt ALJ Springer's recommendation that Dr. Elamir's license to practice medicine and surgery in the State of New Jersey should be presently revoked. In laying a framework for the recommendation, ALJ Springer eloquently considered and discussed the crisis of CDS abuse and addiction, citing repeatedly to the State of New Jersey Commission of Investigation July 2013 report: "Scenes from an Epidemic: A Report on the SCI's Investigation of Prescription Pill and Heroin Abuse." There is no question that Dr. Elamir's cavalier disregard for all tenets of basic medical practice - evidenced each and every time he elected to write prescriptions for CDS to J.A., K.S. and/or M.S. -- compromised both his patient's and the public's welfare.

It is clear to us that Dr. Elamir repeatedly acted in a manner antithetical to any continued practice of medicine. The window opened into his medical practice -- established by the evidence introduced below to include the tapes of each undercover visit and the transcriptions of those tapes - reveals that Dr. Elamir repeatedly eschewed and abandoned all of his obligations as a physician, and instead acted solely as a drug dealer. Dr. Elamir used his medical license as nothing more than a conduit to allow him to write and sell prescriptions for monetary gain, and in doing so fundamentally compromised and corrupted his integrity as a

physician. Nothing short of a license revocation is adequate to redress that misconduct.[7]

While the Attorney General urges us to impose even greater civil penalties against Dr. Elamir in addition to ordering the revocation of his license, we are satisfied on balance that a civil penalty of $100,000 in this case is fair and proportionate. In making that determination, we have considered the mitigation evidence presented by respondent, to include his claims regarding his prior history of willingly treating indigent patients and providing uncompensated hospital care, and are satisfied that the testimony offered militates against the assessment of any additional monetary penalty.

Finally, while we adopt ALJ Springer's recommendation that respondent should be assessed all of the State's costs, we have independently reviewed the submissions offered in support of that cost application to determine a reasonable cost assessment.

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[7] We echo ALJ Springer's recognition that the findings regarding Dr. Elamir's indiscriminate prescribing fully support license revocation, and his concomitant recognition that the additional violations found only buttress that conclusion:

> In light of his reckless disregard for the safety of his patients and the threat to the general public health, Dr. Elamir's indiscriminate prescribing of controlled dangerous substances, standing alone, is deserving of the penalty of revocation. Considered together with his other serious violations, such as the flouting of his duty to keep medical records and the upcoding of his billing records, the surrounding circumstances call forcefully for revocation.

ID, p. 45

Based thereon, we have concluded that there is cause to reduce the attorneys' fees sought from $241,300 to $120,650, which in turn supports an aggregate cost assessment of $169,009.40.[8]

In reviewing the application for attorney's fees, we are guided by the general principles established in Rendine v. Pantzer, 141 N.J. 292 (1995) and recently reaffirmed in Walker v. Giuffre, 209 N.J. 124, 130 (2012). Specifically, we are required to establish a "lodestar" fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. In evaluating the reasonableness of hours, we are required to "carefully and critically" evaluate the aggregate hours claimed, and are required to eliminate duplicative or nonproductive time. See also Poritz v. Stang, 288 N.J. Super. 217, 221 (App. Div. 1996) (in evaluating reasonableness of actual hours expended, one must be mindful that "actual time expended does not necessarily equate with reasonable time."). An attorney seeking a fee award must prepare and provide a certification of services that is sufficiently detailed to allow for an accurate calculation of a lodestar. While "exactitude" is not required, the submission needs to include "fairly definite information as to the hours devoted to various general activities." Rendine, 141 N.J. at 337.

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[8] We find all costs sought other than attorneys' fees, to include costs of investigation ($20,730.91), court reporter and transcript costs ($10,984.20) and costs for the state's expert witness ($$15,990.50) to be adequately documented and fully supported, and thus impose all said costs in addition to the allowed portion of attorneys' fees.

The Attorney General's application for counsel fees is supported by a certification of DAG Mendoza dated October 17, 2014, which identifies each attorney who participated in this case, and attaches time sheets for each attorney who participated. Those time sheets detail a total of 1378.8 hours spent in the prosecution of this matter. The bulk of those claims (all but 5.1 hours) are for legal services provided by three Deputy Attorneys General - Kay Ehrenkrantz (310.9hours), Kathy Stroh Mendoza (642.7 hours) and Lisa Brown (424.8 hours). Consistent with rates established in a directive of Nancy Kaplen, Acting Director of the Division of Law, dated June 17, 2005, all three DAsG (each of whom has been admitted to the practice of law in New Jersey for more than ten years) bill at an hourly rate of $175.

In the vast majority of cases, the time entries for a given day's billings consist solely of a single three letter time-keeping code and an aggregate total of the hours billed on that day.[9] While in some cases the three letter codes are supplemented with additional, more detailed descriptions of what was done on a particular day, the inclusion of descriptive information was often omitted.

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[9] As noted in ¶5 of DAG Mendoza's October 17, 2014 certification in support of the cost application, codes used within the time sheets include "CMB" for "motion or briefs," "CCM" for "meeting or telephone conference," "CDR" for "contract document review", "CDS" for "discovery," "CRW" for "research/writing," "CPR" for "prep for trial", "CMS" for "miscellaneous", "CIV" for "investigation", "CAP" for "appearance," "CCR" for "correspondence," "CAD" for "administration" and "CTL" for "travel."

We find the $175 hourly rate charged for services provided by DAsG Ehrenkrantz, Mendoza and Brown to be an entirely reasonable rate (indeed, we recognize that the rates sought are well below market rates for comparably experienced attorneys in private practice), and thus fully allow that rate for purposes of the lodestar calculation. Our ability to carefully and critically review the reasonableness of the total hours claimed, however, was compromised by the lack of specificity in the submitted time sheets. We thus point out that, while we were able to fully extrapolate and understand what legal work was done in some instances [such as when the three letter codes "CAP" (appearance) or "CTL" (travel) were entered on trial dates, or when the code "CMB" (motion/brief) was used repeatedly on days immediately preceding the submission of briefs at the OAL], at other times it was far more difficult to understand what legal services were being performed and to determine whether the hours claimed were reasonable and/or duplicative.[10]

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[10] By way of example, the lead DAG's time sheets, beginning on 2/7/14 and running through 5/29/14, use the code "CPR" (trial preparation) on forty-seven different days, aggregating 259.0 hours of billable time. While we recognize that the lead trial attorney would clearly have a need to spend significant time preparing for trial, absent any additional information detailing what was done on a given day, we find it difficult to determine whether the hours billed were reasonable. Similar issues were identified in our review of time sheets submitted by an assisting DAG, which included entries on fifty-one independent days, aggregating 190.8 hours, billed under the code "CMS" (miscellaneous) without any additional descriptive information.

Given the highlighted difficulties, and in an abundance of caution, we conclude that the attorney's fee award sought by the Attorney General should be reduced by a factor of 50%. We are fully satisfied that ample documentation has been submitted to support a conclusion that (at a minimum) one-half of the attorney hours billed in this case were reasonable.[11] We thus assess costs, to include attorney's fees, in the aggregate amount of $169,009.40.

WHEREFORE it is on this 24th day of November, 2014

ORDERED:

1. The license of respondent Magdy Elamir, M.D., to practice medicine and surgery in the State of New Jersey is revoked.[12]

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[11] We point out that our decision to reduce the attorney's fee award should in no way be taken to suggest that we have found the number of hours spent in the pursuit of this case by the Attorney General's office, and the related staffing decisions made, to have been unreasonable. Rather, it is entirely conceivable, if not likely, that we would have been prepared to award all or the vast majority of the claimed counsel fees, had more detailed documentation been provided and had we then been able to conduct the critical analysis required under established law. We further point out that the aggregate number of hours billed by the Attorney General's office in pursuit of this matter is fully supported by the paramount public interest promoted by the pursuit of this matter. Dr. Elamir's conduct was, in all respects, egregious, and the public interest supported if not dictated a substantial allocation of attorney resources.

[12] In the event that respondent applies, at any time in the future, to the Board for reinstatement of license, he must simultaneously provide notice of that application to the Director of the Division of Consumer Affairs. In the event the Board were to then decide to reinstate Dr. Elamir's license, with or without limitations, the Director explicitly retains the right to decide whether Dr. Elamir's CDS Registration should also be reinstated.

2. Respondent is assessed an aggregate civil penalty in the amount of $100,000.

3. Respondent is assessed costs, to include investigative costs, expert witness fees, costs of transcription and attorneys' fees, in the aggregate amount of $169,009.40.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By:

Karen Criss, C.N.M.
Board Vice-President