State Board of Medical Examiners
Open Disciplinary Minutes
May 21, 2008

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, May 21, 2008 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor Conference Center, Trenton, New Jersey for Disciplinary Matters Pending Conclusion, open to the public. The meeting was called to order by Ms. Karen Criss, Chairperson for Open Disciplinary Matters.

PRESENT

Board Members Cheema, Ciechanowski, Criss, Criscito, DeGregorio, Jordan, Haddad, Lomazow, Mendelowitz, Nussbaum, Paul, Reichman, Scott, Stanley, Walsh and Weiss.

EXCUSED

Board Members Clemency-Kohler, Lambert, Salas-Lopez, Strand and Wheeler

ALSO PRESENT

Deputy Attorneys General Dick, Ehrenkrantz, Flanzman,Gelber, Horowitz, Levine, Lim, Volonte and Warhaftig, Executive Director Roeder, Medical Education Director Blanks and Mary Lou Mottola, Executive Director of the Medical Practitioner Review Panel.

RATIFICATION OF MINUTES

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE MINUTES FROM THE April 9, 2008 BOARD MEETING AS SUBMITTED.

HEARINGS, PLEAS, RETURN DATES AND APPEARANCES

MINTZER, Frederic M.D. 25MA04626300
Diana Fredericks, DAG for Complainant
Anthony P. DeMichele, Esq. For Respondent

On April 24, 2008 a Committee of the Board reviewed and approved a settlement proposal regarding Dr. Mintzer. Both Dr. Mintzer and his attorney have signed a Consent Order and the matter settled on previously agreed upon terms. The mitigation hearing in this matter was adjourned.

SPAL, Mark D.P.M. 25MD00213800
Kay Erenkrantz DAG for the Complainant
Edward J. Bilinkas, Esq. for the Respondent
Sandra Dick DAG Counseling

An Order to Show Cause, Notice of Hearing, and Notice to File an Answer was filed with the Board by the Attorney General on May 7, 2008 seeking the suspension or revocation of Dr. Spal's license to practice podiatric medicine and surgery in the State of New Jersey. The hearing in this matter was scheduled for Wednesday May 21, 2008. DAG Ehrenkrantz presented information on a settlement agreement.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR DELIBERATIONS AND ADVICE OF COUNSEL.

All parties, except counseling and administrative staff, left the room.

The Board returned to Open Session.

An Agreement was reached on an Interim Consent Order for voluntary surrender with leave to surrender Dr. Spal's CDS registration pending resolution of the plenary hearing. Dr. Spal must have a Board approved monitor to review records. Dr. Spal must also complete a Board approved record keeping course (including reason and rationale of record keeping). Dr. Spal will cease and desist from the practice of podiatry until he has completed this course. Dr. Spal may work as a pharmacist in a location where CDS is not dispensed. During the active period of suspension, this will be credited toward any further active period of suspension.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO RATIFY THE SETTLEMENT TERMS.

PERERA, Santusht M.D.25MA06664200
Kevin Jespersen DAG for the Complainant
Michael J. Keating, Esq. for the Respondent
Steven N. Flanzman DAG Counseling

Drs. Ciechanowski and Haddad were recused from this matter and left the meeting prior to the beginning of the hearing.

Office of Administrative Law Judge(ALJ) Ken Springer filed his decision in this matter on April 14, 2008. On April 29, 2008 the Attorney General filed exceptions to the decision.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO EXECUTIVE SESSION FOR ADVICE OF COUNSEL.

All parties, except administrative and counseling staff, left the room.

Returning to open session, Chairperson Criss opened the hearing whereupon the parties placed their appearances on the record. Ms. Criss granted the Attorney General's motion for thirty minutes of oral argument, including time for rebuttal.

At the onset, Chairperson Criss reminded the parties that this would be a bifurcated hearing and the Board would first consider whether to accept, modify or reject the findings of fact and conclusions of law of the ALJ. Thereafter, if the Board were to determine that liability exists, the Board would then conduct a mitigation hearing.

DAG Jespersen opened by arguing that the essence of the case involved was a catastrophic error in that Dr. Perera removed the wrong lung of a patient. This was a case of deliberate concealment because Dr. Perera informed the patient that he had a plan to operate on the right side, when there was no reason to operate on that side. Secondly, although the ALJ did not find this, DAG Jespersen argued that Dr. Perera altered the record.

DAG Jespersen asked the Board to adopt the ALJs' findings. This patient was referred for the removal of the carcinoid and it was viewed as a life-threatening condition. Medical records consistently refer to a plan to remove the carcinoid and the patient absolutely and unequivocally understood that it was to be a left side surgery. DAG Jespersen stated that contrary to this overwhelming evidence, Dr. Perera testified that he meant to go in on the right side because he saw something there. While there was a

density on the right side, it was of an uncertain significance and the referring physician recognized the importance of the need for an expedited surgery. DAG Jespersen stated that even if one were to accept Dr Perera's argument, he should have performed a new CT scan as well as inform the referring physician. All the findings of the ALJ should be adopted in its entirety insofar as Dr. Perera removed the wrong lung in surgery. DAG Jespersen stated that the ALJ determined, as the Board was urged to do likewise, that this was gross malpractice.

On the issue of deceit, DAG Jespersen stated that Dr. Perera assured patient RF that he saved his life by removing a large tumor, and this too was gross negligence. Although no tumor was found in the pathology, he told the patient that he removed a large tumor in his right lung.

One exception noted by DAG Jespersen stated that the ALJ failed to find that Dr. Perera altered the medical records. He maintained that the medical record was altered and provided reasons to support the claim. First, an expert found that two different inks were used in the patient chart and here was not evidence that refuted this testimony. During trial, Dr. Perera offered no explanation why the items were "added" with a different ink. The addition of the text, DAG Jespersen continued, that Dr. Perera completely altered the medical record and altered it in a way that support Dr. Perera's alleged position. When one compares the information written in ink 1 and ink 2, it becomes clear, according to DAG Jespersen, what was added at a later date by Dr. Perera was added to "cover his tracks." Also that which was added is in a layout that is not consistent with the way one would fill out a record. Most of the added information is written in the margins and/or crammed in between existing lines.

Moreover, DAG Jespersen stated that the ALJ found that Dr. Ciechanowski was not involved in the pre-operative discussions of the nature of the surgery with Dr. Perera and was not aware that he had intended to perform the right sided surgery until Dr. Ciechanowski saw RF in the hospital, postoperatively.

DAG Jespersen asked the Board to correct the ALJ's decision by finding that Dr. Perera altered the medical records.

Mr. Keating addressed the Board and in his opening statement, reminded the Board that it was not to re-try the case. He was prepared to address the Board on the issue of ALJ Springer's Initial Decision and whether or not to accept, modify or reject the findings of fact and conclusions of law. In broad terms, Mr. Keating accepted the opinion of ALJ Springer. There were a few minor areas that he believed the Board should find that the wrong sided surgery and/or the failure to order a new CT scan was not gross negligence. But if the Board does find that one or both of the acts were gross negligence, Mr. Keating urged the Board to then also accept the recommended penalty of the ALJ.

According to Mr. Keating, the Attorney General's position is two-fold: The ALJ erred in not finding that Dr. Perera altered the medical records and that there should be a harsher penalty. Again, he pointed out that the ALJ's decision was well reasoned. However, Mr. Keating added that the ALJ reached the wrong conclusion in determining that it was gross negligence. In this case, Dr. Perera acted in good faith and did not act in a grossly negligent manner.

Turning his attention to the record keeping issue, Mr. Keating argued that the ALJ correctly decided, based on the totality of the evidence, that there was no proof that the record was altered. The limited proof submitted at trial was that two different pens were used and that is all that the ALJ found to be factually based. Dr. Perera's testimony that

he has pens all over the office and grabs one or another at any given time, the ALJ found to be reasonable and determined this testimony was credible.

On the issue of wrong side surgery, Mr. Keating said it was a systems error and should not automatically be considered gross negligence on the part of Dr. Perera. One must look at this on a case-by-case basis working to get an explanation of why it happened. If you adopt ALJ Springer's view that he operated on the wrong side, Mr. Keating posited, the nature of it compels the finding that it was only simple negligence. Even if the Board were to find that it was gross negligence, then, Mr. Keating urged the Board, to adopt the penalty recommendation of the ALJ.

Finally, Mr. Keating opined that doctors are wrongfully accused in many cases and his experience has taught him that just because a mistake is made, a physician's career should not be destroyed because of it. He noted that this was an isolated case that occurred in September 2000.

In rebuttal, DAG Jespersen, noted that Mr. Keating argued that this incident was a systems error. The evidence shows that the record upon which Dr. Perera relies, states that he intended to operate on the right side.

DAG Jespersen again turned the Board's attention to the two different inks used. While it is true that it is common for people to grab different pens, it is not common to write on the same line. The expert testified that half of the line was written with one pen while the other half was written with another. This flies in the face of logic.

DAG Jespersen closed by urging the Board to find that this conduct was gross malpractice and to correct the mistake made by the ALJ, and find that he altered the medical records of RF.

In rebuttal, Mr. Keating noted that when he argues that this was a systems error, he did not mean to imply that Dr. Perera did not take responsibility in this case. In fact, in this case, RF was seen in April and was referred to a thoracic surgeon and the patient did not go. Instead, the patient went out to sea for a number of months. Right from the beginning, the patient's follow-up was poor. Here, Mr. Keating continued, the patient came back four months later with no physical symptoms, and CT scan showed questionable masses on both sides. With the passage of time, Mr. Keating concluded, unfortunately, mistakes happen.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR DELIBERATIONS AND ADVICE OF COUNSEL.

All parties, except administrative and counseling staff, left the room.

The Board, returning to open session, announced the following:

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE FINDINGS OF FACT THAT DR. PERERA OPERATED ON THE WRONG LUNG, THERE WAS A BREACH OF THE STANDARD OF CARE IN NOT ORDERING A SECOND CT SCAN AND THAT HE USED TWO DIFFERENT PENS ON THE MEDICAL RECORD. THE BOARD FOUND HOWEVER, THAT THIS WAS DONE IN AN EFFORT TO ALTER THE MEANING OF THE RECORD AND WITH AN INTENT TO DECEIVE THE PATIENT. THE BOARD ALSO VOTED TO ACCEPT THE CONCLUSIONS OF LAW OF THE ALJ INSOFAR AS THESE ACTS CONSTITUTE GROSS NEGLIGENCE.

The Board adopts findings of fact and conclusions of law as those that pertain to issues of Dr. Perera's gross negligence of wrong-sided surgery and failure to order a CT scan. The Board did modify the findings of fact and law conclusions as they pertain to issues of alteration of RF's medical records and, instead, find that he altered the medical record (P-1) by adding information to the chart to indicate that it was his plan to remove the right lung and that alteration constitutes misrepresentation, deceit and dishonesty.

The Board moved into the mitigation phase. DAG Jespersen informed the Board that the Attorney General was prepared to move forward. Mr. Keating asked for an adjournment because he has unable to gather his witnesses. In response, DAG Jespersen objected to an adjournment as Mr. Keating had sufficient time to prepare this aspect of the case. The ALJ's decision is more than one-month old, and the Board notified all parties of these proceedings, which included the notice that the mitigation hearing would be held in the event that the Board determined liability existed. The Attorney General did not believe that Mr. Keating proffered sufficient proof to grant the adjournment. Mr. Keating, in response, asked the Board to consider that he has not had the opportunity to gather witnesses or prepare certifications. Mr. Keating suggested that the Attorney General proceed with her case, and he would be happy to return next month to present his case. DAG Jespersen objected because in essence Mr. Keating would be turning the case into a discovery hearing.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO EXECUTIVE SESSION FOR ADVICE OF COUNSEL AND DELIBERATIONS.

All parties, except administrative and counseling staff, left the room.

The Board, returning to open session, announced its decision.

THE BOARD, UPON MOTION MADE AND SECONDED TOOK A VOTE TO GRANT THE ADJOURNMENT, HOWEVER, THAT MOTION DID NOT CARRY WITH A VOTE OF NINE TO FOUR.

By rules of procedure, Mr. Keating's motion was denied and the Board moved into the mitigation hearing.

Mr. Keating apologized to the Board for his unpreparedness. Mr Keating advised the Board that the only explanation he has for this case was that the doctor had a bad day. He said that Dr. Perera is a well-regarded physician and that this was an isolated incident in his career. Even the ALJ, according to Mr. Keating, recognized that Dr. Perera was a well trained physician. In fact, Mr. Keating posited that the punishment recommended by the ALJ indicates just that.

He also asked the Board to consider that the impact of a disciplinary sanction on a physician is immense. He was confident that the Board would be able to reach a decision that not only was fair to the physician, but at the same time protective of the public. Mr. Keating expressed his opinion that to invoke a penalty greater than what the ALJ recommended would be disproportionate to the facts of this case.

DAG Jesperson addressed the Board and reminded the Board that Dr. Perera's acts produced catastrophic results and that Dr. Perera attempted to cover those acts. He urged the Board to impose a severe sanction that reflects the severity of his actions.

Mr. Keating did not have witnesses or certifications to offer into evidence. He asked the Board to afford him the right to supplement the record. He proffered that he would submit information about Dr. Perera's character. DAG Jespersen did not object to the

request.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR ADVICE OF COUNSEL.

All parties, except administrative and counseling staff, left the room.

Returning to open session, the Board announced it's decision.

THE BOARD, UPON MOTION MADE AND SECONDED, TOOK A VOTE TO GRANT THE MOTION TO SUPPLEMENT THE RECORD, HOWEVER THAT THE MOTION FAILED WITH A VOTE OF EIGHT IN FAVOR AND FIVE AGAINST.

The record will close at the end of this hearing.

DAG Jespersen called his witness, Edith Bickoff. She testified that she first met RF ("Richie") in the late 90s and lived together, sharing their live for about twelve years when he passed away in 2003. She recalled that RF had surgery in September 2000 whereby he had parts of his lung removed, specifically, portions of his right lung. Prior to the surgery, RF was rather healthy, with bright blue eyes. He was the captain of an oil barge which involved work which he loved. The witness also told the Board that RF loved to fish, boat, cook, travel and make pottery. Socially, prior to the surgery, he was quite active with family and friends. She hoped, as he did, to spend many years together and eventually run a marina. Turning the attention to the surgery in September 2000, there was a tumor on the lobe of his lower left lung. Mr. Keating noted an objection given the findings of fact and conclusions of law, he questioned the relevancy of this witness. He further requested that the scope of testimony be limited to mitigation. In response, DAG Jespersen argued that her testimony directly addressed the effect that the physician's actions had on this witnesses' life. Mr. Keating took issue with this argument and again noted his objection, requesting that the testimony be limited to mitigation issues only. The objection was sustained.

DAG Jespersen began to question the witness as to RF's knowledge about the surgery performed, and Mr. Keating objected. The Chair allowed the DAG some leeway. When RF received a copy of his medical record, the witness recalled that RF called her, crying after reading the pathology report. Physically and mentally, RF told her how much pain he was experiencing. She also recalled that he was taking Percocet regularly. Immediately after surgery, he was required to use oxygen and tried to wean himself off. The witness continued that by early January 2001, he required oxygen constantly. He had to stop fishing and boating. The witness testified that they continued to take car trips, but he mostly wanted to stay home. It was depressing, according to the witness, that he had to use a scooter. She described RF as a highly socially active person prior to the surgery.

On cross examination, the witness recalled that he had bypass surgery in 1996 and that he had asthma. He was using some supplemental oxygen because of the COPD/sleep apnea. He was cleared to go back to work, however, the witness didn't think that he was able to continue working because he developed another condition as a result of a medication that he was prescribed.

P-1 (S-1) – Certification of Costs
P-2 (S-27/28) Depositions of RF excerpts
Mr. Keating noted that some of the issues deal with surgery issues, and objected to anything beyond the mitigation issues. Ms. Criss denied his objection and allowed it into evidence and noted that the Board would afford its due weight.
P - 3 - Deposition of RF, dated November 8, 2002

DAG Jespersen played a video tape of RF. In that video, RF described his conditions and explained that he was always a person who believed his cup was half full. Since the operation, he was unable to believe that. He perceived himself as a negative person and questioned how much time he had left to live.

This concluded the state's case.

In closing, Mr. Keating asked the Board to again consider this case as an isolated incident in an otherwise stellar career. He urged the Board to give deference to the ALJ's decision. Mr. Keating asked the Board to be fair and just.

DAG Jespersen urged the Board to determine that this was a revocation case. Dr. Perera had sufficient notice and information that the tumor was on the patient's left lung. In spite of the overwhelming information, Dr. Perera operated on the right side of the lung and removed a section that was not affected. According to the deputy, Dr. Perera ignored the information that he had. He countered the systems error argument by positing that if this were a systems error, it was because Dr. Perera set the system in the wrong direction. The mistake made by Dr. Perera was catastrophic. By removing as much lung tissue as he did, he precluded the removal of the carcinoma. The patient, post operatively, was severely compromised.

To complicate matters even more, after performing the wrong site surgery, he then altered the medical records and lied to the patient. In an attempt to cover up this, he actively attempted to conceal the error. It was a deliberate concealment in three instances: he lied to the patient, altered the medical records, and persisted in his excuse in his sworn testimony before the ALJ. He never admitted to the fact that he committed an error.

DAG Jespersen continued that the fundamental duty of the Board is to protect the public, and therefore an appropriate sanction must be imposed in this case. He urged the Board to impose a license revocation. An inadequate sanction will communicate to the public and the profession that these types of gross errors are acceptable and can be overlooked. The actions of Dr. Perera in this case demonstrate poor judgment and a lack of caring for the patient. It also shows that he does not have the ability to correct his behavior because he will not admit to what he has done. Ultimately, such behavior undermines the confidence that patients have in their doctors and the Board that was established to protect the public. Again, he urged a revocation with a two year period in which he would be illegible to reapply; $50,000 penalty, and costs.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR ADVICE OF COUNSEL AND DELIBERATIONS.

All parties, except administrative and counseling staff, left the room.

Returning to open session, the Board announced the following:

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MODIFY THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED PENALTY AND, INSTEAD, IMPOSED A TWO YEAR SUSPENSION, SIX MONTHS ACTIVE, EFFECTIVE CLOSE OF BUSINESS JUNE 6, 2008 WITH THE REMAINING MONTHS TO BE SERVED AS A PERIOD OF PROBATION. THE BOARD ASSESSED A CIVIL PENALTY IN THE AMOUNT OF $30,000 AND $51,273.10 IN COSTS. DR PERERA MUST TAKE AND SUCCESSFULLY COMPLETE A BOARD

APPROVED MEDICAL RECORD KEEPING COURSE AND ETHICS COURSE TO BE COMPLETED DURING THE PERIOD OF ACTIVE SUSPENSION. PRIOR TO RESUMING THE PRACTICE OF MEDICINE, RESPONDENT SHALL APPEAR BEFORE A COMMITTEE OF THE BOARD AND DEMONSTRATE THAT HE HAS COMPLIED WITH ALL THE TERMS OF THE ORDER. THE BOARD RESERVES THE RIGHT TO IMPOSE ADDITIONAL SANCTIONS DURING THE PERIOD OF PROBATION.

OLD BUSINESS

1. MIRO,Claudio M.D. 25MA4069500
Joan Gelber, DAG for Complainant
Thomas M. Barron, Esq. For Respondent

This matter was provided for the Board to accept, reject or modify the Office of Administrative Law decision and to memorialize the settlement agreed to by the parties in this case.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE SETTLEMENT AGREEMENT.

2. FERSTANDIG, Russel L. M.D. 25MA03504800
Ledra H. Horowitz DAG for Complainant

This matter was opened to the Board by Verified Complaint filed on May 14, 12008. The Attorney General is seeking the temporary suspension of Dr. Ferstandig's license to practice medicine and surgery and for other relief as deemed appropriate.

THE BOARD, UPON MOTION MADE AND SECONDED VOTED TO MOVE INTO EXECUTIVE SESSION FOR ADVICE OF COUNSEL AND DELIBERATIONS.

All parties, except administrative and counseling staff, left the room.

The Board returned to open session.

The parties informed the Board that the matter was settled. They presented a signed Interim Consent Order which provided for a voluntary surrender in two days and an evaluation before the PAP. The Voluntary surrender states no admissions and no discipline. The evaluation through the PAP will include a Board approved psychiatric evaluation with Dr. Jeffery Berman. Dr Ferstandig agreed to abide by all the recommendations and, at the July Board meeting, the materials will be reviewed. Five days prior to the July Board meeting, the evaluation results will be provided to the Attorney General and at that time, the Attorney General will decide whether to pursue the Temporary Suspension and Mr. Kern would be foreclosed to argue the passage of time, with two days to close down Dr. Ferstandig's practice.

Dr. Ferstandig was sworn and, on the record, acknowledged that he understood the terms of the Consent Order. After advice of counsel, Dr. Ferstandig willingly signed the Interim Consent Order.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE TERMS OF THE INTERIM CONSENT ORDER.

3. GOOBERMAN, Lance M.D. 25MA03819100
This matter was before the Board to ensure that Dr. Gooberman continues to make his

monthly cost penalty payments to the Board per the May 19, 2003 Final Order.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE PAYMENT PLAN OF $3,000 PER MONTH.

DISCUSSION

SISTER-STATE MATTER

AZIZ, Abid Shamin, M.D. 25MA06541600
Carmen A. Rodriguez DAG

The Board was asked to finalize the Provisional Order of Discipline as proposed.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO FINALIZE THE FINAL ORDER OF DISCIPLINE.

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