

[Cite as *Leak v. State Med. Bd. of Ohio*, 2011-Ohio-2483.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

W. David Leak, M.D., :
 :
 Appellant-Appellant, :
 :
 v. : No. 09AP-1215
 : (C.P.C. No. 08CVF 8 12288)
 State Medical Board of Ohio, : (REGULAR CALENDAR)
 :
 Appellee-Appellee. :

D E C I S I O N

Rendered on May 24, 2011

Graff & Associates, LPA, Douglas E. Graff, and James McGovern, for appellant.

Michael DeWine, Attorney General, and *Kyle C. Wilcox*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Appellant, W. David Leak, M.D., appeals from a decision of the Franklin County Court of Common Pleas, upholding an order of the State Medical Board of Ohio ("board") permanently revoking Dr. Leak's license to practice medicine and surgery.

{¶2} Dr. Leak is a board certified anesthesiologist and a diplomate of the American Board of Pain Medicine. He directed a practice in Columbus, Ohio, known as Pain Control Consultants, Inc. ("PCC"), practicing interventional pain medicine. Beginning in 1998, appellant offered a fellowship program in pain management through

PCC, giving medical practitioners practical experience and, later, progress toward board certification in this field.

{¶3} In August 2006, the board notified Dr. Leak of proposed disciplinary action based on three grounds: allegations of a violation of minimum standard of care for patients, Dr. Leak's failure to notify his patients and receive signed acknowledgements of his lack of malpractice insurance, and an allegation that Dr. Leak had aided and abetted a podiatrist, Dr. Hoogendoorn, to unlawfully practice medicine and surgery in Ohio. This last allegation was based upon Dr. Hoogendoorn's participation in Dr. Leak's pain management fellowship at PCC, and did not ultimately give rise to any adverse action against Dr. Leak.

{¶4} A medical board hearing examiner conducted a 17-day evidentiary hearing on the charges against Dr. Leak as well as consolidated charges against Dr. Hoogendoorn and another participant in the fellowship program, Dr. Griffin. The state's expert medical witnesses presented testimony that Dr. Leak had performed unnecessary and invasive tests on patients, had failed to adapt his treatment methods and recommendations based on the results of these tests, and that Dr. Leak had generally engaged in pain management treatment that maximized fees rather than providing critical individualized treatment to patients. Dr. Leak presented expert witnesses to rebut this testimony.

{¶5} At the conclusion of the proceedings, the hearing examiner issued a lengthy report and recommendation detailing the evidence and finding that, from November 1998 to November 2001, with reference to 24 confidentially protected patients, Dr. Leak had "inappropriately utilized testing and/or failed to provide treatment in accordance with the minimal standards of care." July 7, 2008 report at 131. The hearing examiner further

concluded that Dr. Leak's malpractice insurance lapsed from August 2003 to March 2004, and, during this period, Dr. Leak had failed to provide written notice of his lack of malpractice insurance to each patient and obtain from each patient a signature acknowledging receipt of the malpractice insurance notice; these two deficiencies together constituting a violation of R.C. 4731.143. Based upon these conclusions of fact and law, the examiner recommended permanent revocation of Dr. Leak's medical license. Both the state and Dr. Leak filed objections to the hearing examiner's report and recommendation. The board eventually voted 7-2 to adopt the hearing examiner's report and recommendation and permanently revoked Dr. Leak's certification to practice medicine and surgery in Ohio, effective September 14, 2008.

{¶6} Dr. Leak appealed the board's order to the Franklin County Court of Common Pleas, also moving the court to admit additional evidence pursuant to R.C. 119.12. The court of common pleas denied Dr. Leak's motion to admit additional evidence and upheld the board's order, finding that it was supported by reliable, probative, and substantial evidence and in accordance with law. The court of common pleas further noted in its decision that, even if it were "inclined to impose a more lenient sanction than permanent revocation, the Board's action is well within its statutory authority, and the Court has no authority to reverse or modify it."

{¶7} Dr. Leak has timely appealed and brings the following four assignments of error:

[I.] THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE SANCTION IMPOSED BY THE BOARD WAS NOT A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION WHEN SIMILARLY SITUATED WHITE PHYSICIANS WHO ADMINISTER THE TESTING AND TREATMENT AT QUESTION WERE

SANCTIONED SIGNIFICANTLY LESS HARSHLY, ONE WITH A DISMISSAL AND ONE WITH A PROBATION AND EDUCATIONAL REQUIREMENT. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING THE ACTIONS OF THE BOARD WERE IMPROPER, PREJUDICIAL AND ABUSE OF DISCRETION. APPELLANT'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED.

[II.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE BECAUSE THE EXPERTS RELIED UPON BY THE BOARD WERE INHERENTLY UNRELIABLE.

[III.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION [WHEN] IT FAILED TO PERMIT THE INTRODUCTION OF ADDITIONAL EVIDENCE.

[IV.] THE ORDER SHOULD BE VACATED BASED UPON THE BOARD'S FAILURE TO FILE A COMPLETE ADMINISTRATIVE RECORD, AS REQUIRED BY R.C. §119.12

{¶8} We begin by stating our standard of review upon appeal. In an appeal pursuant to R.C. 119.12 from an order of the state medical board, the court of common pleas is bound to uphold the order if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. Reliable, probative, and substantial evidence has been defined as follows:

(1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571. Upon further appeal to this court, however, our review is more limited than that of the court of common pleas. *Pons* at 621. While it is incumbent on the court of common pleas to examine the evidence, the court of appeals must determine only if the lower court abused its discretion in finding that the board's order was supported by reliable, probative, and substantial evidence and in accordance with law. *Id.* Moreover, when reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and ethical requirements of its profession. *Pons* at 621-22. "The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of [people] equipped with the necessary knowledge and experience pertaining to a particular field." *Farrand v. State Med. Bd.* (1949), 151 Ohio St. 222, 224. On questions of law, however, our review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus.

{¶9} In Dr. Leak's first assignment of error, he asserts that the board's order violates his constitutional rights to due process and equal protection under the law. These asserted violations are based upon the fact that similarly situated white physicians, i.e., Drs. Griffin and Hoogendoorn, received little or no discipline from the board, while Dr. Leak, who is African American, saw his license permanently suspended. Dr. Leak's argument of constitutional violations based upon racial discrimination was not raised before the board or the court of common pleas in his initial appeal. Only now upon appeal to this court does Dr. Leak argue that the action taken by the board was based upon race and that he received a harsher sanction than similarly situated white

physicians. It is a fundamental tenet of appellate review that a reviewing court will not consider in the first instance any alleged error known to a party but not brought to the lower tribunal's attention. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210. Sometimes deemed a forfeiture, and more commonly termed a waiver, this forecloses the right to contest an issue on appeal if the issue was in existence at the time the matter was heard before the trial court or initial administrative tribunal, and the party did not raise it at the appropriate time for consideration by the lower tribunals. *Varisco v. Varisco* (1993), 91 Ohio App.3d 542, 545; *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1993), 91 Ohio App.3d 76, 80. In proceedings emanating from the board, we have applied this rule in the form of waiver to preclude initial consideration on appeal of issues not raised before the board. *Ansar v. State Med. Bd. of Ohio*, 10th Dist No. 08AP-17, 2008-Ohio-3102: "the * * * argument was not raised before the court of common pleas, and therefore cannot be raised for the first time in this appeal." *Id.* at ¶41. Because Dr. Leak did not raise his constitutional arguments alleging racial discrimination before either the medical board or the court of common pleas, we decline to address them for the first time in his appeal to this court. Dr. Leak's first assignment of error is accordingly overruled.

{¶10} Dr. Leak's second assignment of error asserts that the court of common pleas abused its discretion in finding that the board's order was supported by reliable, probative, and substantial evidence. Dr. Leak argues that the experts principally relied upon by the board were inherently unreliable because these experts were unfamiliar with the standard of care in the practice of pain medicine. Specifically, Dr. Leak argues that the experts presented before the board, Drs. Chelimsky and Katirji, while well-qualified neurologists, are insufficiently versed in the practice of interventional pain medicine.

{¶11} Both board experts testified regarding their assessment of Dr. Leak's practice, particularly Dr. Leak's use of Selective Tissue Conductance Tests ("STC") and Somatosensory Evoked Potentials ("SSEP") to substantiate or corroborate a patient's claims of pain before administering palliative medication. Both Drs. Katirji and Chelimsky testified that these tests were ineffective or worthless from a diagnostic standpoint, and that each of Dr. Leak's patients was referred for the same array of tests regardless of pain symptoms or otherwise accessible factors and circumstances underlying the complaints of pain. The experts also testified that the testing ordered and conducted by Dr. Leak lacked sufficient documentation in the patients' medical records establishing the fundamental reasoning or medical judgment underlying the need for the tests, and little follow up or invocation of the test results when proceeding to prescribe pain treatment medication and treatment for those patients.

{¶12} This assignment of error essentially questions whether there was reliable, probative, and substantial evidence in the form of testimony supporting the board's disciplinary order against Dr. Leak. Although such evidence need not be heard by the board in the form of expert testimony, when the board does hear expert testimony, the expert must be capable of expressing an opinion grounded in the particular standard of care applicable to the area of practice for the physician facing discipline. *Lawrence v. State Med. Bd. of Ohio* (Mar. 11, 1993), 10th Dist. No. 92AP-1018. " 'The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity [with them].' " *Griffin v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-276, 2009-Ohio-4849, ¶13. This rule is codified at R.C. 2743.43(A)(3). This rule acknowledges that a

medical expert well-versed and well-credentialed in one field may not be an expert in other medical fields. Id.

{¶13} Drs. Chelimsky and Katirji, Dr. Leak alleges, are perhaps eminently qualified neurologists, but not qualified as experts in pain medicine, Dr. Leak's area of practice. The board, to the contrary, argues on appeal that Dr. Leak's practice in the diagnosis and alleviation of pain eventually involved the use of nerve blocks and STC and SSEP studies, which in fact represented an attempt by Dr. Leak to practice in the area of neurology. A neurological standard of care, the board argues, is necessary to understand the board's critical assessment of Dr. Leak's diagnostic testing practices.

{¶14} Dr. Chelimsky was board certified in neurology and neurophysiology by the American Board of Psychiatry and Neurology ("ABPN") in 1994, and in pain management by that body in 2000. Dr. Katirji was board certified in neurology and neurophysiology by the ABPN in 1985 and 1992 respectively, certified by the American Board of Electroencephalography in 1985, by the American Association of Electrodiagnosis and Electromyography in 1986, and by the American Board of Electrodiagnostic Medicine in 1990. He is not certified in any area of pain management. Dr. Katirji however, did, present himself as an expert in SSEP testing such as that ordered by Dr. Leak.

{¶15} Dr. Katirji described SSEPs as studies involving stimulating nerves in the limbs and recording the resulting nerve activity from spine to brain. This nerve activity is recorded by electrodes placed at the base of the neck and the fingers which detect the nerve response when electric current is introduced to the nervous system. With respect to Dr. Leak's practice, Dr. Katirji testified specifically that, although SSEPs may indicate an abnormality along the nerve route, they do not permit a treating physician to pinpoint the nerve damage or other condition causing pain. His professional opinion was that

SSEPs have not been productively utilized in the localization and diagnosis of pain, although there were many attempts toward using these tests for that purpose when the tests became available in the mid-1980s. Eventually the profession concluded that SSEPs were ineffective in the diagnosis of radiating pain, giving too many false positives and some false negatives. Finally, Dr. Katirji opined that SSEPs had become obsolete, both because of a diminishing professional regard for the accuracy of the test and the introduction of more accurate MRI scans that produced more conclusive results.

{¶16} With respect to the nerve conduction studies ("NCS") ordered by Dr. Leak, Dr. Katirji testified that these studies also cannot reliably diagnose radiating pain because in many instances the root lesion will be near the spine, and the NCS studies do not test that area.

{¶17} After reviewing the patient records in the matter, Dr. Katirji opined that the SSEP and NCS studies ordered by Dr. Leak appeared to be ordered for all patients without regard to the patients' actual condition and without any assessment of whether the tests were medically necessary. Dr. Katirji also opined that the test results were never integrated into a comprehensive clinical analysis as part of a treatment program. Dr. Katirji opined that Dr. Leak's notes did not reflect any thoughtful attempt to tailor the testing process to the condition of the patient, but simply ordered a battery of tests for all patients regardless of their condition. These included, Dr. Katirji stated, patients who did not suffer from spinal-type radiating pain, who would have been even less indicative for NCS tests yet nonetheless received them by reference of Dr. Leak.

{¶18} Turning to the testimony of the states other expert, in addition to his other credentials, Dr. Chelimsky directed the pain center at University Hospitals in Cleveland from 1994 to 2004. In this position he treated many patients using interventional pain

therapy treatment methods, including sympathetic blocks or epidurals. After reviewing the confidentially identified patients' charts from Dr. Leak's practice, Dr. Chelimsky opined that the overarching observation was that the charts lacked any coherent, systematic analytical approach to patient needs and proposed treatment plans. Dr. Chelimsky opined that this fell below one of the threshold requirements of the standard of care of any practice. Opining further on the diagnostic evaluations performed on the selected patients, Dr. Chelimsky specifically opined that the NCS studies ordered by Dr. Leak, when performed without a complementary procedure known as a needle examination, were "meaningless." (Tr. Vol. 6, 1587.)

{¶19} Dr. Chelimsky also opined that the STC tests ordered by Dr. Leak were not reproducible in their results and therefore not useful. Dr. Chelimsky described these tests as measuring the galvanic skin response of the patient, or the electrical conductivity of the patient's skin. Dr. Chelimsky felt that the theory upon which such tests were based, that the electrical conductivity of the skin would reflect corresponding levels of nervous activity, was an unproved diagnostic tool at best and that performance of such tests in pain medicine was, of itself, below a minimum standard of care because such tests were purely experimental, rather than clinically oriented.

{¶20} Giving due deference to the board's expertise, we cannot find that the court of common pleas abused its discretion in finding that the board properly held that Drs. Chelimsky and Katirji were qualified to establish the minimum standard of care in Dr. Leak's area of practice and to assess whether Dr. Leak had conformed to that standard of care. Both doctors undertook extensive and knowledgeable critical analyses of the testing battery ordered by Dr. Leak, and the board was within its discretion to accept both experts as "similar" practitioners to Dr. Leak. Likewise, the board could within its

discretion accept the expert opinions provided and base its final conclusions upon them. As we noted in *Griffin*, neither the board nor the court of common pleas was required to reconcile any philosophical conflicts between two different schools of pain management that was predicated on anesthesiology and those predicated on neurology because "[t]he decision as to which medical philosophy is more appropriate for pain management is best left to the medical professionals, not appellate judges or trial court judges sitting in an appellate role on an administrative appeal." *Griffin* at ¶25, citing *Pons*.

{¶21} We accordingly find that the court of common pleas did not abuse its discretion in finding that the medical board's decision was based upon reliable, probative, and substantial evidence and in accordance with law, and Dr. Leak's second assignment of error is overruled.

{¶22} Dr. Leak's third assignment of error asserts that the court of common pleas abused its discretion when it refused to allow the introduction of additional evidence. This evidence included minutes and audiotapes of board proceedings and deliberations in related cases, a request for testimony before the court of common pleas by the board's president addressing the board's procedural handling of several motions brought by Dr. Leak, the board's final orders in its disciplinary cases involving Drs. Griffin and Hoogendoorn, and production of written decisions by the board addressing Dr. Leak's motions before the board for additional time, motion to strike the testimony of an expert witness, and motion to strike the state's objections to the hearing examiner's report and recommendation.

{¶23} R.C. 119.12 provides that "[u]nless otherwise provided by law, in the hearing of the [administrative] appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the

admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency."

{¶24} The court of common pleas in the present case concluded, pursuant to *Gordon Lending Corp. v. Ohio Dept. of Commerce, Div. of Financial Insts.*, 10th Dist. No. 08AP-84, 2008-Ohio-3952, ¶11, that "newly discovered" evidence under the statute is evidence that was in existence at the time of the administrative hearing but that could not have been discovered with the exercise of due diligence prior to the hearing. Under this definition, newly discovered evidence does not refer to *newly created* evidence. See also *Steckler v. Ohio State Bd. of Psychology* (1992), 83 Ohio App.3d 33, 38.

{¶25} We find that the trial court correctly denied Dr. Leak's motion for additional submissions. First, we note that the "evidence" proposed by Dr. Leak constitutes, in large part, not evidence at all but reproduction of the record in various forms from the proceeding at which evidence was heard, i.e., the hearings before the board hearing officer and subsequent proceedings before the board itself. An administrative appeal under R.C. 119.12 is a review of the record as transmitted by the administrative agency, not a collateral attack upon those proceedings involving outside evidence to establish corruption, bias, or other irregularities based upon the conduct of the medical board and its hearing officers. To the extent that Dr. Leak believed that the record transmitted by the agency was incomplete, his remedy was a motion to supplement the record with required items, not a motion to submit additional evidence. Even if some of the cited items were taken as proper evidence, none by their nature could be in existence at the time of the board hearing, since they reflect the board's subsequent proceedings in large part. They cannot fit the definition of newly discovered evidence under R.C. 119.12 and

Gordon Lending. The trial court therefore did not err in denying Dr. Leak's motion to submit additional evidence. Dr. Leak's third assignment of error is overruled.

{¶26} Dr. Leak's fourth assignment of error asserts that the trial court should have vacated the board's order based upon the board's failure to file a complete administrative record. Under this assignment of error, Dr. Leak points in particular to the board's failure to provide written rulings on three of his motions before the board: (1) a motion for additional time to address the board; (2) a motion to strike the testimony of the state's expert witness; and (3) a motion to strike the state's objections to the hearing examiner's report. Failure to include written decisions on these motions, Dr. Leak asserts, constitutes a failure to provide a complete and certified record for the appeal to the court of common pleas under R.C. 119.12. Dr. Leak argues that the failure to file a complete record deprives the court of common pleas of jurisdiction, by which we understand him to mean that the court of common pleas is deprived of the jurisdiction to uphold the board's order, citing our decision in *Sinha v. Ohio Dept. of Agriculture* (Mar. 5, 1996), 10th Dist. No. 95APE-1239. In *Sinha*, we held that "when the agency has failed to certify any record whatsoever within the thirty-day period [required by R.C. 119.12], the court of common pleas must enter judgment for the appellant."

{¶27} The state responds that the record of proceedings before the board reflects that the board in fact ruled orally upon all motions, and denied them. The state points out that Dr. Leak can demonstrate no prejudice from the board's failure to provide a written ruling on these motions, since Dr. Leak was fully aware of the denial of his motions before the board at the time the denial took effect, and denial of those motions was not a point at issue at anytime in the proceedings before the court of common pleas. While *Sinha* certainly stands for the proposition that a complete failure by the agency to file a record

within the required time on appeal might require a reviewing court to vacate the agency order, *Sinha* certainly does not expressly stand for the proposition that partial, and especially trivially partial, omissions from the agency record on appeal would require such a result.

{¶28} In order to demonstrate a denial of due process warranting relief, Dr. Leak must establish both a constitutional deprivation and prejudice flowing therefrom. *Estes v. Texas* (1965), 381 U.S. 532, 85 S.Ct. 1628. Assuming, arguendo, that failure to render a written ruling on Dr. Leak's motions constituted a deprivation, there is simply no prejudice in the present case that would warrant tailoring a constitutional remedy to correct the procedural flaws in the proceedings. Dr. Leak's fourth assignment of error is accordingly overruled.

{¶29} Based upon the foregoing, Dr. Leak's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
