

**IN THE MATTER OF
DOUGLAS PALMER, P.T .
LICENSE NO. 16898**

*** BEFORE THE MARYLAND
* STATE BOARD OF
* PHYSICAL THERAPY EXAMINERS
*
* Case No. 05-BP-460**

Respondent

* * * * *

FINAL DECISION AND ORDER

On June 6, 2011, Douglas Palmer, P.T., was charged by the Maryland Board of Physical Therapy Examiners (the “Board”) with a violation of probation and with being disciplined by a licensing authority of any state for an act that would be grounds for discipline in Maryland. Specifically, Mr. Palmer was charged for (1) failing to provide the Board with six patient records for review, a condition of probation pursuant to a Final Order issued by the Board on March 20, 2007; and (2) having his license suspended by the West Virginia Board of Physical Therapy (the “West Virginia Board”) for failing to advise that board on a reinstatement application about his disciplinary history in Maryland.

An evidentiary hearing was held on these charges on February 1, 2012, at the Office of Administrative Hearings. Administrative Law Judge Geraldine A. Klauber issued a 14-page Proposed Decision on April 18, 2012, recommending an affirmative finding on the charges and proposing as a sanction a one-year suspension of Mr. Palmer’s license.¹ Mr. Palmer filed Exceptions with the Board, and an Exceptions Hearing was held before the Board on August 21, 2012. This Final Decision and Order constitutes the Board's final decision in this case.

The Board has considered the entire record in this case, including the printed transcript of the testimony at the evidentiary hearing. During the exceptions process, Mr. Palmer argued that he could not comply with the terms of his probation because he did not have the authority or the

¹ On May 31, 2012, Mr. Palmer allowed his license to practice physical therapy in Maryland to lapse.

ability to submit six patient records to the Board. He also argued that it was unconstitutional for the Board to discipline him reciprocally based on discipline by the West Virginia Board. Mr. Palmer made similar arguments at earlier stages of the proceedings, including at the evidentiary hearing in front of the Administrative Law Judge. The Board has taken into consideration all of his arguments and the documents he submitted in support of his arguments in making its decision.

FINDINGS OF FACT

The Board adopts the findings of fact proposed by the Administrative Law Judge in the Proposed Decision. To the extent that any findings of fact are set out in the "Discussion" section of the Administrative Law Judge's Proposed Decision, the Board adopts them as well. The Proposed Decision is incorporated into this Final Decision and Order and is attached as Attachment A.

CONCLUSIONS OF LAW

The Board adopts the conclusions of law set out in the Administrative Law Judge's Proposed Decision.

OPINION

Mr. Palmer failed to comply with his probation with the Board when he failed to submit the requisite patient records for review by the Board.² Mr. Palmer initially argued that the privacy restrictions in the Health Insurance Portability and Accountability Act ("HIPAA") prevented him from submitting patient records to the Board for review. The Board informed Mr. Palmer that as a health oversight regulatory agency, the Board is exempt from HIPAA, and his

² The Board notes that Mr. Palmer did comply with the other requirements of his probation, including the payment of a \$2,000 fine and the completion of the Maryland Law and Ethics course and a Board-approved documentation course.

disclosure of records to the Board would be permissible; Mr. Palmer, however, still failed to provide complete patient records to the Board.³

Mr. Palmer also argued that the Board's former Executive Director, Ann Tyminski, had agreed to waive the probationary term requiring him to provide patient records as long as the companies he worked for provided the Board with written documentation stating that they refused to provide the records. Although Mr. Palmer presented an email from his former attorney stating that Ms. Tyminski told the attorney such a waiver was possible, Ms. Tyminski herself specifically testified that she said no such thing and that the Board would not modify the terms of probation in such a way without a written order. The Administrative Law Judge found that Mr. Palmer's recitation of this supposed arrangement was not convincing, and the Board agrees.

Assuming arguendo that Ms. Tyminski did say the Board would waive the submission of patient records, however, Mr. Palmer failed to show he could not comply with the probationary term. Mr. Palmer presented a letter provided to the Board by his employer, Janis Grissing Cutchall, stating that the company refused to provide the Board with "confidential patient records."⁴ Like the Administrative Law Judge, however, the Board gives "no weight" to the letter from Ms. Cutchall, who is hardly a disinterested party; in addition to being Mr. Palmer's employer, Ms. Cutchall was also his live-in fiancée, and Mr. Palmer often referred to himself, Ms. Cutchall, and the company as "we" when discussing the patient records. Additionally, Mr. Palmer later argued that the records in question were actually in the possession, custody, and

³ Although Mr. Palmer did attempt to provide some notes from patients' charts, there were two main problems with the records provided: (1) he redacted the patients' names, making it impossible for the Board to know who the patients were or how many different patients' charts were being provided; and (2) he failed to provide complete patient charts (for example, he did not include any patient billing records).

⁴ Again, because HIPAA does not apply to the Board, the use of the word "confidential" is not entirely accurate in this context.

control of various entities that Ms. Cutchall's company (a subcontracting agency) worked for. Although he stated at the evidentiary hearing that those companies also denied his request for the entire patient file, Mr. Palmer failed to present any evidence that he requested the records from these entities or that they were unable, or unwilling, to provide the records to him. Although Mr. Palmer continues to argue that he had neither the authority nor the ability to provide the records in question, he failed to show that he was actually unable to comply with this term of his probation.

Further, it is an indisputable fact that on March 28, 2011, the West Virginia Board suspended Mr. Palmer's license to practice physical therapy in that state for one year for falsely reporting on a reinstatement application that he had not been disciplined in any other state.⁵ The Board's disciplinary statute clearly allows the Board to discipline Mr. Palmer reciprocally for the action taken by the West Virginia Board.⁶ Mr. Palmer argues that the Board's reciprocal discipline statute violates the United States Constitution, specifically the Double Jeopardy Clause of the Fifth Amendment. Maryland courts, however, consistent with courts in other jurisdictions, have held that a "Board's enforcement of its licensing and disciplinary requirements serve purposes essential to the protection of the public, which are deemed remedial, rather than punitive, and therefore are not subject to double jeopardy principles." *Spencer v. Board of Pharmacy*, 380 Md. 515, 534 (2004) (internal citations omitted); *see also Tandon v. State Board*

⁵ Mr. Palmer argues in his exceptions that this fact is not indisputable because he was denied a telephonic hearing by the West Virginia Board and because he appealed the suspension by the West Virginia Board. An exceptions hearing in front of the Maryland Board of Physical Therapy is not the appropriate venue to argue about the procedural posture of a hearing by the West Virginia Board of Physical Therapy, however, and Mr. Palmer cannot deny that his license to practice physical therapy was, in fact, suspended for one year by the West Virginia Board.

⁶ Pursuant to Md. Code Ann., Health Occ. § 13-316(10), the Board may take disciplinary action against a licensee who "is disciplined by a licensing or disciplinary authority of any state . . . for an act that would be grounds for disciplinary action under the Board's disciplinary statutes," which, pursuant to Md. Code Ann., Health Occ. § 13-316(1), includes "[f]raudulently or deceptively obtain[ing] or attempt[ing] to obtain a license."

of Medicine, 705 A.2d 1338, 1344 (Pa. Commw. Ct. 1997) (“Doctor argues that, under [*U.S. v. Halper*, 490 U.S. 435 (1989)], the Board was precluded from suspending his license . . . as he had been previously disciplined by the Tennessee Board for the same conduct. However, Doctor misconstrues the protections afforded by the Double Jeopardy Clauses . . . [which] protect an individual from twice being punished for *criminal* conduct.”).

Although given a number of opportunities, Mr. Palmer failed to comply with his probation with the Board, and his various attempts at avoiding providing records to the Board suggest that he never intended to comply.⁷ Further, the Board has the authority to discipline Mr. Palmer reciprocally for the action taken against his license by the West Virginia Board. Each violation provides appropriate grounds for the Board to discipline Mr. Palmer, and each violation independently warrants the progressive sanction issued in this Order.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and Opinion, by a unanimous decision of a quorum of the Board, it is hereby:

ORDERED that in the event he petitions the Board for reinstatement of his license to practice physical therapy in Maryland, Mr. Palmer shall comply with all requirements for reinstatement contained in Md. Code Ann., Health Occ. § 13-312, including application, continuing education, and fee; and be it further,

ORDERED that upon any reinstatement of his license, Mr. Palmer’s license to practice physical therapy shall be **SUSPENDED** for a period of **ONE (1) YEAR**; and be it further,

ORDERED that, upon completion of the one year suspension period, Mr. Palmer’s

⁷ In fact, as noted by the Administrative Law Judge, Mr. Palmer once said, in response to the Board’s directions for how he could get the records and provide them to the Board within the confines of HIPAA, “I am not going to do this because all they are trying to do is further ruin my career as a physical therapist,” suggesting that his true concern was not avoiding a HIPAA violation but rather avoiding complying with probation because of the Board’s supposed motive.

license shall be placed on PROBATION for ONE (1) YEAR, during which time Mr. Palmer shall submit to the Board three (3) patient records, including patient billing records, with treatment and reevaluations provided by Mr. Palmer, for review on a quarterly basis; and be it further,

ORDERED that that after one (1) year of probation, Mr. Palmer may petition the Board to terminate probation, provided that he has been fully compliant with the terms of probation and does not have any pending complaints filed against him; and be it further,

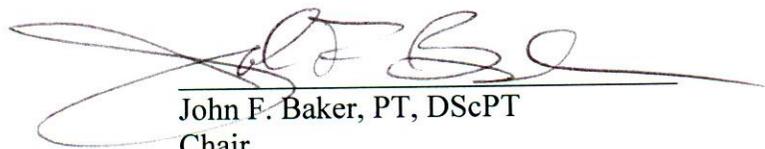
ORDERED that Mr. Palmer shall at all times cooperate with the Board in the monitoring, supervision, and investigation of Mr. Palmer's compliance with the terms and conditions of this Final Order; and be it further,

ORDERED that Mr. Palmer's failure to fully cooperate with the Board shall be deemed a violation of the probationary terms and a violation of this Order; and be it further,

ORDERED that in the event the Board finds in good faith that Mr. Palmer has violated any of the conditions of probation herein, or in the event the Board finds in good faith that Mr. Palmer has committed a violation of Title 13 of the Health Occupations Article or regulations adopted thereunder, the Board may impose further disciplinary action against Mr. Palmer's license, including but not limited to revoking Mr. Palmer's license, provided that Mr. Palmer is first given the opportunity for a hearing; and be it further,

ORDERED that this is a formal order of the Board and as such is a public document pursuant to Md. Code Ann., State Gov't § 10-617(h).

04/03/13
Date


John F. Baker, PT, DScPT
Chair
Board of Physical Therapy Examiners

NOTICE OF RIGHT TO APPEAL

Pursuant to Md. Code Ann., Health Occ. § 13-318, and Md. Code Ann., State Gov't § 10-222, you have the right to take a direct judicial appeal. A petition for appeal shall be filed within thirty (30) days of the date this Final Decision and Order is mailed and shall be made as provided for judicial review of a final decision in the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't §§10-201, *et seq.*, and Title 7, Chapter 200 of the Maryland Rules.

If you file an appeal, the Board is a party and should be served with the court's process. In addition, if an appeal is filed, you are requested to send a copy to the Board's counsel, Brett Felter, at the Office of the Attorney General, 300 West Preston Street, Suite 302, Baltimore, Maryland 21201. The Administrative Prosecutor is no longer a party to this case and need not be served or copied.