

**BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS**

In the Matter of)
)
Merle J. Fieser, M.D.)
Kansas License No. 4-18324)
_____)

Docket No. 02-HA-41

FINAL ORDER

NOW ON THIS Fifteenth Day of February, 2003, this matter comes before the Board to review the Initial Order and Supplemental Initial Order issued by Charlotte Seago, M.D., Presiding Officer. Respondent Merle J. Fieser, M.D., appears in person and through counsel, Brian C. Wright, Attorney at Law. Petitioner appears through Stacy L. Cook, Litigation Counsel to the Board.

After hearing the arguments of the parties and the statement of Respondent, and having the agency record before it, the Board finds, concludes and orders as follows:

A. Initial Order

The Board adopts paragraphs 1-13 of the Initial Order. Those paragraphs state as follows:

1. Summary judgment in administrative hearings is authorized by K.S.A. 77-519. That statute does not include a specific standard for granting summary judgment. The Presiding Officer concludes that the standard for summary judgment in civil cases guides administrative proceedings. Summary judgment is proper where the pleadings, depositions, written discovery and affidavits show that there is no genuine dispute as to any material fact, and that the moving party is entitled to judgment as a matter of law. Minor disputes that are immaterial to the case do not preclude summary judgment.

2. The material facts in this case are not in dispute. The parties do not agree on all of the details, but the Presiding Officer finds that a hearing to resolving a dispute about those details would not affect the outcome of the case, and therefore these details are not material.

3. The Board has alleged in Count I of the First Amended Petition that Respondent

referred patients to her husband, Dr. Carl Fieser, who is licensed in this state as a medical doctor. Dr. Carl Fieser practices radiology in Dodge City, Kansas. He began practicing in that city in approximately June 1999, and continues to practice there at the present time. For the first year and four months, he was an employee of Professional Radiology Services, P.A., (PRS) and in October 2000 he became a shareholder, owning thirty percent of the shares of the professional corporation.

4. The number of patients Respondent referred to PRS is not controverted for the purpose of the summary judgment motion. The Presiding Officer finds that the number of patients referred over the years is substantial and purposeful.

5. Respondent does not give written notice to patients whom she refers to PRS that her husband owns a significant interest in PRS, and that patients may obtain radiology services elsewhere.

6. The Board alleges that these referrals of patients constitute unprofessional conduct, as provided by K.S.A. 2001 Supp. 65-2837(b)(29). That statute defines unprofessional conduct to include “[r]eferring a patient to a health care entity for services if the licensee has a significant investment interest in the health care entity, unless the licensee informs the patient in writing of such significant investment interest and that the patient may obtain such services elsewhere.” K.S.A. 2001 Supp. 65-2837(h) states that a significant investment interest means

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ownership of at least ten percent of the value of the entity. The Board also alleges that these referrals violate subsection (b)(12) of that same statute which defines unprofessional conduct to include conduct likely to deceive, defraud or harm the public.

7. The Presiding Officer concludes that, as a matter of law, Respondent has a significant investment interest in PRS. Even though she is not a named shareholder of the entity, her husband is. Respondent benefits from her referrals to PRS because her husband is a named shareholder. The

statute imposes a duty upon Respondent to advise patients that she has this interest, and that the patients may obtain the services elsewhere.

8. Respondent argues that she is motivated to refer patients to her husband's practice because she is familiar with his work and trusts him. She also believes that the radiology devices available to PRS are superior to local radiology devices, suggesting that there is a medical purpose for the referrals. The Presiding Officer concludes that the statute does not allow this as a defense. The statute does not prohibit the referral, it just ensures that the patient is well informed. The statute would not prohibit Respondent from also informing the patient of the quality of PRS's services, as long as the statements are not false or misleading.

9. The Presiding Officer finds and concludes that Respondent engaged in unprofessional conduct by referring patients to an entity in which she has a significant investment interest without informing patients as provided by law, and that censure is appropriate.

10. Count II of the First Amended Petition alleges that Respondent treated a patient C.S. for colds and bronchitis when she knew that the patient was pregnant, and that this violated a prior order of the Board. Respondent disputes the facts in this count because these details are not supported by the patient's record. But Counsel for Respondent admits, for purposes of this motion, that she does treat pregnant patients for illnesses that are unrelated to the pregnancy. To resolve the dispute, the prior order must be interpreted, and thus the issue is one of law, not of fact and summary judgment is appropriate.

11. As provided in a stipulation and agreement and enforcement order dated in June 1995, Respondent's license was limited to prohibit her from practicing obstetrics, which means having no medical management of a patient during the period of the patient's pregnancy.

12. The plain language of the order indicates that Respondent may not treat a pregnant patient, and this would include ailments such as a cold or bronchitis. While treating such an ailment is not the practice of obstetrics, it is foreseeable that managing a pregnant patient's other illnesses

will seriously impact the pregnant woman and her fetus. If the Board intends the prior order to allow the treatment of a pregnant patient's unrelated illnesses, the Final Order should modify the prior order to clarify Respondent's authority.

13. Respondent does provide evidence that supports her belief that she was authorized to treat pregnant women for non-pregnancy ailments. While that evidence does not require a different interpretation of the order, it does support a finding that Respondent's violation of the prior Board order was not intentional. No further discipline should be imposed for that violation.

The Board modifies paragraph 14 of the Initial Order to state as follows:

14. The Board, on review, determines that Respondent is not disciplined by this censure for past violations of the prior stipulation, agreement and enforcement order. The Board concludes that prior order limits Respondent's license to prohibit her from treating pregnant patients for any reason. If Respondent wants that limitation to be modified, she may file a request with the Board, and the Board will conduct a separate hearing on that request.

B. Supplemental Initial Order

The Board adopts paragraphs 1- 14 of the Supplemental Initial Order. Those paragraphs state as follows:

1. On October 11, 2002, the Presiding Officer heard arguments and statements of counsel regarding the motions for summary judgment that had been filed by both parties.

2. On November 4, 2002, the Presiding Officer issued an Initial Order finding that there was a material fact in dispute in regard to that portion of Count II of the First Amended Petition that alleged Respondent's failure to maintain adequate patient records of patient C.S. and determined that a hearing would be required to resolve this issue of fact.

3. On January 6, 2003, the parties agreed to and filed a Stipulation of certain facts and admissions and attached thereto Exhibits P, Q, R and S.

4. The Presiding Officer accepts as true the facts agreed upon and adopts and

incorporates herein the Stipulation filed January 6, 2003, in its entirety and admits into the evidence as part of the agency record the Exhibits attached thereto.

5. The Presiding Officer concludes that Respondent did provide medical treatment to Patient C.S. on August 15, 2000, in the form of a standard office visit and a urinalysis dip.

6. The Presiding Officer further concludes Respondent prescribed Diflucan for Patient C.S. on January 5, 2001.

7. The Presiding Officer further concludes that Respondent did not create and/or maintain notes of a history or exam for the office visit on August 15, 2000, and did not create and/or maintain documentation of the laboratory results from the urinalysis dip ordered that day.

8. The Presiding officer also concludes that Respondent did not create and/or maintain documentation of the prescription order for Diflucan on January 5, 2001.

9. Respondent's failure to create and/or maintain records for the services provided to patient C.S. on August 15, 2000 and January 5, 2001 constitutes violations of K.A.R. 100-24-1.

10. The failure to create and/or maintain records as above stated also constitutes unprofessional conduct as set forth in K.S.A. 65-2837(b)(25).

11. Unprofessional conduct and violation of a rule and regulation of the Board constitute grounds for which the Board may take disciplinary action under K.S.A. 65-2836(b) and (k).

12. The Presiding Officer further finds that the Respondent's standard practice is to maintain records of office visits and prescription orders and that no justification for Respondent's failure to create and/or maintain records for the services provided to C.S. on August 15, 2000 and January 5, 2001 has been provided that would amount to mistake or excusable neglect by Respondent.

13. Respondent should be assessed an administrative fine in the amount of \$1000 for her violations of K.S.A. 65-2836(b) and (k).

14. As this order and the prior Initial Order are adverse to the Respondent, costs incurred

by the Board in conducting these proceedings should be assessed against Respondent.

C. Costs

The Board orders that the costs of this proceeding be assessed against Respondent as provided by K.S.A. 65-2846. Petitioner has filed a statement of costs. The parties indicate a willingness to confer and to stipulate to the amount of costs to be paid and a time for paying those costs.

D. Order

The Board adopts the recommended disciplinary actions stated in the Initial Order and Supplemental Initial Order.

IT IS, THEREFORE, ORDERED that Respondent is hereby censured for engaging in unprofessional conduct as defined at K.S.A. 65-2837(b)(29).

IT IS FURTHER ORDERED that Respondent shall, within 30 days following the effective date of this Final Order, pay an administrative fine in the amount of \$1000 for engaging in unprofessional conduct as defined at K.S.A. 65-2837(b)(25) and for violating K.A.R. 100-24-1.

IT IS FURTHER ORDERED that the costs as allowed by K.S.A. 65-2846 are hereby assessed against Respondent. The parties shall confer with each other regarding the amount of these costs. If no agreement is reached as to the amount of costs and the time within which the costs are to be paid, either party may request a hearing on the issue of costs.

PLEASE TAKE NOTICE that this is a Final Order. A Final Order is effective upon service. A party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court as authorized by K.S.A. 77-610, et seq. Reconsideration of the Final Order is not a

