

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2348-09T2

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF
JOHN G. COSTINO, JR., D.O., LICENSE
NO. 25MB02575800, TO PRACTICE
MEDICINE AND SURGERY IN THE
STATE OF NEW JERSEY.

Argued September 14, 2010 - Decided October 12, 2010

Before Judges Wefing, Payne and Baxter.

On appeal from the New Jersey State Board of
Medical Examiners, Division of Consumer
Affairs, Docket No. BDS 736-08.

Glenn A. Zeitz argued the cause for
appellant John G. Costino, Jr., D.O. (Mr.
Zeitz, of counsel; Jordan G. Zeitz, on the
brief).

David M. Puteska, Deputy Attorney General,
argued the cause for respondent New Jersey
State Board of Medical Examiners (Paula T.
Dow, Attorney General, attorney; Andrea M.
Silkowitz, Assistant Attorney General, of
counsel; Mr. Puteska, on the brief).

PER CURIAM

John G. Costino, Jr., D.O. appeals from a December 21, 2009
final agency decision of the State Board of Medical Examiners
(the Board), revoking Costino's medical license for a minimum
period of five years and imposing substantial monetary penalties
based upon a finding that Costino fraudulently prescribed

Percocet and deliberately falsified medical records to justify the issuance of those prescriptions. After a careful review of defendant's contentions in light of the record and applicable law, we reject his arguments that the Board: 1) abused its discretion in not remanding the case to the Administrative Law Judge (ALJ) to consider newly-discovered evidence before the Board issued its final decision; 2) made factual findings that was not supported by competent, credible and substantial evidence; and 3) imposed a penalty of license revocation and assessment of costs that were "disproportionate" to any offense he may have committed and "shocking to one's sense of fairness." We affirm.

I.

At some point prior to April 2007, the United States Drug Enforcement Administration (DEA), the Cape May County Prosecutor's Office, the United States Postal Inspector, and the Insurance Fraud section of the Department of Law and Public Safety commenced a joint investigation to determine whether Costino was issuing prescriptions for Percocet, a narcotic, without medical justification and whether Costino was billing insurance carriers for services not performed. As part of that investigation, Little Egg Harbor Township police officer Tonya Anderson, acting in an undercover capacity, made seven visits to

Costino's North Wildwood office pretending to be an exotic dancer and requesting Percocet to help her "relax and unwind." During each of those visits, Anderson covertly recorded her entire conversation with Costino.

On her first undercover visit, which took place on April 12, 2007, Anderson told Costino she had come to his office because she was on her feet all day, and it was hard for her to "unwind" at the end of her workday. She explained that one of the other dancers had given her some Percocet pills, which she had taken "just to kind of unwind" and the Percocet had helped her "relax." She explained that she was hoping Costino would give her a prescription for Percocet.

Costino told Anderson that Percocet was a pain medication, that it was "not for relaxation," and that Anderson should not want such an "addictive" medication unless "you've really got a real problem." When Anderson said the medication had worked for her before, Costino asked if she were addicted. Anderson stated she was not, and that she only used Percocet on nights when she worked.

Costino then asked Anderson if she was experiencing any pain; Anderson replied, "[n]o, no I wouldn't say pain. I don't have any" and stated that she had no "spine issues" or "major issues" of any kind. Costino did not conduct a physical

examination of Anderson's neck or back or assess her physical functioning. Instead, his examination was limited to listening to Anderson's heart and lungs with a stethoscope. Anderson never said she had "pain" or "even soreness," and Costino left blank the "chief complaint" section of Anderson's medical record and entered a minus sign¹ next to "spine and extremities" on her medical chart.

Despite all of these negative findings, Costino entered a diagnosis of "acute lumbar and thoracic strain and sprain" in Anderson's chart. He gave Anderson a prescription for thirty 7.5 milligram Percocet tablets, instructing her to take one tablet "four or five nights a week," which would be enough "for like six weeks." When Anderson asked him when she should come back for her next visit, he answered "between five or six weeks." For the April 12, 2007 visit, Costino billed the insurance company using the current procedural terminology (CPT) code 99204, which requires the physician to complete a "comprehensive history, a comprehensive examination" and make a medical decision of "moderate complexity."

Anderson's next undercover office visit with Costino occurred on May 2, 2007. Anderson told Costino that the

¹ Costino testified that a minus sign meant the absence of any findings of abnormality.

Percocet he prescribed had been "helping" her. Explaining that she had no discomfort at all, she told Costino the Percocet was "more [for] the relaxation." Like the visit on April 12, 2007, Costino's physical examination of Anderson was limited to listening to her chest with a stethoscope. The visit lasted nine minutes, and again, even though Costino entered a minus sign as his findings concerning Anderson's extremities and again left the "chief complaint" section blank, he wrote a diagnosis of acute lumbar sprain and strain.² Moreover, even though he told Anderson on April 12, 2007 that the prescription he was writing would provide her with enough medication to last six weeks, he gave her a prescription for thirty more Percocet tablets during the May 2, 2007 visit without asking her why she needed a refill a mere twenty days later.

During Anderson's third undercover office visit on June 7, 2007, she asked Costino if he would give her a prescription for ten milligram Percocet pills, which was stronger than the 7.5 milligram dosage Costino had prescribed on each of the first two visits. Anderson's explanation for that request was limited to

² Costino billed the insurance company under CPT code 99214, which requires a physician to satisfy two of the following three components: a detailed history; a detailed examination; or a medical decision of moderate complexity. The visit should last twenty-five minutes. The May 2, 2007 visit consumed only nine minutes.

her statement that she wanted "something a little stronger that lasts a little longer." Without asking her any questions and without conducting a physical examination to determine if Anderson was experiencing any problems with her back or legs, Costino immediately agreed to increase the dosage, stating "well you can go to 10's, yeah."

He reminded Anderson not to take the pills every day or she would develop a tolerance to the medication. The visit lasted approximately eight minutes, with Costino again limiting the examination to Anderson's chest sounds and writing the same diagnosis in her medical record. At this visit, Anderson signed a pain management agreement, which stated, among other things, that she would be honest about her pain and her reaction to the medicine, she would not use illegal substances, she would not share or sell her medication, and she would not obtain pain medication elsewhere.

On June 26, 2007, Anderson visited Costino's office, this time expressing a concern that the ten milligram Percocet pills he had prescribed on June 7 were no more effective than the 7.5 milligram pills he had prescribed earlier. After attributing the lack of any difference between the two to Anderson having developed an increased tolerance for the medication, he gave her another prescription for thirty ten milligram Percocet tablets.

The visit lasted approximately nine minutes, and Costino's examination, diagnosis and negative findings remained the same.

During the fifth visit, which occurred on July 13, 2007, again Anderson did not mention any pain or soreness, nor did she complain of any problems. The discussion of how Anderson had been feeling since her last visit was confined to the following:

[Costino]: So how's everything going, alright?

[Anderson]: Okay.

[Costino]: No real problems.

[Anderson]: No.

The remainder of the visit involved discussion of Costino's office hours, the weather and Anderson's approaching birthday. The physical examination, again limited to listening to her heart and lungs with a stethoscope, concluded with Costino's statement that Anderson had "nice healthy lungs." He made no attempt to determine if she was experiencing any back or leg pain and did not examine her spine. At the end of the visit, Costino gave Anderson a prescription for thirty ten milligram Percocet tablets.

On August 3, 2007, Anderson again visited Costino's office, this time accompanied by DEA Special Agent Margarita Abbattiscianni, who also posed as an exotic dancer. After Abbattiscianni told Costino she was hoping he would prescribe

Percocet for her as he had done for Anderson, Costino asked her to describe any medical problems she was experiencing. Abbattiscianni responded "[i]t's just the pain and up all night. Long hours." Later in the examination, however, Abbattiscianni said that she was "100% healthy" and was experiencing no problems whatsoever. After listening to Abbattiscianni's chest sounds, which was the extent of his physical examination, the following exchange occurred:

[Costino]: Deep breath, again. Well you're clear as a bell too. Um you want to do the same thing? Take one of these [P]ercocets?

[Abbattiscianni]: Yes please.

[Costino]: Do you have any back pain every now and then?

[Abbattiscianni]: No back pain whatsoever.

[Costino]: No?

[Abbattiscianni]: Nothing, no.

. . . .

[Costino]: Just take it when you're done your work you know it'll just relax you, takes the pain away.

[Abbattiscianni]: Um hum, um hum.

[Costino]: You know I'm sure you get these acute strains and sprains and this and that.

[Abbattiscianni]: You know I'm pretty flexible so not much pain. I do a lot of exercise[.]

Costino spent approximately three to five minutes taking a history from Abbattiscianni and discussing why she wanted Percocet. As with Anderson, without making any positive findings to support such a diagnosis, Costino diagnosed Abbattiscianni with thoracic-lumbar sprain and strain and issued her a prescription for thirty ten milligram Percocet tablets. He did the same for Anderson.

Anderson and Abbattiscianni visited Costino for the last time on August 23, 2007. Neither one complained of any pain and assured Costino they were doing well with the medication. When Abbattiscianni informed Costino that she and Anderson were about to leave for Florida for an extended period, he offered, without any request from either of them, to "double the amount" and handed each of them a prescription for sixty ten milligram tablets.

On December 5, 2007, the Attorney General filed a verified complaint with the Board accusing Costino of violating applicable regulations by indiscriminately prescribing Percocet and "upcoding" (charging insurance companies for services not provided).

The Board held a hearing on December 12, 2007 to consider the Attorney General's application for temporary suspension of Costino's medical license. The Board considered Costino's

testimony that because the undercover agents gave no indication of addiction to, or diversion of, medication, he had agreed to give them prescriptions for Percocet because he believed they were experiencing pain resulting from their work as exotic dancers. The Board issued an order December 20, 2007 temporarily suspending Costino's medical license.

In anticipation of the plenary hearing before the ALJ, the Board issued an order on September 10, 2008 requiring the Attorney General to provide Costino with all medical records of Anderson or Abbattiscianni dealing with conditions or injuries of the cervical, thoracic or lumbar spine from April 12, 2006 to August 23, 2007. In response to the Board's September 10, 2008 order, Anderson issued a certification on September 19, 2008 asserting that from April 12, 2006 to August 23, 2007 she had no medical problems related to her cervical, thoracic or lumbar spine and had received no medical treatment to any of those areas.

The plenary hearing before ALJ William Todd Miller began on December 4, 2008. Anderson described her visits to Costino's office and stated she was experiencing no back or neck pain, or even any soreness, prior to, or during, her April 12, 2007 covert office visit. She also testified she was symptom-free during each of her six remaining visits to Costino.

Abbattiscianni likewise testified that she had no back or neck injuries or pain when she visited Costino.

The hearing continued with Costino presenting Detective Joseph Landis of the Cape May County Prosecutor's Office, who had visited Costino in a previous undercover investigation on December 12, 2005 following notification from the DEA that Costino was prescribing large quantities of pain medication. Landis testified that he visited Costino under the guise of a heroin addict seeking prescription medication to help overcome his addiction. Costino refused to prescribe such medication, indicating that he did not want to prescribe addictive pain medication to overcome a different addiction. Landis did, however, receive a prescription for Suboxone, a medication used to treat opiate addiction.

Costino also called Richard Jermyn, D.O., who testified as an expert in the examination and management of patients, the factors justifying the prescribing of opiate medication such as Percocet, the reviewing of patient charts and the management of pain. Jermyn testified that if a patient, such as Anderson, came to him and asked for opiate medication, he would determine whether the patient was addicted to the medication or might be diverting it to others, and whether the patient actually had pain and required the medication. Jermyn opined, based on his

review of the transcripts and records and a conversation with Costino, that Costino's diagnosis of Anderson as having acute sprain and strain of the thoracic and lumbar spine was appropriate because: Anderson clearly indicated she required the medication only after working; Costino specifically delineated the uses of the medication; Costino counseled her as to addiction; and Anderson stated she was not an addict.

However, when questioned further by the ALJ, Jermyn stated that, based solely on the transcript of Anderson's visit, he would not be able to provide a favorable opinion to Costino. It was only after evaluating the documents and speaking with Costino that Jermyn had reached the conclusion that Costino's actions had been appropriate. He further admitted that the diagnosis of Abbattiscianni as having thoracic and lumbar sprain and strain was not consistent with her statements to Costino that she had no back pain.

Jermyn also conceded that a physician should not prescribe pain medication solely because a patient said she needed help "unwinding" and it would not be appropriate to prescribe Percocet without performing a physical examination and without the patient complaining of pain. He further stated that if a patient came to him stating only that she had pain, he would "ask them where specifically their pain was"; examine that area;

"find out how long the pain was ongoing"; check reflexes; perform a sensory exam and motor strength testing; determine the patient's functionality (i.e., how much bending and pain the patient can tolerate); question their medication usage and how the medication was working; and would counsel the patient about alternatives to pain medication.

Jermyn also testified about the medical records prepared by Costino, opining they were better than most records of primary care physicians; however, Jermyn acknowledged that if each record was based on a template, as it appeared it was, with the physical findings being merely photocopied from a prior record, that these records would not be better than most and would, in fact, be substandard.

The hearing before the ALJ continued with Costino presenting the testimony of Glenda Hamilton, an expert on CPT standards in relation to coding, billing, and patient management. Hamilton observed that Costino had "upcoded" two of the seven visits, "downcoded" two others and correctly coded the remaining three. Ultimately, Hamilton opined that "[m]ost of the majority" of Costino's coding was appropriate and it did not constitute "a gross deviation from the standard of care in billing." Hamilton, however, acknowledged her opinion was based upon the accuracy of Costino's medical records and her opinion

would change if the records were not accurate or if Costino did not complete a detailed examination during each visit.

Costino testified, explaining that he was able to observe Anderson walking during her first visit and her "gait, stanchion and movements" all "seemed normal." He also explained that Anderson told him during her first visit she was experiencing no problems, but she nonetheless wanted a physical examination and, according to him, "some prescriptions." He conceded Anderson also told him she had no ailments of any sort. When asked on direct examination why he had agreed to give Anderson a prescription for Percocet when she complained of no pain and was able to ambulate and move normally, Costino justified his actions as follows:

Well, I think my interpretation is, obviously, the interpretation that I relied upon in treatment of these people. That's the point, it's my interpretation. . . . It's my interpretation of their words and their gestures which precipitated the treatment that I rendered.

[(Emphasis added).]

When asked "[w]hat gestures" Anderson had made that would not be captured by reading the transcript or listening to the audiotapes, Costino responded:

Well, I mean that's a great question. There has to be a better way to go through the first visit. And I am not certain exactly how to do it except to say this.

This female came into my office, and she said to me that she wanted to establish herself as a patient. She was already taking medication, because she was a dancer, and she danced between 5 and 8 or 9 hours per night, three, four nights a week, sometimes five. And she was having some difficulties. The difficulties that she was having were difficult, in my opinion, for her to express. Her exact words you'll have to get from the transcript. I actually forget her exact words to me, but what they indicated to me is as follows: I dance all night for . . . X amount of hours, and during that time I exert myself. I create for myself issues with regard to my physiology that I'm not happy with. As a result of not being happy with those issues, I am coming to you as a pain doctor to possibly get a prescription for some medication, which I am already taking that seems to be working for me and helping me to get through my night of -- you know, my night after dancing and into the next day. . . .

So, I listened to her, and, unfortunately, I believe her. She seems to be a reasonable human being. . . . She in no way describes any aberrant behavior in my mind. She doesn't seem like a drug seeker. She's certainly not addicted. . . . So she's taking [Percocet]. She's doing very well with it. And she apparently does not want to continue buying these medications illegally. . . . I came to the conclusion that this is probably a reasonable human being.

. . . .

I thought to myself well, here's a girl, like other people that I have treated in those occupations and other occupations which have problems with their physiology.

They're taking a product as a treatment modality for that particular problem.

And, frankly, by this point in time, even though she didn't quite address -- as many people really do not address their symptoms, you know, adequately. I mean, they dance around things . . . she has an occupation which connotes serious activity, physical activity. . . . So she has the criteria for the strain-sprain, overuse syndrome mechanism for which she is already taking Percocet after her dancing.

. . . .

But, nevertheless, at the end of the visit, you know, I make the decision that it's okay for her to take a Percocet after dancing. And I write a prescription for her for Percocet.

When asked by the ALJ why he had not questioned Anderson further about the specifics of what was bothering her or "where it hurt," and why he had not asked her to elaborate on whether it was her knees, ankles or toes that were hurting, Costino responded by stating: "I'm going to tell you I can't give you an answer. I could have just been very busy that day. I can't give you an answer why I didn't get into more of this with her."

On cross-examination, Costino admitted that Anderson never "said the word 'pain'" and did not "say . . . 'soreness' [or] 'it hurts.'" He further admitted he did not perform a musculoskeletal system exam, did not "ask [Anderson] to move her neck back and forth," did not "ask her to move her arms, stand

up, sit down, [or] bend over," did not palpate her abdomen, and never asked why she needed a new prescription twenty days after the first visit when the first prescription should have lasted six weeks. Costino further conceded that, at some point, Anderson's first medical record was photocopied, including the findings as to Costino's examinations of her, and was used as a template for each of her subsequent office visits.

In a thirty-six page written decision issued on May 14, 2009, ALJ Miller recommended revocation of Costino's medical license, imposition of a \$10,000 fine, and an award of costs to the Attorney General. ALJ Miller made credibility findings, observing that the testimony of Anderson and Abbattiscianni was credible. He did, however, comment that because "[m]ost of their testimony emanated from prior proceedings[,] . . . the vast majority of their trial testimony [consisted of] merely authenticat[ing] prior recorded statements." The ALJ found Hamilton's testimony about the CPT codes reliable but "not significantly relevant" because it was "dependent upon the accuracy of the information provided by Dr. Costino."

Next, the ALJ found the testimony of Jermyn to be "unreliable and questionable" because Jermyn had initially attempted to justify Costino's prescription of pain medication even though Costino made no findings of pain, which Jermyn

ultimately conceded "was clearly contrary to [applicable] principles and medical guidelines." Further, according to the ALJ, Jermyn was unreliable because he "ignore[d]" the manner in which the agents presented themselves to Costino and because the "patient records and transcripts are void of any competent basis to reach . . . a diagnosis" of acute sprain and strain of the thoracic and lumbar spine. ALJ Miller also determined that Jermyn's testimony did not constitute an expert opinion because he merely "gave opinions as to what Dr. Costino was thinking or 'what Costino believed' when treating the [undercover] agents."

Ultimately, ALJ Miller concluded: Costino prescribed Percocet for "relaxation," which "was precisely what the agents requested"; the diagnosis of sprain and strain of the thoracic and lumbar spine was "patently unsupportable" as neither Anderson or Abbattiscianni mentioned pain and Costino did not examine those regions; Costino "aided and abetted the use of painkillers by exotic dancers for invalid medical reasons"; Costino "engaged in dishonesty, fraud, misrepresentation and false pretense by prescribing [Percocet] to patients who did not present with pain"; Costino "knowingly and intentionally dispensed these medications based upon a false diagnosis"; and Costino "fabricated his patients' medical records to justify his diagnosis and to recover insurance proceeds."

Costino filed written exceptions to the ALJ's opinion and order, after which the Board conducted a hearing to determine whether to adopt the ALJ's opinion. After hearing argument from both parties, the Board unanimously voted on July 8, 2009 to adopt the ALJ's decision in its entirety, including the ALJ's findings of fact and conclusions of law. After the Board voted on July 8, 2009 to revoke Costino's license, but before the Board issued its written decision, Costino discovered, while proceeding with a related criminal case,³ that contrary to Anderson's September 19, 2008 certification -- in which she swore she had never been treated for any cervical, thoracic or lumbar spine problems -- she had indeed consulted a chiropractor. Anderson's medical record included the chiropractor's intake form, on which Anderson had checked "neck pain/stiffness, pain between shoulders and sciatica." The visit to the chiropractor took place on July 26, 2007, which was within the time frame covered by the Board's September 20, 2008 order.

³ The criminal case, involving allegations that Costino improperly distributed a controlled dangerous substance, is pending in the Law Division. We recently issued an opinion in defendant's interlocutory appeal of the trial judge's order permitting the State, with one relatively minor exception, to introduce at trial the covert tape recordings by Anderson and Abbattiscianni. State v. Costino, No. A-2761-09 (App. Div. August 19, 2010).

Upon learning that Anderson had been seen by a chiropractor for problems with her back, neck and shoulder, Costino moved before the Board for a remand to the ALJ to enable the ALJ to determine whether the newly-discovered chiropractic records would alter his conclusion that Anderson was credible. On September 9, 2009, the Board denied Costino's motion for a remand to the ALJ. Instead, the Board voted to re-open its own record so that the Board could consider Anderson's July 26, 2007 chiropractic record.

In its final decision issued on December 21, 2009, the Board found that the new materials, namely, Anderson's chiropractic records from July 26, 2007, "would not change the result" the Board had already reached on July 8, 2009. The Board reasoned that Anderson's July 26, 2007 chiropractic record was of "little relevance" to Anderson's initial presentation to Costino on April 12, 2007, which was three months earlier. Moreover, any condition Anderson actually had was not significant "because [she] was seeing [Costino] much like an actress - and she presented to him repeatedly as having no pain." Under those circumstances, "[w]hether the undercover officer actually had any condition is not significant in the circumstances of this matter" because of "Costino's utter failure, as documented by the testimony and audio recordings, to

perform any examination for such a condition, such as range of motion tests, palpation for tenderness or neurological examination."

In its December 21, 2009 final decision, the Board began by finding it was appropriate to hold Costino to the standards of a pain management specialist, and even if Costino were to be judged by the standards applicable to a general practitioner, the result would remain unchanged because of Costino's "remarkably poor medical judgment."

Second, the Board rejected Costino's arguments concerning the ALJ's failure to comment on Costino's refusal to prescribe Percocet to undercover detective Joseph Landis in 2005. The Board found that Landis's testimony had no bearing on the central issue before the ALJ because the fact that Costino may have prescribed medication appropriately "to some other individual sixteen months prior" to Anderson's and Abbattiscianni's undercover visits "is not relevant, nor does it [a]ffect the outcome" because there "was no allegation that [Costino] prescribed improperly to all of his patients - nor is such proof necessary."

Third, the Board refused to disturb the ALJ's credibility determinations and findings as to Jermyn, Hamilton, Anderson and Abbattiscianni. The Board observed that "credibility

determinations are best made by the trier of fact," who has the opportunity to hear live testimony and is thus in the "best position" to judge a witness's credibility. The Board concluded that the ALJ had "convincingly explain[ed]" why he accepted the testimony offered by the Attorney General's witnesses and found Costino's witnesses less credible or not credible at all.

Notably, the Board did not simply adopt the ALJ's findings as to Dr. Jermyn's testimony. Instead, the Board "agree[d] in [its] own expertise" with the ALJ's determination that Jermyn's testimony was "unreliable and questionable" because of his attempt to validate Costino's prescribing of painkillers to individuals who did not complain of pain. The Board observed that ultimately Jermyn had been forced to concede that although painkillers may be prescribed appropriately to treat musculoskeletal injury, they should never be prescribed to patients who do not present with those issues and without meaningful examination to reach such a diagnosis.

Fourth, the Board found that by "fabricat[ing]" Anderson's and Abbattiscianni's medical records "to justify his diagnosis and collect insurance payments," Costino created the "false impression" that he was treating patients "with real injuries and pain. . . . [and] [o]nce [he] submitted a bill based on a fraudulent diagnosis, the billing was fraudulent as well[,]"

thereby "amply support[ing]" the ALJ's conclusion that the billing for each of the undercover visits constituted dishonesty, fraud, deception, misrepresentation or false pretense, and professional misconduct.

Fifth, the Board concluded that Costino had presented no meritorious basis for the Board to disturb the ALJ's conclusions of law. The Board reasoned:

The clear findings that two patients who came to [Costino's] office seeking painkillers, with no medically significant complaints of pain, in order to relax or unwind, with little legitimate examination, were repeatedly prescribed Percocet, a Schedule II painkiller, in increasing dosages culminating in a visit in which [Costino] suggested prescribing a double amount (two per day) in order not to arouse suspicion upon a fabricated diagnosis of overuse syndrome synonymous with sprain/strain of the thoracic/lumbar spine, clearly supports the ALJ's conclusions. Thus, we agree that [Costino's] treatment of the agents was grossly and repeatedly negligent; that his actions in prescribing CDS involved the use of dishonesty, fraud, deception and misrepresentation; . . . constitute[ed] moral turpitude or relat[ed] adversely to medical practice; fail[ed] to comply with an Act or regulation of the Board; fail[ed] to follow regulations for prescribing medication or CDS; indiscriminate[ly] prescrib[ed] . . . CDS and/or demonstrate[d] a failure to be of good moral character required for licensure as a physician.

[(Internal statutory citations omitted).]

Turning to the sanctions to be imposed against Costino, the Board first observed that Costino did not have a clean record, having been reprimanded in 1998 for engaging in sexual relations with two patients he was currently treating. After hearing from several of Costino's character witnesses, the Board voted to revoke Costino's license, ordering that he could not apply for reinstatement until at least five years had elapsed. Finally, the Board adopted the \$10,000 fine imposed by the ALJ and required Costino to reimburse the Attorney General's costs of litigation in the amount of \$77,809.45, of which \$70,733 was for attorney's fees. The counsel fee was calculated at the hourly rate of \$175, which was the standard amount charged for deputies having more than ten years of experience.

The Board justified its order that required Costino to pay \$77,809.45 in legal fees and costs to the Attorney General, stating:

[Costino] argue[s] that the costs sought by the State are too high. He claims attorney's fees should be set by dividing a [Deputy Attorney General's] weekly salary by 40 hours to obtain an hourly rate. [Costino] also asserts he has already paid his own legal fees, and transcript costs and as he has been unemployed since December of 2007 when his license was suspended, he should not pay attorney fees in this matter.
. . .

We have reviewed the costs sought by the State and find the application

sufficiently detailed and the amount reasonable given the length and complexity of the prosecution in this matter. . . .

. . . . The Attorney General's certification was supported by the time sheets of DAG David Puteska and included information derived from a memorandum by Nancy Kaplan, then Acting Director of the Department of Law and Public Safety, detailing the uniform rate of compensation for the purpose of recovery of attorney fees . . ., setting the hourly rate of a DAG with ten plus years of legal experience at \$175.00 per hour This document has been presented and accepted many times in the past in professional licensing proceedings. We are satisfied that the record adequately details the tasks performed and the amount of time spent on each by the Deputy Attorney General We are satisfied the tasks performed, while time-consuming, needed to be performed and that in each instance the time spent was reasonable.

. . . .

We further find that [Costino] has provided only an uncertified statement of assets and tax returns demonstrating substantial income and thus has not documented an inability to pay such costs.

II.

Costino first argues that the Board abused its discretion by denying his motion for remand once he discovered Anderson's July 2007 chiropractic records. Costino maintains that this new evidence was material to his case both because the chiropractic

records supported his diagnoses and because those records could have been used to impeach Anderson.

After an ALJ renders an initial decision, the Board may choose to adopt, reject, or modify that decision before issuing its final decision. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.6. An agency, such as the Board, may not reject or modify an ALJ's credibility findings unless such findings are arbitrary or unsupported by the record. N.J.S.A. 52:14B-10(c). The Board also has the discretion to remand the matter to the ALJ "for further action on issues or arguments not previously raised or incompletely considered." N.J.A.C. 1:1-18.7. However, an agency is not required to automatically remand a contested case to the ALJ whenever newly-discovered evidence is presented. In re Kallen, 92 N.J. 14, 24-25 (1983) (observing that because administrative agencies "are not judicial tribunals" they are vested with "flexibility in exercising their executive role" in the adjudication of contested cases with powers "more expansive and flexible than those of" the judiciary).

While an agency's prerogative to determine how the case will proceed is broad, the adjudication process must still "'operate fairly and conform with due process principles.'" Id. at 25 (quoting Laba v. Newark Bd. of Educ., 23 N.J. 364, 382 (1957)). Although "the manner of conducting a hearing may vary,

'[a]s long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met.'" Ibid. (quoting Kelly v. Sterr, 62 N.J. 105, 107 (1973)) (alteration in original).

Applying the principles articulated in Kallen, we are satisfied the Board's handling of the newly-discovered evidence was appropriate and did not unfairly infringe on Costino's right to a fair hearing. Costino makes much of the fact that the ALJ was the original factfinder. For that reason, according to Costino, the ALJ alone should have been vested with the authority to determine whether Anderson's July 26, 2007 chiropractic record should operate to diminish Anderson's credibility.

Costino's argument ignores the fact that the ALJ, in finding Anderson credible, pointedly noted that "[m]ost" of her testimony "emanated from prior proceedings" and the "vast majority of [her] trial testimony merely authenticated prior recorded statements." That being so, Costino's argument that the Board should have remanded to the ALJ for new credibility findings vastly overstates the extent to which the ALJ made credibility findings. The record demonstrates that the facts upon which the ALJ relied in evaluating Costino's response to

Anderson's request for Percocet came from the covert tape recordings that Anderson made while speaking with Costino, rather than from Anderson's live testimony. The tape recordings speak for themselves, and thus there was no need for the ALJ to make credibility findings that would otherwise be of critical importance in any contested hearing.

Moreover, the Board did not treat Anderson's July 2007 chiropractic treatment lightly. Instead, the Board reopened the record and considered the new evidence, ultimately determining that even if Anderson had a back injury at the time of her visits to Costino, his diagnosis of lumbar sprain and strain was not legitimate because Anderson said she had no pain and Costino performed no examination of her lumbar spine. Under such circumstances, we reject Costino's contention that the Board's decision to consider the newly-discovered evidence itself, rather than send the matter back to the ALJ, resulted in a denial of due process.

III.

In Point II, Costino argues the Board's conclusion, that he violated the various provisions of N.J.S.A. 45:1-21, was not based upon credible and substantial evidence in the record, thereby requiring reversal. "The Medical Practices Act (MPA) [N.J.S.A. 45:9-1 to -27] vests the Board with broad authority to

regulate the practice of medicine in the State of New Jersey." In re License Issued to Zahl, 186 N.J. 341, 352 (2006). The MPA, along with the Uniform Enforcement Act (UEA), N.J.S.A. 45:1-14 to -27, which sets standards for disciplinary proceedings, grants the Board the right to pursue disciplinary action against a physician, Del Tufo v. J.N., 268 N.J. Super. 291, 296 (App. Div. 1993), including suspension or revocation of the physician's license to practice medicine. N.J.S.A. 45:1-21. The Board may suspend or revoke a physician's license to practice medicine if the physician

b. Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense;

c. Has engaged in gross negligence, gross malpractice or gross incompetence which damaged or endangered the life, health, welfare, safety or property of any person;

d. Has engaged in repeated acts of negligence, malpractice or incompetence;

e. Has engaged in professional or occupational misconduct as may be determined by the board;

f. Has been convicted of, or engaged in acts constituting, any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board. For the purpose of this subsection a judgment of conviction or a plea of guilty, non vult, nolo contendere or any other such disposition of alleged criminal activity shall be deemed a conviction;

. . . .

h. Has violated or failed to comply with the provisions of any act or regulation administered by the board;

. . . .

m. Has prescribed or dispensed controlled dangerous substances indiscriminately or without good cause, or where the applicant or holder knew or should have known that the substances were to be used for unauthorized consumption or distribution[.]

[Ibid.]

Furthermore, a physician's license may be suspended or revoked if he is not a person "of good moral character." N.J.S.A. 45:9-6. The burden of proof for establishing claims against a physician in an administrative adjudication is a fair preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982).

Moreover, N.J.A.C. 13:35-7.1A establishes standards for the prescribing of medication and requires a physician to conduct an examination of a patient before issuing any prescription. As part of this examination, the physician must:

1. Perform an appropriate history and physical examination;
2. Make a diagnosis based upon the examination and all diagnostic and laboratory tests consistent with good medical care;

3. Formulate a therapeutic plan and discuss such plan, along with the basis for the plan and the risks and benefits of various treatment options, with the patient; and

4. Ensure the availability of the physician or coverage for the patient for appropriate follow-up care.

[N.J.A.C. 13:35-7.1A(a).]

N.J.A.C. 13:35-7.6 establishes additional requirements for the prescribing of a controlled dangerous substance (CDS), stating:

(a) When prescribing, dispensing or administering controlled substances, a practitioner shall ensure that a patient's medical history has been taken and physical examination accomplished, including an assessment of physical and psychological function, underlying or coexisting diseases or conditions, any history of substance abuse and the nature, frequency and severity of any pain. The medical record shall reflect:

1. A recognized medical indication for the use of the controlled substance;
2. The complete name of the controlled substance;
3. The dosage, strength and quantity of the controlled substance; and
4. The instructions as to frequency of use.

This court's review of final agency action is limited, as decisions of an administrative agency, such as the Board, are entitled to our deference. Zahl, supra, 186 N.J. at 353. This

deference is "appropriate because of the expertise and superior knowledge of agencies in their specialized fields and because agencies are executive actors[.]" Ibid. (internal quotations and citations omitted). Furthermore, "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007). Our review is limited to three inquiries:

(1) whether the agency's action violates express or implied legislative policies; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.

[R & R Mktg., L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 175 (1999) (emphasis added).]

Ultimately, this court should "examine the proofs to determine whether there is sufficient or substantial credible evidence in the record to support the agency's determination," and "[w]here such evidence appears, the determination should not be disturbed." In re Suspension of Heller, 73 N.J. 292, 309 (1977).

Here, the Board found that Costino's prescribing of Percocet to the undercover agents amounted to violations of N.J.S.A. 45:1-21(b) (employment of dishonesty, fraud, deception, or misrepresentation); N.J.S.A. 45:1-21(c) (gross negligence); N.J.S.A. 45:1-21(f) (offense involving moral turpitude); N.J.S.A. 45:1-21(h) (failure to comply with provisions of statute or regulations); N.J.S.A. 45:1-21(m) (indiscriminate prescribing of CDS without good cause); N.J.S.A. 45:9-6 (physician must be of good moral character); N.J.S.A. 45:1-21(b) (fraudulent billing); and N.J.S.A. 45:1-21(e) (professional or occupational misconduct).

The tapes of Anderson's and Abbattiscianni's visits to Costino, as well as the testimony of both officers, showed Costino did not perform the necessary physical examination of either officer, thereby supporting the Board's conclusion that Costino violated N.J.A.C. 13:35-7.1A(a)(1) and (2) and N.J.A.C. 13:35-7.6(a). Although Costino diagnosed both with sprain and strain of the thoracic and lumbar spine, the history he took from each consisted of little more than asking the patient if she had any problems, with no appropriate history being taken. Rather than conduct the physical examination and the assessment of physical functioning that is required, Costino admitted and his records confirm, that the physical examination he conducted

was incomplete, consisting of little more than listening to the heart and lungs and merely "observing" the two while they walked or were seated on the examination table. Such cursory observation is not a substitute for a complete examination.

Costino's failure to conduct an examination is further confirmed by Costino's patient records. He himself acknowledged that his records included an identical template of his physical exam from Anderson's first visit on April 12, 2007, which he had merely photocopied and continued to use on each of the next six visits.

In addition, the record demonstrates that Costino failed to establish a chief complaint, thereby supporting the Board's finding that he violated the applicable regulations by failing to "ensure that a patient's medical history has been taken and physical examination accomplished, including an assessment of physical . . . function." N.J.A.C. 13:35-7.69(a). Additionally, Costino ignored the requirement that he provide a "recognized medical indication for the use of the controlled substance." N.J.A.C. 13:35-7.6(a)(1).

The record additionally supports the Board's conclusion that not only did Costino ignore what the Board described as "the drug seeking behavior" of Anderson and Abbattiscianni, but he prescribed the most "highly addictive class of drugs on a

repeated basis," without any demonstration of medical need on the mere request by Anderson to obtain Percocet to help her "unwind," in violation of N.J.S.A. 45:1-21(m), which prohibits a physician from prescribing CDS "indiscriminately or without good cause."

As to Abbattiscianni, although Costino points to her statement in the initial portion of her first undercover visit that she was experiencing "pain," she thereafter repeatedly denied having any problems or pain. In light of Abbattiscianni's insistence that she had no pain, and Costino's failure to make any objective clinical findings that would support the "pain" to which Costino now points as justification for prescribing Percocet to Abbattiscianni, the record is devoid of any "recognized medical indication," N.J.A.C. 13:35-7.6(a)(1), for the prescribing of Percocet to Abbattiscianni.

At appellate oral argument, Costino argued that although the transcripts of the undercover office visits by Anderson and Abbattiscianni do not, in and of themselves, support a finding that either was experiencing pain from her work as an exotic dancer, his own interpretation of their words -- based upon his years of experience as a practitioner -- enabled him to conclude they were suffering from "overuse syndrome" and the pain that

such "overuse" would entail. This argument is unconvincing for two reasons: First, accepting such an argument would require us to ignore the precise requirements of N.J.A.C. 13:35-7.1A(a) and 13:35-7.6, which require a physician to take a complete history, perform a thorough physical examination and establish a reliable diagnosis. We are not prepared to ignore such binding regulations, and neither was the Board. Second, acceptance of such an argument would give any physician virtual carte blanche to indiscriminately prescribe Percocet based upon the physician's claim that the patient must have been experiencing more pain than she was able to describe in an articulate fashion.

We thus conclude that the ALJ and the Board properly determined that Costino's actions warranted application of the disciplinary framework established by N.J.S.A. 45:1-21 and required the revocation of his license for a minimum of five years. In particular, his indiscriminate prescribing of Percocet without medical justification, without performing a complete physical examination and without any objective clinical findings constitutes gross negligence in violation of subsection (c), dishonesty, fraud, deception and misrepresentation in violation of subsection (b), moral turpitude that adversely reflects upon the practice of medicine in violation of

subsection (f), violation of Board regulations, in violation of subsection (h), and indiscriminate prescribing of CDS in violation of subsection (m). The Board's findings of fact and conclusions of law are well supported by the record. We therefore reject the claim Costino advances in Point II. Zahl, supra, 186 N.J. at 353.

IV.

Last, in Point III Costino maintains that the sanctions imposed against him, namely a license revocation subject to a five-year minimum before he may seek reinstatement, and costs in the amount of \$77,809, were "excessive" and "shocking to one's sense of fairness," thereby warranting reversal.

The Board has the right, when confronted with professional misconduct, to impose penalties ranging from license suspension or revocation, N.J.S.A. 45:1-21, to a formal reprimand or civil penalties, N.J.S.A. 45:1-22. This court's review of an agency sanction is limited, and deference is generally paid to the Board's choice of sanction. Zahl, supra, 186 N.J. at 353. "[T]he test in reviewing administrative sanctions is whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Polk, supra, 90 N.J. at 578 (internal quotations and citations omitted). Unless the penalty shocks the

conscience, this court may not substitute its judgment for that of the Board. Ibid.

In support of his claim that the revocation of his license for a minimum of five years was excessive, Costino points to several factors that allegedly mitigate the need for license revocation, including: proof that Costino instructed a pharmacy not to fill a prescription for a patient who had apparently presented a fraudulent prescription; Costino's refusal to prescribe a painkiller to Detective Landis who requested a prescription while acting in an undercover capacity; the numerous character witnesses presented; and the dwindling number of physicians in Atlantic and Cape May counties who practice in Costino's specialty area of pain management.

The record demonstrates the Board gave ample consideration to Costino's proposed mitigating factors, allowing him, for example, to present the testimony of twenty-two character witnesses even though most of their testimony was cumulative and repetitious. The Board also considered the two occasions when Costino did not commit illegal activity, namely, the pharmacy phone call and Landis's testimony. As the Board correctly found, these two incidents do not change the fact that Costino engaged in serious professional misconduct during each of the seven undercover visits.

While it is unfortunate that some of Costino's patients may now have to travel a further distance to obtain care, this does not lessen the importance of sanctioning a physician who put patients at risk by prescribing medication for which they had no need. The Board also took into consideration that this was not Costino's first infraction because he had been sanctioned in 1998 for engaging in sexual relations with patients he was treating. While the nature of the prior transgression is not the same as the present matter, the Board was entitled to take Costino's prior infraction into consideration in establishing the proper sanction. Polk, supra, 90 N.J. at 579 (directing the Board, in a disciplinary proceeding, to "scrupulously consider all factors relevant to continued licensure").

In light of the seriousness of Costino's violations, and his prior infraction in 1998, the penalty imposed is not "shocking to one's sense of fairness," id. at 578, and we therefore have no occasion to interfere with the broad discretion afforded the Board in establishing the proper penalty. See Zahl, supra, 186 N.J. at 353. We therefore reject Costino's claim that the revocation of his license is excessive.

Costino also challenges the assessment of \$77,809 in costs as excessive, maintaining that granting the Deputy Attorney General an hourly rate of \$175 "would in effect transform the

OAL D.A.G. into the State's highest paid employee as he would be earning nearly three times more than his own boss (Attorney General Anne Milligram [sic])." Multiplying the \$175 hourly rate by forty hours per week and fifty-two weeks a year, Costino observes that the DAG's hourly rate is tantamount to an annual salary of \$364,000. He urges us to reject the \$175 hourly rate and instead calculate the hourly rate by dividing the DAG's actual salary by fifty-two and forty. Notably, Costino does not argue that the number of hours spent by the DAG was excessive, or that the DAG was not fully successful, instead taking issue only with the hourly rate.

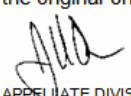
"[A] reviewing court will disturb a[n] . . . award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)). In determining what constitutes a reasonable hourly rate for the calculation of an award of attorney's fees, "the appropriate rate to be applied is the rate that would be charged by a competent and knowledgeable attorney engaged to render legal services in the particular case." Singer v. State, 95 N.J. 487, 500 (1984).

Here the \$175 hourly rate claimed by the Attorney General's Office was a fair hourly rate for the DAG involved, who had over ten years experience; and was comparable to, or less than, other hourly rates for experienced counsel, which have been upheld on appeal. See New Jerseyans For a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 146 (2005) (in which the Court found an hourly rate of \$155 for plaintiff's attorney, who had three years experience, fair); DePalma v. Bldg. Inspection Underwriters, 350 N.J. Super. 195, 220 (App. Div. 2002) (affirming a counsel fee award based on an hourly rate of \$350 in a Family Leave Act case). Moreover, the record demonstrates that the hourly rate utilized here is the same hourly rate sought by the Attorney General, and approved by the Board, in awarding counsel fees to the Attorney General for deputies of comparable experience. Consequently, we conclude that the Board did not abuse its discretion when it concluded that the \$175 hourly rate was reasonable. We therefore affirm the imposition of \$70,733 in attorney's fees.

Costino's remaining argument, that the Board abused its discretion when it imposed \$7,075 in costs of transcription, court reporting and travel expenses lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(A) and (E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION