

FILED

June 14, 2010

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF SUSPENSION OR	:	Administrative Action
REVOCATION OF THE LICENSE OF	:	
	:	
KEVIN M. FLEMING, M.D.	:	
LICENSE NO. 25MA46720	:	
	:	
TO PRACTICE MEDICINE AND SURGERY	:	ORDER OF SUSPENSION
IN THE STATE OF NEW JERSEY	:	OF LICENSE

This matter was opened before the New Jersey State Board of Medical Examiners by way of a Complaint filed on October 7, 2007 against respondent Kevin M. Fleming, M.D. The Complaint alleged in Counts I through V that respondent repeatedly prescribed controlled dangerous substances (CDS) in excessive dosages and frequencies, thus deviating from accepted standards of medical practice in connection with six patients.¹ Inadequate record keeping was also alleged in each of the counts. Further, Count VI alleged deceptive billing practices on numerous occasions, and the failure to comply with N.J.A.C. 13:35-6.11 regarding the charging of excessive fees.

An Answer was filed on or about November 1, 2007, denying

¹ Allegations with respect to one of the two patients, (D.S. and E.S.) cited in Count II were later dismissed with respect to one (E.S.). These patients were the parents of N.S., a patient cited in Count I of the Complaint.

the allegations, and the matter was transferred to the Office of Administrative Law as a contested case on December 31, 2007. Respondent retained substitute counsel, resulting in an adjournment of the originally scheduled hearing dates in 2008, and the five day hearing was ultimately held on July 13, 14, 15, 16 and 20 of 2009. The record was closed on December 15, 2009. Jeff S. Masin, Administrative Law Judge, obtained an extension of time for the filing of the Initial Decision, which issued on February 9, 2010. Exceptions to the Initial Decision were filed by respondent on February 26, 2010. The Attorney General's reply was filed on March 16, 2010, along with a Certification of Costs.

On May 12, 2010, the parties appeared before the Board. Dr. Fleming was represented by Carl Poplar, Esq., and Jeri Warhaftig, Deputy Attorney General, represented the State. At that time, the parties stipulated to the proposed findings of fact and conclusions of law of the Initial Decision with an exception by the Attorney General as to the ALJ's finding that Dr. Fleming acted in good faith in the treatment of his patients.

The Board, following deliberation, adopted in full the Findings of Fact and Conclusions of Law of the Administrative Law Judge, with respect to Dr. Fleming's conduct, deferring any

findings with respect to penalty until the conclusion of the mitigation hearing which immediately followed.²

The findings as to the first five Counts of the Complaint concerned the prescribing of massive doses of narcotics for five patients, with little or no indication of examination or assessment. The relevant medical records were also found to be inadequate, and were so described in testimony by experts for both parties. The facts as found by the ALJ and stipulated to by the parties are as follows:

Patient N.S. named in Count I, was permanently disabled as a result of an automobile accident in January of 1999. He experienced excruciating pain, and was placed on Oxycontin by another physician. From March of 2001 to September of 2003, he did not see Dr. Fleming because Dr. Fleming was not covered by his insurance plan. When N.S. returned to the care of Dr. Fleming, he was taking Actiq, a narcotic used for "breakthrough pain." The ALJ found that Dr. Fleming treated N.S.'s pain "by feeding him massive amounts of narcotics without a real assessment of the

² The Board also adopted and incorporated by reference the exhibit list included with ALJ Masin's Initial Decision, with the addition of the exhibits admitted on May 12, 2010 at the mitigation hearing before the Board:

1. S-1 June 16, 1992 New Jersey State Board of Medical Examiners Order of Reprimand I/M/O Kevin Fleming, M.D.
2. R-1 Kevin M. Fleming Accountant's Report, Statement of Financial Condition as of May 10, 2010.
3. R-2 2007, 2008 and 2009 U.S. Individual Income Tax returns of Kevin Fleming
4. R-3 2007, 2008 and 2009 U. S. Individual Tax Returns for an S Corporation, Kevin Fleming.

problem and a recognition that . . . he was not adequately equipped to deal with this patient and was . . . '[in] over his head.'³ With respect to the treatment records, specifically the Progress Notes, Judge Masin found: "The records did not properly indicate even the reasons why N.S. was seen, and in many instances there was no way to determine that the patient had actually been seen with any regularity by Fleming."

D.S., cited in Count II, was an elderly patient of Dr. Fleming's who had moved to Ocean City, Maryland. He suffered a stroke, but refused to see a Maryland physician. Although he never saw the patient after the move to Maryland, Dr. Fleming began treating him for pain, prescribing Oxycontin and Percocet, from August 27, 2003 until the death of D.S. in December of 2006. D.S.'s daughter, a nurse, visited Dr. Fleming periodically to report on her father's condition, and to receive the prescriptions from Dr. Fleming. The ALJ found that Dr. Fleming issued "dozens and dozens of prescriptions for Schedule II narcotics to D.S. during three years during which time the doctor both failed to ever examine, or for that matter even see, D.S., and during which he failed to document any information about the patient[.]"⁴

³ Judge Masin was quoting the testimony of Dr. Fleming's expert, Dr. Susan I. Moreno, with regard to respondent's pain management of N.S.

⁴ N.J.A.C. 13:35-7.6 provides that when controlled substances are continuously prescribed for pain management for three months or more, the physician is required to review the course of treatment, any new information about the etiology of the pain, and the patient's progress towards treatment objectives. The physician is also required to make reasonable efforts

K.B., the subject of Count III, had a thyroid condition and other complex medical problems. Prescription records from 2002 through 2004 include 32 prescriptions for pain medication in significant doses, including Vicoprofen, Hydromorphone (Dilaudid), Oxycodone and Oxycontin. The medical records provided no indication of any examinations or assessments of the patient's condition during that period. Judge Masin found that Dr. Fleming continued to prescribe large amounts of Schedule II and III narcotics for K.B. in 2002, 2003 and 2004 without ever actually conducting an examination of the patient after 1999, and termed the records "woefully inadequate."

C.O., the patient named in Count IV, suffered from a wrist drop caused by cervical spine radiculopathy. Dr. Fleming wrote four or five prescriptions per month for Schedule II narcotics for this patient, including Percocet, Oxycontin, Actiq and Duregesic patches over a two year period. Eventually, Dr. Fleming discharged C.O. and his wife, (~~see~~ Count V) T.O., as patients, when he found they were using cocaine. The ALJ found the "scanty" documentation in the records did not support the "rampant" prescribing of narcotics which occurred.

T.O., named in Count V, suffered from fibromyalgia. Treatment records list medications prescribed, but there is no indication as

to stop use of CDS, decrease dosage, and try to substitute other drugs. If the treatment objectives are not met, the physician is required to assess whether continued treatment is appropriate, or whether referral to a specialist is warranted.

to whether the patient was actually seen during the years 2003-2006. The ALJ again found the medical records "woefully inadequate" to support the level of CDS prescribing for this patient.

Thus the ALJ concluded and we concur that Dr. Fleming engaged in gross malpractice and/or repeated acts of negligence in violation of N.J.S.A. 45:1-21(c) and (d)⁵ as to each of the five patients named supra; indiscriminate prescribing of CDS in violation of N.J.S.A. 45:1-21(m) as to those same five patients; and failure to maintain proper patient records in violation of N.J.A.C. 13:35-6.5 and N.J.S.A. 45:-12(h) as to each of the five patients.

With respect to Dr. Fleming's billing practices, which were the subject of Count VI, Judge Masin found that billings for patients B.K. and N.S. included three occasions where a medical student's name appeared in the records, and there was no indication that Dr. Fleming even saw the patient or discussed the patient's treatment; and three occasions where the records provided no indicia of examination, assessment, analysis or decisionmaking, as would be appropriate for the billing code used, i.e., for an enhanced or more complex visit. The ALJ concluded that Dr. Fleming's failure to properly bill for those visits constituted

⁵ Although the ALJ did not specifically cite N.J.S.A. 45:1-21(d), his findings of fact indicate repeated acts. Therefore, the Board makes an additional finding of repeated acts of negligence.

professional misconduct in violation of N.J.S.A. 45:1-21(e), and further found a violation of the Board's regulation against excessive fees, N.J.A.C. 13:35-6.11, thus implicating N.J.S.A. 45:1-21(h).⁶

Although the parties stipulated to the above findings of fact and conclusions of law, and the Board adopted those findings and conclusions in toto, a finding by Judge Masin that Dr. Fleming acted in good faith was not stipulated to by the parties. The Attorney General's position was that good faith was assumed on the part of medical practitioners, and its existence was thus irrelevant in terms of the standard of care, although it may be relevant to the assessment of penalty. Dr. Fleming's attorney, although he did not disagree with the Attorney General's position, made Dr. Fleming's good faith a lynchpin of his arguments for mitigation, both in his written exceptions and in his oral argument before the Board. The Board noted on the record that it would consider the ALJ's finding of good faith in its determination of penalty.

ALJ Masin, in his Initial Decision, recommended imposition of a five year suspension of license upon Dr. Fleming, with two years of the suspension to be actively served; civil penalties in the total amount of \$295,000.00, investigative costs

⁶ The Initial Decision indicates a violation of N.J.S.A. 45:1-21(f), with regard to the violation of this regulation, but it is plain from the context that N.J.S.A. 45:1-21(h) was intended. We thus modify the conclusion of law to find a violation of N.J.S.A. 45:1-21(h).

and attorney fees pursuant to N.J.S.A. 45:1-25, and any remedial education in recordkeeping and/or prescribing that the Board, in its discretion, found appropriate.

The Board entertained oral argument on mitigation and aggravation of penalty, with Carl Poplar, Esq., arguing respondent's position, followed by Jeri Warhaftig, Deputy Attorney General, appearing for the State. At the hearing before Judge Masin, more than a day had been devoted to the testimony of physicians and other witnesses, attesting to Dr. Fleming's character and dedication to his patients, and letters expressing similar sentiments from other physicians are included in the record.

Mr. Poplar maintained in oral argument before the Board, as well as in his written exceptions, that although Dr. Fleming acted "excessively and inappropriately" to address the significant medical problems of the five patients cited in the Complaint, no patient had been injured by him or complained to any entity about his or her care. Dr. Fleming's care and commitment, and his "good faith," was particularly stressed. It was further argued that the five cases cited in the Complaint, culled from ten cases submitted by the Attorney General for expert review, were a small percentage of Dr. Fleming's overall practice, and thus not representative of his practice. The lapse of time since the violations occurred was also urged in mitigation: respondent, in his brief, pointed out

that "the last inappropriate patient contact was in 2006." The testimony of various medical professionals at the hearing before Judge Masin was also cited in mitigation in the written exceptions: "They attested to the skill, competence and commitment of Dr. Fleming to patient care as well as the profession." (Rb9) The written submission suggested monitoring and supervision as a more appropriate result than the term of active suspension proposed by Judge Masin.

Dr. Fleming testified before the Board that since the filing of the Complaint in 2007, he has taken greater pains with documentation, having consulted with a nurse practitioner who is an expert in this field, and made sure that his current documentation supported the coding on his submissions to insurance companies. His office was renovated, and his practice no longer includes "chronic, non-malignant [patient] pain management." Dr. Fleming currently uses Schedule II opioids in his role as a hospice physician for terminally ill patients, a position which he began in February of 2009. In his current practice, he sees approximately 25-30 patients daily, not including 5-15 hospitalized patients seen daily. Dr. Fleming currently has privileges at hospitals in Stratford, Washington Township, and Cherry Hill. He has also been offered a position at a Camden assisted living facility, and testified regarding an offer from the United States Army involving South Jersey residents. With regard to his financial circumstances, Dr.

Fleming testified that his divorce in 1999, and education costs for his four children have left him "cashed out," so that his only income is from the practice of medicine. To document his financial situation, Dr. Fleming submitted a brief, uncertified statement from his accounting firm, demonstrating a net worth of \$32,830.00. The statement, which was not signed by any individual accountant, noted that the contents were a compilation which had not been audited or reviewed by the firm, based solely on Dr. Fleming's representations. The submission further indicated that Dr. Fleming had "omit[ted] substantially all of the disclosures required by generally accepted accounting principles." Copies of corporate and personal tax returns for three years were also provided.

The Attorney General argued that, while the five cases resulting in discipline may indeed be a small portion of Dr. Fleming's practice, that does not necessarily demonstrate that all the other cases in his patient base were appropriately handled: the State did not examine all his patient files or interview all of his patients. Moreover, it was urged that finding five problematic cases out of a total of ten cases examined was a disproportionately large number.

On the issue of good faith, DAG Warhaftig maintained that the standard by which physicians are judged is whether there has been a deviation from accepted standards of good medical practice, not whether the physician had good intentions. She stressed that

good intentions or good faith are assumed in the medical profession. She also highlighted the ALJ's findings that Dr. Fleming's assertion of having "eyeballed" patients when they came to pick up prescriptions was found not credible by the ALJ and is contrary to good medical practice even if believed. In addressing the extent of Dr. Fleming's excessive prescribing of narcotics, DAG Warhaftig used as an example the case of N.S., who was prescribed Actiq. She contrasted the testimony of Dr. Marino, Dr. Fleming's expert, that she believed the highest daily dose of Actiq in her practice was 6,400 micrograms a day, with the fact that Dr. Fleming at one point was prescribing 63,000 micrograms a day for N.S. DAG Warhaftig noted Dr. Marino's testimony that Dr. Fleming was "in over his head" in his ongoing attempts at pain management in the cited cases.

The State also raised the issue of prior discipline imposed on Dr. Fleming. On June 16, 1992, Dr. Fleming was reprimanded by Order of the Board for writing prescriptions in the name of one patient, S.F., who was eligible for Medicaid reimbursement, although the medication was for the use of patient P.F., who was not eligible for Medicaid reimbursement. DAG Warhaftig acknowledged that Dr. Fleming may have been acting to assist P.F., but maintained that by acting contrary to law he had been engaging in "societal harm."

DAG Warhaftig asserted that the proposed sanctions imposed in the Initial Decision were appropriate because of the seriousness of the misconduct found and the potential for patient harm. Nevertheless, she pointed out that ALJ Masin appeared to have misread N.J.S.A. 45:1-25, in that the Uniform Enforcement Act, with regard to the imposition of monetary penalties, does not require a minimum penalty of \$10,000.00 for an initial violation and of \$20,000.00 for a subsequent violation. Those figures are maximum penalties pursuant to the statute.

The Board has considered the record, and the arguments and submissions of the parties, and has determined that the nature of Dr. Fleming's conduct in this matter warrants severe sanctions. The prescribing on a continuous basis of massive amounts of narcotics, and the scanty record keeping which supplied no justification for such prescribing, is beyond the pale of any conceivable standard of care. This, coupled with minimal indications of examinations and the doctor's own admission that for years he prescribed huge quantities of CDS without ever even seeing one of the patients, constitutes a blatant deviation that defies explanation.

Moreover, although the patients cited in the Complaint were experiencing severe pain, such indiscriminate prescribing without careful monitoring of the patient's condition could result in a patient using the physician to enable substance abuse. In

fact, two of the patients, C.O. and T.O., were ultimately dismissed as patients by Dr. Fleming when they tested positive for cocaine. Dr. Fleming's own expert acknowledged that in the cases of C.O. and T.O. she found the medical records were too scant to be able to ascertain whether there was any "absolute need" for the prescribed medications on the part of the patients. For these reasons, and those cited by the ALJ, the Board finds that the term of suspension recommended in the Initial Decision by Judge Masin is warranted. The Board has taken into account, in making this determination, the impressive testimony and written submissions by medical professionals and others, as to Dr. Fleming's character and professional attainments.

With respect to the monetary penalties, the Board has reviewed Dr. Fleming's submissions, including his personal income tax returns, and has determined that although significant penalties are warranted, the monetary penalties of \$295,000.00 assessed in the Initial Decision, possibly based upon a misapprehension of the applicable law, should be reduced.

As directed by the ALJ in the Initial Decision, the Attorney General submitted a Certification of Costs to the Board for consideration, which included a total amount of \$41,335 in attorney fees, of which \$605.00 was for paralegal services. The total amount of attorneys fees and costs sought is \$78,388.41.

In reviewing the application for attorneys fees, the Board is mindful of the standards set forth in Furst v. Einstein Moomjy, 182 N.J. 1 (2004); see also Rendine v. Pantzer, 141 N.J. 292, 335 (1995) (begin with the "lodestar," the "number of hours reasonably expended multiplied by a reasonable hourly rate.") A review of the certification indicates that the attorney's time was billed at \$175.00 per hour, which is eminently reasonable for an attorney with more than ten years experience. The number of hours billed, excluding the amount billed for paralegal costs, came to 236.20 hours. The meticulously documented time sheets date from March 27, 2006 through November 20, 2009, and include time spent in communicating with Dr. Fleming's attorney, coordination of investigative efforts, reviewing investigative materials, selecting an expert, drafting a formal complaint and other pleadings, conducting and coordinating discovery, trial preparation, five days of hearings, including travel to the hearing, and preparation of a post-hearing brief. The records indicate that preparation for the hearing, including meeting with the State's expert; the hearing itself; travel to the hearing; and preparation of the post-hearing brief consumed approximately 135 hours. This leaves approximately 100 hours of other activities, including coordination with the investigators, drafting the complaint and engaging in discovery. Taking account of the Rendine factors, including the time and labor required, novelty and difficulty of the case, nature of the

interests vindicated, and the underlying statutory objectives, i.e., the regulation of the practice of medicine and surgery in the State and the protection of the public, the Board is satisfied that the record adequately details the tasks performed, and that the time spent was reasonable.

The applicable standards with regard to costs is set forth in Poritz v. Stang, 288 N.J. Super. 217 (App. Div. 1996). The total amount of expert consultant costs incurred by the State in this matter with respect to Dr. Mooney is \$12,200.00, which includes his services at trial. Shorthand reporting costs amount to a total of \$6,240.45. The investigative costs amount to a total of \$18,007.96. The State has submitted in justification of investigative costs two certifications of Supervising Investigator Cindy Gohl, as well as Daily Activity Reports which identify the precise activities performed, the amount of time spent in each activity, and the hourly rate charged for each investigative assignment from 2005 through 2007. The overall amount of the investigative time expended (approximately 114 hours) is not atypical for investigative services in a matter of this magnitude. The hourly rates are also reasonable, in that they are based on salaries, overhead and costs of State employees, and have been approved many times in the past. Accordingly, having reviewed the costs sought in this matter, the Board finds the application

sufficiently detailed and the amount reasonable in light of the complexity of the investigation and prosecution of this matter.

Accordingly,

IT IS, ON THIS 9th DAY OF JUNE, 2010,

HEREBY ORDERED:

1. Respondent's license to engage in the practice of medicine and surgery in the State of New Jersey is hereby suspended for five years, with two years of the suspension to be actively served, and the remainder to be served as a period of probation. To permit respondent to provide for transition of care of his current patients, this order is to become effective at the close of business on June 14, 2010.

2. As of the oral announcement of this Order on the record on May 12, 2010, Respondent shall not accept any new patients or commence any of the new contemplated business endeavors as indicated in his testimony before the Board.

3. Respondent shall pay attorney and paralegal fees of \$42,545.00 and costs to the state for the prosecution of this matter as follows: expert fees, \$12,200.00; transcript costs, \$6,240.45; and investigative costs of \$18,007.96, for a total of \$78,388.41 in costs and attorney fees.

4. Respondent is hereby assessed a civil penalty in the amount of \$20,000.00 for the violations of N.J.S.A. 45:1-21(c), N.J.S.A. 45:1-21(d), N.J.S.A. 45:1-21(m) and N.J.S.A. 45:1-21(h),

with respect to each of the five patients cited in Counts I-V for a total of \$100,000.00; and a civil penalty in the amount of \$5,000.00 for the violations of N.J.S.A. 45:1-21(e) and (h) relating to Count VI. The total amount of monetary penalties assessed is \$105,000.00.

5. Payment of the monetary penalties and costs imposed pursuant to this order shall be due no later than thirty (30) days from the entry of this order or in such installment payments as approved by the Board on application of respondent prior to that date. Failure to provide timely payment may result in the filing of a certificate of debt. The Board also reserves the right to impose interest calculated in accordance with R. 4:42-11 in the event of installment payments or respondent's failure to make timely payment of this sum, or to take any other action permissible by law.

6. Prior to consideration of any application for reinstatement of respondent's license following the active period of suspension, respondent shall appear before a Committee of the Board and demonstrate his fitness and competence to practice. He shall also be required to document successful completion of Board-approved courses in record keeping, and in the prescribing of controlled dangerous substances. In the event he is reinstated, the Board reserves the right to limit respondent's practice with regard to ongoing pain management of patients.

7. No later than 30 days from the effective date of this order, respondent shall forward his license and biennial renewal card to: William V. Roeder, Executive Director, Board of Medical Examiners, P.O. Box 183, Trenton, NJ 08625-0183.

NEW JERSEY STATE BOARD OF
MEDICAL EXAMINERS

By: 

Paul C. Mendelowitz, M.D.
Board President