



Janice K. Brewer,
Governor

State Of Arizona Board of Podiatry Examiners

"Protecting the Public's Health"

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Barry Kaplan, DPM; Joseph Leonetti, DPM; Dedrie Polakof, DPM;
Jeanne Reagan, Public Member; Jose Villanueva, Public Member; Sarah Penttinen, Executive Director

BOARD MEETING MINUTES

September 9, 2009, 8:30 a.m.
1400 West Washington St., B1
Phoenix, AZ 85007

Board Members: Joseph Leonetti, D.P.M., President
Dedrie Polakof, D.P.M., Member
Barry Kaplan, D.P.M., Member
Jeanne Reagan, Secretary-Treasurer
Jose Villanueva, Public Member

Staff: Sarah Penttinen, Executive Director

Assistant Attorney General: Keely Verstegen

I. Call to Order

Dr. Leonetti called the meeting to order at 8:39 a.m.

II. Roll Call

Dr. Leonetti noted for the record that all Board members were present.

III. Approval of Minutes

a. August 12, 2009 Regular Session Minutes.

MOTION: Dr. Kaplan moved to accept the minutes as written. Dr. Polakof seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

IV. Informal Interview: Time-specific agenda item scheduled for 9:30 a.m. The Board will conduct and Informal Interview and also review, discuss and possibly take action regarding this matter.

a. Dr. Maling 08-50-M

This matter was called before the Board at 10:28 a.m. Dr. Maling was not present. His attorney Bruce Crawford was present but did not address the Board. Dr. Polakof was recused as she was the Physician Investigator for this case and she provided a brief summary to the Board. Ms. Verstegen advised the Board that because Dr. Maling declined the Informal Interview the Board's options are to offer a consent agreement or to refer the matter to a formal hearing.

MOTION: Dr. Kaplan moved to go into Executive Session to obtain legal advice. Ms. Reagan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the Board went into Executive Session at 10:19 a.m.

The Board returned to Regular Session at 10:28 a.m.

Dr. Leonetti questioned Dr. Polakof briefly regarding proper billing codes related to this case and the patient's complaints of substandard care.

MOTION: Dr. Leonetti moved to refer this matter to a formal hearing with the alleged violations of A.R.S. §32-852(5)(6) and §32-854.01(9)(16)(20). In lieu of formal hearing, offer Dr. Maling a consent agreement for the same violations and Order terms as follows: probation for six (6) months during which time Dr. Maling must submit by the 15th day of each month copies of his records for the previous month for all 1st metatarsal osteotomies combined with 2nd digit arthrodesis with flexor tendon transfer, and all records for cases where the billing code 27691 was used. Dr. Kaplan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

V. Review, Discussion and Possible Action –Review of Complaints

a. Marvin Dobkin – 08-49-M: Malpractice action.

Dr. Kaplan recused himself as he was the Physician Investigator for this matter. Dr. Dobkin was not present. His attorney Bruce Crawford was present but did not address the Board. Dr. Kaplan reviewed the case which was a result of a malpractice action filed against Dr. Dobkin by patient D.B. The patient only made a generalized claim of negligence following treatment for a hammertoe and related foot problems including an infection which the patient claims resulted in permanent injury. Dr. Kaplan reviewed the patient's medical records from Dr. Dobkin, Dr. Andrew Johnston, M.D., Dr. Mordechie Twena, M.D., and Tucson Medical Center. His conclusion is that Dr. Dobkin's care of the patient was appropriate. Dr. Leonetti questioned Dr. Kaplan about the results of an MRI done on the patient's foot and any sign of infection which would cause a need for additional surgery. Dr. Kaplan stated he did not believe the MRI showed signs of osteomyelitis so he is unsure why Dr. Twena elected to perform the second surgery; however, Dr. Twena's course of treatment did not affect Dr. Dobkin's care of the patient. Drs. Polakof and Leonetti concurred that they believed Dr. Dobkin's care of the patient was appropriate.

MOTION: Dr. Polakof moved to dismiss the matter finding no violation of statute. Dr. Leonetti seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

b. J. David Brown – 09-02-C: Improper surgery.

Dr. Leonetti recused himself as he was the Physician Investigator for this matter. Dr. Polakof served as the acting Board President. Dr. Brown was not present. His attorney Bruce Crawford was present but did not address the Board. Dr. Leonetti summarized the complaint which was filed by patient W.B. alleging that Dr. Brown improperly performed surgery on his foot which required him to seek additional medical care and undergo corrective surgery. Dr. Leonetti reviewed the patient's medical records from Dr. Brown, Dr. Shahram Askari, DPM, and Dr. Kerry Zang, DPM. His conclusion is that the internal fixation performed by Dr. Brown was of poor quality and resulted in non-union of the bone segments. He stated the x-rays do not support Dr. Brown's claim that the patient's complications were caused by a post-operative injury. Dr. Leonetti concluded that the allegation of improper surgery is substantiated. In addition, he believes Dr. Brown failed to recognize incorrect bone alignment, allowed weight-bearing too soon, inappropriately allowed manipulation of the surgical site with physical therapy, and that the steroid injections administered to the patient were contraindicated in this patient's condition.

Dr. Polakof stated she agreed with Dr. Leonetti's findings. Dr. Kaplan stated he noted some changes between Dr. Zang's first and second reports as compared with the patient's symptoms, but clearly there was a non-union of the bone segment which should have been recognized by Dr. Brown. He stated that intra-operative films should have been taken to verify fixation placement.

MOTION: Dr. Polakof moved to invite Dr. Brown to attend an Informal Interview in this matter at the next available Board meeting with the specific allegations of violation of A.R.S. §32-854.01(16)(20). Dr. Kaplan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

c. Jeffrey Copoloff – 09-07-C: Improper removal of ingrown toenail.

Dr. Leonetti recused himself as he was the Physician Investigator for this matter. Dr. Polakof served as the acting Board President. Dr. Copoloff was present. Dr. Leonetti summarized the complaint filed by T.V. on behalf of patient S.M. alleging that Dr. Copoloff caused excessive pain to patient by not waiting long enough for local anesthetic to take effect before removing portion of an infected toenail. Dr. Leonetti reviewed Dr. Copoloff's records for the patient and stated he did not believe the allegation was substantiated. Dr. Polakof asked Dr. Copoloff why x-rays were taken. Dr. Copoloff explained that the patient had been diagnosed with MRSA in the affected toe and he wanted to be certain the infection had not spread to the bone. Ms. Reagan asked if Dr. Copoloff had taken any pictures of the patient's toe before or after the nail removal and he replied that he did not. He also explained that when he saw the patient at her follow-up visit the toe was greatly improved and there were no signs of infection. Dr. Copoloff stated that he observed a very noticeable level of conflict between the patient and her mother (the complainant) which he believes caused the stress the patient exhibited during the nail removal procedure. He said this same stress level was noticeably not present when the patient appeared for her follow-up visit accompanied by her step-father. Dr. Kaplan stated he did not see anything wrong with the procedure performed but asked Dr. Copoloff if he would ever re-evaluate a patient and re-anesthetize if needed. Dr. Copoloff stated he would do so, and he believes the complainant exaggerated the situation in her complaint. Dr. Leonetti stated it is difficult to know exactly what happened in the room just based on the medical records, but he does not find any violation with regard to the quality of care.

MOTION: Dr. Polakof moved to dismiss this matter finding no violation of statute. Dr. Kaplan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

d. David Berman – 09-08-C: Failure to properly clean nail trimming tools between patients.

Dr. Leonetti recused himself as he was the Physician Investigator for this matter. Dr. Berman was not present. His attorney Bruce Crawford was present but did not address the Board. Dr. Leonetti summarized the complaint filed by P.L. on behalf of patient A.L. who is the complainant's mother-in-law. The patient was a resident at a long term care facility where Dr. Berman appeared to provide foot and nail care to the residents. The complainant stated that Dr. Berman only had one pair of nail clippers which he did not clean in between patients. Dr. Leonetti reviewed Dr. Berman's response and the patient's medical records and stated that he believes the allegation is substantiated. Dr. Polakof agreed that there appears to have been a lack of hygienic procedures between patients.

MOTION: Dr. Polakof moved to dismiss this matter with a Letter of Concern to Dr. Berman for A.R.S. §32-854.01(20) regarding the use of sterile techniques and procedures for each patient when treating multiple patients in the same facility. Dr. Kaplan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

e. J. David Brown – 09-14-C: Overcharging for durable medical equipment.

Dr. Kaplan recused himself as he was the Physician Investigator in this matter. Dr. Brown was not present. His attorney Bruce Crawford was present but did not address the Board. Dr. Kaplan summarized the complaint filed by L.J. on behalf of the patient T.J. who is the complainant's son. The complainant alleges that he was overcharged by several hundred dollars for a cam walker provided to the patient. Dr. Kaplan reviewed Dr. Brown's response and the patient's medical records and stated he believes the billing was improper. The billing code used was for fracture-related orthosis, but the patient did not have a fracture; his diagnosis was related to plantar fasciitis.

The complainant addressed the Board and showed them the patient's cam walker which he brought with him. He stated he tried to resolve his concerns with Dr. Brown and the doctor's billing department, both without success. He stated that he has a very high insurance deductible and that his wife was with the patient when the cam walker was dispensed but she was not told the cost of the device. The complainant stated Dr. Brown's office turned this matter over to a collection agency and he now has a negative incident on his credit report.

There was discussion among the Board members regarding the billing code used. Dr. Polakof reviewed the code used, which was L2116, and stated that was for fracture-related orthosis. She believes the proper billing code would have been L4360 which is for supportive, non-fracture orthosis. Drs. Kaplan and Polakof stated the customary charge for a device billed under L4360 would be approximately \$300.00-400.00, while the patient was charged \$795.00. Dr. Leonetti agreed that the L2116 code is not appropriate and he also is concerned about the patient not being told the cost of the device. He believes it would be beneficial to provide patients with a financial estimate form, including insurance coverage estimates, at the time durable medical equipment is discussed or dispensed. Ms. Reagan asked whether there was a way to determine how often Dr. Brown has used the wrong billing code in this manner. Ms. Verstegen advised that in the absence of additional complaints it would be best for the Board to focus on this specific billing matter for this patient. When asked about possible Board actions and reimbursement to the patient/complainant, Ms. Verstegen offered that the Board could offer a consent agreement which includes restitution, or they could refer to an informal or formal proceeding which could not include a demand for restitution.

MOTION: Dr. Leonetti moved to invite Dr. Brown to an Informal Interview at the next available Board meeting. In lieu of an Informal Interview a consent agreement may be offered to Dr. Brown which would include correcting the billing in this case using billing code L4360 and reimbursing the patient/complainant of the cost difference. Correction of the billing must be initiated within 60 days of the effective date of the agreement and Dr. Brown would have to submit proof to the Board of the correction and reimbursement. Dr. Polakof seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

f. Kathleen Richards – 09-16-C: Failing or refusing to file toenails after trimming.

Dr. Polakof recused herself as she was the Physician Investigator for this case. Dr. Richards was not present. Dr. Polakof summarized the complaint filed by patient N.B. alleging substandard care provided by Dr. Richards while trimming his toenails. The complainant stated the doctor did not soften his nails with moisture before trimming them and refused to file them after trimming. Dr. Polakof reviewed the patient's medical records from Dr. Richards and noted that this patient only saw the doctor once and she was not his regular doctor. Dr. Polakof stated she did not believe Dr. Richards' care was below the acceptable standard. Dr. Leonetti agreed that filing nails after trimming is a personal preference of the doctor, but not filing is not considered substandard. Also, softening nails prior to trimming them had been done many years ago but is no longer considered a standard of care.

MOTION: Dr. Leonetti moved to dismiss this complaint finding no violation of Statute. Ms. Reagan seconded the motion. There was brief discussion from Ms. Reagan regarding the appropriateness of filing toenails after trimming them. Dr. Leonetti explained that filing causes nail dust, and possible pathogens, to be released into the air which can spread infection and cause lung problems if the dust is breathed in by others. There was no further discussion.

VOTE: The motion passed unanimously by voice vote.

g. Sanford Kaner – 09-35-B: Dispensing drugs and/or devices without a valid dispensing registration.

Dr. Kaner was present. Ms. Penttinen summarized her investigation of this complaint which alleges that Dr. Kaner had been dispensing drugs and / or devices without a valid dispensing registration issued by

the Board. Dr. Kaner has been licensed since 1985 but lived in another state before moving to Arizona in October 2008. Dr. Kaner stated in his response to the investigation that he was not aware of the need for a separate dispensing registration. He also admitted he had been dispensing durable medical equipment. Dr. Kaner addressed the Board and stated that he relied on his office staff to guide him (regarding licensure requirements), but conceded that ignorance of the law is not an excuse. There was brief discussion among the Board members regarding similar cases with other licensees which previously have been brought before the Board. Dr. Leonetti stated that although a Letter of Concern has been issued previously, and each case must be considered on its own merit, he believes a Letter of Concern is appropriate in this case.

MOTION: Dr. Leonetti moved to dismiss this matter by issuing a Letter of Concern for A.R.S. §32-854.01(24) regarding obtaining the proper registration from the Board for dispensing drugs and/or devices. Ms. Reagan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

VI. Status Updates: No Board Action – Information Only

a. 07-28-C – Kent Peterson: Monthly status update.

Ms. Penttinen advised that no update has been received since the August 12, 2009 Board meeting (indicating that Dr. Peterson is still in negotiations with the U.S. Attorney).

b. Status of appeal filed by Dr. Gaveck in case number 06-04-C.

Ms. Versteegen reviewed with the Board the opinion issued by the Court of Appeals in this matter. The Court affirmed the Board's finding of unprofessional conduct in relation to obtaining a written consent prior to surgery. The Court vacated the Board's finding of unprofessional conduct in relation to post-surgical management, and vacated the related discipline imposed by the Board. The Court remanded this second issue back to the Board for re-notice of the alleged violation(s) and alleged deviation(s) from the standard of care, after which the Board may make a new determination as to its findings and appropriate disciplinary action. Ms. Versteegen advised the Board that no official action needs to be taken by the Board at this time as the Court's opinion is not yet final due to the applicable appeal period. The matter will be brought back before the Board once the Court's opinion becomes final.

VII. Review, Discussion and Possible Action – Probation / Disciplinary Action Status Reports

a. 06-04-C – Alan Gaveck: Monthly update.

Ms. Penttinen advised that Dr. Gaveck reported he did not perform any surgeries during the month of August 2009. She has not received any request from Dr. Gaveck or his attorney to terminate his probation.

b. 08-03-C – Elaine Shapiro: Monthly update.

Ms. Penttinen advised that the next regular progress report is due in November 2009. She has not received any reports from Dr. Sucher of non-compliance.

c. 08-18-C – David Laurino: Monthly update.

Dr. Leonetti advised that he has reviewed Dr. Laurino's records for June and July 2009 and the only billing records submitted were EOB's and billing statements sent to the patients. Dr. Laurino's consent agreement requires submission of complete billing records. Dr. Leonetti directed Ms. Penttinen to obtain those billing records as well as a consultation report for patient E. G. for date of service 06/18/09.

d. 09-17-B – J. David Brown: Monthly update and comprehensive probation review.

Dr. Brown was not present. His attorney Bruce Crawford was present. Ms. Penttinen advised that she had originally received a verbal request from Dr. Brown to have this matter of the agenda today to discuss his possible return to practice as he had anticipated being discharged from treatment on September 4, 2009 and expected to have a recommendation that he be allowed to return to practice. However, on September 8 Ms. Penttinen received the discharge report/order from the treatment facility dated September 3 which indicates their recommendation that Dr. Brown not return to practice for three months. In light of that information there is no longer a request at this time for Dr. Brown's suspension to be lifted. Dr. Brown is reportedly meeting with Dr. Sucher to enroll in Dr. Sucher's monitored aftercare program. The Board members reviewed and discussed the information contained in the discharge report with regard to Dr. Brown's reported unauthorized use of prescription medication on two occasions and general failure or refusal to comply with treatment activities. Ms. Penttinen stated she will be following up with the treatment facility to clarify some of the information contained in the discharge report.

Mr. Crawford addressed the Board and urged that he/Dr. Brown has not requested the Board to make a decision in this matter today. He confirmed that Dr. Brown will be meeting with Dr. Sucher to enroll in the monitoring program and to review the treatment records and discharge report from the treatment facility. Drs. Kaplan and Leonetti both expressed that the Board does not have enough information to make a decision today regardless. In addition to the follow-up information which Ms. Penttinen will obtain, they would like a report and recommendations from Dr. Sucher. This matter will be reviewed by the Board again in the future upon request from Dr. Brown and receipt of the desired information as stated above.

VIII. Review Discussion and Possible Action on License Renewal Applications: The Board will review, discuss, and take action to approve, deny, or issue a deficiency notice for the following physicians' license renewal applications or dispensing registration renewals:

Jason Anderson
Kelley Gillroy
Noland Jones

Bjorn Lawson
Vivian Seater-Benson
Kendall Shumway

Don Shumway
Todd Zang

MOTION: Dr. Leonetti moved, and Dr. Polakof seconded the motion, to approve the renewal applications for Drs. Gillroy, Lawson, Seater-Benson, Kendall Shumway and Zang. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

MOTION: Dr. Kaplan moved, and Dr. Leonetti seconded the motion, to approve the renewal applications for Drs. Jason Anderson and Noland Jones upon completion of deficiencies for citizenship documentation and CME, respectively. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

The Board members reviewed and discussed Dr. Don Shumway's renewal application with regard to his CME. Ms. Penttinen summarized that Dr. Shumway was initially sent a deficiency notice in May 2009 indicating that all his CME was online therefore he must complete 15 hours of additional, non-online CME. Dr. Shumway submitted additional CME; however, Ms. Penttinen verified with the CME providers that all of the courses were online broadcasts or podcasts. The CME providers cannot verify whether Dr. Shumway listened to the live broadcast or the recorded podcast.

The Board members asked Ms. Verstegen to clarify the Board's options at this point since it is after August 31 which is the last date of the renewal grace period. Ms. Verstegen reviewed with the Board the 60-day allowance to complete CME under A.A.C. R4-25-502. After further discussion, Dr. Leonetti instructed Ms. Penttinen to notify Dr. Shumway that podcast CME is considered "online," therefore he must still complete 15 hours of direct-instruction, seminar-type CME. He will be allowed until October 31, 2009 to complete those hours and if not completed his license renewal will be denied.

IX. Review, Discussion and Possible Action on Administrative Matters

- a. George Thompson, DPM: Possible administrative closure of the following complaint investigations: 06-11-C, 06-28-C, 07-36-B, 08-30-C.

There was brief discussion among the Board members and Ms. Penttinen. It was confirmed that Dr. Thompson did not file an appeal to the Board's order revoking his license so he is now officially revoked. These four cases had been referred to formal hearing but required the acquisition of expert witness review and testimony as the allegations concerned quality of care. The hearings have not been completed. Ms. Versteegen confirmed that the Board could closed these cases without prejudice and re-open them when or if Dr. Thompson re-applied for a new license in the future.

MOTION: Dr. Leonetti moved to administratively close each of these four cases without prejudice. Dr. Kaplan seconded the motion. There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

- b. Request from Dr. Arnold Wolf to refund late renewal fee.

Ms. Penttinen reviewed with the Board the request she received from Dr. Wolf to refund his late renewal fee. Dr. Wolf sent a letter explaining that he thought the last day to submit his renewal without a late fee was July 31, not July 30. He had asked Ms. Penttinen verbally to waive the late fee and she advised him she would not do so but that he could make a request of the Board. Following brief discussion regarding the length of time Dr. Wolf has been licensed in Arizona, the Board members denied Dr. Wolf's request.

- c. New License Applicants
- i. Kimberly Akkerman
 - ii. Darick Freestone
 - iii. Matthew Hakeman
 - iv. Peter Merrill
 - v. Kathleen O'Keefe
 - vi. Lisa Pallini
 - vii. Marie Paul
 - viii. Jeffrey Rager
 - ix. Richard Rand
 - x. Blair Sandall
 - xi. Thomas Shields

MOTION: Dr. Leonetti moved to approve the applications for Drs. Darick Freestone and Kathleen O'Keefe as complete. Dr. Kaplan seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

The remaining license applications contain deficiencies and will be brought back before the Board once all deficient information has been received.

- d. Notification from NBPME regarding change in PMLexis exam.

The Board reviewed the letter received from NBPME regarding a change in their administration of the Part III national board exam. This is essentially an "FYI" which does affect the content of the exam, only when podiatry students are eligible to take the exam. NBPME's time frame for converting the exam process is approximately one year.

e. Selection of 2010 Board meeting dates.

The Board will continue to meet on the second Wednesday of each month. There are no holiday conflicts for those days in 2010. The Board meeting dates will be January 13, February 10, March 10, April 14, May 12, June 9, July 14, August 11, September 8, October 13, November 10 and December 8.

f. Selection of 2010 oral exam dates for initial license applicants.

The oral exam dates will be June 9 and December 8. The exam will be administered immediately preceding the Board meetings on those dates.

X. Executive Director's Report

a. Open complaint status report.

Ms. Penttinen reviewed the open complaint status report which indicates there are currently 46 open complaints, 16 of which have been open for more than 180 days. However, 11 cases were on this meeting agenda, many of which were disposed of today. She also reviewed with the Board the detailed spread-sheet she emailed to the Board members which indicates the status of each case. The Board did not take any action on this matter.

b. Status of contact with FDA regarding use of lasers in podiatric care.

Ms. Penttinen advised that she has not received any further contact from FDA since the last Board meeting. Even though there have been no complaints about this matter filed directly with the Board she will attempt to re-contact FDA to expedite their response.

XI. Call To The Public

There were no requests to speak during the Call to the Public.

XII. Next Board Meeting Date:

a. October 14, 2009, 8:30 am.

XIII. Adjournment

There being no other business before the Board the meeting was adjourned at 12:18 p.m.