



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

December 1, 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

(NOTE: The Board reviewed the non-time-specific agenda items in random order. Recesses were taken from 9:34 a.m. to 9:38 a.m., and from 10:22 a.m. to 10:30 a.m.)

I. Call to Order

Dr. Leonetti called the meeting to order at 8:42 a.m.

II. Roll Call

Dr. Leonetti noted for the record that Mr. Villanueva was absent; all other Board members were present as well as Ms. Penttinen. Ms. Penttinen advised that Ms. Verstegen would not be present due to illness but would be available by phone if needed.

III. Approval of Minutes

a. November 12, 2009 Regular Session Minutes.

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

VOTE: The motion passed unanimously by voice vote.

b. November 12, 2009 Executive Session Minutes.

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

VOTE: The motion passed unanimously by voice vote.

IV. Informal Interviews (Time specific agenda items scheduled for the noted times):

a. 09-02-C – J. David Brown: Improper surgery. (8:30 a.m.)

This matter was called at 8:45 a.m. Dr. Brown was not present. Dr. Leonetti recused himself as he was the Physician Investigator for this matter. Ms. Penttinen advised the Board that she had received an update from Dr. Brown's attorney Bruce Crawford indicating that Dr. Brown declined the Board's invitation to participate in the Informal Interview and does not wish to accept the consent agreement proposed by the Board. Mr. Crawford's update also included a review conducted by Dr. William Fishco at Mr. Crawford's request. The Board members reviewed the documentation provided by Mr. Crawford.

Dr. Kaplan stated that the Board should have the opportunity to question any expert witness put forward by Dr. Brown which in this matter could not be done in a written format or if Dr. Brown refused to participate in the informal proceedings.

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

VOTE: The motion passed unanimously by voice vote and the Board adjourned into Executive Session at 8:52 a.m.

The Board returned to Regular Session at 8:55 a.m.

MOTION: Dr. Polakof moved to refer this matter to a formal hearing through the Office of Administrative Hearings. Dr. Kaplan seconded the motion. Upon discussion, Ms. Penttinen requested the Board members to confirm that the Findings of Fact and Conclusions of Law as stated in the proposed consent agreement sufficiently addressed the Board's opinion in this matter as these would translate to the factual allegations and alleged violations to be included in the Complaint and Notice of Hearing. The Board members so confirmed.

VOTE: The motion passed unanimously by voice vote.

b. 09-14-C – J. David Brown: Charging / collecting an excessive fee. (8:45 a.m.)

This matter was called at 8:58 a.m. Dr. Brown was not present. Dr. Kaplan recused himself as he was the Physician Investigator for this matter. Ms. Penttinen advised the Board that she had received an update from Dr. Brown's attorney Mr. Crawford stating that Dr. Brown declined the Board's invitation to participate in the information proceedings. Mr. Crawford's update also advised the Board that Dr. Brown would be willing to accept a consent agreement for a Letter of Concern to correct the improper billing in this matter as long as it did not include any term of probation. Ms. Penttinen stated that without a time requirement, i.e. probation, there likely would be no way to enforce Dr. Brown's compliance with the terms of the consent agreement. Also, a consent agreement is a disciplinary action which may contradict a non-disciplinary Letter of Concern.

Dr. Leonetti questioned Dr. Kaplan about the use of the wrong billing code and how often it was used in Dr. Brown's office. Dr. Kaplan stated that during his investigation he spoke with Dr. Brown's office manager who told him that the billing code used in this matter was used very frequently for the same type of durable medical equipment. Dr. Leonetti stated he does not wish to change the terms of the consent agreement as offered to Dr. Brown and that he would like to rescind that agreement and continue the investigation to obtain further information about the frequency of use for billing code L2116. Ms. Penttinen offered that a concern may be raised if there is a perception that the Board continued the investigation only because Dr. Brown would not accept the proposed consent agreement.

MOTION: Dr. Polakof moved to go into Executive Session to obtain legal advice. Dr. Leonetti seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote and the Board adjourned into Executive Session at 9:11 a.m.

The Board returned to Regular Session at 9:15 a.m.

MOTION: Dr. Leonetti moved to rescind the consent agreement offered to Dr. Brown and return the case to Dr. Kaplan for further investigation regarding the use of improper billing code(s). Dr. Polakof seconded the motion. Upon discussion it was determined that Dr. Kaplan will advise Ms. Penttinen of the specific information he needs and what time period should be included so that she may issue a subpoena accordingly.

VOTE: The motion passed unanimously by voice vote.

V. Review, Discussion and Possible Action –Review of Complaints (NOTE: The subject matter listed for each agenda item represents the allegation(s) being investigated. The presence of allegations does not automatically indicate violation of Statute or Rule in connection with the practice of podiatry.)

- a. 09-10-M – Michael Dershowitz: Improper surgery and failing to disclose a malpractice action on a license renewal application.

Dr. Dershowitz was not present. Dr. Kaplan recused himself as he was the Physician Investigator for this matter. Ms. Penttinen advised that she received a notification from Dr. Dershowitz's attorney Bruce Crawford stating that Dr. Dershowitz would not participate in informal proceedings in this matter. Dr. Leonetti reviewed a previous request made by Mr. Crawford that he and Dr. Kaplan not be involved in the Board's adjudication of this matter due to a perceived bias or prejudice by Dr. Dershowitz and/or Mr. Crawford. Dr. Leonetti stated for the record that he has no problem, bias, or preconceived notions regarding Dr. Dershowitz. Dr. Kaplan stated for the record that he feels he has been completely impartial and will continue to be so.

Dr. Leonetti asked Dr. Kaplan regarding the lack of improvement the patient experienced following the nerve decompression surgery performed by Dr. Dershowitz and if the procedure was done properly. Dr. Kaplan stated that in his opinion the surgery seemed to have been performed properly and it is unknown why the patient left Dr. Dershowitz and went to another doctor. Regarding allegation #1, (improper surgery), Dr. Leonetti discussed with Dr. Kaplan the pre-operative testing on the patient. Dr. Kaplan stated records from some dates of service were missing as well as the billing records.

Regarding allegation #2, (failing to disclose the malpractice action on the appropriate license renewal application, there was general discussion among the Board members regarding Dr. Dershowitz's previous assertions that the Board had received other notifications of this malpractice action, and reference was made to Dr. Stephen Barrett's involvement with this patient and the Board's prior awareness of such. All Board members were in agreement that regardless of any other notification the Board receives, Dr. Dershowitz should have disclosed this malpractice on his renewal application, and that having his office staff (incorrectly) complete the renewal form for him to sign does not mitigate his failure to disclose it. There was brief discussion offered by Ms. Reagan questioning whether the Board could refer this matter to a formal hearing to revoke Dr. Dershowitz's license for the failure to disclose. Ms. Penttinen advised that she has been involved with many investigations with similar failures to disclose information on license renewals and opined that, while it may be a violation worthy of some type of action, a first-time offense of this nature would not rise to the level of revocation in the eyes of an administrative law judge. Drs. Leonetti, Polakof and Kaplan responded to Ms. Reagan's inquiry by explaining that they do not revoking the doctor's license is proper or necessary in this case and that attempting to do so would demonstrate the very claims Dr. Dershowitz has made against members of the Board regarding bias or prejudice. There also was discussion regarding why action could not be taken on one allegation at a time and why the two allegations were combined into one case. Ms. Penttinen explained that she initially separated the allegations into two separate cases. However, the first time these matters appeared on an open complaint status report she was directed by the Board to combine them into one case.

Dr. Kaplan summarized that allegation #2 is substantiated, and at this time allegation #1 is not but he needs to gather more information. Dr. Leonetti suggested that, in addition to Dr. Dershowitz's billing records for this patient, Dr. Kaplan also should obtain the patient's records from Dr. Barrett. This matter is tabled pending further investigation and consideration of opening a separate case for failure to provide complete medical records requested via subpoena.

VI. Status Updates: No Board Action – Information Only

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

Dr. Leonetti confirmed that there is no recent update for this month. (The next quarterly report is due in February 2010.)

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

Ms. Penttinen advised that to her knowledge Ms. Verstegen had filed a response to Dr. Gaveck's appeal in this case and the matter is still under advisement with the court.

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

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

Dr. Leonetti asked to confirm if there was a monthly report. Ms. Penttinen advised that she had not yet received a report for this month, but due to the Board meeting being moved up one week it may be received in the days following the meeting. The Board has not received any request from Dr. Gaveck to terminate his probation.

b. 08-03-C – Elaine Shapiro: Monthly update and review of consent agreement terms.

Ms. Penttinen advised that she received from Dr. Sucher copies of all Dr. Shapiro's drug test results dating back to her in-patient treatment in 2008. Most of the drug test results have been positive for benzodiazepines which were correlated to legally prescribed sleep-aids and were within normal therapeutic levels. Dr. Sucher also provided a comprehensive summary of the testing protocols for the lab he refers to which is Southwest labs.

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

Dr. Leonetti stated he has reviewed all records submitted to date from Dr. Laurino and everything appears to be in order.

d. 09-17-B – J. David Brown: Monthly update.

Ms. Penttinen advised that she received from Dr. Sucher the same lab information for Dr. Brown's probation as for Dr. Shapiro (Southwest Labs). Dr. Brown has not had any positive drug tests. Ms. Penttinen also reviewed the correspondence between her and Dr. Brown's attorney regarding obtaining a copy of Dr. Brown's office policy for security of controlled substances. Attorney Mr. Crawford expects to have this policy to us sometime next week. The Board reviewed the patient schedules submitted by Dr. Brown which date back to October 19. Because Dr. Brown's suspension was lifted on October 14 the Board would like confirmation of any patients seen between the 14th and 19th. Ms. Penttinen will request that information.

VIII. Review, Discussion and Possible Action on Administrative Matters

a. CME review request from Dr. Don Shumway (with additional information submitted regarding Genomics course).

Dr. Shumway was present. Dr. Kaplan asked how Dr. Shumway calculated the hours for the Genomics CME course in question. Dr. Shumway stated he was present at the course for seven hours on the first day and six the second. Dr. Kaplan noted that not all activities listed in the course program were CME-related (welcome speech, meals, etc.). Dr. Leonetti asked about the status of Dr. Shumway's new application. Dr. Polakof confirmed that Dr. Shumway sat for the oral exam this morning which he passed. Ms. Penttinen confirmed that the new application was complete but that we have two separate issues – one for the new application and one for the renewal application. If the renewal application is denied his new license could be issued as soon as Dr. Shumway submits the appropriate fee, but the denial of his renewal would have to be reported to the National Practitioner Data Bank.

Dr. Leonetti advised Dr. Shumway that even if all the hours from this Genomics course were counted toward his podiatry license he still only had nine hours where he needed twelve. Dr. Leonetti recommended that the CME submitted by Dr. Shumway not be accepted and that his license renewal be denied. The recommendation considered that Dr. Shumway's license is approved and his practice would be seamless, although the denial must be reported to NPDB. Dr. Shumway asked if his license renewal fee could be counted toward his new license issuance fee. The Board members advised that it could not. Dr. Shumway asked how many hours of CME he would be required to complete before the next renewal. Dr. Leonetti confirmed that he would be required to complete two hours per month for a total of fourteen hours.

MOTION: Dr. Leonetti moved to deny Dr. Shumway's renewal application for insufficient continuing medical education. Ms. Reagan seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

b. CME review for Dr. Noland Jones.

Dr. Jones was present. The CME certificate he previously provided the Board indicated that the "Access" program he attended was eligible for up to 25.75 hours of CME and he was awarded 11.25 hours. Dr. Jones now provided the Board with a summary of the course content. Drs. Leonetti and Kaplan stated the course contained appropriate content for podiatry and that all needed hours for the license renewal were achieved.

MOTION: Dr. Leonetti moved to accept Dr. Jones' CME and approve his license renewal. Ms. Reagan seconded the motion. There was no discussion.

VOTE: The motion passed unanimously by voice vote.

c. Request from Drs. Elaine Shapiro and Robin Myers to amend the minutes from the Board's March 11, 2009 meeting.

Dr. Myers participated in the Board's discussion by phone. She explained that she first learned that her name was in the Board's March 11, 2009 meeting minutes when was brought to her attention by a potential employer. The Board asked Dr. Myers when she began working for Dr. Shapiro and she said she often covered one-two days at a time before being asked to cover the practice full time when Dr. Shapiro's license was suspended. Dr. Myers stated she has not worked in Dr. Shapiro's office since October 12, 2008. The Board expressed their understanding of Dr. Shapiro's previous explanation which was that Dr. Myers was assisting in Dr. Shapiro's office during the time of Shapiro's practice restriction which lasted until March 2009. Dr. Myers stated her insurance only allows her to work part time and she is concerned that someone reading the March 11 minutes would assume she was still working, or had worked, full time with Dr. Shapiro after October 2008. The telephone call with Dr. Myers was completed and Dr. Shapiro was not contacted. The Board members determined to take no action on this request and the minutes from March 11, 2009 will not be amended.

d. Review and approval of new procedure for staff absence(s) and associated notifications and time-reporting.

The Board members reviewed the procedure developed by Ms. Penttinen regarding staff absences and associated time-reporting.

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

VOTE: The motion passed unanimously by voice vote.

e. Review of revisions proposed by the Council on Podiatric Medical Education regarding residency documentation.

The Board reviewed the information submitted by the CPME which indicates minor changes in the educational requirements for podiatric residency programs. The Board determined to take no action.

f. Consideration of purchasing new CPT and/or ICD-9 code books – 2010 edition.

Ms. Penttinen advised that the 2010 editions of the CPT and ICD-9 code books could be purchased together for a total cost of \$140.63 plus tax and shipping. Drs. Polakof and Kaplan stated the code books were necessary for investigating billing complaints. The Board authorized Ms. Penttinen to use Board funds to purchase both books.

g. Request from Dr. Blair Sandall for exception to oral exam requirements.

Ms. Penttinen explained that Dr. Sandall's license application was received on August 28, 2009 and contained a number of deficiencies including his NPDB self-query report. On August 31, 2009 a written deficiency notice was sent to Dr. Sandall explaining the deficiencies. All were corrected prior to the November 1 deadline, (which was actually the opening of business on Monday, November 2), except the NPDB report which was not received until November 25. (The Board had reviewed Dr. Sandall's application at the November 2009 Board meeting and determined that he was not eligible to sit for the December 1 oral exam due to this deficiency.) Dr. Sandall was present and provided the Board with a

copy of the printout he made from the NPDB website on August 26 when he submitted his request online. Other documentation shows that payment for his report was charge to his credit card on September 6, although for an unknown reason his request was not processed by NPDB until November 18. Following review of this information the Board determined that the delay by NPDB would not be deemed Dr. Sandall's fault and therefore his application would be considered complete and timely. Dr. Polakof stated she could administer the oral exam for Dr. Sandall following the conclusion of the Board meeting today.

IX. Executive Director's Report

a. Open complaint status report.

Ms. Penttinen advised that she neglected to run the report prior to the meeting but that three new complaints were received since the last Board meeting. A complete, updated report will be provided at the January 2010 meeting.

b. Complaint filed against the Board with the Ombudsman's Office by D.W. (patient and complainant in the Board's investigation case number 08-45-C for Dr. Travis Reber.)

Ms. Penttinen summarized that she received an informal email notification from the Ombudsman's Office that patient D.W. had filed a complaint against the Board regarding the investigation of his previous complaint against Dr. Reber. In review, the patient/complainant stated he has had foot deformities for many years which caused pain and difficulty walking or standing for extended periods of time; however, he voluntarily accepted employment at Home Depot which required him to be on his feet for several hours per day. The patient's complaint against Dr. Reber alleged that Dr. Reber misdiagnosed him and refused to deem him "disabled" for the purpose of collecting disability benefits. Ms. Penttinen's explanation to the Ombudsman's Office stated that the Board concurred with Dr. Reber's diagnosis and treatment plan, and that the Board could not force a physician to deem a patient "disabled." Ms. Penttinen offered either to allow the Ombudsman's Office to review the complaint file in person or provide them with a complete copy. She has not received any further response or inquiry from that office but expects to be notified once their investigation is complete.

X. Call To The Public

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

XI. Next Board Meeting Date:

a. January 13, 2010, 8:30 a.m.

XII. Adjournment

There being no other business before the Board the meeting was adjourned at 11:29 a.m.