

IN THE MATTER OF
ALFRED J. DALEY, RCP
Respondent.

*** BEFORE THE MARYLAND**
*** STATE BOARD OF PHYSICIANS**
*** Case Number: 2015-0487**

License No. L 04723

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FINAL DECISION AND ORDER

PROCEDURAL HISTORY

Alfred J. Daley, RCP, is a respiratory care therapist, originally licensed to practice respiratory care in Maryland in 2007. On January 16, 2015, the Maryland State Board of Physicians (the “Board”) received a complaint from Mr. Daley’s prior employer, Company A, about Mr. Daley’s conduct pertaining to his visit and change of service agreement with a former patient, Patient A. On January 28, 2016, Disciplinary Panel B of the Board charged Mr. Daley with unprofessional conduct in the practice of respiratory care, *see* Health Occ. § 14-5A-17(a)(3), based on his contacting Patient A and using his prior relationship as the patient’s respiratory therapist to try and convince the patient to change ventilator services.

Mr. Daley received an evidentiary hearing on August 11, 2016, at the Office of Administrative Hearings before an Administrative Law Judge (“ALJ”). At that hearing, the State presented expert witness testimony from Thomas Striplin, M.Ed., RRT, RPFT, who was accepted as an expert in respiratory care and on the ethics of the profession of respiratory care. The State also presented testimony from Patient A’s subsequent respiratory therapist for Company A (“Employee A”) and from Molly Dicken, a Board investigator. Mr. Daley testified on his own behalf and presented testimony from Patient A. In a Proposed Decision issued on October 14, 2016, the ALJ found that the State had not proven that Mr. Daley had engaged in

unprofessional conduct in the practice of respiratory care. The ALJ recommended that the Board dismiss the charges.

On December 5, 2016, the State filed exceptions to the ALJ's Proposed Decision. Mr. Daley filed a Response to the State's exceptions on January 16, 2017. Both parties appeared before Disciplinary Panel A (the "Panel") of the Board for an oral exceptions hearing on February 8, 2017.

FINDINGS OF FACT

The Panel finds the following facts were proven by the preponderance of evidence:

Alfred J. Daley, RCP, is a respiratory care therapist licensed in Virginia, the District of Columbia, Pennsylvania, Delaware, and, since 2007, in Maryland. He worked for Company A from 2007 until 2014. Mr. Daley was Patient A's respiratory care therapist for several years, while working at Company A. At the time of the incident, Patient A was a 65-year-old woman who suffered from Arnold-Chiari Malformation of her brain stem and used a ventilator at night for her neuropathy and sleep apnea. A Certified Nursing Assistant provided Patient A home-based nursing and personal services, assisting her activities of daily living, including helping her cook, clean, make appointments, and sign documents.

In September 2014, Mr. Daley left Company A and joined Company B. When he left Company A, Mr. Daley stopped providing care to Patient A. Patient A continued to receive respiratory care therapy from respiratory care therapists employed by Company A.

On or around January 6, 2015, Mr. Daley visited his former patient, Patient A, at Patient A's apartment, discussed her respiratory care, and convinced her to sign a change of supplier form to his new company, Company B. Mr. Daley visited Patient A for approximately two hours. During the visit, Mr. Daley inventoried and touched her ventilator equipment and

checked the ventilator settings. Mr. Daley asked Patient A if she wanted to change her supplier to his new company and presented a “change of supplier” form that Patient A’s nursing assistant signed on Mr. Daley’s iPad on Patient A’s behalf.

EXCEPTIONS

The central facts before the Panel are not in dispute. The charges against Mr. Daley stem from an encounter between Mr. Daley and Patient A on January 6, 2015. The State took exception to the ALJ’s conclusion that Mr. Daley did not commit unprofessional conduct. The State argues the ALJ improperly rejected the testimony of the State’s expert. The State also argues that the ALJ improperly relied almost entirely on Mr. Daley’s version of events, when the ALJ should have relied more on the testimony from Employee A and the testimony dictated by Patient A to Employee A. In his response to the State’s exceptions, Mr. Daley responds that the Panel should uphold the ALJ’s decision. He argues that the Panel should defer to the ALJ’s finding that the State’s expert was not credible because the ALJ made demeanor-based credibility determinations regarding the State’s expert. Second, Mr. Daley argues that the Panel should defer to the ALJ’s fact-witness credibility determinations.

I. Unprofessional Conduct in the Practice of Respiratory Care

The Board’s regulations governing the practice of respiratory care contain a code of ethics for respiratory care practitioners. COMAR 10.32.11.05. The Code of Ethics states that a respiratory care practitioner shall “[g]uard against conflicts of interest” and “[u]phold the dignity and honor of the profession and abide by its ethical principles.” COMAR 10.32.11.05A(8), (9). The Code of Ethics further states, “[a] breach of the ethical principles stated in §A of this regulation may be considered . . . unprofessional conduct in the practice of respiratory care.” COMAR 10.32.11.05B. In addition, under longstanding Maryland caselaw, “unprofessional

conduct . . . refers to conduct which breaches the rules or ethical code of a profession” *Finucan v. Md. Bd. of Physician Quality Assur.*, 380 Md. 577, 593 (2004) (internal quotation marks omitted). The “ethical principles” of the profession are reflected in the American Association of Respiratory Care Statement of Ethics and Professional Conduct, which states that a practitioner should “[a]void any form of conduct that is fraudulent or creates a conflict of interest, and shall follow the principles of ethical business behavior.” Thus, the issue in this case is whether Mr. Daley’s action of visiting a former patient and using their prior therapeutic relationship to convince her to switch respiratory care companies constitutes a conflict of interest that was outside the principles of ethical business behavior and is, therefore, unprofessional conduct in the practice of respiratory care.

The State presented testimony from Thomas Striplin, the Clinical Director of the Respiratory Care Program at Allegany College of Maryland, who was accepted as an expert in respiratory care practice and the ethics of the profession of respiratory care. Mr. Striplin has an associate degree in Applied Science and Respiratory Therapy, a Bachelor of Science in Respiratory Therapy, and a master’s degree in education. He is a Registered Respiratory Therapist, has a Registered Pulmonary Function Technician Certification, and has been a licensed Respiratory Care Practitioner in Maryland since 1992. Mr. Striplin is also the president of the Maryland-D.C. Society for Respiratory Care and previously served in the American Association of Respiratory Care (“AARC”) as a member of the House of Delegates, as Speaker of the House, and on the AARC Board of Directors. He speaks at state level and multi-state level seminars and conferences on topics related to ethics in respiratory care. Mr. Daley did not object to Mr. Striplin being qualified as an expert.

Mr. Striplin gave his expert opinion that Mr. Daley acted unethically and unprofessionally. At the evidentiary hearing, Mr. Striplin noted Mr. Daley's previous professional relationship with the patient as her respiratory care therapist and her family, and explained, "what I found problematic and what I find unethical is that he utilized that relationship to come in as an advantage to try and get the person to switch [Respiratory Care companies]." (T. 70-71.) In his expert report, Mr. Striplin stated, by "us[ing] his past direct patient care relationship to encourage [Patient A] to switch providers and in the manner in which he conducted himself he created a conflict of interest." (Exhibit 12.)

Mr. Daley did not present any expert testimony. Instead, Mr. Daley testified himself about his recollection regarding ethics that he learned from his continuing education coursework. He testified at the evidentiary hearing that he recalled from his coursework that "it's considered unethical if there's some type of coercion or if you're going to gain any type of benefit from that patient switching over to a company because of competition." (T. 159.)

The ALJ wrote that Mr. Striplin "appeared slightly confused" or "uncomfortable" regarding the subject matter and rejected his opinion. Mr. Daley's response to the State's exceptions argues that the Panel must defer to the ALJ rejection of Mr. Striplin's testimony because his determinations are "demeanor-based credibility determinations [that] have almost conclusive force." Mr. Daley misstates Maryland law regarding the deference due to demeanor-based credibility determinations of experts. Unlike fact witnesses, "demeanor has been held to be of little consequences in evaluating the credibility of experts who provide conflicting testimony." *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 202 (2005). The Court of Appeals explained that "[t]hrough credibility of the conflicting experts must play a central role in the [agency] decision, that credibility is a function of logical analysis, credentials, data base, and

other factors readily discernible to one who reads the record.” *Morgan*, 387 Md. at 202 (quoting *Nuclear Pollution v. U.S. Nuclear Regulatory Comm’n*, 582 F.2d 87, 100 (1st Cir. 1978)).

The Court of Special Appeals applied this reasoning in *State Bd. of Physicians v. Bernstein*, holding “the Board may make its own decisions about . . . credentials of expert witnesses, the logic and persuasiveness of their testimony and the weight to be given their opinions.” 167 Md. App. 714, 761 (2006). The Court of Special Appeals ruled, “the Board did not owe deference to the credibility assessments made by the ALJ, and was not required to state strong reasons for rejecting those assessments.” *Id.* at 761. Thus, the Panel may make its own decision regarding the credentials and the logic and persuasiveness of Mr. Striplin’s testimony and owes no deference to the ALJ’s credibility assessment of Mr. Striplin.

The Panel has focused on the Code of Ethics regulations pertaining to respiratory care; the qualifications, expertise, and content of the testimony of the witnesses, who discussed respiratory care ethics and unprofessional conduct; and the logic and reasonableness of the testimony. Mr. Striplin’s qualifications as an expert in ethics in the field of respiratory care are considerable and he has lectured on the subject at several seminars and conferences. The Panel gives less weight to Mr. Daley’s opinion on ethics. Mr. Daley premised his opinion on his recollection from an online continuing education class he recently completed. Further, the Panel finds compelling the logic and reasonableness of Mr. Striplin’s testimony that using one’s previous professional relationship as a health care provider to convince someone to switch companies demonstrated a conflict of interest and is not in accord with ethical business behavior.

As Patient A’s former therapist, Mr. Daley occupied a position of authority and trust as Patient A’s health care provider. He used that special professional relationship to aid his new company. The Panel agrees with Mr. Striplin that there need not be a bonus or direct monetary

compensation for convincing clients to switch companies to find that Mr. Daley benefited from switching clients to his new employer from his old employer. The Panel finds that convincing patients to switch to Company B financially benefits Company B and ingratiates Mr. Daley to Company B. Mr. Daley's conduct created a conflict of interest and was an unethical business practice. This conduct breached the ethical code of the respiratory care profession and was, thus, unprofessional conduct in the practice of respiratory care. The State's exceptions related to the expert testimony are accepted.

II. Credibility of Fact Witnesses

The State also argues that the ALJ should not have relied on Mr. Daley's witnesses' version of events, but rather should rely on Employee A's testimony that noted that Patient A was upset and distressed and on her written statement supposedly dictated by Patient A that Mr. Daley "was being a pain in the ass." The State argues that there are significant discrepancies between Patient A's testimony at the hearing and her statements to Employee A and, therefore, Patient A's testimony at the hearing should be discounted. Mr. Daley in contrast argues that the Panel should not adopt Employee A's statement that Patient A was "upset and distressed," because Employee's A testimony was hearsay. He also argues the Panel should not adopt a hand-written complaint transcribed by Employee A and signed by Patient A's nursing assistant and instead should give more weight to Patient A's testimony at the hearing. At the hearing Patient A expressed that she was not upset by Mr. Daley's visit and did not dictate to Employee A that Mr. Daley "was being a pain in the ass."

The Panel has not relied on testimony regarding Patient A's alleged characterizations of Mr. Daley because the characterizations are irrelevant. The Panel's Findings of Fact, like the ALJ's proposed findings, do not include any characterizations of Patient A's satisfaction, or lack

thereof, because they are irrelevant to the charges.¹ The issue before the Panel is whether Mr. Daley's use of his prior therapeutic relationship constituted unethical and unprofessional conduct, not whether Patient A was satisfied with Mr. Daley's visit. The State's exceptions on this issue are not accepted.

CONCLUSIONS OF LAW

Disciplinary Panel A concludes that Mr. Daley's actions, as described above, constitute unprofessional conduct in the practice of respiratory care, in violation of Health Occ. § 14-5A-17(a)(3).

SANCTION

Mr. Daley's conduct was unethical and unprofessional. The State recommends that Mr. Daley be reprimanded, placed on probation for a minimum of one year, take a Panel-approved course on professional ethics, and pay a civil fine of \$500. The sanctioning guidelines for unprofessional conduct in the practice of respiratory care have a minimum sanction of reprimand and a maximum sanction of revocation, and a minimum fine of \$1,000 and maximum fine of \$5,000. COMAR 10.32.11.16B(3). When deciding a sanction, the disciplinary panel may consider aggravating and mitigating factors listed in the regulations. COMAR 10.32.11.15G. The following mitigating factors are present in this case: Mr. Daley has no prior disciplinary record, there was no patient harm or adverse impact. COMAR 10.32.11.15G(4)(a), (h). The aggravating factor includes that Mr. Daley's action was committed deliberately. COMAR 10.32.11.15G(5)(b). The Panel believes a reprimand is the appropriate sanction for this case.

¹ Mr. Daley also argued at the hearing and the ALJ adopted a characterization that the State was "trying to impose a non-compete clause on [Mr. Daley] where none existed." The Panel rejects this characterization and concludes that employment non-compete clauses are irrelevant to the determination of whether Mr. Daley's conduct was unethical and unprofessional in the practice of respiratory care.

ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, it is, by a majority of the quorum of Disciplinary Panel A, hereby

ORDERED that Alfred J. Daley, RCP, is **REPRIMANDED**; and it is further

ORDERED that this is a **PUBLIC** document pursuant to Md. Code Ann. Gen. Prov. §§ 4-101 to 4-601 (2014 Vol.)

03/31/2017
Date

Christine A. Farrelly
Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Md. Code Ann., Health Occ. § 14-5A-17.1(a), Mr. Daley has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within thirty (30) days from the date of mailing of this Final Decision and Order. The cover letter accompanying this final decision and order indicates the date the decision is mailed. Any petition for judicial review shall be made as provided for in the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

If Mr. Daley files a petition for judicial review, the Board is a party and should be served with the court's process at the following address:

**Maryland State Board of Physicians
Christine A. Farrelly, Executive Director
4201 Patterson Avenue
Baltimore, Maryland 21215**

Notice of any petition should also be sent to the Board's counsel at the following address:

**David S. Finkler
Assistant Attorney General
Department of Health and Mental Hygiene
300 West Preston Street, Suite 302
Baltimore, Maryland 21201**