

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JOSEPH F. ROONEY, JR.,	:	
	:	C.A. NO: K10A-04-002 (RBY)
Appellant,	:	
	:	
v.	:	
DELAWARE BOARD OF	:	
CHIROPRACTIC,	:	
	:	
Appellee.	:	

Submitted: February 1, 2011

Decided: April 27, 2011

Upon Consideration of the Decision of the

Delaware Board of Chiropractic

AFFIRMED

OPINION AND ORDER

Joseph F. Rooney, Jr., *pro se.*

Patricia Davis Oliva, Esq., Department of Justice, Dover, Delaware for Appellee.

Young, J.

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SUMMARY

Joseph Rooney (“Rooney”) appeals from a decision of the Delaware Board of Chiropractic (“Board”) revoking his chiropractic license. Because the Board’s decision is supported by substantial evidence, Rooney’s appeal is **DENIED**.

FACTS

This case arises from a disciplinary complaint filed by the Delaware Department of Justice (“DDOJ”) with the Board alleging that Rooney was guilty of unprofessional conduct. Rooney was accused of engaging in unprofessional conduct by having inappropriately “exposed the patient’s bare breasts, placed his hands on her breasts for several minutes, moved his hands across her nipples and stomach area, lifted her underpants and placed his hands on her pubic bones, and lifted the back of her underpants and palpated her buttocks” during an IME. Ultimately, a complaint was filed by the patient, whose name remains anonymous, but who is referred to as KO, with the Division of Professional Regulation against Rooney as a result of the examination. On March 4, 2010, the Board held a hearing on KO’s complaint against Rooney. KO testified and the facts recited are as follows.

KO treated for injuries she sustained in an automobile accident on August 15, 2008 with then-chiropractor Dr. Robert A. Reese for her neck, shoulder, and mid-back pain. On January 7, 2009, KO received a letter from her automobile insurance carrier instructing her to schedule an appointment with Rooney for an independent medical examination.

The purpose of the IME was to address KO’s: (1) diagnoses; (2) need for

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treatment; (3) work disability; (4) causal connection between the complaints and the accident; and (5) need for diagnostic testing. The request specifically directed Rooney to “not address the need for treatment outside of your specialty.” On January 19, 2009, escorted by her daughter, KO attended her IME appointment with Rooney.

KO testified that when she arrived to Rooney’s office there was no one present. In the waiting room she observed several posters, one pertaining to cervical papanicolaou tests, and the other to prostate exams. Rooney entered the waiting room after some time passed. He requested KO fill out several forms. After KO completed the forms, she was escorted by Rooney into a chiropractic exam room, and instructed to remove all of her clothing, except her panties, and to put on a gown. Rooney departed. The exam room did not contain a separate changing area, but merely a chiropractic table, a separate table with stirrups, and a poster of a human skeleton. KO changed into the gown. Rooney returned to the exam room to begin to question her, specifically on her occupation.

Rooney began the physical examination of KO by conducting a range of motion tests on KO’s neck. Rooney also took a reading of her blood pressure, opening her gown and placing a stethoscope on her bare back to listen to her breathing. Rooney then checked her eyes and left ear. KO testified that she never before experienced these types of tests during a chiropractic exam.

After the initial tests were performed, Rooney instructed KO to remove her gown down to her waist, at which point he felt the sides of her bare breasts. Rooney explained that he was conducting this examination in an effort to check her glands. He then placed his stethoscope to each of KO’s bare breasts. KO was instructed to

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lay down on the exam table and as she lay down she pulled the gown she was wearing back up to cover her breasts. Rooney pulled her gown back down exposing KO's chest. Rooney then touched KO's stomach area and lifted her panties and touched her in her groin area. KO tried to pull up her gown but Rooney pulled it back down.

Next Rooney instructed KO to move to the other exam table and lay on her stomach, which she did and he touched her on her lower back. Then Rooney lifted her back waistband and pushed on her bare buttocks. Rooney then instructed KO to stand up, remove her gown and put out her hands. KO stood facing Rooney naked from the waist up and she performed a range of motion tests while he stood in front of her. Upon completion of the exams, KO got dressed, left the office, and called her treating chiropractor Dr. Reese to ask about the unusual examinations Rooney performed on her. Dr. Reese referred KO to an attorney.

At the hearing, Dr. Reese and KO's daughter also testified, corroborating KO's testimony. The Board ruled that Dr. Reese was qualified as an expert. He provided testimony to the standard of chiropractic care in New Castle County, Delaware. Dr. Reese testified that he treats chiropractic patients in their clothing, and does not require the use of a gown. Dr. Reese opined that Rooney's examination did not constitute a proper chiropractic exam. In general, these types of examinations and tests are performed by medical doctors, not chiropractors. As a result, when presented a patient whose history necessitates any of these types of tests or exams, Dr. Reese refers those patients to medical doctors.

At the conclusion of all testimony presented at the hearing, the Board deliberated the evidence presented by the DDOJ and Rooney. The Board concluded

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that the DDOJ met its burden, and found Rooney guilty of unprofessional conduct. After determining that Rooney was guilty of unprofessional conduct, Rooney's disciplinary history was presented in order to ascertain the appropriate punishment to apply to Rooney. The Board took the following history into account.

That history included a previous revocation of his license in 1995 due to unprofessional conduct. Rooney's license was then revoked as a result of patient complaints that he had conducted vaginal probes as well as breast and buttock massages during examinations as well as making inappropriate sexual comments to patients. In 1995, Rooney's license was suspended for three months and he was placed on probation for one year, during which he was to report to the Board the number of female patient he treated and their corresponding records. Rooney was also ordered to attend additional professional education in the form of sensitivity training on the treatment of female patients.

In 2004, Rooney again was accused of exceeding the scope of chiropractic practice by administering EKGs, conducting anoscopies, taking chest x-rays, drawing blood and performing prostate exams. The Board in 2004 placed Rooney on probation for a period of one year. Additionally, he was ordered to complete 24 hours of continuing education. The Board, taking into account Rooney's past altercations and the more recent 2010 deviations of professional conduct, revoked Rooney's license on April 15, 2010.

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STANDARD OF REVIEW

An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is free from legal errors and whether the Board's finding of facts and conclusions of law are supported by substantial evidence in the record.¹ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."² It is also defined as more than a scintilla, but less than a preponderance of the evidence.³ It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency.⁴

DISCUSSION

Appellant asserts three arguments. First, Rooney argues that his right to due process was violated, because he was denied pre-hearing discovery. Second, Rooney contends that the Board's decision is not supported by substantial evidence. Third, he contends that the Board misapplied the appropriate chiropractic standard of care

¹ 29 Del. C. § 10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

³ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F.Supp 110 (D.Del. 1983)).

⁴ *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).

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in reaching its determination that Rooney was guilty of unprofessional conduct.

It is not within this Court’s purview to act as fact-finder in an appeal from an administrative board.⁵ The Board, as the fact-finder, reviews the testimony and issues an opinion. Unless the Court finds that its opinion cannot be supported, the decision of the Board is affirmed, in as much as that discretion belongs to the Board. On appeal, the Court’s responsibility is to assure that the Board’s decision did not go against the great weight of the evidence.⁶

The Court turns its attention to the first and third arguments presented. Rooney attached a series of exhibits to his opening brief purporting to be from the chiropractic discipline. The relevance of the exhibits is unclear. Rooney contends that the Board below applied the incorrect standard in reaching the conclusion that his behavior was unethical.

The Board did not apply the wrong standard. Furthermore, this Court cannot consider the attached exhibits, because neither Rooney nor the DDOJ produced them for the Board below. This Court reviews administrative decisions on the record and not *de novo*.⁷ “[A] Board’s decision is not reviewed on the merits of the case, but on ‘the record to determine whether the lower tribunal exceeded its jurisdiction,

⁵ *Bernhard v. Phoenix Mental Health*, 2004 WL 304358, at * 1 (Del. Super. Jan. 30, 2004) (internal citations omitted).

⁶ *Hall v. City of Wilmington*, 1978 WL 186829, *2 (Del. Super. Jan. 27, 1978).

⁷ 20 Del. C. § 10142 (c); *Adjile, Inc. v. City of Wilmington*, 875 A.2d 632, 635 (Del. 2005) (citing *Reise v. Bd. of Bldg. Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000)).

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committed errors of law, or proceeded irregularly.”⁸

Turning to the first of Rooney’s arguments, he contends that he was denied due process during the proceedings below, because the Board denied him pre-hearing conferences, discovery, depositions and continuances.

A party waives any procedural due process claim that is not raised in the administrative proceedings below.⁹ Rooney for the first time raises the argument that he was denied due process on the basis that his pre-hearing conference request and continuance requests were denied. Rooney objected only to the Board’s failure to afford him pre-hearing discovery at the hearing below. This Court will address Rooney’s objection below in light of due process requirements.

Professional licensing board proceedings are governed by both the requirements of due process and the Administrative Procedures Act.¹⁰ “In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings.”¹¹ Pursuant to the APA, professional licensees who face an administrative disciplinary

⁸ *Id.*

⁹ See *In re 244.5 Acres of Land*, 2001 WL 1469155, *5 (Del. Super. Aug. 22, 2001).

¹⁰ 29 Del. C. Ch. 101.

¹¹ *Carousel Studio v. Unemployment Ins. Appeal Bd.*, 1990 WL 91108, *1 (Del. Super. Jun. 26, 1990).

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hearing must be afforded notice, opportunity to subpoena witnesses, the right to present evidence, to be represented by counsel and to appear personally or by other representative.¹²

Procedural due process is satisfied when “accomplished by a method reasonably calculated to afford the party an opportunity to be heard.”¹³ In *Bell Atlantic-Del., Inc. v. Pub. Serv. Comm'n*, the Delaware Supreme Court set forth the elements that an administrative hearing must meet to satisfy a respondent's right to procedural due process:

[D]ue process as it relates to the requisite characteristics of the proceedings entails providing the parties...with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends. This court has also held that due process requires that the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings.¹⁴

Rooney must establish that as a result of the Board's denial to provide him pre-hearing discovery, he was not: (1) adequately informed of the nature of the charges against him and; (2) lack of such information prejudiced his ability to defend against

¹² 29 Del. C. § 10122; 29 Del. C. § 10125(5).

¹³ *PAL of Wilmington v. Graham*, 2008 WL 2582986, *4 (Del. Super. Jun 18, 2008) (citing *Reagan Nat'l Adver., Inc. v. Unemployment Ins. Appeal Bd.*, 1990 WL 105632, *2 (Del. Super. Jul. 19, 1990)).

¹⁴ 705 A.2d 601, 605 (1997).

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the charges against him.¹⁵ The APA does not provide a licensee facing discipline the absolute right to discovery or depositions.¹⁶ In *Kotler v. Bd. of Med. Practice*, this Court held that “while pre-hearing discovery is available in proceedings before the Board, the appellant is incorrect in his assumption that he has an absolute due process right to engage in such discovery as a matter of course.”¹⁷ Additionally, a party requesting pre-hearing discovery must first make a request to the administrative board to authorize the discovery.¹⁸

In this case, the Board did not have the authority pursuant to an enabling statute to issue requests for production. Moreover, Rooney did not make any request for pre-hearing discovery to the Board. Rather, Rooney asked the State administrative prosecutor to engage in pre-hearing discovery.¹⁹ The State denied Rooney’s request. At a March 4, 2010 hearing, the Board addressed Rooney’s argument concerning his due process rights and right to depose the complaining witness prior to the hearing. The Board rejected the arguments that it was a violation of his due process rights, denying the request for additional pre-hearing discovery. The Board did not err in

¹⁵ *J.L.B. Corp. v. Del. Alcoholic Bev. Control Comm’n*, 1985 WL 189008, *2 (Del. Super. Jun. 7, 1985); *see also In re Gresick*, 1988 WL 116411 (Del. Super. Nov. 2, 1988).

¹⁶ 29 Del. C. § 10161(a)(4); see also 29 Del. C. § 10125(b) which states: “[i]n connection with such hearings, the agency or its designated subordinate may be empowered to:... (5) [c]ause interrogatories to issue and depositions to be taken ...”

¹⁷ 1993 WL 54587, *4 (Del. Super. Jan. 19, 1993).

¹⁸ 29 Del. C. § 10125(b)(5).

¹⁹ 29 Del. C. § 10125(b)(5).

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light of the Delaware law cited to above and the guidelines set forth in the APA.

Rooney's second contention is that the Board's decision is not supported by substantial evidence. As discussed above, substantial evidence is enough relevant evidence to support the board's conclusion.²⁰ If there is substantial evidence to support the board's findings and its conclusions are free from legal error, this Court must affirm.²¹

Based on the record below, the Board based its decision on an overwhelming amount of evidence that was uncontradicted to support that Board's finding that Rooney's conduct during the examination in question was unprofessional. Rooney challenges the credibility of KO's testimony on appeal, however determinations of credibility are exclusively reserved for the Board.

On appeal, this Court does not weigh the evidence and determine witness credibility.²² This Court does not substitute its own judgment on witness credibility for that of the Board, even if the Court would reach a different conclusion based upon the facts presented.²³ The Board has authority to accept the testimony of one witness over that of another.²⁴

²⁰ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

²¹ *Bash v. Bd. of Med. Practice*, 279 A.2d 1145, 1189 (Del. Super. 1989).

²² *Playtex Prods. v. Harris*, 2004 WL 1965985, *2 (Del. Super. Aug. 31, 2004).

²³ *Gen. Motor Corp. v. Kane*, 2006 WL 1650807, *5 (Del. June 13, 2006) (citing *Anderson v. GMC*, 748 A.2d 406 (Del. 2000)).

²⁴ *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).

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The Board did not abuse its discretion in weighing the witnesses credibility and therefore this Court will not disturb its findings.²⁵ KO's testimony is primarily undisputed with regard to what happened during the examinations. Rooney testified that, while examining KO, he moved his hand across her chest while her gown was dropped to her waist. He also testified that during the exam, he needed to have his hand near KO's chest, and confirmed that "I definitely placed the stethoscope on her left breast." The testimony of KO and Rooney correspond with the Board's findings of the highly unprofessional behavior Rooney engaged in. The transcript and record are, at the very least, rife with evidence, supporting that the behavior Rooney engaged in was inappropriate, unethical, unprofessional and consisted of an invasive medical examination and not a chiropractic IME.

Further, there is an abundance of support on the record to support the Board's findings that: (1) there was no justification whatsoever for Rooney's medical examination of KO, (2) that such examination subjected KO to an extraordinary amount of emotional and psychiatric distress, and (3) that Rooney took advantage of KO's trust in performing on her a chiropractic exam that was unprofessional, unethical, and likely to cause KO psychological harm in violation of 24 Del. C. § 711 (b)(3). There was no evidence presented that would allow the Board to reach a different conclusion.

²⁵ See *Simmons v. Del. State Hosp.*, 660 A.2d 384, 388 (Del. 1995)(a Board's credibility determinations will not be disturbed on appeal unless the Court determines the Board abused its discretion).

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CONCLUSION

In the case at hand the Board found that Rooney acted in an unprofessional manner and violated his ethical obligations. The record supports this finding, and is, in fact, supported by the testimony of the Appellant. The issues Rooney raises are not sufficient to demonstrate that the Board lacked sufficient evidence to revoke his chiropractic license, nor that his due process rights were violated.

For the foregoing reasons, the Board's decision is **AFFIRMED**.

SO ORDERED.

/s/ Robert B. Young

J.

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