

STATE OF MAINE
MAINE BOARD OF OSTEOPATHIC LICENSURE

In Re: GARY S. WINN, D.O.)	
)	
CR 2014-25)	Decision and Order
)	
)	

I. Introduction & Procedural History

The Maine Board of Osteopathic Licensure ("the Board") met in public session at the Board's offices in Augusta, Maine on December 10, 2015 at 11:00 a.m. to conduct an adjudicatory hearing under the authority of 10 M.R.S. § 8003(5), 32 M.R.S. § 2591-A, and 5 M.R.S. §§ 9051-9064. A Notice of Adjudicatory Hearing dated November 5, 2015 informed Gary S. Winn, D.O., ("the Licensee" or "Dr. Winn") that the purpose of the hearing was to determine whether he had engaged in the practice of fraud or deceit in connection with service rendered within the scope of his license, in violation of 32 M.R.S. § 2591-A(2)(A); and whether he had engaged in unprofessional conduct, in violation of 32 M.R.S. § 2591-A(2)(F), by violating a standard of professional behavior. If a violation was found, the Notice stated, the Board would then determine whether to take disciplinary action against his license to practice as an osteopathic physician in Maine. The Notice further informed Dr. Winn of particular facts alleging that he billed for treatment that was not provided, and that he disclosed confidential health care information to unauthorized persons.

A quorum of the Board was in attendance during all stages of the proceeding. Participating and voting members were Board Chair Joseph R.D. deKay, D.O.; John F. Gaddis, D.O.; Marty W. McIntyre, Public Member; Melissa Michaud, P.A.-C.; Gary Palman, D.O.; and Natania Piper, D.O. Scott Thomas, D.O., was present but, as Case Reporter, did not participate. The Licensee was present and represented by Michael Cunniff, Esq. Michael Miller, Esq., Assistant Attorney General, represented the State. Mark Terison, Esq., presided as independent hearing officer. The Board responded negatively to the hearing officer's questions concerning whether any member had a conflict of interest or possible bias in the matter.

The State and the Licensee gave opening statements, called witnesses, provided documentary evidence that the hearing officer admitted¹, and presented closing arguments. Thereafter, the Board deliberated in public and made factual findings.

II. Findings of Fact

The Board reviewed the State's and Licensee's admitted exhibits, and also heard the testimony of Willard Stitzell, D.O.; Celeste Ware; Gary S. Winn, D.O.; Mary Stitzell; Edith Bickford; Nancy Garvin; James Gioia; John Pelletier, D.O.; Amanda Arloro; and Deborah Colomante.² Dr. Winn, a licensed osteopathic physician in Maine, provided health care treatment to Edith Bickford from April through June, 2013. Ms. Bickford, a retired registered nurse, decided to follow the recommendation of her friend, Nancy Garvin, and become a patient of Dr. Winn's, although she never told Ms. Garvin that the doctor had treated her. Records showed that Ms. Bickford visited Dr. Winn on four separate occasions.³ She recalled that she spent approximately fifteen minutes with the doctor during her first visit, and that her other visits lasted no more than five minutes each. Ms. Bickford testified that she was familiar with osteopathic manipulative treatment ("OMT"), but had not undergone any such treatment since 1995 following a cervical fusion. She said she was told at that time that such treatment would no longer be safe for her because of the fusion. Consequently, she was insistent that Dr. Winn had never treated her with osteopathic manipulation. She acknowledged, however, that the doctor had "palpated" her back at the cervical area during her first visit with him. She had no recollection of Dr. Winn ever having touched her pelvis or hips.

¹ Another hearing officer, Rebekah Smith, Esq., issued a pre-hearing ruling that admitted State's Exhibits #1 and #2, #6 and #7, #9 through #13, and #15 through #19, without objection. The ruling also admitted State's Exhibits #3, through #5, #8, and #14 over the Licensee's objection. Ruling was reserved on State's Exhibit pending hearing testimony concerning the reliability of Maine Care billing information. However, the Licensee withdrew his objection at the hearing, and the Exhibit was admitted. Licensee's Exhibits #1 through #3 were admitted without objection, but Licensee's Exhibit #4 was excluded based upon the State's objection.

² All witnesses who had a confidential physician/patient relationship with Dr. Winn elected to waive the privilege.

³ The visits took place on April 8, 2013; April 30, 2013; May 28, 2013; and June 18, 2013.

Ms. Bickford recalled that after she complained of pain in her shoulder, Dr. Winn merely gave her a topical medication and failed to check her shoulder's range of motion. When the pain persisted, she consulted another physician, underwent an MRI, and discovered that she had sustained a fracture. As a result of that and other perceived deficiencies, she stopped seeing Dr. Winn and requested copies of her medical records from his office. Ms. Bickford remembered that the doctor called her early one morning and stated that it would be too costly to provide her records. He also asked why she had decided to leave his practice. According to her testimony, she told him there several reasons, but identified only the failure to treat her fractured shoulder properly. When she and Dr. Winn disagreed about whether he had checked her shoulder's range of motion, Ms. Bickford thanked him for calling and hung up the telephone. Shortly thereafter, Ms. Bickford talked with her sister, Mary Stitzell, whom she said she had identified in Dr. Winn's records only as an individual to contact in case of medical emergency. According to Ms. Stitzell, Dr. Winn had called her to say that Ms. Bickford's medical records were too extensive for him to copy for her, that she could get copies from her next physician if she wanted them, and to ask if there was anything he could do to keep Ms. Bickford as a patient. Ms. Stitzell also recalled that Dr. Winn told her that in treating Ms. Bickford he had performed everything just as it had been dictated and recorded.

Although a form authorizing release of Ms. Bickford's medical information to her sister existed in Dr. Winn's records, Ms. Bickford insisted that she never authorized release of such information to Ms. Stitzell. When Ms. Bickford received copies of her medical billing statements from Medicare, she saw that Dr. Winn had charged for OMT "to 7-8 body regions" for visits on April 8, 2013; May 28, 2013; and June 18, 2013. Dr. Winn's records also reflected assessment of "tobacco use disorder" and discussions about smoking cessation, although Ms. Bickford had not smoked cigarettes since age 19. After consulting with her brother-in-law, Willard Stitzell, D.O., Ms. Bickford complained to the Board. She testified that she later received a telephone call from Nancy Garvin, her friend of twenty years, who asked "right out of the blue," "What has Dr. Winn ever done to you?" According to Ms. Bickford's recollection, Ms. Garvin "intimated" that Dr. Stitzell had "reported [Dr. Winn] for something." Ms. Bickford recalled telling Ms. Garvin that if Dr. Winn had talked to Ms.

Garvin, "it was a huge breach of confidentiality." Ms. Garvin, a patient of Dr. Winn's for eight years, testified that occasionally she had received OMT from Dr. Winn, that she found relief from the treatments, that he had explained them to her, and that she had consented to the procedures. She confirmed that Dr. Winn called her and said that Ms. Bickford had been his patient. When he asked Ms. Garvin how Ms. Bickford was doing, Ms. Garvin replied that she did not know. Dr. Winn stated to Ms. Garvin that a complaint had been filed against him, but did not reveal the nature of it. According to Ms. Garvin, Dr. Winn made no requests of her. Although she recalled speaking to Detective James Gioia of the Maine Attorney General's Office about Dr. Winn and Ms. Bickford, Ms. Garvin did not remember what she had told him. Detective Gioia testified that he had made notes of his conversation with Ms. Garvin, that the notes were accurate, and that she told him that Dr. Winn called her because he knew she and Ms. Bickford were friends. According to the detective's notes, Ms. Garvin said Dr. Winn told her he had obtained consent from Ms. Bickford for the OMT that he performed. She also told Detective Gioia that Dr. Winn had asked her to write something in his support. Detective Gioia remembered reading his notes of the conversation back to Ms. Garvin, who confirmed their accuracy.

Dr. Winn testified that when he first met with Ms. Bickford he spent time with her explaining the different modalities of OMT. He obtained her informed consent for treatment, but because of her condition he was careful not to be too aggressive. Dr. Winn recalled that Ms. Bickford told him she did not want any "cracking," so he gently treated different tender points without being too invasive. He used what he described as myofascial release and mild muscle energy techniques. Dr. Winn insisted that his treatment records were accurate and made contemporaneously with his visits with Ms. Bickford, although he conceded that Ms. Bickford's vital signs were dated in August for her June visit. He explained that after one of his assistants left his practice, he discovered notes she had neglected to enter into the electronic record. The doctor apparently did not "sign off" on aspects of Ms. Bickford's June visit until August.

Celeste Ware, Dr. Winn's assistant, testified that she was present and witnessed the OMT that he performed for Ms. Bickford on at least two occasions. According to Ms. Ware, records

were accurate and made from the doctor's contemporaneous dictation at the time of Ms. Bickford's visits. She recalled witnessing Ms. Bickford's informed consent for OMT treatment. Ms. Ware also recalled that she was present in the doctor's office when Ms. Bickford became fatigued filling out medical release forms, and requested another office worker to write in Ms. Stitzell's name as an authorized receiver of her medical information. Ms. Ware confirmed her understanding that Ms. Bickford's authorization for release of information to Ms. Stitzell was indefinite and unrestricted. John Pelletier, D.O.; Amanda Arloro; and Deborah Colomante all testified that they were satisfied patients of Dr. Winn, and that he had obtained their informed consent prior to administering any treatment.

III. Governing Statutes and Rules

Section 1 of the American Osteopathic Association Code of Ethics provides that "[t]he physician shall keep in confidence whatever she/he may learn about a patient in the discharge of professional duties." Section 12 of the Code requires that "[a]ny fee charged by a physician shall compensate the physician for services actually rendered." Principle II of the Code of Medical Ethics of the American Medical Association states that a physician "shall uphold the standards of professionalism, [and] be honest in all professional interactions ...". Under Principle IV of the Code, a physician "shall safeguard patient confidences and privacy within the constraints of the law." Maine law provides for the imposition of discipline if the Board finds by a preponderance of the evidence that a licensee practiced fraud or deceit in connection with service rendered within the scope of the licensee's license to practice as an osteopathic physician. *See* 32 M.R.S. § 2591-A(2)(A). Further, the Board may discipline a licensee if it finds by a preponderance of the evidence that the licensee engaged in unprofessional conduct by violating a standard of professional behavior established in the practice for which the licensee is licensed. *See* 32 M.R.S. § 2591-A(2)(F). Discipline may include warnings, censures, reprimands, suspensions, revocations, civil monetary penalties of up to \$1,500 for each violation, or conditions of probation. *See* 10 M.R.S. § 8003(5)(A-1). Under 10 M.R.S. § 8003-D, the Board may also assess actual expenses incurred in the investigation and hearing of the matter. Moreover, the Board of Osteopathic Licensure may deny or refuse to renew a license if it finds by a preponderance of the evidence that a licensee

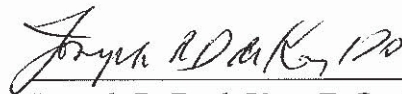
practiced fraud or deceit in connection with services rendered, or violated an applicable code of ethics or standard of practice, while engaged in the profession for which the person is licensed. See 10 M.R.S. §§ 8003(5-A)(A)(1) and (2). Additionally, any violation of the rules of the Board establishes sufficient reason for refusal to renew a license. See 10 M.R.S. § 8003(5-A)(A)(5).

IV. Conclusions of Law

After the evidentiary record was closed, the Board discussed the evidence in public session. A motion made and seconded to find that the Licensee engaged in fraud and deceit in connection with service rendered within the scope of his license failed on a vote of 4-2. Thereafter, the Board discussed the Licensee's apparent record keeping inaccuracies, Ms. Bickford's apparent inadequate and incomplete understanding of OMT that likely would have been addressed had her informed consent for the procedure been sufficient, and the Licensee's apparent revelation to Ms. Garvin that Ms. Bickford had been his patient. Considering these facts, and the facts as found above as well as those alluded to in the record but not specifically referred to above, the Board took the following action: moved, seconded and voted 6-0 to find that the Licensee had engaged in unprofessional conduct. Having found a violation, the Board entertained a motion to reprimand the Licensee, to impose a fine of \$500, and to assess costs of the investigation and hearing, the fine and costs to be paid within 30 days of receipt of this Decision and Order. The motion was seconded, and passed on a vote of 6-0. Finally, the Board voted 6-0 to renew the Licensee's license.

Dated: _____

2/11/2016



Joseph R. D. deKay, D.O., Chair
Maine Board of Osteopathic Licensure

Appeal Rights

Pursuant to the provisions of 5 M.R.S. §§ 11001-11002 and the general language following 10 M.R.S. § 8003 (5)(G), any party that appeals this Decision and Order must file a Petition for Review in the Maine Superior Court having jurisdiction within 30 days of receipt of this Order. The petition shall specify the person seeking review, the manner in which the person is aggrieved and the final agency action which the person seeks reviewed. It shall also contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for review shall be served by Certified Mail, Return Receipt Requested, upon the Maine Board of Osteopathic Licensure, all parties to the agency proceedings and the Maine Attorney General.