

IN AND BEFORE THE OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE AND SUPERVISION
STATE OF OKLAHOMA

FILED

MAY 21 2014

OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE & SUPERVISION

STATE OF OKLAHOMA)
EX REL. THE OKLAHOMA BOARD)
OF MEDICAL LICENSURE AND)
SUPERVISION,)
)
Plaintiff,)
)
vs.)
)
ARDESHIR FAGHIH NIA, M.D.)
LICENSE NO. 24784)
)
Defendant.)

Case No. 12-01-4464

**STATE'S RESPONSE AND OBJECTION DR. NIA'S
"APPLICATION TO WITHDRAW HIS CONSENT TO THE
THE ORDER ACCEPTING VOLUNTARY SUBMITTAL TO
JURISDICTION AND SET THE UNDERLYING COMPLAINT
FOR TRIAL ON THE MAY DOCKET" WITH BRIEF IN SUPPORT**

The State of Oklahoma ex rel. the Oklahoma State Board of Medical Licensure and Supervision ("State") respectfully submits this Response and Objection to Dr. Nia's "Application to withdraw his Consent to the Order Accepting Voluntary Submittal to Jurisdiction and Set the Underlying Complaint on the May Docket" ("Application to Withdraw Consent") that was voluntarily entered into between the parties on March 6, 2014. The State respectfully requests that the Board deny Dr. Nia's Application and, in support thereof, shows as follows:

I. DR. NIA'S APPLICATION TO WITHDRAW HIS CONSENT TO THE VSJ IS UNTIMELY.

The Board is subject to the provisions of the Oklahoma Administrative Procedures Act ("OAPA") (75 Okla. Stat. § 250.1 *et seq.*) See *State ex rel. Okla. Bd. of Med. Licensure &*



Supervision v. Pinaroc, 2002 OK 20, ¶ 6, 46 P.3d 114, 118. Section 317(A) of the OAPA (attached as Exhibit “1”) provides:

A final agency order issued by an administrative head of an agency shall be subject to rehearing, reopening or reconsideration by such administrative head. Any such application or request for such rehearing, reopening or reconsideration shall be made by any party aggrieved by the final agency order within ten (10) days from the date of the entry of such final agency order. The grounds for such action shall be either:

1. Newly discovered or newly available evidence, relevant to the issues;
2. Need for additional evidence adequately to develop the facts essential to proper decision;
3. Probable error committed by the agency in the proceeding or in its decision such as would be ground for reversal on judicial review of the final agency order;
4. Need for further consideration of the issues and the evidence in the public interest; or
5. A showing that issues not previously considered ought to be examined in order properly to dispose of the matter.

(Emphasis added). Dr. Nia’s Application to Withdraw Consent, filed on April 25, 2014,¹ is in essence a motion to rehear or reconsider the Board’s “Order Accepting Voluntary Submittal to Jurisdiction” (“VJS”) entered into between the parties on March 6, 2014. (See Exhibit A to Dr.’s Nia’s Application). Exactly fifty (50) days elapsed between the time of the VJS’s entry and the

¹ Although the motion itself was received and filed by the Board on April 25, 2014, the Application to Withdraw Consent was not technically considered filed until after Dr. Nia paid the required \$120 motion fee on May 7th. See OAC 435:1-1-(a)(4)(O)(i) (“All fees assessed by the Board as set out in the fee schedule . . . shall be received prior to processing”) As such, counsel for the parties agreed to run response and reply deadlines from May 7th – the date Dr. Nia’s motion fee was received by the Board.

time that Dr. Nia filed his Application to Withdraw Consent. Pursuant to 75 Okla. Stat. § 317(A) (as set forth above and attached as Ex. 1), Dr. Nia’s Application was required to have been filed on or before March 20, 2014 – which was ten (10) business days from the date of entry of the March 6, 2014 Order Accepting VSJ. *See* 75 Okla. Stat. § 317(A). Dr. Nia did not, however, file his Application to Withdraw Consent until thirty-six (36) days later and, as such, his motion should not be considered and denied as untimely.

Dr. Nia cites to Oklahoma Administrative Code (“OAC”) 435:3-3-21 from the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act (the “Medical Act”) for the proposition that “the Board has the authority to ‘rehear[], reopen[], or reconsider[] . . . a final order’ upon application with the ‘statutory grounds’ supportive of the application ‘set forth with particularity.’” *See* Application to Withdraw Consent, pp. 2-3, citing, in part, OAC 435:3-3-21 of the Medical Act. What Dr. Nia conveniently omits from this citation, however, is that it may only be filed “**within ten (10) days from the entry of the order.**” OAC 435:3-3-21, attached as Exhibit “2”) (emphasis added). This rule is also in accord with Section 317(A) of the OAPA. Dr. Nia obviously recognizes that the omitted clause is fatal to his present claim for relief, which is why he intentionally excluded it from his citation.

The prescribed 10-day deadline of 75 Okla. Stat. § 317(A) and OAC 435:3-3-21 is a “jurisdictional prerequisite” to appeal of a final agency order. *Williams v. Board of Okla. Polygraph Exam’rs*, 2010 OK CIV APP 100, ¶ 4, 241 P.3d 654, 655. An administrative agency’s final order becomes “impervious to attack” barring timely review in accordance with the OAPA. This is also known as the “finality bar.” *Ashikian v. State*, 2008 OK 64, 188 P.3d 148, 154. Once Dr. Nia failed to file his Application to Withdraw Consent by March 20, 2014 (which was ten (10) business days from the date of entry of the Order Accepting VSJ), the

finality bar was triggered and the VSJ became impervious to attack. Due to Dr. Nia's failure to timely file his Application to Withdraw Consent, the Board lacks subject matter jurisdiction to further consider it. *See also* Op. Atty. Gen. No. 98-39 (1999) (Board of Dentistry lacks authority to reconsider a final order unless a request to rehear, reopen or reconsider the final order is made within 10 days of entry).

In *Conoco, Inc. v. State Dept. of Health*, 1982 OK 94, 651 P.2d 125, 128, the Court stated:

It is well established that the time limits within which to appeal adverse decision are jurisdictional in nature and that if an appeal is brought untimely the court has no power to decide case. This rule applies to judicial review of administrative actions to the same extent as it does to court judgments and decrees The procedural requirements are mandatory and must be complied with timely filing is jurisdictional. (Emphasis added).

Dr. Nia further states in his Application to Withdraw Consent that when he "recovered from his lack of sleep, anxiousness, and depression he was able to fully read and understand the terms of the Order [and that] he was not able to appreciate the terms until after the Order was filed." *See* Application to Withdraw Consent, p. 3 (emphasis added). The Order Accepting VSJ was entered and filed on March 6th, and mailed to Dr. Nia on March 7th, but he did not file his Application to Withdraw Consent until April 25th. Dr. Nia thus acknowledges that he was able to read and fully understand the terms of the Order after he was able to get some sleep and calm his nerves, presumably within days of entry of the March 6th Order. Yet, Dr. Nia failed to file his Application to Withdraw Consent until approximately six (6) weeks later. Even if Dr. Nia had presented statutory grounds adequate for rehearing (and he has not, discussed *infra*), he was plainly dilatory in presenting those grounds.

The fifty (50) days between the time of the VSJ's entry and filing of Dr. Nia's Application to Withdraw Consent is unreasonable under any standard. Due to that untimely filing, the Board

lacks jurisdiction to further consider the merits of Dr. Nia's Application to Withdraw Consent. Dr. Nia's motion should, therefore, be denied.

II. EVEN IF DR. NIA HAD TIMELY FILED HIS APPLICATION TO WITHDRAW CONSENT, HE FAILS TO SET FORTH ADEQUATE GROUNDS FOR A REHEARING.

Section 317(A) of the OAPA sets forth five (5) statutory grounds (Ex. 1 and p. 2, above) upon which an aggrieved party can apply for rehearing, reopening or reconsideration of an agency order. In addition, OAC 435:3-3-21 (Ex. 2) requires the appealing party to "set forth with particularity the statutory grounds upon which it is based." Dr. Nia fails to set forth any of the statutory grounds provided for in 59 Okla. Stat. § 317(A) with any particularity; rather, he offers only personal excuses that he was too "sleep deprived, depressed and anxious over the pending Board action and decision to fully appreciate the terms and conditions of the Order." See Application to Withdraw Consent, p. 3. If that constituted grounds for rehearing, reopening or reconsidering an Order Accepting VSJ, then every VSJ approved by the Board would be subject to such attacks.

Further, nowhere in his Application to Withdraw Consent does Dr. Nia claim that he is not guilty of the allegations in the Complaint. Where a defendant seeks to withdraw a plea of guilty in a criminal proceeding and substitute a plea of not guilty, the burden is upon the defendant to show his plea of guilty was entered through inadvertence, or through ignorance, undue influence, or without deliberation and that there is a defense that should be presented to a jury. See *Brown v. State*, 1965 OK CR 104, 405 P.2d 698, 701; and *Baker v. State*, 1956 OK CR 31, 295 P.2d 294, 296. As stated in *Bearden v. State*, 1964 OK CR 42, 392 P.2d 55, 59:

An accused should not be allowed to trifle with the court by deliberately, apparently in good faith and with the advice of able counsel of his own choosing, enter a plea of guilty and then when judgment and sentence is pronounced, withdraw his plea and enter

a plea of not guilty, especially where he did not contend in his motion for leave to withdraw his plea that he was innocent of the charge, or that he had defenses to be presented to a jury.

Similarly, in the instant case, Dr. Nia should not be allowed to withdraw his consent to the Order Accepting VSJ, which appeared to be given in good faith and with the advice of able counsel of his own choosing. Dr. Nia was represented by not just one, but two, attorneys at the hearing on March 6, 2014, and the negotiations of the VSJ's terms and conditions had been going on with the State for weeks leading up to that hearing. *See* Transcription of March 6, 2014 Board Hearing, attached as Exhibit "3". There were telephone calls, emails, and in-person conferences. In other words, this was not a document seen for the first time by Dr. Nia on March 6, 2014; rather, there were tedious negotiations of the VSJ's terms and conditions, of which Dr. Nia had to have been well-informed in order to participate in those negotiations.

In the months and weeks leading up to and at the hearing, Dr. Nia was represented by very competent attorneys who advocated his interests vigorously. Especially when Dr. Nia does not even contend in his Application to Withdraw Consent that he is not guilty of the allegations of the Complaint, his motion should be denied.

III. UNLIKE COURTS ALLOWING WITHDRAWAL OF GUILTY PLEAS IN CRIMINAL PROCEEDINGS, THE BOARD'S POWER TO ALLOW WITHDRAWAL OF CONSENT TO A VSJ IS LIMITED.

22 Okla. Stat. § 517 states: "The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted." *Id.* The Oklahoma Court of Criminal Appeals has routinely held that the language of 22 Okla. Stat. § 517 allows a court, in the exercise of its sound discretion, to grant permission to withdraw a plea of guilty after judgment, vacate the judgment, and substitute a plea of not guilty. *See Gist v. State*, 1954 OK CR 154, 278 P.2d 250, 252 (court refused to allow defendant to withdraw guilty plea after

judgment entered because defendant failed to sustain burden of proving court abused its discretion in denying the application to withdraw the guilty plea).

Dr. Nia's license was neither revoked nor suspended. Therefore, the Board's power to reexamine its Order Accepting VSJ is limited to the conditions set forth in 75 Okla. Stat. § 317, where a defendant has filed for such reexamination within ten (10) days of the final order and the defendant asserts one of the grounds set forth in 75 Okla. Stat. § 317(A). Dr. Nia has done neither. He failed to file his request for rehearing, reopening or reconsideration within 10 days of the Order Accepting VSJ and he failed to assert a proper ground for reconsideration under 75 Okla. Stat. § 317(A). Dr. Nia's Application to Withdraw Consent should, therefore, be denied.

CONCLUSION

WHEREFORE, Dr. Nia's Application to Withdraw Consent to the Order Accepting VSJ should be denied because he failed to file his motion within ten (10) days of the March 6, 2014 Order Accepting VSJ, as required by 75 Okla. Stat. § 317. Even if Dr. Nia had timely filed his motion, his Application to Withdraw Consent should be denied because his grounds for seeking rehearing/reopening/reconsideration - that he was tired and he was depressed and worried about these proceedings—are wholly insufficient to grant his motion, especially where he had able legal counsel at the time he entered into the consent and where he does not deny he is guilty of the allegations in the Complaint.

Respectfully submitted,

A handwritten signature in blue ink that reads "Matt Stangl". The signature is written in a cursive style and is positioned above a horizontal line.

Janis W. Preslar, OBA No. 12443

Assistant Attorney General

Matt Stangl, OBA No. 20343

Assistant Attorney General

Office of Attorney General

313 N.E. 21st Street

Oklahoma City, OK 73105

Phone: (405)521-3921

Fax: (405)522-4536


Attorneys for the State of Oklahoma

Certificate of Mailing

I hereby certify that on the ___ day of May, 2014, a true and correct copy of the above and foregoing was served postage prepaid, via United States Mail, and/or facsimile to:

David Russell
S. Shea Bracken
RODOLF & TODD
2000 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
Fax: (918)295-7800
Attorneys for Ardeshir Faghieh Nia, M.D.

Gerald Zumwalt, M.D.
Secretary, Oklahoma State Board of
Medical Licensure & Supervision
101 N.E. 51st Street
Oklahoma City, OK 73105



Oklahoma Statutes Annotated
Title 75. Statutes and Reports (Refs & Annos)
Chapter 8. Administrative Procedures Act (Refs & Annos)

75 Okl.St. Ann. § 317

§ 317. Rehearing, reopening or reconsideration of agency decision

Currentness

A. A final agency order issued by an administrative head of an agency shall be subject to rehearing, reopening or reconsideration by such administrative head. Any application or request for such rehearing, reopening or reconsideration shall be made by any party aggrieved by the final agency order within ten (10) days from the date of the entry of such final agency order. The grounds for such action shall be either:

1. Newly discovered or newly available evidence, relevant to the issues;
2. Need for additional evidence adequately to develop the facts essential to proper decision;
3. Probable error committed by the agency in the proceeding or in its decision such as would be ground for reversal on judicial review of the final agency order;
4. Need for further consideration of the issues and the evidence in the public interest; or
5. A showing that issues not previously considered ought to be examined in order properly to dispose of the matter.

B. The order of the agency granting rehearing, reconsideration or review, or the petition of a party therefor, shall set forth the grounds which justify such action.

C. Nothing in this section shall prevent rehearing, reopening or reconsideration of a matter by any agency in accordance with other statutory provisions applicable to such agency, or, at any time, on the ground of fraud practiced by the prevailing party or of procurement of the order by perjured testimony or fictitious evidence.

D. On reconsideration, reopening, or rehearing, the matter may be heard by the agency, or it may be referred to a hearing examiner. The hearing shall be confined to those grounds upon which the reconsideration, reopening or rehearing was ordered.

E. If an application for rehearing shall be timely filed, the period within which judicial review, under the applicable statute, must be sought, shall run from the final disposition of such application.

Credits

Laws 1963, c. 371, § 17; Laws 1992, c. 310, § 13, eff. July 1, 1992.

Oklahoma Administrative Code Currentness
Title 435. State Board of Medical Licensure and Supervision
Chapter 3. Individual Proceedings
Subchapter 3. Investigations and Hearings (Refs & Annos)

Okla. Admin. Code 435:3-3-21

435:3-3-21. Petition for rehearing

(a) A petition for rehearing is not required before an appeal may be perfected in accordance with 59 O.S.1971, Section 513. A petition for rehearing, reopening or reconsideration of a final order may be filed with the Secretary of the Board within ten (10) days from the entry of the order. It must be signed by the party or his/her attorney or representative and must set forth with particularity the statutory grounds upon which it is based. However, a petition for rehearing based upon fraud by any party or procurement of the order by perjured testimony or fictitious evidence may be filed at any time.

(b) The Board shall not hear an appeal to a decision more than one time and shall limit the reconsideration of its decision on appeal to the findings of fact and imposition of terms, sanctions or other direction as set out in the Board Order.

[Source: Added at 11 Ok Reg 4159, eff 6-21-94 (emergency); Added at 12 Ok Reg 1215, eff 5-11-95; Amended at 12 Ok Reg 1219, eff 5-15-95]

Current through rules published in Volume 31, Number 16 of the Oklahoma Register dated May 1, 2014

Okla. Admin. Code 435:3-3-21, OK ADC 435:3-3-21

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

Transcription of Board Hearing

Presentation of VJS for Ardeshir Faghieh Nia, MD

March 6, 2014

Dr. Nia is sworn by Mr. Wiggins.

AAG: With respect to Dr. Nia, we've been working very hard to get an agreement in place. I think we've reached that point. Counsel needs a chance to ---

John Wiggins: Mr. Russell, did you want to say something?

David Russell: Yes, David Russell. I am here on behalf of Dr. Nia. We have been working very hard with Matt to come to a VSJ. There have been proposed VSJs exchanged back and forth. I think we have an agreement and I'm just reading the final product right now. I would apologize to the Board for our delay in that.

John Wiggins: Before we vote, we need to make sure you're both on the same page.

David Russell: Agreed, Mr. Wiggins.

(Counsel continues to review the VSJ)

David Russell: Mr. Wiggins, I would request for my client to discuss this with him outside. Could I please request that perhaps you move on to the other physicians?

Mr. Wiggins: I don't see why not. Mr. President?

Dr. Casper: Yes, I think that would be fine. We will move on so you can have the chance to...

David Russell: We really appreciate that.

(Counsel and witness leave Board room to discuss VSJ at 1:31 p.m.)

(Hearing reconvenes at 1:44 p.m.)

Mr. Wiggins: We are back on the record with the Nia VSJ. This VSJ has been submitted for Board consideration. Mr. Russell?

David Russell: Yes, Mr. Wiggins. Thank you very much. In negotiations with State, we have reached a VSJ agreement. I'm not sure -- there is one paragraph that will be removed from the proposed -- the one they gave - specifically Paragraph No. 13 which I will request -- and I think there's an agreement with the State it be removed. Other than that we do have an agreement.

Mr. Wiggins: All right. Thank you.

David Russell: Matt is working on revising that right now.

Dr. Casper: The paragraph that begins, "On or about March...?"

David Russell: That's correct.

Mr. Wiggins: But as far as the remainder of the Order...

David Russell: We have an agreement (unintelligible).

Mr. Wiggins: All right.

Dr. Sullivan: I guess I'm confused. Part of this, originally, he was told to go to PRC. Is that correct or am I on the wrong page?

David Russell: I am sorry if I didn't make that clear, Dr. Sullivan. He was originally to go to seek an evaluation. He eventually went to Elmhurst in Illinois and then, as a result of the Elmhurst recommendation, sought treatment at PRC in Lawrence.

Dr. Sullivan. Got it. Thank you.

Board Member: I will make a motion. In regard to Dr. Nia, Medical License 24784, I move that we accept the proposed Voluntary Submittal to Jurisdiction.

Board Member: Second.

Dr. Casper. We have a motion and a second. Voice vote, please.

Dr. Sullivan: Aye.

Dr. Sirajuddin: Abstain.

Huff: Nay.

Dr. Kinsinger: Aye.

Dr. Schoeffler: Aye.

Dr. Warn: Aye.

Dr. Skillings: Nay.

Casper: Nay.

Mr. Wiggins: If my fingers counted right, four is a majority vote. We had seven voting, four supported it, so just by the narrowest of margins, Doctor, you escaped a trial. So the VSJ has been approved.

Mr. Kelsey: Three no's and one abstention.

Mr. Wiggins: Three no's, one abstention and four yay.

Mr. Kelsey: So do you count the abstention as –

Mr. Wiggins: No. You still have a quorum with the abstention with seven. So four was needed to –

Mr. Kelsey: Okay. So four yes and four no, essentially?

Mr. Wiggins: No, four yes, three no, one abstention.

Mr. Kelsey: Okay. Well I had always heard that abstentions are a no vote, but –

Mr. Wiggins: (Unintelligible.) So long as we have a quorum.

(End of proceeding.)

JUNE 15th 2014

Harvey C Jenkins PhD MD

Pain Policy Changes

Patient Name: _____ Date: _____

Recently, The State of Oklahoma, The Oklahoma State Medical Board, and the Oklahoma Bureau of Narcotics & Dangerous Drugs (OBNDD) have implemented new measures in response to the epidemic of abuse of pain medicines and other controlled substances in the State of Oklahoma. You may be aware of some of these measures, as well as some of the troubling examples of this abuse in our state including accidental overdoses and deaths. As a result, prescribing pain medicines by physicians and the consumption of these medications by patients are undergoing intense scrutiny to minimize the occurrence of dependency, addiction, overdose, toxicity, deaths and other potential complications. In our continuing effort to provide the highest standards in pain management, Dr. Jenkins and his staff have implemented new policies consistent with this goal. These policy changes will go into effect on June 15, 2014.

These policy changes are designed primarily to continue to provide the safest methods of managing your pain. These changes are listed below. Please read and place your initials by each change signifying that you understand each policy.

- 1) Narcotic medication, as well as all controlled-substances in Class II, III will be limited to no more than **120 tablets-per-month total**. These classes include (Short-acting and long-acting versions of Hydrocodone, Oxycodone, Morphine, Demerol, Oxymorphone/Opana, Hydromorphone/Dilaudid, Codeine, Fiorcet/Fiorinal, Trezix to list the most common). _____ **initial**
- 2) Patients who are already taking more than this amount will have the options of :
 - a) Weaning from the current level down to the new lower level.
 - b) Switching to a long-acting medication such as Butrans, Ultram ER, Zohydro ER (Hydrocodone ER), Oxycodone ER (, Morphine ER, Fentanyl (Duragesic patch)/ Subsys (sublingual), Exalgo, Oxycodone ER, Xartemis XR/(Percocet ER), with or without a short-acting medication.
 - c) Returning to Family Practitioner/PCP for other options. _____ **initial**
- 3) Medications not prescribed by Dr. Jenkins, or not approved by Dr. Jenkins related to a planned surgical procedure, dental procedure, Emergency Department visit, that appear in Urine testing or by 3rd party reporting will result in Dr. Jenkins no longer being able to provide controlled pain medication. It is your responsibility to promptly notify this clinic of any prescribed medications that are controlled-substances. _____ **initial**
- 4) Psychiatric Medications, including those for Anxiety (such as Xanax, Valium, Ativan) and Depression (Lexapro, Doxepine) will no longer be prescribed by Dr. Jenkins. Psychiatric medicines may be prescribed by your PCP or Psychiatrist at their discretion. It is, however, your responsibility to report these medications to Dr. Jenkins and his staff for your protection. _____ **initial**
- 5) Soma (Carisoprodol), a muscle relaxer has been implicated in liver damage with long-term use. Accordingly, soma will not be prescribed for more than twice per-day, or for longer than 2 months in a calendar year. I understand that there are many other safer options. _____ **initial**
- 6) We will not prescribe 2 short-acting pain medications simultaneous, in that it facilitates de-sensitivity to both medication. _____ **initial**
- 7) We will no longer prescribe medications for other health conditions such as high blood pressure, estrogen replacement, and antibiotics including cough syrup and related medications. These must be obtained from your PCP or family physician. If the prescribed medication does contain controlled-substances, it is your responsibility to report these to us when they are prescribed. _____ **initial**
- 8) Suboxone and Methadone will not be prescribed in this clinic. _____ **initial**

Patient Signature

Date Signed