

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH ¹

Marc Baer, D.P.M.
615 Talcottville Road (Route 83)
Vernon, CT 06066

Petition No. 921028-19-004

MEMORANDUM OF DECISION

PROCEDURAL BACKGROUND:

The Department of Public Health and Addiction Services ("Department") presented the Connecticut Board of Examiners in Podiatry ("Board") with a Statement of Charges issued against Marc Baer, D.P.M. ("Respondent"), dated January 9, 1995. The Department presented the Board with a First Amended Statement of Charges dated February 10, 1995. The First Amended Statement of Charges alleged in seven counts that the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(3), §20-59(4), and/or §20-59(11) taken in conjunction with Regulations of Connecticut State Agencies §19a-14-40 and §19a-14-41. (Department Exhibits 1 and 2).

Prior to the initiation of these charges, the Department offered the Respondent the opportunity to attend compliance conferences scheduled on May 23, 1994 and September 30, 1994 to demonstrate compliance with all lawful requirements for the retention of his license. (Department Exhibits 4 and 5).

The Department served the Notice of Hearing and Statement of Charges on the Respondent by certified mail, return receipt requested. (Department Exhibit 1). The Respondent's Answer and Special Defenses was dated March 30, 1995. (Respondent Exhibit A).

¹ Effective July 1, 1995, the Department of Public Health and Addiction Services became the Department of Public Health. Conn. Pub. Acts No. 95-257.

The Respondent filed a Motion to Dismiss on May 19, 1995. The first four paragraphs of such Motion were identical to the Respondent's Special Defenses. (Transcript 5/24/95 p. 52). The Department's Objection to such Motion to Dismiss was dated May 24, 1995. The Board denied the Motion during the first day of hearing. (Transcript 5/24/95 p. 54). Immediately thereafter, the Respondent orally presented a second Motion to Dismiss, to which the Department also objected. The Board denied the second Motion to Dismiss. (Transcript 5/24/95 pp. 54-68).

On May 24, 1995, July 14, 1995, September 20, 1995, and November 16, 1995, the Board held administrative hearings to adjudicate the Respondent's case. The Respondent appeared with his attorney, Richard Brown, Esq., for Brown, Paindiris & Zarella. The Department was represented by Roberta Swafford, Esq. The parties filed simultaneous briefs on December 29, 1995.

At the May 24, 1995 hearing, by agreement of the parties, the Department orally amended the First Amended Statement of Charges to reflect a change in the numbering of one of the statutory sections cited. (Transcript 5/24/95 pp. 36-37).

The Board conducted the hearings in accordance with Connecticut General Statutes Chapter 54 and the Regulations of Connecticut State Agencies §19-2a-1, et seq. Richard Cutler, D.P.M., recused himself prior to the beginning of these hearings. (Transcript 5/24/95 p. 3). Martin Pressman, D.P.M., participated in the hearings, but recused himself from the final fact finding portion of the case. Neither Dr. Cutler nor Dr. Pressman participated in this decision. On June 3, 1996, the Board notified the parties that it would entertain motions to reopen the case for the sole purpose of providing additional expert testimony. Neither party responded during the time period provided. At its fact finding, the Board considered and denied the Respondent's Special Defenses.

All Board members participating in this decision received complete copies of the record and attest that they have either heard the case or read the record in its entirety. This decision is based entirely on the record.

ALLEGATIONS:

1. The Department alleged that the Respondent is, and has been at all times referenced in the Statement of Charges, the holder of Connecticut podiatric medicine license number P00326. (Department Exhibit 2).

With Regard to the First Count:

2. In the First Count of the Statement of Charges, the Department alleged that on or about January 12, 1985, Lillian Caron sought treatment from the Respondent for a primary complaint of calluses ("lesion") on the plantar aspect of her right foot, and that on or about April 18, 1985, the Respondent performed a bunionectomy, a tibial sesamoidectomy, and/or an osteotomy of the first proximal phalanx of Ms. Caron's right foot. (Department Exhibit 2).
3. The Department alleged that in providing such care to Ms. Caron, the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(4) because he: (a) failed to address the painful lesion; (b) failed to biopsy the lesion prior to performing surgery; (c) improperly treated the lesion, including but not limited to performing a bunionectomy and/or tibial sesamoidectomy; and/or (d) failed to properly prescribe and/or administer various medications. (Department Exhibit 2).

With Regard to the Second Count:

4. In the Second Count of the Statement of Charges, the Department alleged that on or about February 19, 1987, the Respondent performed a total joint implant on Ms. Caron's right foot. The Department alleged that in providing such care to Ms. Caron, the Respondent's conduct subjected his license to disciplinary action

pursuant to Connecticut General Statutes §20-59(4) because he failed to properly prescribe and/or administer medication, in that he administered: (a) Versed without appropriate monitoring; and/or (b) dexamethasone acetate in conjunction with implant surgery. (Department Exhibit 2).

With Regard to the Third Count:

5. In the Third Count of the Statement of Charges, the Department alleged that either in 1985 or in 1987, when providing surgical care to Ms. Caron as alleged above, the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(4), because he: (a) removed too much bone from the head of the first metatarsal and/or the base of the first proximal phalanx; and/or (b) inserted an oversized implant. (Department Exhibit 2).

With Regard to the Fourth Count:

6. In the Fourth Count of the Statement of Charges, the Department alleged that the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(3) because in conjunction with the surgeries referenced above in the First and Second Counts, the Respondent engaged in fraudulent or deceptive conduct because he prepared, or caused to be prepared, itemized statements of the surgical procedures he performed, which statements: (a) "fractionalized" the charges which unnecessarily raised the total cost for the procedures; and/or (b) charged twice for a tibial sesamoidectomy of Ms. Caron's right foot. (Department Exhibit 2).

With Regard to the Fifth Count:

7. In the Fifth Count of the Statement of Charges, the Department alleged that the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(4), and/or §20-59(11) taken in conjunction with Regulations of Connecticut State Agencies §19a-14-40 and §19a-14-41,

because the Respondent failed to document appropriately in his medical records the assessment, diagnosis, and/or treatment rendered to Ms. Caron. (Department Exhibit 2).

With Regard to the Sixth Count:

8. In the Sixth Count of the Statement of Charges, the Department alleged that on or about May 11, 1993, Pamela Morrison sought treatment from the Respondent for debridement of calluses on the plantar aspect of her right foot, and/or toenail trimming, and that on that date, the Respondent performed a simple debridement on both of Ms. Morrison's feet. (Department Exhibit 2).
9. The Department alleged that the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(4), because prior to performing said debridements, the Respondent performed a medically unwarranted vascular analysis. (Department Exhibit 2).

With Regard to the Seventh Count:

10. In the Seventh Count of the Statement of Charges, the Department alleged that the Respondent's conduct subjected his license to disciplinary action pursuant to Connecticut General Statutes §20-59(3), because on or after May 11, 1993, the Respondent billed Ms. Morrison's insurance company for said vascular analysis and for debridements involving removal of calluses below the skin line when, in fact, he performed only simple callus debridements. (Department Exhibit 2).

FINDINGS OF FACT:

1. The Respondent is, and has been at all times referenced in the Statement of Charges, the holder of Connecticut podiatric medicine license number P00326. (Department Exhibits 2 and 3; Respondent Exhibit A).

2. In 1990, the Respondent entered into a consent order with the Department which addressed the following allegations regarding two prior patients: billing for treatments not performed, false documentation of such treatments, and misrepresentation to one of the patients regarding the cost of treatment. (Department Exhibit 24).
3. Michael Sabia Jr. is certified in the American Council of Certified Podiatric Physicians and Surgeons and is board eligible in the American Board of Podiatric Surgery. Dr. Sabia holds licenses for the practice of podiatry in Connecticut since 1970 and Vermont since 1975. He commenced his practice as a general practitioner in podiatry in 1971. (Transcript 7/14/95 pp. 45-48; Department Exhibit 26).
4. Dr. Sabia performed a blind review for the Department of the records of the Respondent's treatment of Lillian Caron between 1985 and 1988. Dr. Sabia believed that he was able to make a medical judgment based on a reasonable degree of medical certainty without access to the Respondent's radiographs of Ms. Caron. Dr. Sabia also viewed radiographs taken by Dr. Loren Schneider, Ms. Caron's subsequent treater. Further, Dr. Sabia reviewed the Respondent's treatment of Pamela Morrison. (Transcript 7/14/95 pp. 48-50; Transcript 9/20/95 pp. 91-92, 110-111).
5. The Board finds that Dr. Sabia is qualified to provide an expert opinion regarding all allegations in this case, even though he never treated or physically examined Ms. Caron and Ms. Morrison, nor had access to the Respondent's radiographs of Ms. Caron.

With Regard to the First Count:

6. On or about January 12, 1985, Lillian Caron sought treatment from the Respondent for a primary complaint of calluses ("lesion") on the plantar aspect of

her right foot. (Transcript 7/14/95 pp. 50-54; Transcript 9/20/95 pp. 92-93; Department Exhibit 8).

7. On or about April 18, 1985, the Respondent performed a bunionectomy, a tibial sesamoidectomy, and an osteotomy of the first proximal phalanx of Ms. Caron's right foot. (Transcript 7/14/95 pp. 57-60; Department Exhibit 8).
8. The Respondent: (a) failed to address the painful lesion; (b) failed to biopsy the lesion prior to performing surgery; and (c) improperly treated the lesion, including but not limited to performing a bunionectomy and tibial sesamoidectomy. (Transcript 7/14/95 pp. 54-56; 62-76; Transcript 9/20/95 pp. 108-109; Department Exhibit 8).
9. Dr. Sabia opined and the Board finds that in 1985, the Respondent fell below the acceptable standard of care for podiatrists in his surgical treatment of Ms. Caron on April 18, 1985. (Transcript 7/14/95 pp. 72, 76-77).

With Regard to the Second Count:

10. On or about February 19, 1987, the Respondent performed a total joint implant on Ms. Caron's right foot. (Transcript 7/14/95 pp. 77-78; Department Exhibit 8).
11. In providing such care to Ms. Caron, the Respondent failed to properly prescribe and administer medication, because he administered Versed without appropriate monitoring. (Transcript 7/14/95 pp. 78-86; Department Exhibit 8).
12. Dr. Sabia opined and the Board finds that the Respondent fell below an acceptable standard of care in 1987 in his use of Versed during Ms. Caron's surgery. (Transcript 7/14/95 p. 105).

With Regard to the Third Count:

13. Either in 1985 or in 1987, when providing surgical care to Ms. Caron as provided above, the Respondent: (a) removed too much bone from the base of the first proximal phalanx; and (b) inserted an oversized implant. (Transcript 7/14/95 pp. 108-120; Transcript 9/20/95 pp. 3-4, 88-90; Department Exhibits 8 and 10).
14. Dr. Sabia opined and the Board finds that in February of 1987, the Respondent fell below the acceptable standard of care for podiatrists in the implant surgery he performed on Ms. Caron, due to the amount of bone that was removed and the altering of the joint surface of the implant. (Transcript 7/14/95 p. 120).
15. Dr. Sabia opined and the Board finds that between 1985 and 1987, the Respondent fell below an acceptable standard of care for podiatrists because he removed more than the normal amount of bone from Ms. Caron's first proximal phalanx during that period of time. (Transcript 7/14/95 pp. 120-121).

With Regard to the Fourth Count:

16. In conjunction with the surgeries referenced above in the First and Second Counts, the Respondent engaged in fraudulent or deceptive conduct because he prepared, or caused to be prepared, itemized statements of the surgical procedures he performed, which statements: (a) "fractionalized" the charges, which unnecessarily raised the total cost for the procedures; and (b) charged twice for a tibial sesamoidectomy of Ms. Caron's right foot. (Transcript 7/14/95 pp. 121-137, 185-187; Transcript 9/20/95 pp. 102-107; Department Exhibit 8).
17. The Board finds that the Respondent's bills for Ms. Caron's treatment on April 18, 1985 and February 19, 1987 were deceptive, based on Dr. Sabia's expert opinion. (Transcript 7/14/95 pp. 144-145).

With Regard to the Fifth Count:

18. The Respondent failed to document appropriately in his medical records the assessment, diagnosis, and treatment rendered to Ms. Caron. His records did not include necessary information on the angle of any cuts. The Respondent referred only to an angulational bunionectomy and an osteotomy. (Transcript 7/14/95 pp. 59-61, 73-76, 147-150; Transcript 9/20/95 pp. 18-19; Department Exhibit 8).
19. Dr. Sabia opined and the Board finds that the Respondent fell below an acceptable standard of care for podiatrist in 1985 and 1987 in the medical records he prepared for his treatment of Ms. Caron. (Transcript 7/14/95 pp. 149-150).

With Regard to the Sixth Count:

20. On May 11, 1993, Pamela Morrison sought treatment from the Respondent for debridement of calluses on the plantar aspect of her right foot, and toenail trimming. (Transcript 7/14/95 pp. 9-11, 16, 150-153; Department Exhibit 15).
21. On May 11, 1993, the Respondent performed a simple debridement on both of Ms. Morrison's feet. (Transcript 7/14/95 p. 16; Department Exhibit 15).
22. Prior to performing said debridements, the Respondent performed a medically unwarranted vascular analysis. (Transcript 7/14/95 pp. 11-16, 153-159; Transcript 9/20/95 pp. 101-102; Department Exhibit 15).
23. Dr. Sabia opined and the Board finds that the Respondent fell below an acceptable standard of care for podiatrists in performing such a vascular analysis on Ms. Morrison. (Transcript 7/14/95 pp. 158-159).

With Regard to the Seventh Count:

24. On or after May 11, 1993, the Respondent billed Ms. Morrison's insurance company for said vascular analysis and for debridements involving removal of calluses below the skin line when, in fact, he performed only simple callus debridements. (Transcript 7/14/95 pp. 18-19, 41-42, 159-170; Department Exhibits 12, 14, 19, and 20; Respondent Exhibit B).
25. The Board finds that the health insurance claim form the Respondent submitted for the treatment of Ms. Morrison did not represent what was done and was fraudulent and deceptive, based on Dr. Sabia's expert opinion. (Transcript 7/14/95 pp. 184-185).

DISCUSSION AND CONCLUSIONS OF LAW:

Connecticut General Statutes §20-59 provides in pertinent part:

The board may take any of the actions set forth in section 19a-17 for any of the following reasons: ... (3) fraudulent or deceptive conduct in the course of professional services or activities; (4) illegal or incompetent or negligent conduct in the practice of podiatry; ... or (11) violation of any provision of this chapter or any regulation adopted hereunder....

Regulations of Connecticut State Agencies §19a-14-40 addresses what a medical record should include. Regulations of Connecticut State Agencies §19a-14-41 includes podiatrists in the group of licensed professionals who are required to maintain appropriate medical records.

The Department bears the burden of proof by a preponderance of the evidence in this matter. With regard to the First Count, the Department sustained its burden of proof as to all allegations except that set forth in Paragraph 4d., that the Respondent failed to properly prescribe and/or administer various medications. With regard to the Second Count, the Department sustained its burden of proof as to all allegations except that set

forth in Paragraph 8b., that the Respondent administered dexamethasone acetate in conjunction with implant surgery. The Department sustained its burden of proof with regard to all allegations in the Third Count.

With regard to the Fourth Count, the Department sustained its burden of proof as to all allegations except that set forth in Paragraph 14a., that the Respondent's "fractionalization" of the charges subjected his license to disciplinary action. The Board found that the Respondent did actually fractionalize the charges, which unnecessarily raised the total cost for the procedures. However, because of the Respondent's 1990 consent order with the Department, Dr. Cutler has reviewed certain of his files and has found the Respondent to be in compliance with regard to fee issues. The Respondent's "fractionalization" problem with Ms. Caron's fees existed prior to his consent order. Although such consent order deals with different patients and nothing prevents the Board from disciplining the Respondent, the Board chooses, due to the unique circumstances of this case, not to discipline the Respondent on this Count.

With regard to the Fifth Count, the Respondent did fail to document appropriately in his medical records the assessment, diagnosis, and treatment rendered to Ms. Caron. Again, however, the Board will not discipline him on this issue because his documentation problem with Ms. Caron existed prior to his consent order. The Department sustained its burden of proof with regard to all allegations in the Sixth and Seventh Counts. The Respondent's conduct with regard to Ms. Morrison occurred in 1993, well after his 1990 consent order with the Department. Accordingly, the Board will impose discipline on the Respondent with regard to such conduct.

The Board found both Dr. Sabia and Dr. Thomas Walter, the Respondent's expert, to be credible. However, where the opinions of the two experts differed, the Board afforded greater weight to the testimony of Dr. Sabia. The Board did not find the Respondent to be credible; he did not take responsibility for his own actions.

For the conduct proven in the First, Second, Third, and Sixth Counts, the Board finds that the Respondent violated Connecticut General Statutes §20-59(4). For the conduct proven in the Fourth and Seventh Counts, the Board finds that the Respondent violated Connecticut General Statutes §20-59(3).

ORDER:

Pursuant to the authority vested in it by Connecticut General Statutes §19a-17 and §20-59, the Board orders the following in this case against Marc Baer, D.P.M., Petition No. 921028-19-004, podiatric medicine license number P00326:

1. As to each of the First, Second, Third, Fourth, Sixth and Seventh Counts, the Respondent's license shall be suspended for a period of six (6) months. Said suspensions shall run concurrently.
2. The Board places the following conditions on the Respondent's suspension:
 - a. The Department shall retain the Respondent's license through the course of his suspension. Once the Respondent's suspension is lifted, the Department will return his license if he has complied with all conditions of this decision.
 - b. Within one (1) week of the effective date of this decision, the Respondent shall provide the Board with a list of all institutions in Connecticut where he currently provides podiatric services.
 - c. Within one (1) week of the effective date of this decision, the Respondent shall notify all institutions in Connecticut where he currently provides podiatric services that he has been suspended.

3. Any deviation by the Respondent from the conditions of this decision shall result in the following procedure:
 - a. The Respondent will be notified in writing that the conditions have been violated, provided no prior written consent for deviation from the conditions had been granted by the Department;
 - b. Such notification shall state the act(s) or omission(s) which violated such conditions;
 - c. The Respondent will be allowed fifteen (15) days to demonstrate to the Department that he was in compliance with the conditions or to cure the violation(s) of such conditions;
 - d. If the Respondent does not demonstrate compliance or cure the violation(s) by the limited fifteen (15) day date certain contained in the notification of violation(s) to the satisfaction of the Department, his license shall be revoked unless he requests a hearing as provided below;
 - e. The Respondent shall initiate said hearing through a written request by certified mail to the Department, mailed within thirty (30) days from the date of mailing of the notification of violation(s) of the conditions of this decision;
 - f. The Respondent shall be entitled to a hearing before the Board if he requests the same in a timely fashion; and
 - g. Evidence presented to said Board by either the Department or the Respondent shall be limited to the alleged violation(s) of the conditions of this decision.

4. The Respondent shall be assessed a civil penalty of two thousand dollars (\$2,000.00) for the Sixth Count. The two thousand dollar (\$2,000.00) penalty shall be paid by certified check, payable to Treasurer, State of Connecticut, sent to Bonnie Pinkerton, State of Connecticut Department of Public Health, Medical Quality Assurance, 410 Capitol Avenue MS #12INV, P.O. Box 340308, Hartford, CT 06134-0308, and due within six (6) months of the effective date of this Order. The certified check shall include the Department petition number on its face for identification purposes.
5. A copy of this decision shall be sent to the Massachusetts Board of Examiners in Podiatry, Division of Registration.
6. This Order shall become effective on August 1, 1996.

Connecticut Board of Examiners in Podiatry

7/24/96
Date

Harold S. Diamond, D.P.M.
by: Harold S. Diamond, D.P.M.,
Acting Chairperson