[Cite as *Temponeras v. Ohio State Med. Bd.*, 2015-Ohio-3043.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Margy Temponeras, M.D.,	:	
Appellant-Appellant,	:	No. 14AP-970 (C.P.C. No. 13CVF-8019)
v.	:	(REGULAR CALENDAR)
Ohio State Medical Board,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 30, 2015

Barbin Law, Inc., *Bradley Davis Barbin*, and *Rachael M. Price*, for appellant.

Michael DeWine, Attorney General, and *Henry G. Appel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Margy Temponeras, M.D., appellant, appeals the judgment of the Franklin County Court of Common Pleas in which the court affirmed the order by the State Medical Board of Ohio ("board"), appellee.

{¶ 2} Appellant has been a licensed physician since 1997. In May 2011, the United States Drug Enforcement Administration ("DEA") suspended appellant's certificate of registration to prescribe drugs, based upon appellant's over-prescribing controlled substances, mostly Oxycodone and Xanax; the overdose deaths of several of her patients; and her unauthorized distribution of controlled substances. Appellant was operating two companies in the same building, a pain management clinic (Unique Pain Management)

and a medication dispensary (Unique Relief). Appellant's father, Dr. John Temponeras, a gynecologist, also worked at appellant's clinic. Appellant and/or her father would write prescriptions for a patient in their clinic and then the patient would walk to another office to get the prescription filled by appellant's employees without any supervision by appellant. Over a three-year period, appellant prescribed 1.6 million dosage units of Oxycodone.

{¶ 3} In January 2012, the board indefinitely suspended appellant's Ohio medical license based on the DEA's suspension of her certificate of registration. However, at an October 2011 board hearing relating to the board's suspension of appellant's license, the mitigation testimony of "Patient 3" revealed that appellant had prescribed him controlled substances from October 2009 through May 2011, during which time they had been in a romantic relationship. During this period, appellant provided Patient 3 with 43 prescriptions for 30-day supplies of anti-anxiety medications and opioid pain killers. This court affirmed the board's suspension of appellant's medical license in *Temponeras v. State Med. Bd. of Ohio*, 10th Dist. No. 13AP-374, 2014-Ohio-225 ("*Temponeras*").

{¶ 4} In July 2012, the DEA revoked appellant's certificate of registration, based on appellant over prescribing pain medications and improper dispensing of the same without being registered as a pharmacist.

{¶ 5} On September 12, 2012, the board issued notice to appellant indicating that it proposed to take action against her Ohio medical license. On June 10, 2013, the board approved and adopted a proposed order of the board's hearing examiner and permanently revoked appellant's certificate to practice medicine and surgery, based on (1) the DEA's revocation of appellant's certificate of registration, pursuant to R.C. 4731.22(B)(24), and (2) appellant's violation of a law or board rule with regard to prescribing medication to Patient 3, with whom she had a personal and emotional relationship pursuant to R.C. 4731.22(B)(20). The board found that appellant's violation of R.C. 4731.22(B)(24) alone was sufficient to revoke her medical license because appellant was effectively operating an unlicensed pharmacy with laypersons dispensing controlled substances, but also found her violations regarding Patient 3 warranted revocation of her license.

{¶ 6} Appellant appealed the board's order to the Franklin County Court of Common Pleas. On October 24, 2014, the common pleas court affirmed the board's order.

Appellant appeals the judgment of the trial court, asserting the following three assignments of error:

> I. THE STATE MEDICAL BOARD OF OHIO RELIED SOLELY UPON UNSUPPORTED HEARSAY EVIDENCE SUBMITTED BY A FEDERAL AGENCY WITHOUT PROVIDING SUFFICIENT TESTIMONY OR CORROBORATIVE EVIDENCE.
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> II. O.R.C. 4731.22(B)(24) IS UNCONSTITUTIONAL BECAUSE IT PERMITS A STATE AGENCY TO WHOLLY ABDICATE AND DELEGATE ITS DUTIES TO A FEDERAL AGENCY IN VIOLATION OF THE OHIO CONSTITUTION, THE OHIO REVISED CODE, AND THE OHIO ADMINISTRATIVE CODE.
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> III. THE STATE MEDICAL BOARD OF OHIO ERRED IN ITS DECISION TO PERMANENTLY REVOKE DR. TEMPONERAS' MEDICAL LICENSE BASED ON A VIOLATION OF O.R.C. 4731.22(B)(20) AND O.A.C. 4731-11-08(B) BECAUSE DR. TEMPONERAS TREATED PATIENT 3 IN AN ONGOING "EMERGENCY SITUATION."

{¶ 7} Appellant argues in her first assignment of error that the board relied on unsupported hearsay evidence submitted by a federal agency without providing sufficient testimony or corroborative evidence. In an administrative appeal, pursuant to R.C. 119.12, the common pleas court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence, and is in accordance with the law. *Schechter v. Ohio State Med. Bd.*, 10th Dist. No. 04AP-1115, 2005-Ohio-4062, ¶ 55. "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id*. "Substantial" evidence is evidence with some weight; it must have importance and value. *Id*.

{¶ 8} The common pleas court's " 'review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court "must appraise all [the] evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight [thereof]." ' " *Akron v. Ohio Dept. of Ins.*, 10th Dist. No. 13AP-473, 2014-Ohio-96, ¶ 19, quoting *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio

App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The court must give due deference to the administrative determination of conflicting testimony, including the resolution of credibility conflicts. *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d 526, 528 (10th Dist.1991). The court must defer to the agency's findings of fact unless they are " 'internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.' " *Kimbro v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 12AP-1053, 2013-Ohio-2519, ¶ 7, quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993). However, the common pleas court reviews legal questions de novo. *Akron* at ¶ 19, citing *Ohio Historical Soc.* at 471.

{¶ 9} Our review is more limited than that of the common pleas court. *Smith v. State Med. Bd. of Ohio*, 10th Dist. No. 12AP-234, 2012-Ohio-4423, ¶ 13. In reviewing the court of common pleas' determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Id.*, citing *Roy v. Ohio State Med. Bd.*, 80 Ohio App.3d 675, 680 (10th Dist.1992). An abuse of discretion occurs when a decision is unconscionable, unreasonable, or arbitrary. *Weiss v. State Med. Bd. of Ohio*, 10th Dist. No. 13AP-281, 2013-Ohio-4215, ¶ 15, citing *State ex rel. Nese v. State Teachers Retirement Bd. of Ohio*, 136 Ohio St.3d 103, 2013-Ohio-1777, ¶ 25. When determining whether the board's order was in accordance with the law, our review is plenary. *Id.*, citing *Univ. Hosp., Univ. of Cincinnati College of Med. v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 10} R.C. 4731.22 provides:

> (B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
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> * * *
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> (20) * * * [V]iolating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or

> conspiring to violate, any provisions of this chapter or any rule promulgated by the board.
>
> * * *
>
> (24) The revocation, suspension, restriction, reduction, or termination of clinical privileges by the United States department of defense or department of veterans affairs or the termination or suspension of a certificate of registration to prescribe drugs by the drug enforcement administration of the United States department of justice[.]

{¶ 11} Ohio Adm.Code 4731-11-08(B) and (C) provide:

> Accepted and prevailing standards of care require that a physician maintain detached professional judgment when utilizing controlled substances in the treatment of family members. A physician shall utilize controlled substances when treating a family member only in an emergency situation which shall be documented in the patient's record.
>
> For purposes of this rule, "family member" means a spouse, parent, child, sibling or other individual in relation to whom a physician's personal or emotional involvement may render that physician unable to exercise detached professional judgment in reaching diagnostic or therapeutic decisions.

{¶ 12} In the present case, appellant argues that the board did not call as a witness any DEA or board witness or present any other evidence regarding appellant's purported violation of DEA rules. Appellant contends that no investigators provided any testimony against her, and the board relied solely upon the DEA's order. Appellant claims the board should be required to provide some corroborative testimony regarding the DEA's order. However, appellant fails to cite any case law for the proposition that a DEA order revoking a certificate of registration to prescribe drugs is insufficient by itself to constitute a violation of R.C. 4731.22(B)(24). Appellant raised the exact same issue in *Temponeras* with regard to the DEA's order to suspend her certificate of registration, and we rejected it. In *Temponeras*, we cited the language in R.C. 4731.22(B)(24) that explicitly allows the board to take action against an individual's medical license if the DEA terminates or suspends the individual's DEA certificate of registration. *Id.* at ¶ 14. We found that the statute does not obligate the board to present evidence to support the DEA termination or

suspension. *Id*. Rather, we explained, R.C. 4731.22(B)(24) grants the board authority to take immediate action against an individual's medical license once the board receives evidence that the DEA has terminated or suspended the license holder's DEA certificate of registration. Therefore, we concluded, pursuant to R.C. 4731.22(B)(24), the fact that the DEA suspended appellant's DEA certificate of registration was all the board needed in order to take action against her medical license. *Id*. at ¶ 15. We noted that the proceedings before the board cannot be used as a means of conducting a collateral attack on the DEA decision to suspend appellant's certificate of registration. *Id*., citing *Coniglio v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-298, 2007-Ohio-5018, ¶ 10.

{¶ 13} Applying the same analysis as we did in *Temponeras* to the present case, we find the DEA's order constituted reliable, probative, and substantial evidence that the DEA had immediately revoked appellant's DEA certificate of registration to prescribe drugs. *Id*. at ¶ 16. Accordingly, the board's order revoking appellant's medical license was in accordance with law pursuant to R.C. 4731.22(B)(24). Appellant's first assignment of error is overruled.

{¶ 14} Appellant argues in her second assignment of error that R.C. 4731.22(B)(24) is unconstitutional as applied because it permits a state agency to wholly abdicate and delegate its duties to a federal agency in violation of the Ohio Constitution, Ohio Revised Code, and Ohio Administrative Code. Statutes, ordinances, and administrative rules may be constitutionally challenged on their face or as applied. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 20, citing *Jones v. Chagrin Falls*, 77 Ohio St.3d 456 (1997). Facial challenges allege that no set of circumstances exists under which the act would be valid. *Id*. at ¶ 21, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). A party raising an as-applied constitutional challenge, on the other hand, alleges that the application of the statute in the particular context in which he has acted or proposes to act would be unconstitutional. *Id*. at ¶ 22.

{¶ 15} Parties advancing an as-applied challenge must raise that challenge at the first available opportunity, and failure to do so results in waiver. *Wymsylo* at ¶ 20. They need not do so if arguing a facial challenge. *Id*., citing *Bd. of Edn. South-Western City Schools v. Kinney*, 24 Ohio St.3d 184 (1986), syllabus, and *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, ¶ 16. Thus, a facial constitutional challenge may be

raised for the first time in an appeal from an administrative agency, but an as-applied constitutional challenge must be raised first in the agency to allow the parties to develop an evidentiary record. *Id.*, citing *Reading*. *See also Garrett v. Columbus Civ. Serv. Comm.*, 10th Dist. No. 11AP-1113, 2012-Ohio-3271 (a facial challenge is decided without regard to extrinsic facts, while an as-applied challenge requires extrinsic facts, and the litigant must raise the as-applied challenge, in the first instance, before the administrative agency to allow the parties to develop an evidentiary record).

{¶ 16} Appellant has raised an as-applied constitutional challenge as to R.C. 4731.22(B)(24). However, because appellant did not raise this constitutional challenge before the board, appellant has waived the issue for purposes of appeal. Therefore, we overrule appellant's second assignment of error.

{¶ 17} Appellant argues in her third assignment of error that the board erred when it permanently revoked her medical license based upon a violation of R.C. 4731.22(B)(20) and Ohio Adm.Code 4731-11-08(B), which permits a physician to prescribe a controlled substance to a family member only in an "emergency situation." Appellant contends that Patient 3 had a heart attack on October 9, 2009, and she prescribed him pain medication for the following three months due to excruciating pain in his shin. She asserts that Patient 3 could not work, had little mobility, and had no quality of life from October 2009 through May 2011. Appellant claims that the heart attack and pain created an ongoing "emergency situation," and her father, Dr. John Temponeras, was actually Patient 3's pain management doctor after December 2009. Appellant points out that she referred Patient 3 to 14 other doctors for his leg problems, but no one else could help him. Appellant also argues that she relied on the legal advice of an attorney, who said she was permitted to treat Patient 3 despite their personal relationship.

{¶ 18} Patient 3 testified that he began a personal relationship with appellant in 2003. In October 2009, appellant prescribed him Oxycodone and Percocet after having a "silent" heart attack that progressively prevented him from getting out of bed and caused excruciating leg pain. He called it a life-or-death situation. He could not walk, he cried, he yelled, and the vascular pain was indescribable. Although he admitted that appellant's name continued to appear on prescriptions for him for pain and anxiety medications, including Xanax, until about April or May 2011, Patient 3 testified that it was actually

appellant's father who was treating him nearly exclusively starting in January 2010. He said he saw a multitude of other physicians during this period for his leg, but they would not prescribe him any pain medication and they advised him to continue pain management with appellant. However, Patient 3 admitted that only one of the doctors he saw during this period knew he had a personal relationship with appellant. Patient 3 insisted that appellant continued to prescribe these medications every 30 days because it was an emergency situation. Also, although he claimed he could not go to urgent care or any other doctor for pain medications during this time, he admitted that he received prescriptions for pain medication from appellant's father during this period. Patient 3 also testified that he and appellant met with appellant's attorney, and the attorney told them that it was legal for her to prescribe medication for him. He testified that he began pain management with another doctor five or six blocks from appellant's office after appellant's practice was raided and she lost her DEA certificate of registration.

{¶ 19} In the report and recommendation issued by the board's hearing examiner, the examiner found that, although Patient 3 claimed it was actually Dr. John Temponeras who was prescribing his medication after December 2009, during the October 2011 hearing in the prior related case, Patient 3 testified that appellant had treated him for pain management on a continuing basis and did not mention Dr. John Temponeras when he listed his other treating physicians. The examiner found that Patient 3's attempts to minimize appellant's involvement in prescribing controlled substances to him were not credible because he changed his answers several times about the duration and dates of appellant's treatment of him; he claimed he was not mobile enough to see any other doctors but admitted he saw 8 to 12 other doctors for his leg during the time of appellant's treatment of him; he said his other doctors referred him back to appellant for pain management, but admitted that only one of those doctors knew he had a personal relationship with her; he did not explain why he would not have immediately sought emergency room treatment and pain medication through an emergency room physician for the devastating pain he suddenly began suffering in October 2009; and Patient 3's personal relationship with appellant. The examiner also found that Patient 3's testimony, at best, supported short-term emergency pain treatment when he initially began suffering the pain in his leg, but certainly not ongoing 30-day prescriptions.

{¶ 20} We concur with the board's well-founded findings, and a lengthy rephrasing of those findings by this court is unnecessary. Patient 3's situation was not an emergency from October 2009 until May 2011. At best, Patient 3's condition was an emergency only in early October 2009, and the emergency did not last until May 2011. *See, e.g.*, *Harris v. State Med. Bd.*, 10th Dist. No. 11AP-671, 2012-Ohio-4019, ¶ 26 (prescribing medications for one year goes beyond the period of any emergency). It was clear that Patient 3 was eventually able to travel to other doctors for treatment of his leg, and Patient 3 was able to find another pain management doctor only a few blocks away from appellant's office after appellant lost her DEA certificate of registration. Furthermore, we agree that there is no apparent reason why appellant could not refer Patient 3 to an emergency room or urgent care center. *See id*. (even if some of the situations could be termed "emergency," physician could have referred the patients to an urgent care center or emergency room instead of prescribing medications to persons with which he was engaging in sexual relations). The board's determination that Patient 3 lacked credibility was also well founded for the above-stated reasons. Patient 3's claim that Dr. John Temponeras was actually the prescribing doctor for most of the pertinent period was not believable without any corroborating evidence beyond Patient 3's biased assertion. For the foregoing reasons, we find the board's order regarding a violation of R.C. 4731.22(B)(20) and Ohio Adm.Code 4731-11-08(B) was in accordance with law. Appellant's third assignment of error is overruled.

{¶ 21} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and HORTON, JJ., concur.
