IN THE MATTER OF	*	**BEFORE THE**
AKRAM SALIHI, M.D.	*	**MARYLAND STATE**
Respondent.	*	**BOARD OF PHYSICIANS**
License Number D17536	*	**Case Number 2219-0178**

* * * * * * * * * * * * * *

FINAL DECISION AND ORDER

INTRODUCTION

On July 15, 2020, Disciplinary Panel A ("Panel A") of the Maryland State Board of Physicians ("Board") issued an Order for Summary Suspension, summarily suspending the license of Akram Salihi, M.D., pursuant to its authority under Md. Code Ann., State Gov't § 10-226(c)(2) (2014 Repl. Vol. & 2020 Supp.) and Md. Code Regs. ("COMAR") 10.32.02.08B(7), concluding that the public health, safety, or welfare imperatively required emergency action. On August 17, 2020, Panel A charged Dr. Salihi under the Maryland Medical Practice Act with being professionally, physically, or mentally incompetent, in violation of Md. Code Ann., Health Occ. § 14-404(a)(4). Dr. Salihi requested an evidentiary hearing to challenge the July 15, 2020 summary suspension and August 17, 2020 charges. The hearings were consolidated, and, on September 11, 2020, an evidentiary hearing was held before an Administrative Law Judge ("ALJ") at the Office of Administrative Hearings ("OAH").

Both parties offered testimony from fact witnesses and from expert witnesses who testified regarding Dr. Salihi's competence to practice medicine. On December 21, 2020, the ALJ issued a proposed decision concluding that the summary suspension was proper because the public health, safety or welfare imperatively required emergency action and that Dr. Salihi was mentally incompetent to practice medicine, in violation of Health Occ. § 14-404(a)(4). The ALJ

recommended that Dr. Salihi's license be suspended until he provides information to the Board to establish that he is mentally competent to resume the practice of medicine.

On December 19, 2020, Dr. Salihi filed exceptions to the ALJ's proposed decision, and the State filed a response. On December 23, 2020, the State filed exceptions to the ALJ's proposed decision. On February 24, 2021, both parties appeared before Disciplinary Panel B ("Panel B" or "the Panel") of the Board for an exceptions hearing.

FINDINGS OF FACT

Panel B adopts the ALJ's proposed findings of fact, numbers 1-23, with the modification discussed below. *See* ALJ proposed decision, attached as **Exhibit 1**.[1] These facts were proven by a preponderance of the evidence and are incorporated by reference into the body of this document as if set forth in full. The Panel also adopts the ALJ's discussion set forth on pages 10-21, which is incorporated into the body of this document as if set forth in full.

Dr. Salihi was licensed by the Board to practice medicine in the State of Maryland on December 19, 1974. His license is scheduled to expire on September 30, 2021. In or around January 2019, the Board received a complaint from a health insurance company alleging inappropriate conduct based on an anonymous tip of fraud received by the company. The health insurance company closed its case with no action, but the Board initiated an independent investigation of Dr. Salihi based on the complaint. As part of the investigation, Board compliance analysts conducted a telephone interview with Dr. Salihi. At the beginning of the interview, when Dr. Salihi was asked to provide his office address and phone number, Dr. Salihi asked his office manager, who was also present in the room, for the information. Dr. Salihi was then told that the office manager was not supposed to be present in the room and she was asked to leave. During

[1] The ALJ proposed decision has been redacted to remove confidential information from public view.

the interview, Dr. Salihi was asked for the names of former staff members who were employed at his former practice and he could not remember their names. As a result, Panel A sent Dr. Salihi for an independent evaluation, pursuant to Health Occ. § 14-402(a), to assess Dr. Salihi's competence to practice medicine. The evaluator opined that Dr. Salihi was not competent to safely practice medicine due to a progressive medical condition.

EXCEPTIONS

Dr. Salihi takes exception to one of the ALJ's proposed findings of fact and the conclusion of law that he was mentally incompetent to practice medicine. He argues that the ALJ misunderstood and misstated a crucial fact regarding a statement made by Dr. Salihi during his interview with Board staff. Dr. Salihi also argues that the report and the opinions of the independent evaluator hired by the Board should be rejected because the doctor did not personally administer the tests on which his opinion was based. Finally, he argues that the ALJ erred by failing to give sufficient weight to the testimony of his expert and fact witnesses. Each of Dr. Salihi's exceptions will be addressed, in turn.

I. Findings of Fact

Dr. Salihi takes exception to the ALJ's proposed finding of fact in paragraph 10 on page 5 of the proposed decision. The specific finding of fact is as follows:

> During the interview, [Dr Salihi] had difficulty remembering the names of former staff members at his practice . . . with whom he worked for almost ten years. When asked specifically if he remembered the two individuals [Dr. Salihi] replied: "I really don't recall them, I don't. I should, but I don't. I'm telling you the fact – the truth. I don't recall."

In a footnote, the ALJ clarified that Dr. Salihi later remembered one of the two employees he was asked about and explained that she had a different last name. Dr. Salihi argues that the ALJ misunderstood his statement, and he claims that he did not work with these individuals for ten

years, but that they were short term employees that he had worked with ten years ago, which explains why he did not remember their names. Dr. Salihi argues that this misunderstanding of the correct facts formed part of the basis for the ALJ's finding that Dr. Salihi was not competent to practice medicine.

The full context of Dr. Salihi's interview with Board staff reveals that he was employed at his former office location for approximately eight to ten years before he sold the practice in 2008. He explained that he was the owner of the practice and employed two staff, one at the front desk and one that worked in the back. Dr. Salihi was then asked to name the employees who worked for him and he was unable to remember their names. The Board investigator mentioned two specific names of individuals and he still did not recognize the names or remember the individuals. The investigator then stated: "I mean, Dr. Salihi, with all due respect, you worked with them for almost 10 years. So you're telling me you don't recall [] or []?"[2] Dr. Salihi responded: "I really don't recall them, I don't. I should, but I don't. I'm telling you the fact – the truth." Dr. Salihi was then asked if he had a lot of staff turnover and he responded: "Yeah, I think I did." As the ALJ noted, Dr. Salihi later remembered one of the employees and explained that he did not recognize the name because the employee had a different last name when she worked for him. For the first time, at the OAH hearing, Dr. Salihi testified that he hired one of the former employees he was asked about three months before he sold the practice, about ten years ago. Dr. Salihi also claimed that the individuals were short time employees. Panel B accepts Dr. Salihi's statement and position that these individuals were short time employees that Dr. Salihi had worked with ten years prior to the interview. As such, the Panel will remove the clause, "with whom he worked for almost ten years" from finding of fact paragraph 10. The remainder of the paragraph is

[2] The names of the employees have been redacted for purposes of confidentiality.

uncontested and Dr. Salihi admitted that he should have remembered the names. The details of Dr. Salihi's Board interview are relevant for explaining the reasons why Dr. Salihi was sent for a Health Occ. § 14-402 evaluation but are of little consequence when compared to the results of the evaluation itself.

Panel B has carefully reviewed the ALJ's proposed findings of fact and finds that each of the proposed findings of fact, with the small modification discussed above, was established in the record, and supported by a preponderance of the evidence.

II. Mental Incompetence

As a result of concerns regarding Dr. Salihi's memory and ability to answer questions during his interview with Board staff, the Board referred Dr. Salihi to the Maryland Professional Rehabilitation Program ("MPRP") for an independent evaluation to assess whether he was competent to practice medicine. The clinicians at MPRP performed an intake evaluation and expressed significant concerns regarding Dr. Salihi's cognitive functioning. The Medical Director of MPRP opined that Dr. Salihi was unsafe to practice medicine pending the results of a neurocognitive evaluation and referred Dr. Salihi to a neuropsychologist for purposes of conducting an independent neurocognitive evaluation to determine whether Dr. Salihi was competent to practice medicine. On July 14, 2020, Dr. Salihi underwent an independent evaluation by a neuropsychologist who conducted an in-person neuropsychological examination of Dr. Salihi with the assistance of a credentialed psychology associate.[3] The neuropsychologist concluded, after reviewing the results of the tests conducted by the psychology associate, that Dr. Salihi was not competent to practice medicine safely.

[3] The results of the tests performed as part of the evaluation are not disclosed in this document to protect Dr. Salihi's private health information.

Dr. Salihi obtained evaluations from a psychologist and a neurologist, in addition to his primary care physician, who all opined that Dr. Salihi was competent to practice medicine. At the OAH hearing, Dr. Salihi testified on his own behalf and presented testimony from the psychologist, who was accepted as an expert in general psychology, and a registered nurse who worked in Dr. Salihi's office, who testified as a fact witness. Dr. Salihi did not present testimony from his primary care physician or the neurologist who evaluated him. The State presented testimony from the Medical Director of MPRP, who was accepted as an expert in neurology, the independent evaluator, who was accepted as an expert in neuropsychology, and the Board compliance analyst, who was assigned to investigate the case.

Dr. Salihi takes exception to the ALJ's finding that he was mentally incompetent to practice medicine. He argues that the evaluations conducted by his experts and the opinion of his treating physician should be given more weight than the evaluation conducted by the State's expert. Dr. Salihi also argues that the ALJ erred by permitting the State's expert to testify and render an opinion on Dr. Salihi's competence when he did not personally conduct the testing on which his opinion was based. Finally, Dr. Salihi argues that the ALJ should have given more weight to his testimony and the testimony of the nurse practitioner who worked in his office.

A. Expert Testimony

The ALJ considered the testimony of the experts who testified at the OAH hearing, as well as the letter from Dr. Salihi's primary care physician and the report from the neurologist that Dr. Salihi hired to conduct an evaluation, which were admitted as exhibits. The ALJ explained that she did not find the letter written by Dr. Salihi's primary care physician or the report submitted by the neurologist to be persuasive regarding Dr. Salihi's competence to practice medicine because they did not testify at the OAH hearing and did not provide any basis for their conclusions in the

written submissions. In reaching her decision, the ALJ relied largely on the expert testimony from the State's experts and the psychologist, who testified on behalf of Dr. Salihi, and explained that she found the testimony of the State's expert to be more credible and persuasive.

The ALJ explained that Dr. Salihi's expert is a licensed psychologist whose practice largely involves the assessment of children and noted that he had evaluated only one other physician. Dr. Salihi's expert was also unfamiliar with many of the tests that the State's expert conducted and the ALJ was unconvinced that the limited tests that Dr. Salihi's expert performed were sufficient to make an accurate determination about Dr. Salihi's fitness to practice medicine. The Panel agrees with the ALJ's assessment of the expert testimony and, like the ALJ, gives greater weight to the testimony of the independent evaluator who testified on behalf of the State. *See Blaker v. State Board of Chiropractic Examiners*, 123 Md. App. 243, 259 (1998) ("When two experts offer conflicting opinions, the trier of fact must evaluate the testimony of both experts and decide which opinion, if either, to accept."). Thus, Panel B concurs with the ALJ and the State's experts that Dr. Salihi is mentally incompetent to practice medicine. Dr. Salihi's exception is denied.

B. Admission of Expert Report and Testimony

Dr. Salihi argues that the independent evaluator should not have been permitted to testify and render an opinion based on the tests that were administered by the credentialed psychology associate. The independent evaluator testified that he is a board-certified clinical neuropsychologist with over thirty years of experience in diagnosing, research, and treatment of neurological disorders. The ALJ admitted the independent evaluator as an expert in neuropsychology without objection. As to the evaluation process and the preparation of the report summarizing his findings regarding Dr. Salihi, the independent evaluator explained that he followed a standard process where the psychology associate administered the tests that he selected,

and he interpreted the findings to reach a conclusion. He explained the purpose of each test, methodology of each test, and Dr. Salihi's performance on each test. He also testified that he conducted a thorough interview of Dr. Salihi before the assistant administered the tests and that he spent approximately an hour to an hour and a half with Dr. Salihi. The independent evaluator explained that the test results were adjusted for Dr. Salihi's age, sex, educational background, and estimated premorbid ability. The evaluation also took into consideration that English was not Dr. Salihi's native language. The independent evaluator disagreed with the conclusions of Dr. Salihi's expert and explained that Dr. Salihi's expert used a different set of tests, which were not designed to show the presence of and could have obscured the presence of the suspected condition at issue.

The ALJ permitted the testimony and report of the independent evaluator, over Dr. Salihi's objection, explaining that hearsay is permitted in administrative hearings as long as it is found to be reliable. The ALJ found that the hearsay was reliable, and that the independent evaluator was personally involved in the analysis of the data and very familiar with the tests that were administered and the testing results. The Panel agrees with the analysis of the ALJ and the decision to admit the report and testimony of the independent evaluator. The record reflects that the independent evaluator prepared the report and analyzed the data collected by the psychology associate from the selection of tests that he ordered to be administered. He explained that it was standard practice in the industry to have an associate administer the tests and that the associate followed a standard protocol and was trained in the administration of the tests. Accordingly, Panel B finds that the independent evaluator was competent to testify regarding the entirety of the report and the testing results and that the ALJ properly allowed the testimony over Dr. Salihi's objection. Dr. Salihi's exception is denied.

C. Fact Witness Testimony

Dr. Salihi testified on his own behalf and called a nurse practitioner who worked with him in his office as a fact witness. The nurse practitioner testified that she worked with Dr. Salihi in the same office for approximately three years prior to his retirement. Initially she shadowed Dr. Salihi, and they saw patients together for the first few weeks and then, after that, she saw patients independently. She testified that she was not aware of any complaints regarding Dr. Salihi's care or treatment of patients, that Dr. Salihi was always able to answer her questions regarding their shared patients, and that she was confident in Dr. Salihi's medical practice.

The nurse practitioner, however, was not offered as an expert witness qualified to opine about Dr. Salihi's competence to practice medicine and she testified that she did not have a degree in psychology or neuropsychology. The Board did not investigate or charge Dr. Salihi with any standard of care violations and Dr. Salihi's care and treatment of patients was not at issue in this case. As the ALJ correctly noted, the Board is not required to wait until an actual injury occurs, and the nurse practitioner was not qualified to render an expert opinion regarding Dr. Salihi's mental competence. *See Pickert v. Maryland Bd. of Physicians*, 180 Md. App. 490, 505 (2008) ("No proof of injury or harm is required to take disciplinary actions against a physician's license."). The Board adopts the ALJ's reasoning and discussion regarding the testimony of the nurse practitioner.

Dr. Salihi testified on his own behalf. The ALJ accurately described Dr. Salihi's testimony and noted that he provided clear responses to the same questions that were posed during his Board interview. Dr. Salihi described some of the treatments he routinely provided and conditions he treated. As discussed above, Dr. Salihi's care and treatment of patients was not investigated or at issue in this case. The focus of the Board's investigation and the charges in this case was on

whether Dr. Salihi was mentally competent to practice medicine. The Panel, like the ALJ, relies mainly on the expert reports and opinions of the two doctors who testified at OAH and were accepted as experts of the ALJ. The Panel gives little weight to the testimony of the fact witnesses who testified on Dr. Salihi's behalf.

Dr. Salihi's exceptions are denied.

III. Summary Suspension

Dr. Salihi did not file exceptions to the ALJ's conclusion that the summary suspension of his license was proper because the public health, safety, or welfare imperatively required emergency action. In any event, Panel B agrees with the ALJ's conclusion that the summary suspension was proper.

CONCLUSIONS OF LAW

Panel B concludes that Dr. Salihi is mentally incompetent, in violation of Health Occ. § 14-404(a)(4), and that the summary suspension was proper because the public health, safety, or welfare imperatively required emergency action pursuant to State Gov't § 10-226(c)(2).

SANCTION

The ALJ recommended that Dr. Salihi's license be suspended until the time when he provides information to the Board to establish that he is mentally competent to resume the practice of medicine. The State took exception to the ALJ's proposed sanction and argues that the Panel should impose a revocation of Dr. Salihi's license instead of a suspension due to the permanency of Dr. Salihi's condition and the unlikely possibility that Dr. Salihi will regain competence in the future. The Panel agrees with the State that it is unlikely that Dr. Salihi's condition will improve and that he will regain competence, but if Dr. Salihi does regain competence, the Panel will consider an application for reinstatement after a minimum of one year.

ORDER

On an affirmative vote of a majority of a quorum of Disciplinary Panel B, it is hereby

ORDERED that the license of Akram Salihi, M.D. to practice medicine in Maryland, license number D17536, is **REVOKED**; and it is further

ORDERED that the July 15, 2020, order imposing a summary suspension upon Dr. Salihi's medical license is terminated as moot; and it is further

ORDERED that, if Dr. Salihi regains competence, Dr. Salihi may apply for reinstatement of his license to practice medicine after a minimum of one (1) year from the date of this Order; and it is further

ORDERED that this is a public document. *See* Health Occ. §§ 1-607, 14-411.1(b)(2) and Gen. Prov. § 4-333(b)(6).

Signature on File

June 1, 2021
Date

Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Md. Code Ann., Health Occ. § 14-408, Dr. Salihi has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within thirty (30) days from the date of mailing of this Final Decision and Order. The cover letter accompanying this Final Decision and Order indicates the date the decision is mailed. Any petition for judicial review shall be made as provided for in the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

If Dr. Salihi files a Petition for Judicial Review, the Board is a party and should be served with the court's process at the following address:

Christine A. Farrelly, Executive Director
Maryland State Board of Physicians
4201 Patterson Avenue
Baltimore, Maryland 21215

Notice of any Petition for Judicial Review should also be sent to the Board's counsel at the following address:

Stacey M. Darin, Assistant Attorney General
Office of the Attorney General
Maryland Department of Health
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

EXHIBIT 1

MARYLAND STATE BOARD OF	*	BEFORE MICHELLE W. COLE,
PHYSICIANS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
AKRAM A. SALIHI, M.D.,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No.: MDH-MBP1-71-20-17463 MDH-MBP1-72-20-16563
LICENSE No.: D17536	*	

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On July 15, 2020, the Maryland Board of Physicians (MBP or Board) issued an Order for Summary Suspension against Akram A. Salihi, M.D. (Respondent). On August 20, 2020, the Board filed disciplinary charges alleging violations of the State law governing the practice of medicine. Md. Code Ann., Health Occ. §§ 14-101 through 14-508, and 14-601 through 14-607 (2014 & Supp. 2020). Specifically, the Respondent is charged with violating section 14-404(a) of the Act based on mental incompetence to practice medicine. *Id.* § 14-404(a)(4); Code of Maryland Regulations (COMAR) 10.32.02.03E(3)(d). The disciplinary panel to which the complaint was assigned forwarded the charges to the Office of the Attorney General for prosecution, and another disciplinary panel delegated the matter to the Office of Administrative

Hearings (OAH) for issuance of proposed findings of fact, proposed conclusions of law, and a proposed disposition. COMAR 10.32.02.03E(5); COMAR 10.32.02.04B(1).

I held a hearing on September 11, 2020,[1] at the OAH in Hunt Valley, Maryland. Health Occ. § 14-405(a) (Supp. 2020); COMAR 10.32.02.04. Donald Feige, Esquire, represented the Respondent, who was present. Debra A. Smith, Assistant Attorney General and Administrative Prosecutor, represented the Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules for Hearings Before the Board of Physicians, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 10.32.02; COMAR 28.02.01.

ISSUES

1. Did the Respondent violate section 14-404(a)(4) of the Medical Practice Act by conduct showing the Respondent to be professionally, physically, or mentally incompetent?

2. If the Respondent violated the Medical Practice Act, what sanction is appropriate?

3. Is summary suspension of the Respondent's license necessary because public health, safety or welfare imperatively requires emergency action?

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise noted, I admitted the following exhibits into evidence on behalf of the Board:

MBP Ex. 1 Notice of Charges, August 17, 2020

MBP Ex. 2 Letter from MBP to Respondent, July 30, 2020

[1] The summary suspension and disciplinary cases were consolidated for hearing.

MBP Ex. 3 Letter from Maryland Professional Rehabilitation Program to MBP, June 24, 2020; Mental Status Exam, June 19, 2020

MBP Ex. 4 MBP Investigative Report, July 2, 2020

MBP Ex. 5 Fax Transmittal, January 17, 2019; Intake Unit Complaint Form, January 17, 2019

MBP Ex. 6 MBP Physician Profile, July 1, 2020

MBP Ex. 7 Not Admitted

MBP Ex. 8 Transcript, May 7, 2020

MBP Ex. 9 Letter from G. Westphal, MBP, to Respondent, June 10, 2020

MBP Ex. 10 Letter from C. Farrelly, MBP, to Respondent, July 15, 2020; Order for Summary Suspension of License to Practice Medicine, July 15, 2020

MBP Ex. 11 [redacted] Ph.D., Curriculum Vitae

MBP Ex. 12 [redacted] M.D., Curriculum Vitae

MBP Ex. 13 Not Admitted

MBP Ex. 14 Letter from [redacted] with summary of assessment results, undated

I admitted the following exhibits into evidence on behalf of the Respondent:

Resp. Ex. 1 Report of Evaluation, July 3, 2020

Resp. Ex. 2 Letter from [redacted] M.D., to "To Whom it May Concern," July 9, 2020

Resp. Ex. 3 Medical Notes, July 23, 2020

Testimony

The following witnesses testified on behalf of the Board: [redacted], M.D., whom I accepted as an expert in neurology; [redacted] Ph.D., whom I accepted as an expert in neuropsychology; and Gretchen Westphal, MBP Compliance Analyst.

The Respondent testified on his own behalf, and presented the following witnesses: [redacted], Ph. D., whom I accepted as an expert in general psychology; and [redacted], R.N.

PROPOSED FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Respondent is seventy-seven years old, born in December, 1942.

2. The Respondent was born in Iraq, where he remained until 1970. His native language is Turkman, which was spoken in his childhood home. The Respondent was tutored in English, beginning when he was four years old. In 1971, the Respondent moved to the United States, where he completed his residency training in pediatrics. The Respondent is married and speaks only English in his family home as neither the Respondent's wife nor his children speak Turkman.

3. At all times relevant to this proceeding, the Respondent was a licensed physician in the State of Maryland. He has held a Maryland license since December 19, 1974. This license will expire on September 30, 2021.

4. The Respondent's practice primarily focused on pediatric patients.

5. In 2008, the Respondent announced his retirement and sold his practice at [redacted] to Dr. [redacted].

6. In 2011 or 2012, the Respondent returned to practice at a new location, [redacted].

7. In January 2019, the Board received a complaint from [redacted] alleging inappropriate conduct by the Respondent in the practice of medicine, based on an

anonymous tip of fraud received by [redacted]. After conducting its own investigation, [redacted] closed its case, noting: "no findings/corroborating evidence." (MBP Ex. 4). The Board initiated its own investigation regarding the alleged conduct.

8. On May 7, 2020, Gretchen Westphal and Molly Dicken, compliance analysts with the MBP, interviewed the Respondent by telephone. The Respondent's attorney was present with the Respondent during the entire interview.

9. At the beginning of the interview, when the Respondent was asked to provide his address and telephone number, he asked his office manager, who was also present in the room, for the requested information. When Ms. Westphal indicated that the office manager was not supposed to be present for the interview,[2] the office manager left the room.

10. During the interview, the Respondent had difficulty recalling the names of former staff members at his practice, including [redacted] and [redacted], with whom he worked for almost ten years. When asked specifically if he remembered the two individuals, the Respondent replied: "I really don't recall them, I don't. I should, but I don't. I'm telling you the fact – the truth. I don't recall." (MBP Ex. 8 at 19).[3]

11. The MBP referred the Respondent's case to the Maryland Professional Rehabilitation Program (MPRP) to perform an evaluation.

12. On June 19, 2020, [redacted] M.D., at MPRP, conducted an evaluation. Clinical staff met with the Respondent and administered a Short Test of Mental Status. The Respondent's score on the Short Test of Mental Status [redacted]

[2] Prior to the interview, the Respondent requested that his office manager be permitted to accompany him at the interview. This request was denied.

[3] The Respondent later recalled [redacted] as an employee who had a drug problem. He reported that she had a different last name.

indicating cognitive impairment. [redacted]

13. The MPRP recommended that the Respondent sign a practice cessation agreement, which he declined to do. The MPRP referred the Respondent for additional testing to determine cognitive impairment. An examination was scheduled for June 30, 2020.

14. Prior to the examination date, the Respondent repeatedly requested that the examination be rescheduled so that he may continue to treat patients. These requests were denied.

15. On June 30, 2020, the Respondent failed to appear for the neuropsychological evaluation. The MPRP scheduled another neuropsychological examination.

16. The Respondent announced the effective date of his retirement from his practice as June 30, 2020.

17. On July 3, 2020, Dr. [redacted] conducted an evaluation of the Respondent. He administered the following assessments:

[redacted]

[redacted]

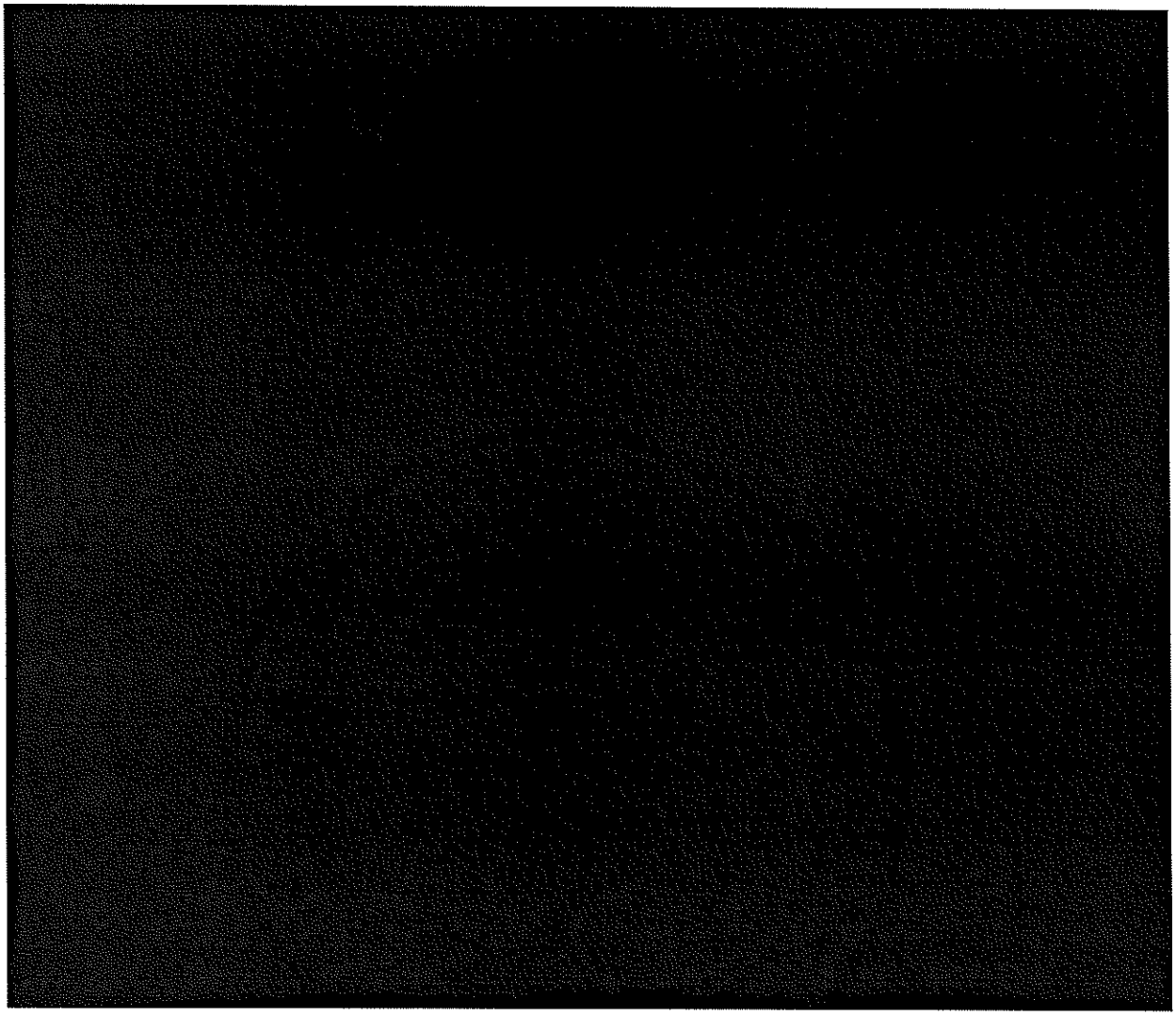
18. On July 9, 2020, [redacted] M.D., the Respondent's treating physician, completed the Respondent's annual exam, during which she administered the Modified Mini Mental Status Exam to him. Dr. [redacted] wrote a letter on the Respondent's behalf as follows: "[The Respondent] is in Excellent Health and had [redacted] in the Modified Mini Mental Status Exam and I am Writing this Letter Per Dr Salihi's request to Certify that he is fit Physically and Mentally." (Resp. Ex. 2).

[4] [redacted]

19. On July 14, 2020, the Respondent attended a neuropsychological evaluation at Johns Hopkins Hospital where he underwent a battery of 32 assessments, focused on cognitive ability, including the following:

[redacted]

[redacted]



20. [redacted]

21. The Respondent has difficulty performing tasks which require the ability to code, store, and recall information.

22. On July 15, 2020, the Board informed the Respondent that it was summarily suspending his license to practice medicine.

[redacted]

23. On July 23, 2020, at the Respondent's request,[11] [redacted], M.D., performed a neurologic examination of the Respondent. [redacted] (Resp. Ex. 3).

DISCUSSION

The grounds for reprimand or probation of a licensee, or suspension or revocation of a license under the Act include the following:

> (a) *In general.* – Subject to the hearing provisions of § 14-405 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum of the disciplinary panel, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:
>
> . . .
>
> (4) Is professionally, physically, or mentally incompetent[.]

Md. Code Ann., Health Occ. § 14-404(a)(4) (Supp. 2020). The Board may summarily suspend a professional's license "if the public health, safety, or welfare imperatively requires emergency action." Md. Code Ann., State Gov't § 10-226(c)(2).

The Board contends that the Respondent is mentally incompetent to perform his duties as a pediatrician and that summary suspension is appropriate based on the risks the Respondent presents to his patients. The Respondent refutes this contention and maintains that he is mentally competent to perform his duties as a pediatrician.

[11] It appears that Dr. [redacted] referred the Respondent for evaluation, as the medical notes are in the form of a letter from Dr. [redacted] to Dr. [redacted] (Resp. Ex. 3).

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. Md. Code Ann., State Gov't § 10-217 (2014); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). In this case, the Board bears the burden to show that the Respondent violated the Medical Practice Act and that summary suspension of the Respondent's professional license is appropriate. Based on the evidence, I conclude that the Board has met its burden in this case.

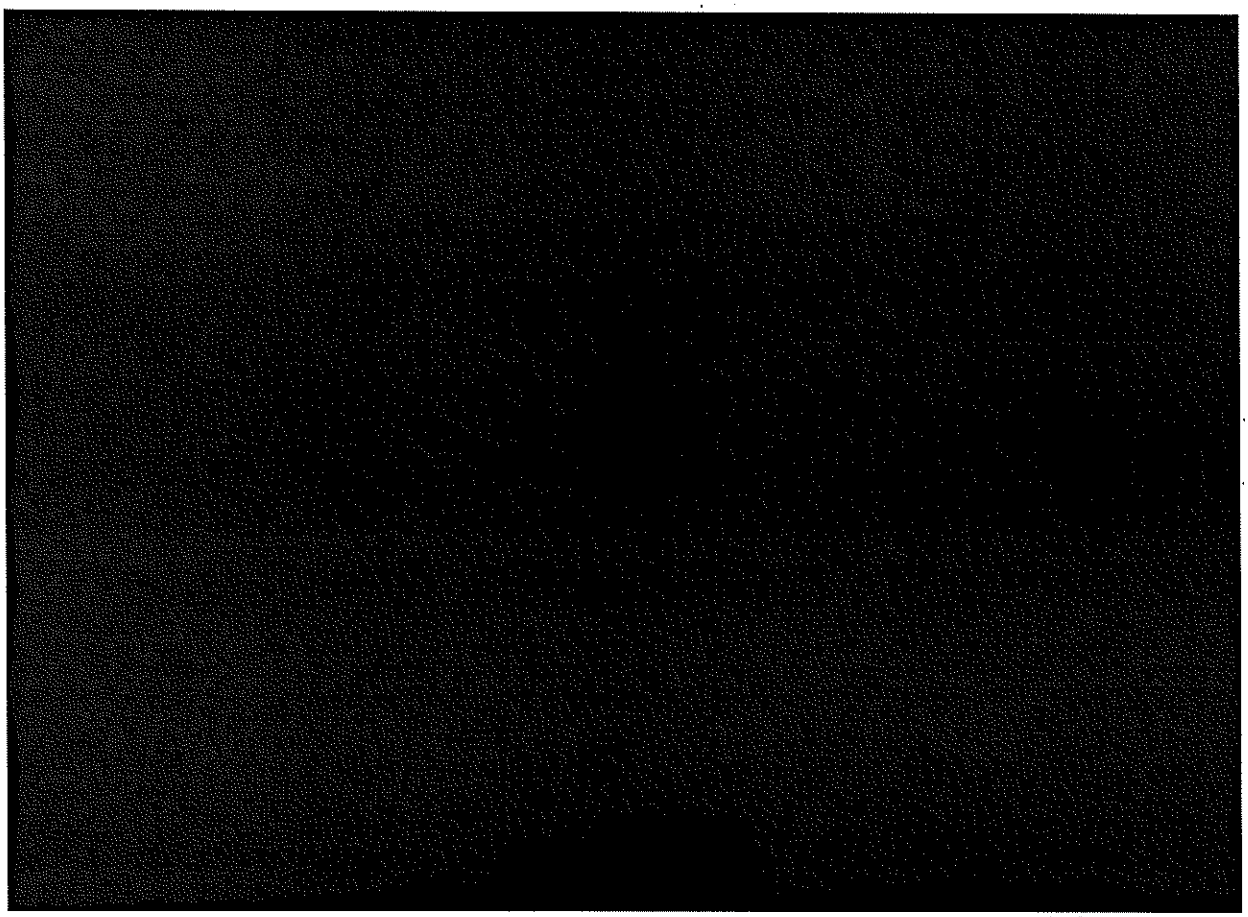
Witness Testimony

Dr. [redacted], medical director of the MPRP, whom I accepted as an expert in neurology, testified regarding the history of the Respondent's case. He was present via videoconference for the Respondent's interview and Short Test of Mental Status on June 19, 2020. He reported that the Respondent's score [redacted] gave cause for further testing of the Respondent's cognitive ability. He stated that mental competence is hard to measure. However, based on his review of the Respondent's information, he believed that the Respondent was not able to safely practice medicine based on his cognitive impairment, as reflected in his interview [redacted].

Dr. [redacted], whom I accepted as an expert in neuropsychology, opined that the Respondent was not competent to safely practice medicine at this time. He interviewed the Respondent and reviewed records, including the Respondent's July 14, 2020 neuropsychological examination and assessments. Dr [redacted] described in detail the various tests administered to

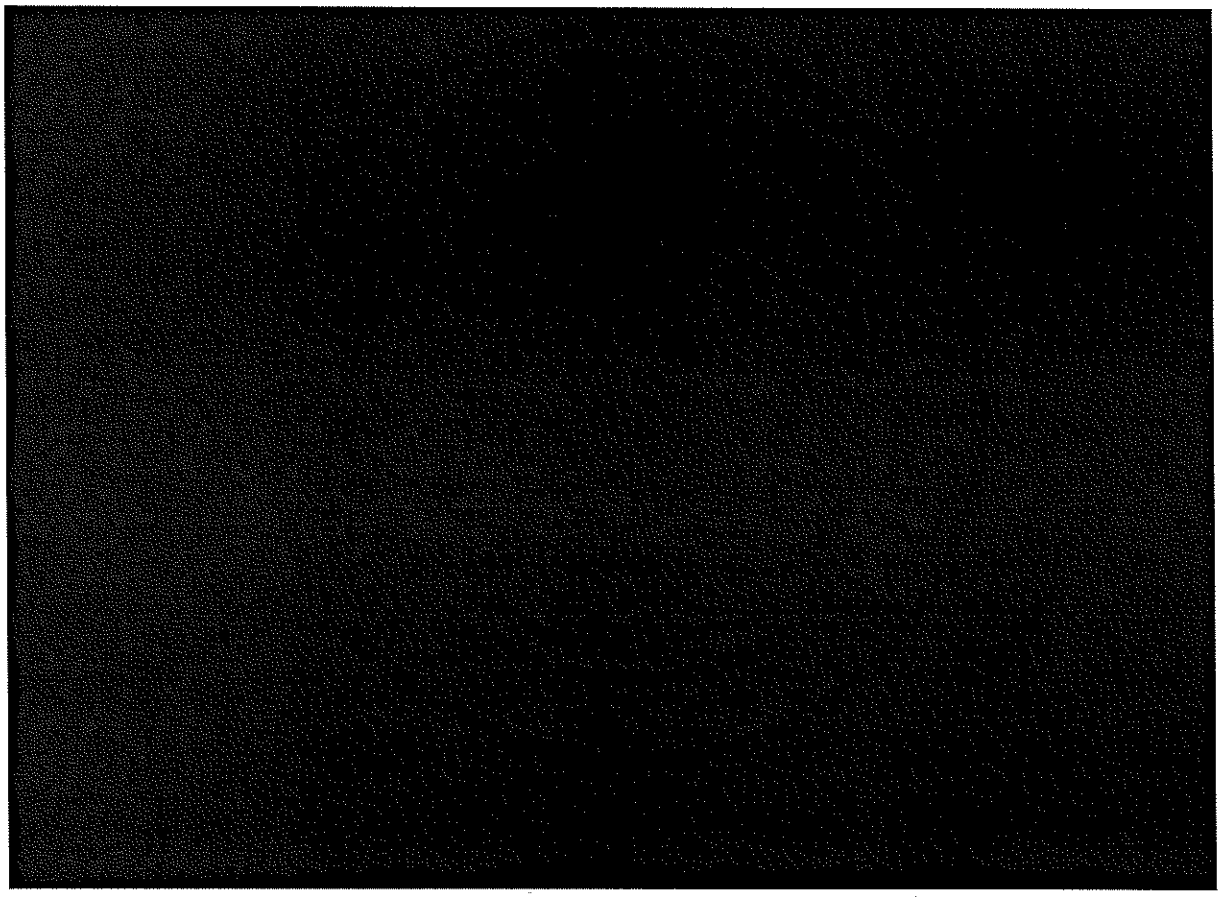
the Respondent, specifically noting which tests provided information on the Respondent's cognitive function. He concluded that the Respondent's performance showed cognitive impairment across multiple domains, [redacted]. Dr. [redacted] reported some difficulty understanding the Respondent because of the Respondent's accent. He indicated that he considered the fact that English was not the Respondent's first language, but did not believe that a language issue affected the assessments or his conclusions, reporting the Respondent's scores to be abnormal even for an individual with English as a second language. [redacted]

[redacted]



[redacted]

Dr. [redacted] stated that he considered the Respondent's evidence, including Dr. [redacted] assessments and opinions. He reported that this information did not affect his conclusions because the assessments failed to "fully" test memory and cognition. [redacted]



Dr. [redacted] concluded that the Respondent was severely impaired. He opined that, at this time, the Respondent is not competent to safely practice medicine.

Gretchen Westphal, compliance analyst, MBP, testified regarding her interview with the Respondent. She stated that she had concerns regarding the Respondent's memory based on his

conduct and lack of recall during the interview. Specifically, she noted that the Respondent could not quickly recall names of former co-workers or the address of his practice. Ms. Westphal explained that the Respondent brought his office manager to participate in the interview even though the MBP denied his request to allow her participation. As the interview was conducted telephonically, Ms. Westphal did not learn of the office manager's presence until the Respondent asked the office manager for assistance with answering a question during the interview. At that time, Ms. Westphal reminded the Respondent and his attorney that the office manager was not permitted to participate in the interview.

[redacted] whom I accepted as an expert in general psychology, testified on the Respondent's behalf. He conducted an evaluation and administered assessments to the Respondent on July 3, 2020. [redacted]

[redacted]

The Respondent testified on his own behalf. He reviewed his personal information and provided clear responses to the same questions that were posed to him during the interview, including identifying the names of former staff members and the addresses for his practice. He explained why he did not immediately recall [redacted], because her last name was changed at some point. He described the rapport that he had with his patients and their families, and stated that he misses medicine. He also described some of the treatments that he routinely employed with patients for ear infections, strep, and bronchitis.

[redacted], a nurse practitioner employed by the Respondent's practice, testified on the Respondent's behalf. She reported working with the Respondent for three years. During that time, after an initial training period where she shadowed the Respondent, she saw the Respondent's patients independent of him. She stated that he knew the patients so well and "always had the answer" if she had a question. She explained that everyone seemed to love the Respondent.

Analysis

The Board summarily suspended the Respondent's license and proposes to revoke his license based on its determination that the Respondent is mentally incompetent to practice medicine. The Respondent denies having any cognitive impairment and maintains that he is capable of returning to his practice and continuing to serve his patients. In making my decision, I have relied largely on expert testimony regarding the interpretation of psychological and cognitive tests which were administered to the Respondent.

In this area, I found Dr. [redacted]'s testimony to be credible and persuasive. He is a clinical neuropsychologist with more than thirty years of experience in diagnosing and treating dementia patients. He demonstrated a vast knowledge of the measures that are regularly utilized

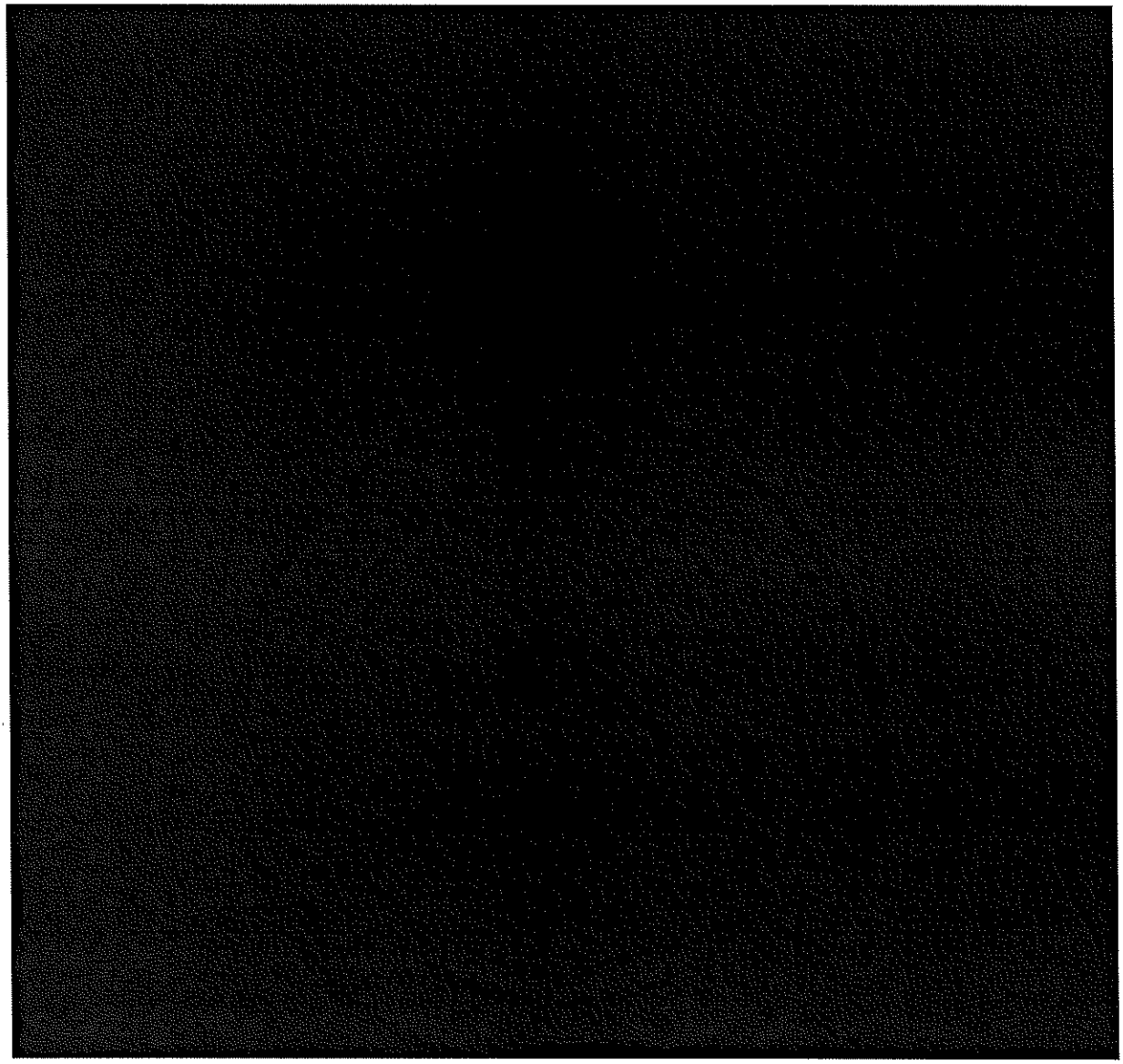
in evaluating cognitive function. In this respect, I gave more weight to Dr. [redacted]'s testimony than to Dr. [redacted]'s. Dr. [redacted] is a licensed psychologist whose practice involves largely the assessment of children. He testified that he has evaluated only one other physician, and does not do evaluations for [redacted]. He stated that if he suspected such a diagnosis, which he did not in the Respondent's case, he would refer the patient to a neurologist. Further, Dr. [redacted] reported that he was unfamiliar with many of the cognitive measures administered to the Respondent in this case, as he does not use any of those tests. I am not persuaded by Dr. [redacted] claim that the limited assessments administered by him are sufficient to make a determination regarding the Respondent's cognitive ability. Rather, I agree with Dr. [redacted] that the more focused testing is significant in making an accurate determination regarding the Respondent's current functional ability. As such, I have placed great weight on Dr. [redacted] testimony regarding the Respondent's performance on cognitive measures.

Dr. [redacted] explanation of the various cognitive tests was thorough and clear. He described the Respondent's weaknesses and explained the significance of the Respondent's abnormal results, performing below 99 percent of individuals in his age group. He noted that the Respondent was not a native English speaker, and explained why he believed that language problems did not affect the results in this case, noting comparable performance on non-linguistic measures. He identified his concerns regarding the pattern of weaknesses, suggesting that this was indicative of an [redacted] diagnosis, and recommended specific tests to confirm a diagnosis of [redacted]. He agreed with Dr. [redacted] was a proper diagnostic test, but suggested that the [redacted] test should also have been administered to provide a full and accurate picture of the Respondent's cognitive ability. He further recommended imaging studies to supplement the cognitive assessments. Dr.

[redacted] explained why the assessments conducted by Dr. [redacted], which largely were focused on [redacted], were insufficient to make or rule out a [redacted] diagnosis. As such, he suggested that the battery of tests administered by Dr. [redacted] were not helpful to a determination in this case, and that these results muddied the waters for making a proper diagnosis.

The sum of evidence supports a conclusion that the Respondent has cognitive impairment. These deficits were apparent during the Respondent's May 7, 2020 interview and in the June 19, 2020 Short Test of Mental Status. The fact that the Respondent appeared to show improved cognitive function on later mini mental exams does not affect my decision. I was not provided any information on the measures included in the mini mental status exams administered by the Respondent's doctors. However, this is irrelevant to my decision because I agree with Dr. [redacted] that the short test of mental status is a preliminary diagnostic tool, which served as the basis in this case for referral for additional testing more focused on cognitive function. The fact that the Respondent had inconsistent results on these preliminary tests is persuasive evidence that additional, more focused testing was required.

The Respondent's performance on various cognitive assessments support the Board's contention that the Respondent has cognitive deficits, particularly in the areas of learning new information and recall. [redacted]



I conclude that the Respondent's cognitive impairment affects his ability to competently practice medicine. In *Blaker v. State Board of Chiropractic Examiners*, 123 Md. App. 243, 258 (1998), the Court of Special Appeals recognized that "[i]n common parlance, 'incompetence' means a lack of the learning or skill necessary to perform, day in and day out, the characteristic tasks of a given calling in at least a reasonably effective way." Dr. [redacted] the medical

[12] [redacted]

director of the MPRP, whom I accepted as an expert in neurology, reported that summary suspension was appropriate in this case based on concerns that the Respondent was unable to safely practice medicine based on his cognitive impairment. He stated that, with the level of impairment indicated by the Respondent's performance, it is logical to assume that a certain amount of his function would be affected. Likewise, Dr. [redacted] opined that the Respondent was not competent to safely practice medicine. He believes that the pattern of results is indicative of a diagnosis of [redacted].

The Respondent has failed to dispute the Board's evidence or to demonstrate that he is competent to practice medicine at this time. The Respondent presented a letter from Dr. [redacted] and medical notes from Dr. [redacted]. Dr. [redacted] reported that the Respondent "had [redacted] in the Modified Mini Mental Status Exam and I am Writing this Letter Per Dr Salihi's request to Certify that he is fit Physically and Mentally." (Resp. Ex. 2). Dr. [redacted] did not testify at the hearing, and did not provide any information regarding the basis for the statement. I did not find Dr. [redacted] statement to constitute persuasive evidence of the Respondent's competence to practice medicine. Likewise, Dr. [redacted] notes did not affect my decision. Dr. [redacted] performed an evaluation and administered a mini mental status exam.[13] Regarding the neurologic examination, Dr. [redacted] noted:

[redacted]

[13] The record is not clear whether the mini mental status exam upon which Dr. [redacted] relies is the same exam administered by Dr. [redacted]. In any event, whether it is the same exam or two does not affect my decision.

(Resp. Ex. 3). Dr [redacted] further concluded:

(*Id.*). As previously stated, I agree with Dr. [redacted] that the neurological tests which are focused on cognitive ability bear more relevance to my determination than repeat mini mental exams. I also consider that Dr. [redacted] did not testify at the hearing to explain the basis for the conclusions reached and the reasons why further testing was not recommended, and did not express an opinion of the Respondent's competence to practice medicine.

Dr. [redacted] did provide an opinion on the Respondent's competence to practice medicine. He administered tests for the purpose of rendering an opinion in this case and opined that the Respondent was "cognitively" competent to practice medicine. As already stated, on the issue of cognitive testing, I have assigned more weight to Dr. [redacted] testimony than to Dr. [redacted] testimony. I do not believe that the limited tests upon which Dr. [redacted] relies in rendering his opinion are sufficient to make a proper determination. I also do not find these results to support a conclusion that the Respondent is competent to practice medicine. Accordingly, I do not credit Dr. [redacted] opinion on this issue.

[redacted] reported that the Respondent was able to answer her questions regarding their shared patients. However, she was seeing patients independent of the Respondent and did not have the opportunity to evaluate the Respondent as he performed his duties as a pediatrician. Moreover, she did not offer any opinion on the Respondent's competence to practice medicine at this time. While there have been no credible complaints raised by colleagues or patients regarding deficient patient care to this date, the Board is not required to wait until an actual injury occurs. I do not doubt Nurse [redacted] testimony regarding the love and admiration that the Respondent's patients have for him. I believe that the Respondent is a caring individual who has dedicated his entire career to the service of his patients. However, I must determine whether the Respondent currently places his patients and the general public at risk based on his mental incompetence. In this regard, as set forth above, I believe that the evidence is clear that the Respondent's cognitive impairment affects his ability to safely practice medicine and emergency action is required to address this imminent threat. As such, I find that the Board's decision to summarily suspend the Respondent's license is correct. I also find that the Board has proven that the Respondent violated section 14-404(a) of the Medical Practice Act based on mental incompetence to practice medicine.

Sanctions

In this case, the Board seeks revocation of the Respondent's license to practice medicine. Md. Code Ann., Health Occ. § 14-404(a) (Supp. 2020); COMAR 10.32.02.09A, B; COMAR 10.32.02.10. Based on the evidence, particularly the expert testimony of Dr. [redacted] I do not agree with the Board's proposed sanction at this time. Dr. [redacted] reported that a diagnosis of [redacted] may be confirmed through additional testing, including imaging studies. While he

suspected a diagnosis of [redacted] in this case, he did not confirm such a diagnosis. As such, it is unclear whether the Respondent may regain competence to practice medicine.

COMAR 10.32.02.09, Sanctioning and Imposition of Fines, provides a framework for consideration of various sanctions available to the Board. In relevant part it provides:

> A. General Application of Sanctioning Guidelines.
>
> (1) Sections A and B of this regulation and Regulation .10 of this chapter do not apply to offenses for which a mandatory sanction is set by statute or regulation.
>
> (2) Except as provided in §B of this regulation, for violations of Health Occupations Article, §§14-404(a), ... the disciplinary panel shall impose a sanction not less severe than the minimum listed in the sanctioning guidelines nor more severe than the maximum listed in the sanctioning guidelines for each offense.
>
> (3) Ranking of Sanctions.
>
> (a) For the purposes of this regulation, the severity of sanctions is ranked as follows, from the least severe to the most severe:
>
> (i) Reprimand;
>
> (ii) Probation;
>
> (iii) Suspension; and
>
> (iv) Revocation.
>
> . . .
>
> (5) Any sanction may be accompanied by conditions reasonably related to the offense or to the rehabilitation of the offender. The inclusion of conditions does not change the ranking of the sanction.
>
> (6) If a licensee has violated more than one ground for discipline as set out in the sanctioning guidelines:
>
> (a) The sanction with the highest severity ranking should be used to determine which ground will be used in developing a sanction; and
>
> (b) The disciplinary panel may impose concurrent sanctions based on other grounds violated.
>
> . . .
>
> (8) Depending on the facts and circumstances of each case, and to the extent that the facts and circumstances apply, the disciplinary panel may consider the aggravating and mitigating factors set out in § B(5) and (6) of this regulation and may in its discretion determine, based on those factors, that an exception should be made and that the sanction in a particular case should fall outside the range of sanctions listed in the sanctioning guidelines.

(9) If the disciplinary panel imposes a sanction that departs from the sanctioning guidelines set forth in Regulation .10 of this chapter, the disciplinary panel shall state its reasons for doing so in its final decision and order.

B. Aggravating and Mitigating Factors.

(1) Depending on the facts and circumstances of each case, and to the extent that the facts and circumstances apply, the disciplinary panel may consider the aggravating and mitigating factors set out in § B(5) and (6) of this regulation and may in its discretion determine, based on those factors, that an exception should be made and that the sanction in a particular case should fall outside the range of sanctions listed in the sanctioning guidelines.

(2) Nothing in this regulation requires the disciplinary panel or an administrative law judge to make findings of fact with respect to any of these factors.

(3) A departure from the sanctioning guidelines set forth in Regulation .10 of this chapter is not a ground for any hearing or appeal of a disciplinary panel action.

(4) The existence of one or more of these factors does not impose on the disciplinary panel or an administrative law judge any requirement to articulate its reasoning for not exercising its discretion to impose a sanction outside of the range of sanctions set out in the sanctioning guidelines.

(5) Mitigating factors may include, but are not limited to, the following:

(a) The absence of a prior disciplinary record;

(b) The offender self-reported the incident;

(c) The offender voluntarily admitted the misconduct, made full disclosure to the disciplinary panel and was cooperative during the disciplinary panel proceedings;

(d) The offender implemented remedial measures to correct or mitigate the harm arising from the misconduct;

(e) The offender made good faith efforts to make restitution or to rectify the consequences of the misconduct;

(f) The offender has been rehabilitated or exhibits rehabilitative potential;

(g) The misconduct was not premeditated;

(h) There was no potential harm to patients or the public or other adverse impact; or

(i) The incident was isolated and is not likely to recur.

(6) Aggravating factors may include, but are not limited to, the following:

(a) The offender has a previous criminal or administrative disciplinary history;

(b) The offense was committed deliberately or with gross negligence or recklessness;

(c) The offense had the potential for or actually did cause patient harm;

(d) The offense was part of a pattern of detrimental conduct;

(e) The offender committed a combination of factually discrete offenses adjudicated in a single action;

(f) The offender pursued his or her financial gain over the patient's welfare;

(g) The patient was especially vulnerable;
(h) The offender attempted to hide the error or misconduct from patients or others;
(i) The offender concealed, falsified or destroyed evidence, or presented false testimony or evidence;
(j) The offender did not cooperate with the investigation; or
(k) Previous attempts to rehabilitate the offender were unsuccessful.

Under COMAR 10.32.02.10B(4)(b) the maximum sanction that may be imposed for violating section 14-404(a)(4) is revocation and the minimum sanction is suspension until the physician's physical or mental incompetence is addressed to the Board's satisfaction. Absent firm confirmation of the permanence of the Respondent's mental incompetence, I believe that the appropriate sanction is to keep the Respondent's license on suspended status until the Respondent provides information to the Board to establish that he is mentally competent to resume the practice of medicine.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the summary suspension of the Respondent's license to practice medicine was proper because the public health, safety, or welfare imperatively required emergency action. Md. Code Ann., State Gov't § 10-226(c)(2) (2014).

I further conclude as a matter of law that the Respondent violated section 14-404(a)(4) by being mentally incompetent to practice medicine. Md. Code Ann., Health Occ. § 14-404(a)(4) (Supp. 2020).

I further conclude that the Respondent is subject to the suspension of his license until the Respondent provides information to the Board to establish that he is mentally competent to resume the practiee of medicine. *Id.*; COMAR 10.32.02.09A, B; COMAR 10.32.02.10B(4)(b).

PROPOSED DISPOSITION

I **PROPOSE** that the summary suspension issued by the Board on July 15, 2020 be **UPHELD**;

I **PROPOSE** that the charges filed by the Board against the Respondent on August 20, 2020 be **UPHELD**; and

I **PROPOSE** that the Respondent be sanctioned by suspension of his license to practice medicine until the Respondent provides information to the Board to establish that he is mentally competent to resume the practice of medicine.

Michelle W. Cole

December 9, 2020
Date Decision Issued

Michelle W. Cole
Administrative Law Judge

MWC/kdp
#189318

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this proposed decision may file written exceptions with the disciplinary panel of the Maryland State Board of Physicians that delegated the captioned case to the Office of Administrative Hearings (OAH), and request a hearing on the exceptions. Md. Code Ann., State Gov't § 10-216(a) (2014); COMAR 10.32.02.05. Exceptions must be filed within fifteen (15) days of the date of issuance of this proposed order. COMAR 10.32.02.05B(1). The exceptions and request for hearing must be addressed to the Disciplinary Panel of the Board of Physicians, 4201 Patterson Avenue, Baltimore, MD, 21215-2299, Attn: Christine A. Farrelly, Executive Director.

A copy of the exceptions should be mailed to the opposing attorney, and the other party will have fifteen (15) days from the filing of exceptions to file a written response addressed as above. *Id.* The disciplinary panel will issue a final order following the exceptions hearing or other formal panel proceedings. Md. Code Ann., State Gov't §§ 10-216, 10-221 (2014); COMAR 10.32.02.05C. The OAH is not a party to any review process.

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