IN THE MATTER OF	*	**BEFORE THE**
VITALIS O. OJIEGBE, M.D.,	*	**MARYLAND STATE**
Respondent	*	**BOARD OF PHYSICIANS**
License Number: D65418	*	**Case Number: 7715-0065B**

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

FINAL DECISION AND ORDER

INTRODUCTION

On April 30, 2018, Vitalis O. Ojiegbe, M.D. was charged under the Maryland Medical Practice Act ("Act") with unprofessional conduct in the practice of medicine; willfully making or filing a false report or record in the practice of medicine; failing to meet appropriate standards for the delivery of quality medical care; failing to comply with the provisions of the Maryland Pharmacy Act, Health Occupations Article § 12-102; willfully making a false representation when seeking or making application for licensure or any other application related to the practice of medicine; and failing to keep adequate medical records. *See* Md. Code Ann., Health Occ. ("Health Occ.") § 14-404(a)(3)(ii), (11), (22), (28), (36), and (40). Dr. Ojiegbe was also charged with violating the March 12, 2015 Consent Order he entered into with Disciplinary Panel B of the Maryland State Board of Physicians ("Board").

The case was forwarded to the Office of Administrative Hearings ("OAH") for an evidentiary hearing and a proposed decision. The hearing was held before an Administrative Law Judge ("ALJ") at OAH on January 29, 2019. Due to the significant stipulations of facts and evidence not in dispute, the State did not call any witnesses and presented its case solely through oral argument. Dr. Ojiegbe testified but did not present any other witnesses.

On April 22, 2019, the ALJ issued a proposed decision concluding that Dr. Ojiegbe engaged in unprofessional conduct in the practice of medicine; failed to meet appropriate standards for the delivery of quality medical care; failed to comply with the provisions of the Maryland Pharmacy Act, Health Occupations Article § 12-102; and failed to keep adequate medical records. *See* Health Occ. § 14-404(a)(3)(ii), (22), (28), and (40). The ALJ also found that Dr. Ojiegbe failed to comply with a condition of the March 12, 2015 Consent Order by failing to comply with the provisions of the Act. The ALJ determined that Dr. Ojiegbe did not willfully make or file a false report or record in the practice of medicine or willfully make a false representation when seeking or making application for licensure or any other application related to the practice of medicine. *See* Health Occ. § 14-404(a)(11) and (36).

The ALJ proposed a sanction of a six-month suspension followed by a period of probation with conditions to be decided by the disciplinary panel should the suspension be terminated. The ALJ also recommended that Dr. Ojiegbe be permanently prohibited from dispensing medications out of his office and that he be required to undergo an evaluation by the Center for Personalized Education for Professionals to determine whether he can safely return to the practice of medicine.

Dr. Ojiegbe filed exceptions to the ALJ's proposed decision, and the State filed a response. On September 11, 2019, both parties appeared before Board Disciplinary Panel A ("Panel A" or the "Panel") for an oral exceptions hearing.

FINDINGS OF FACT

Panel A adopts the stipulations of facts and evidence not in dispute, paragraph numbers 1-10, as well as the ALJ's proposed findings of fact, paragraph numbers 1-10. *See* ALJ proposed decision, attached as **Exhibit 1**. These facts are incorporated by reference into the body of this

document as if set forth in full. Neither party filed exceptions to any of the factual findings, and the factual findings were proved by a preponderance of the evidence. The Panel also adopts the ALJ's discussion set forth on pages 7-19 of the proposed decision. Neither party filed exceptions to any of the ALJ's discussion or the proposed conclusions of law.

CONCLUSIONS OF LAW

The Panel adopts the ALJ's proposed conclusions of law. The Panel finds that Dr. Ojiegbe is guilty of unprofessional conduct in the practice of medicine; failed to meet appropriate standards for the delivery of quality medical care; failed to comply with the provisions of the Maryland Pharmacy Act, Health Occupations Article § 12-102, and related statutes and regulations regarding the dispensing and packaging requirements for prescription drugs; and failed to keep adequate medical records. *See* Health Occ. § 14-404(a)(3)(ii), (22), (28), and (40). The Panel also concludes that Dr. Ojiegbe violated the March 12, 2015 Consent Order. The Panel dismisses the charges of Health Occ. § 14-404(a)(11) and (36).

EXCEPTION/SANCTION

Dr. Ojiegbe does not take exception to any of the proposed factual findings, discussion, or conclusions of law in the ALJ's proposed decision, but does take exception to the ALJ's recommended sanction. Dr. Ojiegbe argues that the Panel should not suspend his license and should instead place him on a period of probation for one to two years with appropriate terms and conditions.

The State responds that the ALJ's recommended sanction is appropriate given Dr. Ojiegbe's past disciplinary history with the Board and his inability to remediate his pattern of misconduct despite the Board's efforts through previous discipline. The State contends that the ALJ's recommended sanction of a six-month suspension with the condition that Dr. Ojiegbe be

evaluated by the Center for Personalized Education for Professionals ("CPEP") to determine whether he is safe to return to the practice of medicine is a fair sanction that protects the public and allows Dr. Ojiegbe to return to the practice of medicine when he is safe to do so.

The Panel agrees that a six-month suspension, which includes an evaluation by CPEP to determine whether Dr. Ojiegbe can safely practice medicine is appropriate. Dr. Ojiegbe's exception is denied.

ORDER

It is, on the affirmative vote of a majority of the quorum of Panel A, hereby

ORDERED that Vitalis O. Ojiegbe, M.D.'s license to practice medicine is **SUSPENDED**[1] for a minimum of **SIX (6) MONTHS**[2] and until he successfully completes an evaluation by CPEP in order for Panel A to determine whether he can safely return to the practice of medicine; and it is further

ORDERED that Dr. Ojiegbe shall not apply for early termination of suspension; and it is further

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[1] (a) During the suspension period, Dr. Ojiegbe shall not:

(1) practice medicine;

(2) take any actions after the effective date of this Order to hold himself out to the public as a current provider of medical services;

(3) authorize, allow or condone the use of Dr. Ojiegbe's name or provider number by any health care practice or any other licensee or health care provider;

(4) function as a peer reviewer for the Board or for any hospital or other medical care facility in the state;

(5) dispense medications; or

(6) perform any other act that requires an active medical license; and

(b) Dr. Ojiegbe shall establish and implement a procedure by which Dr. Ojiegbe's patients may obtain their medical records without undue burden and notify all patients of that procedure.

[2] Dr. Ojiegbe's license expired on September 30, 2019. Pursuant to section 14-403 of the Health Occupations Article, the license of an individual regulated by the Board may not "lapse by operation of law while the individual is under investigation or while charges are pending." The charges in this case were issued before the expiration of Dr. Ojiegbe's license. Therefore, by operation of law, Dr. Ojiegbe's license did not expire during these proceedings. The period of the suspension and any conditions will be tolled, however, until Dr. Ojiegbe administratively reinstates his license. *See* COMAR 10.32.02.05C(3).

ORDERED that after the minimum period of suspension imposed by the Order has passed, Dr. Ojiegbe has fully and satisfactorily complied with all terms and conditions for the suspension, and Panel A has received the report from CPEP, Dr. Ojiegbe may submit a written petition to Panel A for termination of the suspension. Dr. Ojiegbe may be required to appear before Panel A to discuss his petition for termination. If Panel A determines that it is safe for Dr. Ojiegbe to return to the practice of medicine, the suspension shall be terminated through an order of Panel A, and Panel A may impose any terms and conditions it deems appropriate on Dr. Ojiegbe's return to practice, including, but not limited to, probation. If Panel A determines that it is not safe for Dr. Ojiegbe to return to the practice of medicine, the suspension shall be continued through an order of Panel A for a length of time determined by Panel A, and Panel A panel may impose any additional terms and conditions it deems appropriate; and it is further

ORDERED that Dr. Ojiegbe is responsible for all costs incurred in fulfilling the terms and conditions of this Order; and it is further

ORDERED that the effective date of the Order is the date the Order is signed by the Executive Director of the Board or her designee. The Executive Director or her designee signs the Order on behalf of Panel A which has imposed the terms and conditions of this Order; and it is further

ORDERED that the probation imposed in the March 12, 2015 Consent Order is terminated as moot; and it is further

ORDERED that the reprimand imposed in the March 12, 2015 Consent Order remains in effect; and it is further

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

11/05/2019
Date

Signature on File

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. Ojiegbe 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. Ojiegbe 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	*	BEFORE LATONYA B. DARGAN,
BOARD OF PHYSICIANS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
VITALIS O. OJIEGBE, M.D.,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No.: MDH-MBP1-71-18-37328
LICENSE No.: D65418	*	MBP No.: 7715-0065B

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

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
STIPULATIONS OF FACT AND EVIDENCE NOT IN DISPUTE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On April 30, 2018, the Maryland State Board of Physicians (Board) issued charges against Vitalis O. Ojiegbe, M.D. (Respondent), for alleged violations of the State law governing the practice of medicine under the Maryland Medical Practice Act (Medical Practice Act) and associated provisions under the Maryland Pharmacy Act (Pharmacy Act). Md. Code Ann., Health Occ. §§ 12-101 *et seq.* and 14-101 *et seq.* (2014 & Supp. 2018). The Board additionally charged the Respondent with alleged violations of the Maryland Health General Article. Md. Code Ann., Health – Gen, §§ 21-101 *et seq.* and 22-101 *et seq.* (2015 & Supp. 2018). The Respondent was further charged with allegedly violating the provisions of a March 12, 2015 Consent Order (Consent Order). The disciplinary panel to which the matter was assigned held a meeting with the Respondent on July 25, 2018 to explore the possibility of resolution. The parties did not resolve the issues at that time.

On November 30, 2018, the Board delegated the matter to the Office of Administrative Hearings (OAH) for a hearing on the charges. The Board further delegated to the OAH the authority to issue Proposed Findings of Fact, Proposed Conclusion(s) of Law, and a Proposed Disposition. Code of Maryland Regulations (COMAR) 10.32.02.03E(5); COMAR 10.32.02.04B(1).

On January 29, 2019, I conducted a hearing at OAH headquarters in Hunt Valley, Maryland. Health Occ. § 14-405(a) (Supp. 2018); COMAR 10.32.02.04. Christopher B. Anderson, Assistant Attorney General and Administrative Prosecutor, represented the State of Maryland (State). Kevin A. Dunne, Esquire, represented the Respondent, who was also present.

The contested case provisions of the Administrative Procedure Act, the Rules for Hearings Before the Board, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 10.32.02; COMAR 28.02.01.

ISSUES

1. Did the Respondent violate section 14-404(a)(3) of the Medical Practice Act by engaging in unprofessional conduct in the practice of medicine;

2. Did the Respondent violate section 14-404(a)(11) of the Medical Practice Act by willfully making or filing a false report or record in the practice of medicine;

3. Did the Respondent violate section 14-404(a)(22) of the Medical Practice Act by failing to meet appropriate standards of care for the delivery of medical and surgical care;

4. Did the Respondent violate section 14-404(a)(28) of the Medical Practice Act by failing to comply with the provisions of section 12-102 of the Pharmacy Act;

5. Did the Respondent violate section 14-404(a)(36) of the Medical Practice Act by willfully making a false representation when seeking or making application for licensure or other application related to the practice of medicine;

6. Did the Respondent violate section 14-404(a)(40) of the Medical Practice Act by failing to keep adequate medical records;

7. Did the Respondent violate the Pharmacy Act section 12-102(c)(2)(ii)(4)(M) by failing to meet the CME requirement;

8. Did the Respondent engage in violations under sections 12-102 and 12-205 of the Pharmacy Act related to the dispensing, maintenance, labeling, and record keeping for prescription drugs or devices;

9. Did the Respondent engage in violations under Health General Article section 22-311 related to the packaging of dangerous household substances dispensed under prescription;

10. Did the Respondent engage in violations under Health General Article section 21-21-03 related to prescription monitoring data;

11. Did the Respondent engage in violations of COMAR 10.13.01.04 related to dispensing requirements for prescription drugs;

12. Did the Respondent engage in violations of COMAR 10.47.07.03 related to dispenser reporting requirements for prescription drugs;

13. Did the Respondent engage in violations of COMAR 10.19.03.12 related to physical security controls for controlled dangerous substances (CDS);

14. Did the Respondent fail to comply with any term or condition of the Consent Order; and, if so

15. What is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

A complete exhibit list is attached as an appendix.

Testimony

Due to the significant Stipulations of Facts and Evidence not in dispute, the State presented its case solely through oral argument. The Respondent testified and did not present other witnesses.

STIPULATIONS OF FACTS AND EVIDENCE NOT IN DISPUTE[1]

1. Joint Exhibits 1 through 19[2] are admitted without objection, with the exception of certain sections of Joint Exhibit 14 (August 29, 2017 – Board Investigator's Investigative Report).[3]

2. Paragraphs 1 through 3 of the April 30, 2018 Charges Under the Maryland Medical Practice Act ("Charges" hereinafter) are not in dispute.

3. The Respondent completed the required coursework in pain management, bariatric medicine, and recordkeeping to the satisfaction of the Board.

4. The Respondent obtained a practice monitor, obtained the approval of the Board for such a practice monitor, and satisfied all conditions in the 2015 Consent Order as it related to the practice monitor.

5. Paragraphs 4 through 6 of the Charges are not in dispute.

6. Paragraph 9 of the Charges are not in dispute.

7. Paragraphs 12-18 of the Charges are not in dispute.

[1] With the exception of minor edits for grammatical errors, or for the sake of clarity and consistency with other portions of this Proposed Decision (for example, substituting references to "Dr. Ojiegbe" with "Respondent", or instances where a particular stipulation did not constitute a complete sentence), I have reproduced the stipulations verbatim as the parties presented them to me.

[2] Joint Exhibit 20, the April 30, 2018 Statement of Charges and Notice of Violation of Consent Order, was admitted at the hearing and thus was not included in the Joint Exhibit List or Joint Stipulations, which were both submitted to the OAH on January 14, 2019.

[3] The Respondent objected to the portions of Joint Exhibit 14 which contained any conclusions drawn by the Board investigator as to whether the Respondent actually committed violations of the Act. I overruled the objection but advised the parties I would give little weight to the investigator's conclusions on whether the Respondent committed violations of the Act as that is the ultimate issue before me and I would be guided in this regard by my own evaluation of all the evidence in the case.

8. The OCSA[4] staff member found and the Respondent does not dispute the fact that there were deficiencies in the Respondent's dispensing practices as described in the OCSA Report of February 21, 2017 Inspection.

9. In all cases, the Peer Reviewers found and the Respondent does not dispute the fact that the Respondent failed to meet appropriate standards for the delivery of quality medical care to his weight loss/bariatric patients and failed to keep adequate medical records as described in their reports.

10. The Respondent satisfactorily performed all required conditions in his 2015 Consent Order as it related to his pain medicine practice and his prescribing of CDS opioid medicine. As of today, the Respondent has an unrestricted license. He is in compliance with all Board requirements related to his pain medicine practice and can write prescriptions for CDS opioid medicines.

PROPOSED FINDINGS OF FACT

I find the following additional facts by a preponderance of the evidence:

1. The Consent Order contained a provision specifically indicating that if the Respondent failed to comply with any term or condition of the Consent Order or of the two-year probationary period, a disciplinary panel of the Board could, after a show cause hearing, impose further sanctions on the Respondent, including additional probationary terms and conditions, or reprimand, suspension, or revocation.

2. Under the probationary conditions of the Consent Order, the Respondent was required to comply with the Medical Practice Act.

3. At the time the Respondent entered into the Consent Order, his practice consisted of internal medicine, pain management, and weight loss (bariatric) services.

[4] Office of Controlled Substance Administration

4. At all relevant times, the Respondent held a permit to dispense certain drugs, including CDS, from his practice.

5. Under Maryland law, the Respondent was authorized to dispense prescription drugs to his patients at the location of his practice as long as he maintained forms which contained the following information: a statement indicating a pharmacy was not conveniently available to the patient; a statement indicating that the determination a pharmacy was not conveniently available was made solely by the patient; and the patient's signature and the date. The form was to be signed by the patient prior to the first time any prescription drugs were dispensed by the Respondent to the patient.

6. As part of his weight loss practice, the Respondent had access to phentermine and phendimetrazine, both of which are appetite suppressants and CDS.

7. In his weight loss practice, the Respondent got into the habit of dispensing prescription drugs to patients who did not have insurance and writing prescriptions for patients who possessed health insurance.

8. The Respondent had multiple weight loss patients who were unwilling to allow him to weigh them when they came to their appointments. As a result, the Respondent was often unable to document their weight gain or loss in their charts.

9. In or around November 2017, and as a result of the difficulty he had with getting his weight loss patients to cooperate with certain aspects of treatment (including allowing him to weigh them) and the poor economic benefits of a weight loss practice in the Respondent's geographic area, the Respondent wound down and terminated his weight loss practice.

10. Once the Respondent closed the weight loss portion of his medical practice, he stopped dispensing prescription drugs at the practice location.

DISCUSSION

Legal Framework

Section 14-404 of the Medical Practice Act governs the bases on which the Board may take disciplinary action against a licensed physician. Under the Charges, the Respondent was cited for allegedly violating section 14-404, as follows:

> (a) 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:
>
> . . .
>
> (3) Is guilty of:
>
> . . .
>
> (ii) Unprofessional conduct in the practice of medicine;
>
> . . .
>
> (11) Willfully makes or files a false report or record in the practice of medicine;
>
> . . .
>
> (22) Fails to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical and surgical care performed in an outpatient surgical facility, office, hospital, or any other location in this State;
>
> . . .
>
> (28) Fails to comply with the provisions of § 12-102 of this article;
>
> . . .
>
> (36) Willfully makes a false representation when seeking or making application for licensure or any other application related to the practice of medicine;
>
> . . .
>
> (40) Fails to keep adequate medical records as determined by appropriate peer review[.]

Md. Code Ann., Health Occ., § 14-404 (Supp. 2018).

Under the Charges, the Respondent was also cited for violating section 12-102(c) of the Pharmacy Act , which governs the handling of prescriptions, including the dispensing of prescriptions, and provides, in pertinent part, as follows:

> (2) This title does not prohibit:
> (ii) A licensed dentist, physician, or podiatrist from personally preparing and dispensing the dentist's, physician's, or podiatrist's prescriptions when:
> ...
> 4. The dentist, physician, or podiatrist:
>
> A. Complies with the dispensing and labeling requirements of this [Section 12-505];
>
> B. Records the dispensing of the prescription drug or device on the patient's chart;
> ...
>
> H. Complies with the child resistant packaging requirements regarding prescription drugs under Title 22, Subtitle 3 of the Health--General Article;
> ...
>
> J. Maintains biennial inventories and complies with any other federal and State record-keeping requirements relating to controlled dangerous substances;
> ...
>
> M. Completes ten continuing education credits over a 5-year period relating to the preparing and dispensing of prescription drugs, offered by the Accreditation Council for Pharmacy Education (ACPE) or as approved by the Secretary, in consultation with each respective board of licensure, as a condition of permit renewal[.]

Md. Code Ann., Health Occ. § 12-102(c)(2)(ii)(4) (Supp. 2018).

The penalties for violations of the Pharmacy Act are governed by section 12-102(m), as follows:

> (m) A dentist, physician, or podiatrist who fails to comply with the provisions of this section governing the dispensing of prescription drugs or devices shall:
> (1) Have the dispensing permit revoked; and
> (2) Be subject to disciplinary actions by the appropriate licensing board.

Md. Code Ann., Health Occ. § 12-102(m) (Supp. 2018).

The Charges also cite section 12-505 of the Pharmacy Act, which governs the labeling of prescription drugs and devices, and provides the parameters under which a physician may dispense them, as follows:

> (a) Except for a drug or device dispensed to an inpatient in a hospital or related institution, each container of a drug or device dispensed shall be labeled in accordance with this section.
>
> ...
>
> (d)(1) Except as provided in this subsection, if an authorized prescriber dispenses a drug or device, the prescriber shall label each container of the drug or device.
>
> (2) In addition to any other information required by law, the authorized prescriber shall include on the label:
>
> (i) The name and strength of the drug or device;
>
> (ii) The date the prescription is dispensed;
>
> (iii) An expiration date of the drug or device which shall be the lesser of:
>
> 1. 1 year from the date of dispensing;
>
> 2. The month and year when the drug or device expires; or
>
> 3. A shorter period as determined by the authorized prescriber; and
>
> (iv) Any appropriate special handling instructions regarding proper storage of the drug or device.

Md. Code Ann., Health Occ. §§ 12-505 (a), (d) (2014).

The Respondent was further cited for violating section 22-311 of the Health General Article (2015), which governs the packaging of substances which are dispensed via prescription and provides as follows:

> A dangerous household substance dispensed under the prescription of an authorized prescriber may be provided in a package that does not meet the child resistant packaging standards adopted under this subtitle if the noncomplying package is:
>
> (1) Required by the prescription; or
>
> (2) Requested by the purchaser.

Additionally, under section 21-2A-03 of the Health General Article (Supp. 2018), entities with dispensing privileges are required to submit certain data, as follows:

> (c) Except as provided in subsection (d)[5] of this section, each dispenser shall submit prescription monitoring data to the [Prescription Drug Monitoring

[5] Section (d) authorizes the Secretary of the Maryland Department of Health to require the submission of the reports through means other than electronically. Md. Code Ann., Health Gen. § 21-2A-03(d) (Supp. 2018).

Program] by electronic means, in accordance with regulations adopted by the Secretary.

In addition to these statutory provisions, the Maryland Department of Health has also promulgated regulations to govern the dispensing, reporting, and storage of prescription drugs and devices. COMAR 10.13.01.04 imposes dispensing requirements in pertinent part as follows:

> ...
>
> E. A licensee shall comply with the labeling requirements set forth in Health Occupations Article, §12-505, Annotated Code of Maryland.
>
> ...
>
> F. A licensee shall comply with the child resistant packaging requirements set forth in Health-General Article, Title 22, Subtitle 3, Annotated Code of Maryland.
>
> ...
>
> H. A licensee shall record the dispensing of the prescription drug on the patient's chart.
>
> ...
>
> J. A licensee shall, except for starter dosages or samples provided without charge, provide the patient with a written prescription.
>
> ...
>
> L. A licensee shall maintain biennial inventories of all stocks of controlled substances.
>
> M. A licensee shall dispense prescription drugs to a patient only when the patient determines that a pharmacy is not conveniently available to the patient.
>
> N. In each patient's chart for each patient to whom prescription drugs are dispensed or in a format readily retrievable, a licensee shall maintain a single form which:
>
> (1) Indicates that a pharmacy is not conveniently available to the patient;
>
> (2) States that the determination that a pharmacy is not conveniently available was made solely by the patient; and
>
> (3) Is signed and dated by the patient before dispensing prescription drugs to the patient for the first time.

Under COMAR 10.47.07.03A, a licensee has certain obligations related to dispenser reporting, as follows:

> A. For each monitored prescription drug dispensed, the dispenser shall report the following prescription monitoring data to the Department:
>
> (1) Identifying information for the prescription issued and drug dispensed, including:
>
> (a) Prescription number;
>
> (b) Date prescription was issued;

(c) Date prescription was filled;
(d) Whether the prescription was new or a refill;
(e) Number of refills ordered;
(f) Sources of payment;
(g) National Drug Code for dispensed drug;
(h) Metric quantity of drug dispensed; and
(i) Days' supply of drug dispensed;

(2) Identifying information for the patient, including:
(a) Last name;
(b) First name;
(c) Date of birth;
(d) Sex;
(e) Telephone number, if the patient has one;
(f) Address, including residential house or building number, apartment number, street name, state, and zip code; and
(g) A patient identification number, which may include:
(i) A state-issued driver's license or identification card number;
(ii) An insurance or third-party payer identification number;
(iii) A passport identification number;
(iv) An employer-issued identification card number;
(v) A student identification card number;
(vi) A United States Permanent Resident Card identification number; or
(vii) A patient or customer identification number generated by the dispenser's record management system;

(3) Identifying information for the prescriber, including:
(a) A valid Drug Enforcement Administration registration number; and
(b) Last name; and

(4) Identifying information for the dispenser, including a valid Drug Enforcement Administration registration number.

Finally, COMAR 10.19.03.12 governs the steps which must be taken by entities with dispensing privileges to keep prescription drugs/devices and CDS secure, as follows:

A. General.

(1) All applicants and registrants shall provide effective controls and procedures to guard against theft and unlawful diversion of controlled substances. In order to determine whether a registrant or applicant has provided protective controls against theft and unlawful diversion, the Department shall use the security requirements set forth in §B of this regulation ...

B. Security Controls for Registrants.

...

(2) Controlled dangerous substances listed in Schedules II, III, IV, and V shall be stored in a securely locked, substantially constructed cabinet.

Burden of Proof

The burden of proof is by a preponderance of the evidence and rests with the State. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons articulated below, with two exceptions to be discussed, I find the State has satisfied its burden of proof to demonstrate the Respondent violated the applicable statutory and regulatory provisions and, as a result, he is appropriately subject to the imposition of sanctions.

The Merits of the Case

Arguments of the Parties

The State argued the evidence demonstrates two main problem areas of the Respondent's conduct: (i) his dispensing practices; and (ii) his provision of appropriate medical care to several weight loss patients, including failure to maintain adequate medical records about his treatment of the patients. With respect to dispensing practices, the State expressed concern about the Respondent's repeated failure to keep detailed records which demonstrated his patients' awareness they were not *required* to have their medications dispensed by him at his practice location. The Respondent also repeatedly failed to document in his records and the patients' charts that they chose to have him dispense their prescription medication because it was the most convenient for the patients. The Respondent further had a habit of giving prescription

medications to his patients in plain white envelopes rather than in child-resistant packaging, such as standard-issue pill bottles. When the Respondent dispensed medication in this manner, he frequently failed to document in his records whether the patients asked him to do so or otherwise declined child-resistant packaging. The OCSA inspector also noted several deficiencies in the Respondent's record-keeping and reporting related to his dispensing practices and his handling of prescription drugs and CDS. (*See* Joint Exs. 5, 6.)

The State argued the Respondent continued to have problems with his dispensing practice because he was not familiar with the statutory and regulatory requirements for entities with dispensing privileges. According to the State, there were several times during the OCSA inspector's site visit on February 21, 2017 where the Respondent expressed surprise about various requirements, such as performing a biennial count of on-hand CDS, providing written prescriptions to his patients, and properly labeling the containers in which drugs were dispensed, to give some examples. (Joint Ex. 6, pp. 36-37.) The State argued the Respondent's demonstrated lack of familiarity with statutory and regulatory dispensing requirements supports a finding that he willfully made a false statement, in violation of the Medical Practice Act, when applying for his dispensing permit.

In addition to the significant deficiencies in the Respondent's dispensing practices and record-keeping, the State also noted the Respondent's provision of medical care to his weight loss patients fell below the standards of care, as determined by two peer reviewers who assessed the Respondent's records. The peer reviewers looked at the records for six of the Respondent's weight loss patients, as well as the Respondent's written summary of each patient's care. Among the deficiencies noted by the reviewers were the following:

- Failure to document patients' weights in their chart, which makes actual weight management nearly impossible
- Failure to alter, cease, or re-evaluate patients' treatment regimens when patients gained weight

- Failure to alter, cease, or re-evaluate patients' treatment regimens when patients weights were not recorded despite months of treatment
- Failure to discuss or record discussions of activity and nutrition goals
- Failure to perform or record physical examinations of patients, even when prescribing appetite suppressants or other drugs
- Failure to order or maintain lab tests as a means of investigating whether there were co-morbid conditions which were related to or had an impact on patients' weight condition

(Joint Ex. 15, 16.)

The State further noted that at all relevant times, the Respondent was subject to the Consent Order. The allegations which resulted in the issuance of the Charges are both a violation of the terms of the Consent Order and their own, separate violations under the Medical Practice Act and the Pharmacy Act. The State was concerned by the similarity between the violations specified in the Charges and the violations which resulted in the Consent Order. The Respondent had already been sanctioned for deficiencies related to his dispensing practices and in his provision of appropriate medical care to his patients. According to the State, it is troubling the Respondent continued to experience the same problems in his medical practice. The State urged me to consider recommending progressive disciplinary action against the Respondent in light of the fact he did not significantly improve either his dispensing habits or his provision of medical care between the issuance of the Consent Order and the issuance of the Charges. A recommendation for progressive discipline (i.e., the imposition of something above a reprimand) is not punitive, according to the State, but rather is designed to effectuate the Board's goal: maintaining public safety and welfare.

The State made the following sanctioning recommendations: (i) the Respondent be permanently prohibited from dispensing any medications out of his office; (ii) the Respondent be subject to a six-month suspension, commencing sixty (60) days after the date of any issued order to give him the opportunity to close out his practice; (iii) he be required to undergo an evaluation by the Center for Personalized Education for Professionals (CPEP) to determine whether he can safely

return to the practice of medicine; (iv) after serving the period of suspension, he may petition the Board for a termination of the suspension; and (v) should the Board determine the suspension should be terminated, the Respondent shall abide by any conditions imposed by the Board for his return to the practice of medicine, including the imposition of any period of probation.

The Respondent acknowledged being the subject of previous discipline by the Board, which resulted in the Consent Order. He does not contest the findings and statements made in the peer review reports related to his conduct in his weight loss practice. According to the Respondent, he had a very challenging patient mix, and his patients would often refuse to let him weigh them. As a result of the difficulty he had in managing the patients in the weight loss practice, he wound down that portion of his practice in or around November 2017 and re-focused his attention on providing primary medicine care.

The Respondent conceded he is in violation of the Consent Order because he violated the Medical Practice Act in how he handled his weight loss patients, as described by the peer reviewers in their October 25, 2017 reports (Joint Exs. 15, 16). The Respondent further conceded the dispensing deficiencies noted by the OCSA inspector in the February 21, 2017 inspection report and associated narrative memorandum (Joint Exs. 5, 6), and that those deficiencies amounted to violations of the Medical Practice and Pharmacy Acts.

Although the Respondent largely conceded to the violations cited in the Charges and argued by the State, he took issue with two allegations of misconduct. First, he disputed that he failed to comply with the continuing medical education (CME) requirement under section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act Under that provision, a physician has five years to record ten hours of CME credits on dispensing, once the physician is licensed to dispense. According to the Respondent, he obtained his dispensing license in May 2013[6] so he could

[6] The Permit to Dispense Prescription Drugs was issued on May 13, 2013 and expired on May 12, 2018. (Joint Ex. 1, p. 2.)

prescribe weight loss medications. He shut down his weight loss practice in or around November 2017. He argued he was not yet in violation of section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act at the time the Charges were issued because he had not held the dispensing permit for five years; he still had time to comply with the requirement to obtain the ten CME credits. The Respondent urged me to recommend the dismissal of any charge related to his alleged failure to obtain the required CME credits. Additionally, he noted he does not intend to revive his weight loss practice, so he would not dispense prescription medications from his practice location.

The Respondent further disputed the assertion by the State and included in the Charges that he made any willful false statements in applying for his dispensing permit. The Respondent testified that at the time he applied for the permit, he was given information related to the statutory and regulatory requirements for dispensing, including the reporting and record-keeping requirements. He argued it is absurd for the State to argue that because he may have forgotten some of the requirements or did not strictly adhere to them it meant he made willful misrepresentations six years ago, when he first applied for and obtained the dispensing permit. The inability to retain legal requirements in one's memory with perfect clarity after a few years is not, according to the Respondent, the equivalent of or even similar to a willful misrepresentation of one's knowledge at the time of signing an application. The Respondent urged me to recommend the dismissal of any charge related to his alleged willful making of false statements in applying for the dispensing permit.

Finally, the Respondent noted he was always cooperative with the Board's inspections and investigation requests, and there has been no allegation of any patient being *harmed* as a result of the Respondent's conduct. He argued a six-month suspension is too harsh a sanction when he has closed down the portion of his business with which he continued to have trouble – the weight loss practice – and has no intention of reviving it. The Respondent made

the following sanction recommendation: (i) a two-year period of probation, during which the Respondent would be subject to whatever conditions the Board deemed appropriate and during which the Board could conduct at-will inspections as it deemed appropriate; (ii) the Respondent be assigned a practice monitor for the period of probation; and (iii) the Respondent be required to attend a Board-approved course on medical record keeping.

Analysis

With the exception of the allegations related to willfully making false statements and willfully filing a false report or record, and failing to obtain the required CME credits, the Respondent stipulated to the allegations in the Charges and contained in the State's supporting documentary evidence. The primary issue before me is one of the appropriate sanction given the facts of the case. I will first address the areas of dispute and then discuss a sanctioning recommendation.

Failure to Obtain Required CME Credits

As noted above, section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act imposes a duty on licensed physicians who also have dispensing authority to complete ten hours of CME credits within the five years the dispensing permit is active. Here, the Respondent's dispensing permit was issued on May 13, 2013 and was set to expire on May 12, 2018. The bulk of the Board's investigation took place between February 21, 2017 (the date on which the OCSA inspector conducted a cite visit and issued her inspection report) and November 20, 2017 (the date on which the Board investigator issued a final report; *see* Joint Ex. 18). The Charges were issued on April 30, 2018. As a practical matter, *at the time the charges were issued*, the Respondent could not have been in violation of section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act . A reading of the statute on its face demonstrates the earliest possible date on which the Respondent could be in violation was the last date on which the dispensing permit was effective – May 12, 2018. While

it may seem unlikely the Respondent could earn ten CME credits in twelve days, the fact of the matter is that at the time the Board issued the Charges, the Respondent was not yet in violation of the CME requirement. I decline to find the Respondent violated section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act .

Willful Making of a False Record or Report and Willful Making of a False Representation When Seeking a License

Under section 14-404(a)(11) of the Medical Practice Act, the Board is authorized to discipline a physician who willfully makes or files a false report or record in the practice of medicine. Section 14-404(a)(36) authorizes discipline when a physician willfully makes a false representation when seeking or making application for licensure or other application related to the practice of medicine. The State argued the Respondent violated these provisions of the Medical Practice Act when, on April 26, 2013, he signed the attestation on the Application for Physician's Permit to Dispense Prescription Drugs. The attestation states as follows: "I am thoroughly familiar with the statutes and regulations which govern physician dispensing of prescription drugs, including Health Occupations Article §§ 12-102, 12-505, and 12-604 ... and [COMAR] 10.3.01, 10.19.03.04, 10.19.03.05, and 10.19.03.07." (Joint Ex. 1, p. 1.)

According to the State, when the OCSA inspector conducted her site visit on February 21, 2017, there were several requirements related to dispensing with which the Respondent seemed unfamiliar. Additionally, during the Board's investigation, there were a number of times when the Respondent conceded he was not familiar with the statutes and regulations related to the dispensing of prescription medication. (Joint Exs. 7, 8, 12.) The State took the position that because the Respondent admitted he was unaware of the statutory and regulatory dispensing requirements during the investigation, it was more likely than not he was unaware of the requirements at the time he signed the dispensing permit application on April 26, 2013.

I am not persuaded by the State's argument. The Respondent testified, without contradiction, he familiarized himself with the applicable statutes and regulations at the time he applied for the dispensing permit. The Respondent's incomplete recall of the regulations in 2017 does not mean that in April *2013* he was unfamiliar with the regulations. It is not reasonable to assume that because someone does not know or remember a fact in one given year it means the person *never* knew the fact in the first place. When something is done "willfully," it is done deliberately or intentionally.[7] For me to find the Respondent violated sections 14-404(a)(11) and (36) of the Medical Practice Act , the State has to demonstrate it is more likely than not that *on April 26, 2013* the Respondent was unfamiliar with the applicable statutes and regulations related to dispensing prescription drugs. The State's argument here amounts to retroactive pleading, i.e., "Because the Respondent did not know Thing A in 2017, he also did not know Thing A in 2013." The State produced no evidence to support the argument, particularly given the Respondent's testimony that he did review the statutes, regulations, and information sheet provided to him by the Board at the time he signed the application. I decline to find the Respondent violated sections 14-404(a)(11) and (36) of the Medical Practice Act .

Sanctioning Recommendation

Although I decline to find the Respondent violated section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act and sections 14-404(a)(11) and (36) of the Medical Practice Act, I find the State has satisfied its burden as to the remaining violations cited in the Charges. The Respondent stipulated to the remaining violations. The remaining issue before me is the appropriate sanction. As noted above, the State recommended a six-month suspension and further conditions. The Respondent recommended a two-year period of probation and further conditions.

[7] "Definition of Willful," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/willful, (last accessed, April 19, 2019).

The guiding regulation in this matter, found at COMAR 10.32.02.09B, provides in pertinent part as follows:

> 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.
>
> ...
>
> (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.
>
> ...

The State argued the existence of a significant aggravating factor, namely, the Respondent's prior disciplinary history. Additionally, the State argued the Respondent's disciplinary history demonstrates the Board gave him the opportunity to improve and remediate the problems with his dispensing habits and his weight loss practice and he was not able to do so. Based on the record before me, I find the State's sanctioning recommendation to be appropriate.

While I do not believe the Respondent acted with malign intent, I do find it troubling that he was not able to remediate the deficiencies in his dispensing habits and his weight loss practice between March 2015 and February 2017. This is particularly concerning given that under the Consent Order the Respondent was required to successfully complete Board-approved courses focused on proper medical record keeping (which necessarily includes dispensary record keeping) and on weight management medicine. Despite the additional remedial training, the Respondent continued to have difficulty in these two areas of his medical practice. Given the Respondent's prior disciplinary history and his likely awareness of the seriousness with which licensees are expected to take the Board's orders, I do not find any significant mitigating factor that makes the Respondent's continued practice deficiencies in any way excusable. I recommend the Board adopt the State's sanctioning recommendations in their entirety.

PROPOSED CONCLUSIONS OF LAW

Based on the Stipulations, Findings of Fact, and Discussion, I conclude as a matter of law:

1. The Respondent violated section 14-404(a)(3) of the Medical Practice Act by engaging in unprofessional conduct in the practice of medicine;

2. The Respondent violated section 14-404(a)(22) of the Medical Practice Act by failing to meet appropriate standards of care for the delivery of medical and surgical care;

3. The Respondent violated section 14-404(a)(28) of the Medical Practice Act by failing to comply with the provisions of section 12-102 of the Pharmacy Act;

4. The Respondent violated section 14-404(a)(40) of the Medical Practice Act by failing to keep adequate medical records;

5. The Respondent engaged in violations under sections 12-202 and 12-205 of the Pharmacy Act related to the dispensing, maintenance, labeling, and record keeping for prescription drugs or devices;

6. The Respondent engaged in violations under section 22-311 of the Health General Article related to the packaging of dangerous household substances dispensed under prescription;

7. The Respondent engaged in violations under section 21-21-03 of the Health General Article related to prescription monitoring data;

8. The Respondent engaged in violations of COMAR 10.13.01.04 related to the dispensing requirements for prescription drugs;

9. The Respondent engaged in violations of COMAR 10.47.07.03 related to dispenser reporting requirements for prescription drugs;

10. The Respondent engaged in violations of COMAR 10.19.03.12 related to physical security controls for CDS;

11. The Respondent failed to comply with the Consent Order by failing to comply with provisions of the Medical Practice Act;

12. The Respondent did not violate section 14-404(a)(11) of the Medical Practice Act by willfully making or filing a false report or record in the practice of medicine;

13. The Respondent did not violate section 14-404(a)(36) of the Medical Practice Act by willfully making a false representation when seeking or making application for licensure or other application related to the practice of medicine;

14. The Respondent did not violate section 12-102(c)(2)(ii)(4)(M) of the Pharmacy Act by failing to meet the CME requirement; and

15. A six-month suspension and additional conditions, as recommended by the State, is the appropriate sanction under section 14-404(a) of the Medical Practice Act and COMAR 10.32.02.09A(3)(iii).

PROPROSED DISPOSITION

I **PROPOSE** the April 30, 2018 charges filed by the Maryland State Board of Physicians against the Respondent be **UPHELD.**

I further **PROPOSE** the Respondent: (i) be subject to a six-month suspension, commencing sixty (60) days after the date of any Board-issued order to give him the opportunity to close out his practice; (ii) be permanently prohibited from dispensing any medications out of his office; (iii) be required to undergo an evaluation by the Center for Personalized Education for Professionals to determine whether he can safely return to the practice of medicine; (iv) may petition the Board for a termination of the suspension after he has served the period of suspension; and (v) shall abide by any conditions imposed by the Board for his return to the practice of medicine, including the imposition of any period of probation, should the Board determine the suspension should be terminated.

April 22, 2019
Date Decision Mailed

Latonya B. Dargan
Administrative Law Judge

LBD/cmg
#179331

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.

Copies Mailed To:

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