OAH 21-0901-36754

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the Chiropractic License of K.D.K., D.C., License No. 5391

ORDER ON MOTION FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Kimberly Middendorf pursuant to a Notice and Order for Prehearing Conference and Hearing filed on March 17, 2020.

Natasha Robinson, Assistant Attorney General, appears on behalf of the Minnesota Board of Chiropractic Examiners Complaint Review Panel (Panel). Thomas D. Jensen, Lind, Jensen, Sullivan & Peterson, appears on behalf of K.D.K. (Licensee).

On June 5, 2020, Licensee moved for summary disposition. The Panel filed its response on July 8, 2020. Licensee replied on July 15, 2020, and the motion record closed.

Based on the files and record in this proceeding, and for the reasons explained in the Memorandum below, the Administrative Law Judge issues the following recommended:

ORDER

1. Licensee's Motion for Summary Disposition is **DENIED**.

2. This matter will proceed to an evidentiary hearing on **October 13, 2020**, beginning at **9:30 a.m.**

Dated: August 21, 2020

KIMBERLY MIDDENDORF
Administrative Law Judge

MEMORANDUM

I. Introduction

Licensee moves for summary disposition of the claims against him. Specifically, Licensee argues that "record-keeping violations cannot be grounds for licensure discipline" and "the chiropractic prepay plan rule should not be the basis for discipline in the circumstances presented here."[1] The Administrative Law Judge concludes that there are disputed issues of material fact, and the matter shall proceed to an evidentiary hearing.

II. Facts

Respondent obtained a license to practice chiropractic from the Board on June 1, 2010.[2] In 2016 and 2017, Respondent began treating three new patients, all members of the same family, referred to here as Father, Mother, and Child.[3] Licensee approved a different payment method for each member of the family. Father put down 20% of the estimated treatment cost ($1,648.64) and then made twelve monthly payments of $349.55 from the family's checking account and $200 from his HSA account.[4] Mother made monthly payments from her Care Credit Account until her credit line was exhausted, at which point she made $100 monthly payments from the family's checking account.[5] For Child, the family made $50 monthly payments from their checking account.[6]

Thereafter, according to the family, Licensee refused to submit their claims to insurance because their accounts needed to be paid in full first.[7] The family ultimately sent a letter to the Board, stating that they needed "some questions answered as we are getting contradicting information from the Chiropractic Office and the Insurance Company."[8] As a result of this complaint, the Panel requested patient records from Licensee and, after a review, scheduled a conference with Licensee to address alleged license violations.[9]

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[1] Respondent's Memorandum of Law in Support of Motion for Summary Disposition (Respondent's Mem.) at 1 (June 5, 2020).
[2] Notice and Order for Prehearing Conference and Hearing (Notice and Order for Hearing) at 3 (Mar. 10, 2020).
[3] *See* Affidavit (Aff.) of Natasha Robertson at Exhibit (Ex.) A.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *See id.* at Ex. B.

III. Procedural Background

The Department commenced this contested case by filing its Notice and Order for Prehearing Conference and Hearing on March 17, 2020.[10] On June 5, 2020, Licensee moved for summary disposition. The Panel filed its response on July 8, 2020. Licensee replied on July 15, 2020, and the motion record closed.

IV. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[11] A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[12] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[13] The Administrative Law Judge does not weigh the evidence;[14] instead, the Judge views the facts and evidence in a light most favorable to the non-moving party.[15]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[16] A fact is material if its resolution will affect the outcome of the case.[17] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[18] A genuine issue is not a "sham or frivolous" one,[19] and it cannot rely on mere allegations or denials.[20] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[21]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[22] Thus, summary disposition is only proper when no fact issues need to be resolved.[23]

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[10] Notice and Order for Hearing.
[11] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[12] *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[13] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[14] *Id.*
[15] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[16] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[17] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[18] *Thiele,* 425 N.W.2d at 583.
[19] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[20] *DLH*, 566 N.W.2d at 71.
[21] Minn. R. Civ. P. 56.05.
[22] *Sauter*, 70 N.W.2d at 353.

V. Analysis

In its Notice and Order for Hearing, the Panel alleges that Licensee: (1) failed to comply with statutory record-keeping and prepay rule provisions; (2) engaged in unprofessional conduct; and (3) failed to keep written chiropractic records justifying the course of treatment for the patients.[24] Licensee argues that "record-keeping violations cannot be grounds for licensure discipline" and "the chiropractic prepay plan rule should not be the basis for discipline in the circumstances presented here."[25] Licensee also questions jurisdiction. Therefore, according to Licensee, he is entitled to summary disposition. The Administrative Law Judge disagrees.

The Minnesota Board of Chiropractic Examiners (Board) "may revoke, suspend, condition, limit, restrict, or qualify a license to practice chiropractic" for a range of impermissible actions. Discipline can be imposed for, among other things: (1) "the violation of, or failure to comply with, the provisions of sections 148.01 to 148.105;" (2) the violation of the rules of the state Board of Chiropractic Examiners or a lawful order of the Board; (3) unprofessional conduct; and (4) "failing to keep written chiropractic records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, test results, and x-rays."[26]

A. Record Keeping

The Panel alleges two record-keeping violations, including Minn. Stat. §§ 148.107, and 148.10, subdivision 1(a)(18) (2020).

First, the Panel contends that Licensee failed to "comply with the record keeping provisions of Minnesota Statutes section 148.107, in violation of Minnesota Statutes section 148.10, subdivision 1(a) (10)." Section 148.107 lists items that should be included within a patient record. As noted above, the Board may impose discipline for, in relevant part, "the violation of, or failure to comply with, the provisions of sections 148.01 to 148.105." But, clearly, section 148.107 falls outside of the confines of section 148.10, subdivision 1(a)(10) (2020), which references 148.01 to 148.105. Thus, the Panel's cite to section 148.107 as a stand-alone basis for disciplinary action lacks legal support.

As further support for his allegation that "record-keeping violations cannot be grounds for licensure discipline," Licensee notes that health licensing boards "may take administrative action against a regulated person whose records do not meet the standards of professional practice," but such action "shall not be considered disciplinary action."[27] Licensee fails to acknowledge, however, that the statutory section further provides that "[r]ecords that are fraudulent or could result in patient harm may be

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[23] *Id*.
[24] Notice and Order for Hearing.
[25] Respondent's Mem. at 1.
[26] Minn. Stat. § 148.10, subd. 1(a)(10), (11), (18) (2020).
[27] *See* Minn. Stat. § 214.109 (2020).

handled through disciplinary or other corrective action."[28] Here, the Panel argues that Licensee's deficient record-keeping "could result in patient harm."[29] Therefore, although section 148.107 does not, by itself, provide a basis for disciplinary action, section 214.109 does. The Administrative Law Judge, therefore, must consider whether Licensee's conduct violated section 214.109. This determination requires an evidentiary hearing.

The Panel also alleges that Licensee "failed to keep written chiropractic records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, test results, and x-rays, in violation of Minnesota Statutes section 148.10, subdivision 1(a)(18)." Licensee argues that his records justified the course of treatment for the patient and could not have resulted in patient harm. The Panel disagrees, pointing to specifics in the charts themselves, as well as the expert opinion of Dr. Richard Tollefson, D.C.[30] The content and sufficiency of these patient records creates a material fact dispute precluding summary disposition.

B. Prepay Plan

The Panel next alleges that Licensee failed to "comply with the Prepay Plan provisions of Minn. R. 2500.6060, in violation of Minnesota Statutes 148.10, subd. 1(a)(10)."[31] According to Minn. R. 2500.6060 (2019), "[a]ny arrangement or agreement between a chiropractor and a patient for a course of future treatment for which funds in an amount of $1,000 or more are collected in advance of these services shall be considered a prepay plan within the meaning of this part."[32] The rule then states that "[a]ll prepay plans shall be in writing, signed by both the chiropractor and the patient, with a copy provided to the patient and a copy maintained in the patient's record." The rule also delineates other required elements of a prepay plan.

Licensee argues that "the chiropractic prepay plan rule should not be the basis for discipline in the circumstances presented here" because Father "was not [technically] a prepay patient."[33] This argument does not support summary disposition.

It is the Board, rather than an Administrative Law Judge, that has been entrusted with the discretion to determine what, if any, discipline is appropriate when a violation has occurred.[34] Licensee seems to concede that this was a prepay plan and that he

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[28] *Id.*
[29] Complaint Panel's Memorandum of Law in Opposition to Licensee's Motion for Summary Disposition (Panel's Mem.) at 10 (July 8, 2020).
[30] *See* Robinson Aff. at Ex. D.
[31] Notice and Order for Hearing at 4.
[32] Minn. R. 2500.6060, subp. 1.
[33] Respondent's Mem. at 1, 15.
[34] *Padilla v. Minnesota State Bd. of Medical Examiners*, 382 N.W.2d 876 (Minn. Ct. App. 1986) (concluding that "the legislature has conferred upon [the professional licensing board], and not upon the ALJ, a discretion to determine the type of discipline to impose. To hold that the ALJ should make a recommendation as to the type of discipline would be to usurp the power delegated to the Board.").

violated the rule, stating, "[s]ince this issue arose, Dr. Kramer revamped the clinic's prepay plan paperwork making it now compliant to the 't' with the Board's rule."[35] Licensee further states: Licensee "had a prepay plan protocol in effect at the time of the [family's] visit. Admittedly it was not followed [for Father] when he put 20% down as a partial payment of his care plan."[36]

The Panel alleges that all three family members had prepay plans and that Licensee violated several of the prepay-plan rule requirements.[37] Because there are material facts in dispute regarding whether the family's payment agreements constituted prepay plans, and, if so, whether Licensee violated the applicable rule, summary disposition is inappropriate.

C. Jurisdiction

Licensee argues that "adjudicatory jurisdiction does not exist for this contested case proceeding" because the Panel "seeks discipline for reasons wholly untethered to the patient complaint."[38] In addition, Licensee contends that "[w]hat happened here is the complaint panel took a complaint and asked for the patient charts."[39]

The Panel has explicit authority to request patient charts during an investigation.[40] Moreover, Licensee's implicit contention that the Panel is not able to look beyond the four corners of the complaint is without support in law or common sense.

The Board has a duty to protect the public from unsafe and unprofessional conduct by licensed chiropractors, and Licensee can be disciplined for violations discovered by the Panel beyond those alleged in the complaint.[41] Therefore, the Administrative Law Judge has jurisdiction to consider the issues raised in the Notice and Order for Hearing.

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[35] Respondent's Mem. at 15.
[36] *Id.* at 18.
[37] *See* Robinson Aff. at Ex. D.
[38] Reply Memorandum in Support of Respondent's Motion for Summary Adjudication (Reply Mem.) at 2-3 (July 15, 2020).
[39] *Id.* at 5.
[40] *See* Minn. Stat. § 148.104 (2020) ("A doctor of chiropractic who is the subject of an investigation by or on behalf of the board shall cooperate fully with the investigation. Cooperation includes appearing at conferences, meetings, or hearings scheduled by the board and for which the board provided notice in accordance with chapter 14; responding fully and promptly to any question raised by or on behalf of the board relating to the subject of the investigation; and providing copies of patient health records, as reasonably requested by the board, to assist the board in its investigation.").
[41] *See In re License of Freidenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998), *review denied* (Minn. Apr. 30, 1998) (The medical board received a complaint regarding a doctor who had performed an examination without gloves and, during the investigation, learned that the doctor had been arrested for soliciting prostitutes. The Minnesota Court of Appeals held that while "solicitation of prostitutes alone may not have been sufficient to warrant investigation, such actions, in the context of this case, were relevant and worthy of the board's consideration.").

VI. Conclusion

Licensee has failed to show that there are no material facts in dispute. Therefore, Licensee's motion for summary disposition is **DENIED**.

K. J. M.