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administrative rule governing medical license applications, an examination inquiry into matters other than medical principles, diagnosis or treatment, does not constitute a legal or factual error justifying a rehearing in this matter.

3. Contrary to the assertions in paragraphs 3 and 4 of the *Petition for Rehearing*, it is not a material error of law for the Department of Regulation and Licensing (Department) to limit the review of the examination materials, including audio tapes.

As prescribed in Wis. Admin. Code § Med 1.09(6), the process for the challenge of an oral examination may include a review of the applicant's answer sheet, oral-practical tape or master answer sheet. However, the review is structured to protect the content of the oral examination. The review process limits the length of review to not more than 2 hours, prescribes the type of materials that can be reviewed, requires the presence of a proctor and the location of the review. The petitioner was duly informed in writing by the MEB of this process for review.

4. Contrary to the assertions in paragraphs 3 and 4 of the *Petition for Rehearing*, the audio tape of the petitioner's final oral examination before the MEB on November 29, 2007, was maintained and made available.

The petitioner was offered an opportunity to review the audiotape of his final full board oral examination, per the letter of the Board dated January 8, 2008. This opportunity was provided in accordance with examination review process in Wis. Admin. Code § Med 1.09. The petitioner was advised that this process would not permit him to have copies of tapes mailed directly to him and that certain of the tapes were not available. However, the petitioner was provided with a copy of his final oral examination audiotape which was introduced at the hearing. The petitioner did not raise any concerns about the availability of the prior examination tapes at the hearing. While the Board might have done better to maintain the tapes of the petitioner's prior examinations, this inadvertence had no effect on the petitioner's failure of the oral examinations so as to warrant a rehearing in this matter.

5. Contrary to the assertions in paragraphs 5, 6 and 7 of the *Petition*, it is not a material error of fact or law for the ALJ to find that Dr. Parker was more qualified to render an expert opinion in this case.

It is within the discretion of the fact-finder to assess the credibility of witnesses, including those witnesses who are presented at hearing as experts, and to determine the relative weight to be given to such testimony. The ALJ who was the fact-finder in this proceeding made specific findings regarding the qualifications and expertise of the witnesses. [pgs. 66-67] The ALJ found that Dr. Parker, the expert witness presented by the Division of Enforcement was more qualified to render an opinion based upon her substantial education, training and experience as a professor of clinical medicine. The ALJ also found in contrast, that there was no testimony or documentation offered by the petitioner, such as a curriculum vitae or other documentary evidence to show that his witness, Dr. Tomeh, was qualified to render an expert opinion on the issues in this matter. The ALJ's assessment of credibility with respect to the expert witness testimony was not an error of law or fact and does not warrant a rehearing in this matter.

ANALYSIS OF THE PETITION

The primary issue in this proceeding is whether the petitioner gave adequate answers to the examination questions during his June 27, 2008, oral examination before the MEB. The *Petition for Rehearing* unfortunately misses the crux of this issue. The licensure decision of the MEB as reflected in the *Proposed Decision* by the ALJ was not simply based upon a dispute as to a choice of medication stated in his answer or to a list of the petitioner's past record in regard to his clinical training and postgraduate examinations. The MEB denied the petitioner's application on the basis that his examination answer were inadequate, incomplete and did not demonstrate the minimal competence necessary to qualify for a medical license in this state. The ALJ affirmed the decision of the MEB based upon the evidence presented at the hearing. The ALJ found that the petitioner's position that his answer was consistent with the essential steps listed in several medical reference textbooks was not supported by the evidence of record. In fact, the ALJ noted that only one of the three references relied upon by the petitioner at hearing was actually identified by him during his oral examination before the board. The ALJ also found that the petitioner appeared to assert for the first time during the hearing that many of essential steps which were referenced in the medical textbooks would be taken by a nurse.

Dr. Parker, the Division's expert witness, refuted the petitioner's testimony and testified that in answering an examination question, a minimally competent physician cannot defend an inadequate answer by saying that "he did not mention that, but nurses would know to do that." *Proposed Decision* at pg. 31. According to Dr. Parker, the assumption that nurses know to do something is not an appropriate assumption. It is still the physician's job to take all of that information in and make sure that the care is appropriate. In Dr. Parker's opinion, the critical factor was not what the petitioner included in his answer but what he did not include; his overall lack of understanding of why something was important and what was missing from his answer. *Id.* at 34.

In plain terms, the petitioner failed his examination because he did not demonstrate that he himself possessed the knowledge minimally necessary to treat a seizing patient. The petitioner gave, at best, partial answers which did not warrant a passing grade. The petitioner's claim in the *Petition for Rehearing* that his failure was due to a disagreement about the drug of choice

was the least of his obstacles in his defense of an inadequate examination answer. The petitioner had far more basic gaps in his apparent understanding of the effects and processes of seizures and how to stop them as verified by the expert testimony of Dr. Parker. Competing preferences between two acceptable medications does not rise to the level of a material error because it would not make a difference in the grading of the petitioner's examination.

Nor is a material error for the ALJ's decision to decline to accept the petitioner's witness, Dr. Tomeh, as an expert qualified to render an opinion on the issues in this case. The Petitioner did nothing to present any information about the credentials of his witness at the hearing. Nor is there any indication in the agency record that this witness was presented as an expert to the MEB before the hearing. Neither the ALJ nor the MEB can consider evidence that was never presented by the petitioner.

Under the rules and statute governing eligibility for medical licensure in the state of Wisconsin, it is clear that an applicant who fails to achieve a passing grade in the required examinations pursuant to Wis. Stat. § 448.06 (2) shall be denied licensure. It is equally clear that the *Petition for Rehearing* does not identify any material legal or factual errors in the final decision denying his application for a medical license or newly discovered evidence sufficiently strong to warrant a rehearing in this matter. Accordingly, for all of the reasons discussed herein, the *Petition for Rehearing* is denied.

WISCONSIN MEDICAL EXAMINING BOARD

Gene Musser, M.D.
Board Chair

11/3/08

[\[1\]](#) The petitioner is a graduate of a foreign medical school not approved by the board and has a history of multiple failures of the United States Medical Licensing Examinations. Although these factors are sufficient reason for requiring an oral examination, the primary focus of the petitioner's oral examination was the adverse formal actions taken against him during his postgraduate training. These formal actions included the petitioner's failure to complete an anesthesia residency training program and termination from the program for violating personnel rules in his training application. In addition, the petitioner failed to complete a surgical residency at another postgraduate training program and was eventually removed from that program for poor clinical performance.