

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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1984
#84med4

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE	:	
APPLICATION FOR LICENSURE	:	
TO PRACTICE PODIATRIC	:	FINAL DECISION
MEDICINE AND SURGERY OF	:	AND ORDER
	:	
MARK E. PFEIFER, D.P.M.,	:	
APPLICANT	:	

The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Hearing Examiner, makes the following:


ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Hearing Examiner, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board. Let a copy of this order be served on the applicant by certified mail.

A party aggrieved by this decision may petition the board for rehearing within twenty (20) days after service of this decision pursuant to Wis. Stats. sec. 227.12. The party to be named as applicant in the petition is Mark E. Pfeifer, D.P.M.

A party aggrieved by this decision who is a resident of this state may also petition for judicial review by filing the petition in the office of the clerk of the circuit court for the county where the party aggrieved resides within thirty (30) days after service of this decision. A party aggrieved by this decision who is not a resident of this state must file the petition for judicial review in the office of the clerk of circuit court for Dane County. A party aggrieved must also serve the board and other parties with a copy of the petition for judicial review within thirty (30) days after service of this decision pursuant to Wis. Stats. sec. 227.16. The party to be named as respondent in the petition is the State of Wisconsin, Medical Examining Board.

Dated this 21st day of June, 1984.



STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION :
FOR LICENSURE TO PRACTICE :
PODIATRIC MEDICINE AND SURGERY OF : PROPOSED DECISION
:
MARK E. PFEIFER, D.P.M., :
APPLICANT. :

The parties to this proceeding for the purposes of Wis. Stats.
sec. 227.16 are:

Mark E. Pfeifer, D.P.M.
Route 1, Box 311
Argonne, WI 54511

and

Mark E. Pfeifer, D.P.M.
c/o Department of Radiology
Dr. William M. Scholl
College of Podiatric Medicine
1001 North Dearborn Street
Chicago, IL 60610

Medical Examining Board
1400 East Washington Avenue, Room 176
P.O. Box 8936
Madison, WI 53708

The above-captioned matter was commenced as a class 1 proceeding within the meaning of Wis. Stats. sec. 227.01(2)(a), by the filing of a Notice of Hearing on January 25, 1984. The Notice of Hearing indicated that the purpose of the proceedings was to provide the applicant, Mark E. Pfeifer, D.P.M., a hearing upon the following action taken by the Medical Examining Board and the Podiatry Examining Council:

"On December 8, 1983, the Wisconsin Medical Examining Board and the Podiatry Examining Council denied your (Dr. Pfeifer's) application for licensure to practice podiatric medicine and surgery on the grounds that you failed to achieve a passing grade on the oral-practical examination, and notified you of this decision by letter dated December 12, 1983, a copy of which is attached hereto and incorporated herein. The issue raised for consideration at the hearing on the denial of your application for licensure is:

"Did you provide answers to questions presented at your oral-practical examination on December 8, 1983, adequate to achieve a passing grade on said examination?"

The hearing was held on March 14, 1984 in the Washington Square Building, 1400 East Washington Avenue, Room 177. The applicant, Mark E. Pfeifer, appeared personally and without legal counsel. John R. Zwieg appeared as the attorney for the Department of Regulation and Licensing, Division of Enforcement.

Based upon the record herein, the Hearing Examiner recommends that the Medical Examining board adopt as its final decision in this case, the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Mark E. Pfeifer, D.P.M., (Pfeifer) has applied for a license to practice podiatric medicine and surgery (sometimes referred to herein as "podiatry") in the State of Wisconsin.
2. Applicants for a license to practice podiatry in the State of Wisconsin must satisfy the requirements set forth in Wis. Stats. sec. 448.05(3), Wis. Stats. sec. 448.06(2), and Wis. Adm. Code ch Med. 6.
3. Pfeifer has satisfied all of the requirements leading to licensure as a podiatrist in the State of Wisconsin with the exception of not having received a passing grade upon the oral-practical examination required under Wis. Adm. Code sec. MED 6.05(1).
4. Pursuant to Wis. Adm. Code secs. Med 6.05(1) and (4), the oral-practical examination is given to applicants for a license to practice podiatry by the Podiatry Examining Council and is scored on a pass or fail basis.
5. Pfeifer took the oral-practical examination before the Podiatry Examining Council on December 7, 1983. Subsequent to the examination Pfeifer was notified that the Medical Examining Board and Podiatry Examining Council had denied his application for a license to practice podiatry upon the basis that he failed to achieve a passing grade on the oral-practical examination.
6. During the oral-practical examination of Pfeifer, the Podiatry Examining Council (consisting of three members) requested that he examine four separate x-rays of feet and evaluate the conditions presented. The x-rays were placed upon a view box. With the exception of one occasion when a member of the Podiatry Examining Council suggested that he "take a little closer look" at an x-ray, Pfeifer was seated approximately four to eight feet from the view box.
7. The answers given by Pfeifer regarding the conditions depicted upon the x-rays were deficient in the following respects, in that he:
 - (1) failed to observe an obvious fracture in the distal phalanx of the right big toe,

- (2) failed to observe that the second cuneiform was missing from the left foot,
- (3) failed to observe that arthritic changes were present in the dorsum of the left foot in the area of the first cuneonavicular joint,
- (4) failed to observe the existence of a supernumerary ossicle behind the right ankle,
- (5) failed to describe with sufficient adequacy the condition depicted in order to sufficiently indicate the problems presented,
- (6) failed to observe that the first metatarsal base did not articulate with the first cuneiform.

8. During the oral-practical examination of Pfeifer, he was also asked general questions which did not involve the use of x-rays or the view box.

9. The answers given by Pfeifer regarding the general questions asked were deficient in the following respects, in that he:

- (1) gave an inappropriate answer in responding to his knowledge about pitted keratolysis,
- (2) gave an incorrect response to what is meant by the term "Salter III",
- (3) gave an incorrect response regarding the symptoms of acute adrenal crisis,
- (4) gave an inadequate response regarding the origin, course and insertion of the tibialis posterior muscle in that the response as to origin was incomplete, as to course was unsatisfactory, and as to insertion was incomplete,
- (5) gave an incorrect response regarding the anatomy of the tarsal tunnel by confusing it with the sinus tarsi.

10. Wis. Adm. Code sec. Med 9.04 provides that in this proceeding "(t)he burden of proving eligibility for licensure shall remain on the applicant."

11. Pfeifer has not met his burden of proving his eligibility for licensure to practice podiatry in the State of Wisconsin.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to Wis. Stats. sec. 448.02(1), Wis. Stats. sec. 448.06(2), and Wis. Adm. Code Ch. Med 9.

2. The Medical Examining Board may deny an application for a license to practice podiatry on the basis of the failure of an applicant to achieve a passing grade in the required examinations, pursuant to Wis. Stats. sec. 448.06(2).

3. In order to be qualified for the grant of a license to practice podiatry in the State of Wisconsin, an applicant must pass the oral-practical examination pursuant to Wis. Stats. sec. 448.05(6)(a), and Wis. Adm. Code Ch. Med 6.

4. The burden of proving eligibility for licensure as a podiatrist, after having been notified of the failure of the oral-practical examination, remains upon the applicant pursuant to Wis. Adm. Code sec. Med 9.04.

5. Pfeifer has not met his burden of proving his eligibility for a license to practice podiatry in the State of Wisconsin.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the application of Mark E. Pfeifer for licensure to practice podiatric medicine and surgery in the State of Wisconsin shall be, and hereby is, denied.

OPINION

The applicant, Mark E. Pfeifer, was denied a license to practice podiatry in the State of Wisconsin on December 8, 1983 by the Medical Examining Board and Podiatry Examining Council. The stated basis for the denial was Pfeifer's failure to successfully pass the oral-practical examination administered by the Podiatry Examining Council on December 7, 1983. Pfeifer requested a hearing upon the denial pursuant to Wis. Adm. Code sec. Med 9.04. This proposed decision is based upon the hearing requested and held.

This action is designated as a "class 1 proceeding", which is described within Wis. Stats. sec. 227.01(2)(a) as one in which the Medical Examining Board "acts under standards conferring substantial discretionary authority upon the agency." Furthermore, it is essential in evaluating this case to recognize that the primary purpose for the legislative creation of the Board is to assure the public that its licensees, including podiatrists, are competent to perform professional services at a minimal standard; and that the granting of such license constitutes an assurance to the public of such competency. See, Strigenz v. Department of Regulation and Licensing, 103 Wis. 2d 281, 287 (1981). It is my opinion, based upon the record made in this proceeding, that Pfeifer has failed to meet his burden of establishing his competency to practice podiatry and that the Board should exercise its discretion to deny his application for licensure.

The sufficiency and accuracy of Pfeifer's answers during the oral-practical examination is a major issue to be determined. Pfeifer, additionally, challenges the nature of the examination itself, both in

terms of its validity in testing minimal skills necessary to the practice of podiatry and in the manner in which it was conducted. The performance of Pfeifer upon the oral-practical examination and the nature of the examination itself will be discussed separately.

PERFORMANCE UPON EXAMINATION

A cassette tape of the oral-practical examination (State's Ex. D) and a written transcript prepared from the tape (State's Ex. F) were introduced into evidence at the hearing, as were the x-rays which were utilized (State's Ex. A, B, C and E). Accordingly, the sufficiency and correctness of Pfeifer's responses to the questioning by the members of the Podiatry Examining Council are capable of review and evaluation.

The first expert witness to testify concerning Pfeifer's performance on the oral-practical examination was Dr. Roy M. Cowen. Cowen testified as to numerous omissions, inaccuracies and inadequacies in the responses given by Pfeifer at the examination. The expert witnesses called by Pfeifer, Drs. Edwin J. Harris and John Grady, did not materially dispute or contradict the opinions of Cowen regarding the problems he believed to exist concerning Pfeifer's responses. Accordingly, the deficiencies listed in the Findings of Fact at pars. 7 and 9 are essentially uncontroverted. This being the case, there is no need to dwell upon Cowen's underlying rationale for his conclusions in this opinion. It merely should be indicated that the supportive reasoning of Cowen for the ultimate findings was set forth at the hearing in extensive detail, (Trans., pp. 27-113), and that Cowen believed Pfeifer's performance upon the examination indicated a lack of sufficient knowledge of podiatry to establish his minimal competency in the profession.

The only real challenge to Cowen's opinions that Pfeifer's performance upon the oral-practical examination demonstrated a lack of minimal competency to practice podiatry was contained in the testimony of Dr. John Grady. Grady has been a licensed podiatrist for four years, has actively practiced podiatry for three, and is currently the Director of Sports Medicine and Assistant Chairman of the Department of Orthopedics at Scholl College of Podiatric Medicine in Chicago, Illinois. Grady testified that his review of Pfeifer's answers at the oral-practical examination would have led him to give Pfeifer a grade of "close to eighty percent", which he believed would be an adequate passing grade. (Trans., p. 138). However, Grady conceded that his resulting "grade" was based upon the assumption that all questions were of equal weight (Trans, p. 138) and did not include Pfeifer's responses concerning his analysis of the x-rays (Trans., p. 140).

Obviously, Pfeifer's performance concerning the analysis of the x-rays was a major portion of the examination and Pfeifer made several omissions of significant import in these answers. The failure to consider Pfeifer's responses upon the x-rays clearly detracts from the value of an opinion that Pfeifer should have received a passing grade upon the examination. Also, the Podiatry Examining Council may not have given equal weight to each general question upon the pass-fail examination. For example, it is undisputed that Pfeifer was unknowledgable with regard to the symptoms of acute adrenal

crisis and that a patient could be placed in a life threatening situation if such a condition were undiagnosed. (Trans., pp. 43-44; also see, Grady Testimony, Trans., p. 142). Incorrect answers to other questions might not have as significant impact upon the health and safety of a patient and, accordingly, the Podiatry Examining Council would be more than justified in placing more weight upon one question than another.

In short, the testimony that Pfeifer should have received a grade of "close to eighty percent", and thus presumably have been found to pass the oral-practical examination, must be rejected as totally speculative since it is based upon a critical, but unsubstantiated assumption of equal weight per question and failing to adequately consider a major portion of the examination--the analysis of x-rays.

NATURE OF EXAMINATION

Pfeifer did not challenge Cowen's opinions as to the appropriateness of Pfeifer's responses to the questions posed at his oral-practical examination. His primary position, simply stated, was that the examination was not a fair or reliable measure of competency to practice as a podiatrist. Pfeifer raises two concerns in this regard. First, he claims that he was seated too far from the view box in order to adequately analyze the conditions presented in the x-rays. Second, Pfeifer believes that a majority, or at least many of the questions asked of him were not reliable in evaluating minimal competency at the entry level into podiatry.

The testimony is contradictory as to the distance from which Pfeifer viewed the x-rays during the examination. The administrative assistant to the Board, who was present during Pfeifer's oral-examination, testified that he was seated approximately four to four and a half feet from the view box. (Trans., p. 17). Pfeifer testified that he sat in a chair different, and further from the view box than that claimed by the administrative assistant. He claimed that he was actually seated approximately ten to twelve feet from the view box. (Trans., p. 94).

Since the room in which the oral-practical examination took place is within the same building where the evidentiary hearing was held, the parties and witnesses conducted a view of the examination room during the hearing. (Trans., pp. 152-153). During the visit to the examination room Pfeifer sat in a chair he claimed to be located approximately the same distance from the view box as during the oral-practical examination. (It should again be noted that the Board's administrative assistant testified that Pfeifer was actually seated closer to the view box than where he placed himself during the view of the examination room). A measurement of the distance between where Pfeifer seated himself and the approximate location of the view box was then taken. The resultant calculation was seven feet, ten inches. (Trans., p. 154). Accordingly, it appears that depending upon where Pfeifer actually sat during the examination (or, to put it another way, whether Pfeifer's or the Board's administrative assistant's testimony in this regard is accepted), his actual location in relationship to the view box was between approximately four to eight feet. In either event it was agreed upon by the

opposing experts at hearing that appropriate and standard podiatric practice would require an x-ray examination be conducted from a distance of from about twelve to eighteen inches from the view box, (Trans., pp. 86, 117). Nevertheless, Cowen testified that the problems which Pfeifer failed to observe in the x-rays--as set forth in pars. 7(1)(2)(3) of the Findings of Fact--could be observed easily from a distance of at least four feet. (Trans., pp. 97, 101, 104). Thus, Pfeifer's distance from the view box during the examination would not appear to account for at least three of the six problem areas set forth in par. 7 of the Findings of Fact. And, of course, the distance from the view box had nothing to do with Pfeifer's inability to answer the general questions concerning podiatry posed to him, which were unrelated to the x-rays, as set forth in pars. 9(1)-(5) of the Findings of Fact.

Finally, if distance was a problem with regard to Pfeifer's ability to adequately and accurately analyze the x-rays, he simply should have moved closer to the view box. There is nothing in this record which indicates that he was or would have been prevented from doing so. In fact, at least during one point in the examination a member of the Podiatry Examining Council suggested that Pfeifer "should take a little closer look at the x-ray." (State's Ex. F, p. 6). Pfeifer claims, however, that he was directed to a specific chair and that due to his "respect for authority", he stayed there. (Trans., p. 148). He admits he was never instructed that he was required to view the x-rays from where he initially seated himself (Trans., p. 148), which, of course, would be inconsistent with the suggestion by the council member that he take a closer look at an x-ray. Furthermore, Pfeifer admitted that he had been educated by an instructor in podiatry--the instructor having been Dr. Edwin J. Harris, one of Pfeifer's experts witnesses--to view x-rays from a close distance. (Trans., p. 149). Dr. Cowen also further testified that a minimally competent podiatrist would have requested to move closer to the view box during the x-ray examination. (Trans., pp. 109-110). Pfeifer simply should have requested to move closer to the view box. It cannot be assumed, furthermore, that even had Pfeifer moved closer to the view box that he would have appropriately analyzed the x-rays such as to achieve passage of the oral-practical examination.

Pfeifer's second objection to the nature of the oral-practical examination is that it did not fairly assess the knowledge required of a podiatrist at the basic entry level of practice. (Trans., p. 92). Dr. Harris shared this view. (Trans., p. 130). Dr. Cowen disagrees, as inferred through his testimony that Pfeifer's concerned answers were not those to be expected from a minimally competent podiatrist.

This examiner is not a podiatrist and would be remiss in attempting to personally assess the relationship between the questions asked upon the oral-practical examination and the practice of podiatry without sufficient and specific expert testimony on such an issue. In my opinion, such testimony is insufficient in this case. However, even could it be provided, such an evaluation may be legally inappropriate by a hearing examiner in light of the decision of the Wisconsin Supreme Court in Wall v. Wisconsin R.E. Brokers' Board, 4 Wis. 2d 426 (1958). In that case an applicant for a real estate broker's license appealed from a licensing board decision

finding that she had failed the examination required for licensure. The applicant's claim in Wall was substantially the same as that presented here by Pfeifer; that is, the licensing examination required unreasonably high standards of competency for passage. The Court commented as follows:

"The trial court expressed surprise that the board thinks a qualified realtor should know so much of the law of real property as the examination indicates. We are equally surprised. Left to ourselves, it would hardly occur to us that a broker should be able to name 'the four unities required to create a joint tenancy,'--but we are not realtors nor has the legislature charged us with the responsibility of determining the qualifications to be required of one aspiring to engage in that occupation. This is the function of the board. Not many of the examination questions are so startling and the trial court did not find that either in the questions or in grading the answers the board acted arbitrarily or capriciously. Fraud, of course, cannot even be suggested.

"Though we would, ourselves, not have asked several of the questions except in a bar examination nor would we in some instances have marked the answers as low as did the board, we recognize that the questions in the main dealt with the situations apt to confront a real-estate broker and are germane to his competency in his business "
Wall, at p. 431.

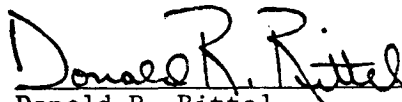
In view of the impact of the foregoing judicial position upon Pfeifer's claim that the oral-practical examination was more difficult than necessary, or that some questions were unnecessary to an assessment of minimal competency to practice podiatry, and in view of Dr. Cowen's strong testimony regarding the quality of Pfeifer's performance, I cannot find Pfeifer's position to be legally, or factually, sustainable.

CONCLUSION

Based upon the record in this case, in my opinion, the Medical Examining Board should deny Pfeifer's application for a license to practice podiatry since he has not met his burden of establishing the necessary qualifications required by the Board.

Dated at Madison, Wisconsin this 30th day of May, 1984.

Respectfully submitted,



Donald R. Rittel
Hearing Examiner

DP
mailed
1-25-84

BEFORE THE STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION :
FOR LICENSURE TO PRACTICE :
PODIATRIC MEDICINE AND SURGERY OF : NOTICE OF HEARING
:
MARK E. PFEIFER, D.P.M., :
APPLICANT. :

To: Mark E. Pfeifer, D.P.M.
Route 1, Box 311
Argonne, WI 54511

PLEASE TAKE NOTICE that a hearing constituting a Class I proceeding as defined in Wis. Stats. sec. 227.01(2) will be held on the 14th day of March, 1984, at 9:30 a.m. or as soon thereafter as the matter may be reached, in Room 177 at 1400 East Washington Avenue, Madison, Wisconsin on the December 8, 1983 decision of the Wisconsin Medical Examining Board and the Podiatry Examining Council denying your application for licensure to practice podiatric medicine and surgery in the State of Wisconsin. The legal authority and jurisdiction under which this hearing is to be held is set forth in Wis. Stats. secs. 448.02, 448.06(2) and 227.07, and in Wis. Adm. Code, Ch. Med 9.

The hearing examiner designated to preside over the matter pursuant to Wis. Stats. sec. 227.09 is Donald R. Rittel, Department of Regulation and Licensing, Office of Hearing Examiner, Room 171, 1400 East Washington Avenue, P.O. Box 8936, Madison, Wisconsin 53708-8936. All correspondence and other documents shall be filed with the hearing examiner at the address indicated. Copies of said correspondence and documents shall be filed with the Wisconsin Medical Examining Board, Department of Regulation and Licensing, Room 176, 1400 East Washington Avenue, P.O. Box 8936, Madison, Wisconsin 53708-8936, and with John R. Zwieg, the attorney for the Department of Regulation and Licensing, Division of Enforcement, Room 183, 1400 East Washington Avenue, P.O. Box 8936, Madison, Wisconsin 53708-8936.

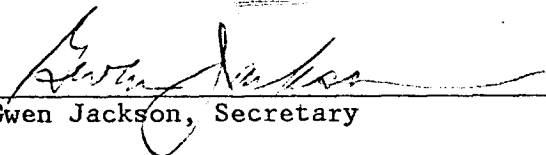
On December 8, 1983, the Wisconsin Medical Examining Board and the Podiatry Examining Council denied your application for licensure to practice podiatric medicine and surgery on the grounds that you failed to achieve a passing grade on the oral-practical examination, and notified you of this decision by letter dated December 12, 1983, a copy of which is attached hereto and incorporated herein. The issue raised for consideration at the hearing on the denial of your application for licensure is:

Did you provide answers to questions presented at your oral-practical examination on December 8, 1983, adequate to achieve a passing grade on said examination?

If you are represented by counsel, counsel is requested to file a notice of appearance forthwith.

Dated January 19, 1984.

BY THE BOARD:


Gwen Jackson, Secretary

John R. Zwieg, Attorney
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue, Room 183
P.O. Box 8936
Madison, Wisconsin 53708-8936
(608) 266-1790

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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION :
FOR LICENSURE TO PRACTICE :
PODIATRIC MEDICINE AND SURGERY OF :
MARK E. PFEIFER, D.P.M., :
APPLICANT :

ORDER

A Notice of Hearing having been filed with the Medical Examining Board regarding the above applicant in accordance with Wis. Adm. Code Ch. Med 9 and the rules of the Medical Examining Board and the statutes of State of Wisconsin allowing the appointment of an independent hearing examiner to preside over this matter, and Donald Rittel, an attorney to practice law in the State of Wisconsin, and being an employee of the Department of Regulation and Licensing, State of Wisconsin having agreed to serve as said independent hearing examiner, it is hereby ORDERED:

1. That the said Donald Rittel is hereby designated as the hearing examiner to preside over the above captioned matter with the power specified in the provisions of sec. 227.09(1), Wis. Stat.
2. That the said Donald Rittel is hereby directed to prepare a proposed decision including findings of fact, conclusions of law, order and opinion a form that may be adopted by the Medical Examining Board as a final decision in this case.

Dated in Madison, Wisconsin this 19 day of January, 1984.

BY THE BOARD:


Gwen Jackson, Secretary

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