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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

HAROLD J. DYKEMA, D.C.

LS0105071CHI

Respondent

ORDER ON REMAND

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Harold J. Dykema, D.C.

1620 South Hastings Way

Eau Claire, WI 54701

Department of Regulation & Licensing

Division of Enforcement

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

State of Wisconsin Chiropractic Examining Board

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

A Class II hearing was held in the above-captioned matter on June 11 and 12, 2002, at 1400 East Washington Avenue, Madison, Wisconsin. Dr. Dykema appeared personally and by Attorney Richard L. Wachowski. The Division of Enforcement appeared by Attorney James E. Polewski. Closing arguments were filed by September 12, 2002.

The administrative law judge (ALJ) filed his Proposed Decision on November 11, 2002. On November 27, 2002, Dr. Dykema, by Attorney Wachowski, filed his Objections to Proposed Decision, and the Division of Enforcement, by

Attorney Polewski, filed its Response to Respondent's Objections to Proposed Decision on December 3.

The Chiropractic Examining Board took up the matter at its meeting of December 19, 2002, at which time the board approved the ALJ's Proposed Decision. However, what was deemed to be an irregularity in the procedure exercised by the board in its consideration of the matter was discovered following adjournment of the meeting. Contrary to policy established by the department, the Board Advisor on the case was permitted to participate in the deliberations and voting on the matter. Accordingly, the board Chair approved staying the issuance of the final decision pending reconsideration by the board at its next meeting.

On January 8, 2003, the board again considered the matter. The board's legal counsel at that time recommended to the board that in reconsidering the matter, the board vacate its previous decision and remand the matter to the ALJ under § 22746(3), Stats., to make the final decision in the case following his consideration of the respondent's objections to the Proposed Decision. The board approved that recommendation and, on January 21, 2003, the board entered its Order Vacating Previous Board Action and Ordering the ALJ's Decision to Be the Final Decision. The ALJ thereafter entered the board's Final Decision and Order on January 29, 2003. By the terms of the Final Decision and Order, Dr. Dykema's license was ordered revoked.

On March 3, 2003, Dr. Dykema, by Attorney Richard Wachowski, filed his Petition for Review with the Circuit Court for Eau Claire County. The Chiropractic Examining Board, by Assistant Attorney General Thomas J. Balistreri, filed its Notice of Appearance and Statement of Position in Response to Petition for Review of Administrative Decision on March 18, 2003. The matter was submitted on briefs, and the court issued its Order on July 18, 2003. Three of the board's findings of unprofessional conduct were affirmed, and two of the board's findings were reversed. Additionally, the board's order revoking Dr. Dykema's license was reversed, and the matter was remanded to the board to reconsider appropriate discipline on the basis of the three findings of unprofessional conduct that had been affirmed.

By its Remand Order dated September 29, 2003, the Chiropractic Examining Board remanded the matter to the ALJ to reconsider appropriate discipline and to determine whether to appeal the circuit court's decision. Based upon the foregoing, it is ordered as follows:

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Harold J. Dykema, D.C., be, and hereby is, suspended for a period of not less six months from the date hereof.

IT IS FURTHER ORDERED that after six months, Dr. Dykema may petition the board for termination of the suspension, and shall appear before the board in support of his petition. The board may make such inquiry of Dr. Dykema as may be necessary to determine his current ability to safely and competently engage in the practice of chiropractic, and may impose such reasonable limitations on his practice as the board deems appropriate to ensure that his future practice is consistent with accepted chiropractic standards.

IT IS FURTHER ORDERED that pursuant to § 440.22(2), Stats., one-half of the costs of this proceeding, are assessed against Dr. Dykema. Such assessment shall not include any costs accruing after the board's remand of this matter to the ALJ on January 23, 2003.

DISCUSSION

The two findings of unprofessional conduct in the Board's Final Decision and Order in this matter which were reversed were Conclusions of Law numbered 3 and 6. These stated as follows:

3. Dr. Dykema's use of Neuro Organization Technique constitutes use of a technique which is unsafe or ineffective, in violation of § Chir 4.05(2), Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

6. Dr. Dykema's use of Live Cell Analysis in the practice of chiropractic constitutes the use of a technique, ancillary procedure or instrument which is ineffective, in violation of § Chir 4.05(2), Wis. Admin. Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

In support of the first of these, the ALJ opined in the January 29, 2003 Final Decision and Order in part as follows:

In other circumstances, . . . Dr. Dykema might be excused for a failure to understand that the Neuro Organization Technique was forbidden to him. In this instance, however, it was in fact Dr. Dykema himself who elicited approval from the board for use of the technique in 1991, and the board's approval does not change the fact that as a trained health care provider and presumed expert on the technique, he should have known in 1991 and should have known in 1998 that the technique is nothing more than a sham.

As to Conclusion of Law #6, the ALJ wrote:

It is clear that the so-called Live Blood Analysis performed as a part of Dr. Dykema's treatment is useless if not bogus. To the extent that Dr. Dykema in fact believes that the test has validity, he demonstrates incompetence. To the extent he recognizes that it is useless, then he is deceiving and victimizing his patients.

The foregoing demonstrates the extent to which the ALJ considered these to be unmitigated violations, and further considered them to support the conclusion that nothing less than revocation of the license would adequately address the disciplinary objectives of protecting the public by encouraging the rehabilitation of the licensee and deterring other licensees from engaging in similar misconduct.

Which is not to diminish the seriousness of the remaining findings of unprofessional conduct. But those violations, when isolated from those which were reversed, are not of a nature which would preclude the possibility of rehabilitation.

The first of these is that Dr. Dykema's use of the sensometer constituted unprofessional conduct. The ALJ observed that "[a]bsent evidence of knowledge by Dr. Dykema that use of the device is quackery, it must be assumed that he does not possess that knowledge. Accordingly, the violation found is simply that he used an ineffective device in his practice in violation of § Chir 4.05(2), Code." Based upon this finding, and the fact that the federal courts have prohibited the use of such devices, it may be presumed or at least hoped that Dr. Dykema will have recognized that he should no longer utilize the technique.

The second affirmed finding of misconduct is that the manner in which he utilized the neuro emotional technique constituted unprofessional conduct. The important factor here is that the finding was that there was insufficient

evidence to establish that Dr. Dykema's use of Neuro Emotional Technique constitutes use of a technique which is unsafe or ineffective. Sufficient evidence was found, however, to establish that the manner in which Dr. Dykema used the technique rendered it ineffective. It would appear from the record that Dr. Dykema grasped the underlying concepts and was aware of the accepted technique, but failed to utilize them. To the extent, therefore, that it may be concluded that the technique has some validity, it may also be concluded that Dr. Dykema has the underlying knowledge and ability to correctly utilize it.

The third affirmed finding is that Dr. Dykema's use of a laser to perform therapy based on the theories and the practice of acupuncture constitutes practice beyond the scope of chiropractic and is a prohibited practice under § CHIR 4.05(1)(b)(3), Wis. Admin. Code. The finding is thus not that the practice is inefficacious or that Dr. Dykema utilized it incompetently or negligently, but rather that the practice is beyond the scope of practice of chiropractic. Again, one may presume or at least hope that this affirmed finding would discourage Dr. Dykema from utilizing the technique when and if he resumes practice.

In commenting on appropriate discipline in the Opinion section of the board's January 29, 2003 Final Decision and Order, the ALJ commented as follows:

With the possible exception of Neuro Emotional Technique, there is satisfactory evidence that the techniques utilized are useless and, as a trained health care professional, Dr. Dykema should know that they are useless. The problem remains, however, that the evidence in this case stops short of determining whether he believes in these techniques and procedures, or is purposefully deceiving and duping his patients.

As previously stated, however, it makes no difference in terms of the required outcome. Either way, rehabilitation is probably not a possible objective. If his treatment of Ms. Kobs is a manifestation of underlying incompetence, retraining would probably not be of value. If he is aware that he provides ineffective care, then his rehabilitation is beyond the powers of this board to effect. Consequently, it is concluded that the objectives of deterring other licensees from engaging in similar misconduct and protecting the public militate for revocation of Dr. Dykema's license.

With two of the major findings of violation reversed, and based on the foregoing analysis of the nature of the findings which were affirmed, the conclusion previously reached that rehabilitation is probably not a possibility may no longer be valid. Loss of his license for six months should impress upon Dr. Dykema the importance of conforming his practice to accepted chiropractic treatment modalities. To require that he appear before the board after six months in support of his petition for reinstatement will provide the board the opportunity to confirm that he intends to do so and the ability to impose limitations on his practice to ensure that he continues to do so.

Dated this 20th day of October, 2003.

Wayne R. Austin

Administrative Law Judge