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STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION	:	
FOR A LICENSE TO PRACTICE	:	FINAL DECISION
MEDCINE AND SURGERY	:	AND ORDER
	:	LS0602011MED
THOMAS V RANKIN, M.D.,	:	
APPLICANT.	:	

Division of Enforcement Case No. 05MED473

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

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board, with a correction of the date of the applicant's date of original licensure appearing on page 5, subparagraph b.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 15th day of November, 2006

Gene Musser MD
Member of the Board
Medical Examining Board

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION FOR A LICENSE TO PRACTICE MEDICINE AND SURGERY	:	
THOMAS V. RANKIN, M.D. APPLICANT	:	PROPOSED FINAL DECISION AND ORDER LS 0602011 MED

PARTIES

The parties to this action for the purposes of Wis. Stat. § 227.53, are:

Thomas V. Rankin, M.D.
c/o William R. Wick
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Manitowoc, WI 54220-2992

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P.O. Box 8935
Madison, WI 53708-8935

Wisconsin Department of Regulation and Licensing
Division of Enforcement
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PROCEDURAL HISTORY

On October 7, 2005, Thomas V. Rankin, M.D., submitted an application to the Medical Examining Board, ("Board"), for the issuance of a license to practice medicine and surgery. (Ex. 20) On November 18, 2005, the Board denied Rankin's application for a license to practice medicine and surgery. (Notice of Hearing) On April 5, 2006, a Class One hearing was conducted affording Rankin the opportunity to present evidence of a mistake of fact or law made by the Board in its November 18, 2005, denial, and to meet his burden of proof that he meets the eligibility requirements set by law for the issuance of a credential. Wis. Admin. Code §§ RL 1.07 (3), 1.08 (4).

Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On or about August 4, 1993, Rankin submitted an application for a license to practice medicine and surgery to the Board. (Administrative Notice- Final Decision and Order, LS 0005191 MED)

2. Thomas V. Rankin, M.D. (DOB, 04/25/42), was licensed to practice medicine and surgery in the state of Wisconsin (license number 34869). The license was first granted on September 23, 1993. (Administrative Notice- Final Decision and

Order, LS 0005191 MED)

3. Rankin failed to disclose criminal convictions on his August 4, 1993, application which resulted in a false statement being made and presented to the Board in connection with his application for licensure. (Administrative Notice- Final Decision and Order, LS 0005191 MED)

4. On November 25, 2000, the Board revoked Rankin's license, number 34869, to practice medicine and surgery in the state of Wisconsin. (Administrative Notice- Final Decision and Order, LS 0005191 MED)

5. On October 7, 2005, Rankin submitted an application ("2005 application") to the Board for the restoration of his revoked license. (Ex. 20)

6. The 2005 application contained the practice status question number 9, "Have any suits or claims ever been filed against you as a result of professional services; if yes, submit a copy of the claim or suit and a copy of the final settlement and disposition." (Exh. 20, 2005 application, p. 4 of 6)

7. In response to the practice status question number 9 on the 2005 application, Rankin provided information to the Board indicating that he had been a defendant in forty four malpractice lawsuits in Wisconsin, one lawsuit in the state of Pennsylvania and five lawsuits in Florida. (Exh. 20)

8. The Individual Self-query National Practitioner Data Bank Report received in conjunction with Rankin's 2005 application contained 22 Medical Malpractice Payment reports.

9. On August 23, 2005, the Board, through legal counsel, requested that Rankin provide a narrative explanation of the malpractice lawsuits including information about settlements. (Exh. 20)

10. On October 4, 2005, Rankin, through his attorney, provided information regarding forty four medical malpractice suits filed against Rankin in Wisconsin, and their disposition. (Exh. 20)

11. The 2005 application also contains an explanation sheet summarizing one Pennsylvania medical malpractice lawsuit and five Florida malpractice lawsuits. (Exh. 20)

12. The one Pennsylvania medical malpractice lawsuit and five Florida malpractice lawsuits were all either filed and dismissed prior to Rankin's original application for licensure in Wisconsin being filed in August, 1993, or thereafter settled without a court finding that Rankin acted negligently in treating a patient. (Exh. 20)

13. The forty four medical malpractice lawsuits filed in Wisconsin against Rankin were filed from 1997 to 2002. (Exh. 20)

14. Three of the forty four medical malpractice lawsuits filed against Rankin concluded with a finding by a court that Rankin acted negligently in treating a patient (Exh. 20);

a. Estate of Gary Davidshofer- 02 CV 339, Jury trial- Judgment for Plaintiff- $216,000; Act/Omission 01/30/1998.

b. Elke Nelsen- 99 CV 471, Jury trial- Judgement for Plaintiff- $746,107; Act/Omission 11/10/1997.

c. Brian Pierce- 97 CV 592, Jury trial- Judgement for Plaintiff- $473,698; Act/Omission 02/10/1996.

15. The case of Elizabeth Morrison- 03 CV 171- is still pending. (Exh. 20, Exh. 21)

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to Wis. Stat. § 227.01(3) (a), and Wis. Admin. Code Ch. RL 1.

2. Thomas V. Rankin, M.D., has not met the burden of proof for the issuance of a license under Wis. Admin. Code § RL 1.08(4), for a license to be issued under Wis. Stat. § 448.02 (6).

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that Thomas V. Rankin, M.D, is denied a license to practice medicine and surgery in the State of Wisconsin.

APPLICABLE LAW

Statute

Wis. Stat. § 448.02 (3)(b)

(b)…A unanimous finding by a court that a physician has acted negligently in treating a patient is conclusive evidence that the physician is guilty of negligence in treatment…."

Wis. Stat. § 448.02 (6)

(6) Restoration of License, Certificate or Limited Permit. The board may restore any license, certificate or limited permit which has been voluntarily surrendered or revoked under any of the provisions of this subchapter, on such terms and conditions as it may deem appropriate.

Administrative Rules

Wis. Admin. Code § RL 1.08(4)

(4) Burden of Proof. The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential.

OPINION

1. Introduction

The Board's November 18, 2005, denial of Rankin's 2005 application was based on the record of multiple malpractice suits and payments by Rankin, leading the Board to conclude that he is not competent or qualified to practice medicine and surgery in Wisconsin:

> In light of the Applicant's record of multiple medical malpractice suits and payments, the Applicant has failed to demonstrate he is competent or qualified to practice under a license in this state.
>
> The Medical Examining Board has determined that reinstatement of Applicant's license to practice medicine and surgery would not be commensurate with the duty of the Board to protect the public health, safety and welfare. (Notice of Hearing)

The issue framed in the notice of hearing for this Class One proceeding is thus:

Did the Medical Examining Board exceed its authority or abuse its discretion in denying a license to practice medicine and surgery to the applicant in light of his history of numerous medical malpractice lawsuits, settlements and adverse judgments?

I conclude that Rankin failed to meet his burden of proof that he is qualified for issuance of a license, and the Board did not abuse its discretion in denying the restoration of his license.

At issue is the propriety of the Board's exercise of its discretion. Discretion has been defined as follows:

> The term "discretion" contemplates an exercise of judgment based on three factors: (1) the facts of record, (2) logic, and (3) the application of proper legal standards. State v. Shanks, 2002 WI App 93, ¶6, 253 Wis. 2d 600, 644 N.W. 2d 275, review denied, 2002 WI 111, 256 Wis. 2d 64, 650 N.W. 2d 841 (Wis. July 26, 2002) (No. 01-1372-CR).

Further, "The exercise of discretion is not the equivalent of unfettered decision making." Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981). A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Id. A misapplication or an erroneous view of the law is an erroneous exercise of discretion. State v. Hutnik, 39 Wis. 2d 754, 763, 159 N.W. 2d 733 (1968).

This case presents the interesting questions of:

a. Whether a doctor's past acts of medical negligence based upon a court finding may form the basis of the Board exercising discretion to deny the restoration of a license to practice medicine and surgery?

I find that the Board properly exercised its discretion to deny restoration of Rankin's license.

b. Whether a doctor's past history of medical malpractice claims, dismissals and settlements may form the basis to deny the restoration of a license to practice medicine and surgery.

I find the Board is barred from their use if they existed prior to the granting of Rankin's original license in the year 2000.

I find that the Board may consider the evidence of their existence during Rankin's term of licensure in this state, given the legal standard under which the Board operates to restore a license following a prior revocation.

2. Standard of Board Discretion

Rankin, while acknowledging that he bears the burden of proof under Wis. Admin. Code § RL 1.08(4), to demonstrate that he meets the "eligibility requirements set by law for the credential", thereupon seeks to be evaluated under the wrong law. Rankin urges that the Board's discretion be judged by Wis. Stat. § 448.05 (1), the general requirements that an applicant must meet for the issuance of a credential.[1]

To that end, Rankin garnered numerous professionals to provide opinions of competence in judging Rankin's abilities. Testimony is in the record from Dr. Sanford Larson, Dr. George Cybulski, Dr. Steven Immerman, and Dr. Michael Spak. To the man, they testified that they had reviewed the majority of lawsuits, or were otherwise acquainted with Rankin's work.

Rankin also explained that the majority of the cases against him had settled or been dismissed, and suggested that many of the latter lawsuits against him were the result of a newspaper article about him which prompted lawsuits, (Exh. 6); and the actual solicitation of lawsuits against him by an attorney after Rankin's original license was revoked. (Exh. 7)

Thus, Rankin exhorts the Board to consider that the perfect storm had gathered to riddle his record with these lawsuits, and that his specialty, complex spine surgeries, is by nature a specialty prone to such lawsuits, meritorious or not. Much was

made by the parties of how to evaluate the dismissed and settled claims.

The evaluation begins with the applicable law. Rankin is a revokee, his status and that of his application is governed by Wis. Stat. § 448.02 (6), which provides:

> Wis. Stat. § 448.02 (6)
>
> **(6) Restoration of License, Certificate or Limited Permit.** The board may restore any license, certificate or limited permit which has been voluntarily surrendered or revoked under any of the provisions of this subchapter, on such terms and conditions as it may deem appropriate.

The Board's discretion is therefore viewed through this very different lense than that which may be used under Section 448.05 (1) for the granting of an original license. Rankin presented no argument that a licensee once revoked has any right to the restoration of a license at all, or that a Board must give any reason in that instance other than it exercised its discretion once to revoke him, and now he must find a new profession.

To be sure, the Board in exercising its discretion must not act pretextually, nor be capricious; however, the specific authority granted by Section 448.02 (6) allows great leeway and deference to the Board.

The Board here is provided with the opportunity but not the mandate to restore the license. The section uses the phrase "may restore" and this is significant because restoration is not mandatory. The initial revocation, being the penultimate form of discipline, is reserved for instances where the public cannot be protected in any other way, i.e.…education, suspension, limitation. Here, Rankin reappears before the Board in the position of a professional deemed not capable of competent practice in this state.

Section 448.02 (6), then uses unique language to qualify the conditions of restoration, namely, the extremely broad phrase, "..on such terms and conditions as it may deem appropriate." Therefore, on its face this section places an entirely different gloss on the concept of judging the Board's exercise of discretion. This section grants broad authority, and leaves it to the Board to determine what it deems appropriate, *if at all*.[2]

Therefore, restoration is not of right. The Board is not a dancing bear where the revokee calls the tune to 'work something out', or 'justify why the revokee can't have his license back.'
The justification is that it was revoked in the first instance.

The Board may merely deem nothing appropriate to justify the restoration of a credential. This section certainly implies that a revokee may be faced with the Board deeming an unlimited license as not appropriate, and no conditions could safely justify a limited license.

I find therefore, that while it was a professional courtesy for the Board to provide a justification in this instance, such was not necessary. The Board could have said, "you are revoked, we deem no appropriate means for you to be reinstated."[3]

3. Medical Malpractice Claims, Judgements, and Settlements

Although not necessary, the Board based its denial of restoration of Rankin's license upon his medical malpractice claim history.

The Board's exercise of discretion is to be judged based upon whether it is founded upon correct facts applied to correct law, and is not arbitrary or capricious.

Here, the Pennsylvania and Florida medical malpractice claims cannot be used as a basis for denial, given that they occurred prior to Rankin's original licensure in this state in the year 2000. The record is devoid of Rankin's original application file, so the presumption must be that these matters were disclosed to the Board at the time of Rankin's original application, and the Board nonetheless granted licensure. Therefore, even given the Broad's broad grant of authority under Wis. Stat. § 448.02

(6), due process would seem to dictate that the Board would be barred from raising those actions as a basis against restoration of Rankin's license, because it would be irrational to not use them to initially deny issuance of the license but later to raise them as a ground to deny restoration.[4]

For the forty claims made against Rankin and thereafter settled or dismissed during the tenure of his licensure the parties are divided in their impact. Rankin considers that dismissals certainly demonstrate that no unprofessional conduct can be automatically inferred where he obtained a jury verdict in his favor, and similarly a dismissal cannot be so used following settlement.

The division asserts that the mere fact a civil claim was filed is "evidence" of medical negligence, given that an expert must file an affidavit of merit prior to the filing of such a claim. The argument proceeds thus; that if an expert believes a claim is valid as the basis of filing a civil claim, then the board can consider that medical negligence exists for licensing purposes. This argument is rejected. An action for medical malpractice claimed to have "merit" for purposes of filing a civil action is a pleading requirement. The judicial system still requires the plaintiff to prove the case, as does the administrative law system.[5] The Board always retains full jurisdiction, with one exception *discussed supra*, to decide the merits of any case. Therefore the division's argument is not tenable.

The issue of the medical malpractice claims in the record are at issue in this case, but not in the manner the parties argued. It is true, that even giving Rankin credit for claim dismissals following jury verdicts, the claims that were settled are another category. Theoretically, any or all of these claims could be the subject of an investigation by the department to determine whether disciplinary proceedings for unprofessional conduct, ie..medical negligence should be initiated. Certainly, as Rankin suggests, evidence of a "nuisance value" settlement might be used in screening to determine that no investigation for some of the claims is warranted.

However, other claims settled for $500,000, $150,000, $55,000, $52,000, $90,000, $225,000, $65,000, $200,000, $175,000, while some claims were voluntarily dismissed. As to these claims, the Board is correct in acknowledging that this evidences at least the potential for Board action, in the protection of the public.

However, as a revokee, Rankin is, perhaps unwittingly, attempting to shift the burden to the Board to try to figure out whether he is safe and competent to practice. Because Rankin is unlicensed now, the Board is not required to investigate these claims, nor do they impact practice, given that Rankin can't practice in Wisconsin. However, reinstating a license changes this landscape dramatically. It raises the spectre that the Board may be in danger of restoring a license for a person where further investigation into these claims will occur, yet an unsafe doctor is unleashed in the interim. Alternatively, investigation may lead to future discipline, resulting in limitations or ultimate revocation once again. Therefore, in one sense, the Board may be engaging in an idle act by restoring Rankin's license thereafter to limit it or potentially revoke it.

This absurd result runs counter to the very purpose and wording of Wis. Stat. § 448.02 (6), namely, the Board may deem *now* that it simply refuses to engage in trying to sort out Rankin's competence in order to convenience *him* while possibly putting the public at risk. Currently, Rankin is revoked and the public is safe. Rankin does not have the right to force the Board to figure out how to divine if he is safe such that he may practice again. Section 448.02 (6), certainly cannot be read in that manner. Therefore, to the extent that past civil actions provide a basis for the Board to be concerned about Rankin's safety, the Board is properly exercising its discretion to leave Rankin where it currently finds him.

Finally, as to the three court findings of medical negligence currently in the record, they constitute separate and independent grounds to justify the Board's action. The Board is required by statute to consider that Rankin has committed negligence in treatment. This is considered conclusive evidence binding the Board.

Therefore the Board is faced with the undesirable option under Wis. Stat. § 448.02 (6), of either restoring Rankin's license and turning a blind eye to three statutory findings of conduct which will result in discipline, or restoring Rankin's license and instituting disciplinary proceedings against him, using scarce department and Board resources to proceed under Wis. Admin. Code Ch. RL 2, with the likely outcome of discipline.[6]

The first option is dangerous to the public, the second option could result that restoring the license was an idle act if Rankin is revoked again, or has his license restricted. But

this type of Hobson's Choice is eliminated by the operation of Wis. Stat. § 448.02 (6). The Board can simply leave Rankin as it finds him.

Conclusion

For the above reasons I recommend to the Board that Thomas V. Rankin, M.D, be denied the restoration of his license to practice medicine and surgery in the State of Wisconsin

Date: September 21, 2006

Dennis C. Schuh
Administrative Law Judge

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[1] Although even under Wis. Stat. § 448.05 (1) the result would be the same here.
[2] Otherwise the scenario exists whereby a revoked licensee could file serial applications forcing the board to continue to provide reasons for non restoration. The fact of revocation initially is sufficient.
[3] The board is certainly free to review the testimony of the witnesses on Rankin's behalf to determine whether a basis exists for the restoration of an unlimited or limited license.
[4] Given that the Board is charged with protecting the public health safety and welfare, it must be assumed it discharged its duty correctly in the year 2000, thus to raise this issue now appears pretextual. (I.e. It is required to presume that an official act of an agency was validly undertaken following the exercise of discretion.)
[5] As the division well knows, in the administrative context a prosecution against a respondent can fail, even where the division retains an expert to testify. It is the fact finder, not the division or plaintiff's attorney that determines the ultimate validity of a claim.
[6] This analysis applies with equal force to the Morrison case which is currently pending.