

IN THE MATTER OF)	BEFORE THE STATE
)	
VICTOR E. HENRY, D.P.M.)	BOARD OF PODIATRIC
)	
Respondent)	MEDICAL EXAMINERS
)	
<u>License No. 00309</u>)	

FINAL DECISION AND ORDER

On November 29, 1999, the Maryland State Board of Podiatric Medical Examiners (“Board”) issued charges against Victor E. Henry, D.P.M. (“Respondent”) for violations of the Maryland Podiatry Act (“Act”), Maryland Code Ann., Health Occupations § 16-312.¹ An evidentiary hearing was held before Administrative Law Judge (“ALJ”) Douglas E. Koteen of the Office of Administrative Hearings. On December 21, 2000, ALJ Koteen issued a Proposed Decision consisting of Proposed Findings of Fact and Conclusions of Law.

The ALJ found that Respondent violated all provisions of the Act that he was charged with violating except Health Occupations Article §§ 16-312(a)(2) and (10), which relate to fraudulent and deceptive use of a license and willfully making or filing a false report of podiatric services rendered, respectively. The State filed exceptions to the Proposed Decision on January 24, 2001, contending that the ALJ erred concerning his findings regarding Respondent’s violation of Health Occupations Article §§ 16-312(a)(2) and (10). Respondent filed a response on January 29, 2001. An exceptions hearing was conducted before the Board on March 22, 2001.

¹ Specifically, Respondent was charged with violating the following subsections of Health Occupations Article § 16-312(a):
(2) Fraudulently or deceptively uses a license;
(10) Willfully makes or files a false report or record of podiatric services rendered;
(12) Submits a false statement to collect a fee;
(16) Grossly overutilizes health care services;
(17) Behaves fraudulently, immorally, or unprofessionally in the practice of podiatry;
(18) Is professionally or mentally incompetent;

After consideration of the record in this case, including the record made before the ALJ at the Office of Administrative Hearings, the written Exceptions filed by the State, Respondent's Response, and argument held before the Board on the Exceptions, the Board issues this Final Decision and Order.

FINDINGS OF FACT

The Board adopts the Findings of Fact numbered 1-215 set forth in the ALJ's Proposed Decision, dated December 21, 2000. The Proposed Decision is incorporated by Reference into this Final Decision and is attached. The Board also adopts the ALJ's Discussion on pages 30 through 77, except for the Discussion relating to the question of Respondent's violation of Health Occupations Article §§ 16-312(a)(2) and (10). Specifically, the Board declines to adopt the following portions of the ALJ's Discussion: pages 37 and 38 starting with the last full sentence on page 37 and ending with the first sentence on page 38; page 42, the last sentence concerning Patient D; page 58, the first sentence of the last paragraph relating to Patient N; page 72, the last full sentence, including footnote 4; and pages 73 through 75, beginning with the last paragraph on page 73.

Fraudulent or Deceptive Use of License

The Board disagrees with the ALJ's conclusion that the State failed to show by a preponderance of the evidence that Respondent used his podiatric license in a fraudulent or deceptive manner. As the Board has previously determined, performing medical procedures outside the scope of podiatric practice constitutes deceptive use of a license. *See, In the Matter of Steven A. Brownstein*, Order dated March 9, 1999. As the ALJ found, the Respondent gave a steroid injection in the knee of Patient E. Proposed

(22) Violates any rules or regulations adopted by the Board[.]

Decision at 16. This is beyond the lawful scope of podiatric practice. Health Occupations Article §16-101. Respondent subsequently billed the patient's insurer for the injection. State's Exhibit 5E, Bates000213. The Board finds that this constitutes a deceptive use of Respondent's license, which violates Health Occupations Article § 16-312(a)(2).

By performing the knee injection, Respondent was warranting to the patient that this treatment was in the scope of practice permitted by his license. Respondent was also using the fact that he was a licensed podiatrist to falsely imply that to the patient that he was competent to render this treatment. In addition, Respondent's submission of the bill to the patient's insurer was deceptive because Respondent was aware that the procedure for which he was billing exceeded the scope of podiatric practice.

Willfully Making or Filing a False Report of Record of Podiatric Services Rendered

In all of those instances in which Respondent submitted a false statement to collect a fee, the Board also finds that Respondent violated Health Occupations Article § 16-312(a)(10) by willfully making a false report of podiatric services rendered. The ALJ found that the Respondent's frequent instances of overbilling, upcoding, fragmentation, billing for services not rendered and gross overutilization of services were mere "billing errors [that] demonstrate a lack of familiarity with billing practice and codes, and poor documentation, rather than the intent to deceive an insurance carrier." Proposed Decision at 75. The ALJ further stated in his opinion that the statute requires such a specific intent to defraud insurers. Proposed Decision at 73-75.

The Board disagrees with the ALJ's determination. The Board rejects the ALJ's finding that the false bills to insurers submitted by Respondent were simply the result of lack of familiarity with appropriate billing practices and bad documentation. The Board

finds Respondent's claims of ignorance about applicable billing requirements to be incredible. Respondent has been a practicing podiatrist for twenty-nine years. It is inconceivable that someone with that much experience in managing a podiatric practice would have as little knowledge about appropriate billing requirements as Respondent claims to have. Respondent routinely reviewed his patient's charts, which contained billing and insurance reimbursement information. He admitted that he discussed insurance reimbursement with his staff and that he was aware that there were different types and levels of coding corresponding to different types and levels of procedures. T. 645, 652-655.

Moreover, even if Respondent's claims of ignorance about proper billing practice were credible, the Board finds that Respondent still would be in violation of Health Occupations Article § 16-312(a)(10). Applicable case law, including *Attorney Grievance Comm'n v. Glenn*, 314 Md. 448 (1996), cited by the ALJ, indicates that, in order to support a charge of "willfully" submitting a false report, the State must show by a preponderance of the evidence that Respondent had a general intent, rather than a specific intent, to submit such reports. *See, e.g., McBurney v. State*, 280 Md. 21, 28-29 (1977). In a matter involving civil, rather than criminal penalties, "willfulness has been characterized as voluntary or intentional action, as contrasted with accidental." *Stanton v. Machiz*, 183 F.Supp. 719, 724 (D.Md. 1960). In civil matters, an act has been held to be done willfully when it is "done without ground for believing it is lawful or . . . [with] careless disregard whether or not one has the right so to act." *Pacific Mortgage v. Horn*, 100 Md. App. 311, 332 (1994).

The Board finds that the State has met its burden of showing that Respondent acted willfully. The State showed that Respondent's submission of bills to insurers for

podiatric services that he did not perform was intentional and voluntary. For instance, Respondent routinely billed for two x-ray views when only one x-ray was taken. He admitted that he knew the appropriate code for x-rays required that a minimum of two x-rays be taken and that he instructed his staff to bill for two x-rays when only one x-ray had been taken. T. 652-653. Similarly, Respondent intentionally submitted bills for hydrotherapy services as a physical therapy modality when Respondent knew that these treatments were not being given as a physical therapy modality. T. 379. In addition, Respondent systematically billed the highest-level evaluation and management code for routine office visits. Respondent did this intentionally and voluntarily, not accidentally.

At the very least, the record shows that Respondent acted without grounds for believing that his actions were lawful and with careless disregard for whether his actions were lawful or not. Indeed, the ALJ found that “Respondent’s failure to spend time to learn [billing requirements] or adequately supervise his office staff with regard to the billing process demonstrates . . . an alarming abdication of his professional obligations” Proposed Decision at 76. The Board finds that such actions constitute not only professional incompetence but willful conduct, requiring a finding that Respondent’s submission of false reports of podiatric services rendered was in violation of Health Occupations Article § 16-312(a)(10).

CONCLUSIONS OF LAW

The Board adopts the ALJ’s Conclusions of Law set forth at page 77 of the Proposed Decision. However, for the reasons set forth above, the Board declines to adopt the ALJ’s conclusions relating to violation of Health Occupations Article §§ 16-312(a)(2) and (10) set forth on page 78. For the reasons set forth above, the Board concludes that Respondent violated Health Occupations Article §§ 16-312(a)(2) and (10).

SANCTIONS

Respondent is guilty of serious violations of the Act and the Board's regulations. Respondent repeatedly engaged in overbilling of insurers, including systematic upcoding and fragmentation of billing and billing for services not rendered. Respondent grossly overutilized podiatric services. His conduct has allowed him to reap great financial benefit at the expense of the general public who pay for the submission of false insurance bills and overutilization of services through higher health insurance costs.

Respondent's record-keeping practices are unprofessional and well below the standard of care. Respondent often failed to provide completed consent forms to ensure that patients were properly informed of procedures to be performed. He failed to sign office notes and prepare postoperative reports to accurately document what care was rendered. In addition, Respondent has engaged in practice outside the scope of podiatry, which poses a grave threat to patient health. Respondent's conduct warrants a severe sanction. While may severe sanctions may be warranted, the following Order provides sanctions sufficient to deter further misconduct by Respondent and others as well as a rehabilitative program to enable Respondent to eventually return to practice in conformance with the Act, Board regulations, and current professional standards.

ORDER

Based on the foregoing, it is this 12 day of July, 2001, by a majority of the membership of the Board now serving:

ORDERED that the podiatric license of Victor E. Henry be SUSPENDED for one year; and it is further

ORDERED that, following the first six months of the suspension, which shall be effective ten days from the date of this decision, the remaining six months of this

suspension shall be stayed, contingent upon Respondent's compliance with the remaining terms of this Order; and it is further

ORDERED that Respondent pay a fine of \$5,000, by check made out to the State Board of Podiatric Medical Examiners, within sixty days of the date of this Order; and it is further

ORDERED that, beginning on the date on which a Mentor is appointed, which shall be after the first six months of the suspension period, Respondent shall serve a thirty-six month probation, during which time Respondent's practice will be monitored as follows:

1. Respondent will select a Mentor from a list of three podiatrists selected by the Board;
2. For the first three months of the probationary period, the Mentor will conduct monthly reviews of Respondent's billing practices and records of treatment;
3. After the first three months and until the end of the probationary period, the Mentor will conduct quarterly visits and file quarterly reports with the Board;
4. Respondent shall pay the Mentor directly after each office review, a fee of \$200 per hour for the time necessary to conduct the office review and \$200 per hour for the time necessary to meet the requirements of the Board, i.e., the time necessary to prepare reports and meet with the Board; and it is further

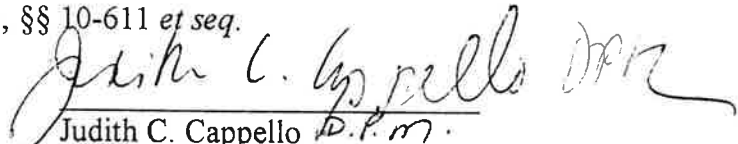
ORDERED that, in addition to the continuing education requirements imposed by Board regulations, Respondent take a course, approved by the Board,

in each of the following subject areas: risk management, coding and billing, and professional ethics; and it is further

ORDERED that within one month of the date of this Order, Respondent shall provide notice of this Final Decision and Order to all insurers to which his medical services are billed and all institutions with whom he has privileges, or to whom he provides services, providing copies of this Final Decision and Order to all insurers and institutions so notified. Respondent shall also provide documentation of all such notifications to the Board within 30 days of the notifications; and it is further

ORDERED that at the end of the thirty-six month probationary period, Respondent may petition for termination of the Respondent's probationary status; and it is further

ORDERED that this is a Final Order of the State Board of Podiatric Medical Examiners and, as such, is a PUBLIC DOCUMENT pursuant to Maryland State Government, Code Ann., §§ 10-611 *et seq.*


Judith C. Cappello, *D.P.M.*
Board President

NOTICE OF RIGHT TO APPEAL

Pursuant to Maryland Code Ann. Health Occupations § 16-316(b), Respondent has the right to take a direct judicial appeal. Any petition for appeal shall be filed within thirty days from receipt of this Final Order and shall be made as provided for judicial review of final administrative decisions in the Maryland Administrative Procedure Act, Md. Code Ann. State Gov't § 10-222 *et seq.* and Title 7, Chapter 200 of the Maryland Rules.