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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SANDY WITZLING,

Plaintiff and Appellant,

v.

MEDICAL BOARD OF
CALIFORNIA,

Defendant and Respondent.

B277162

(Los Angeles County
Super. Ct. No. BS155051)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

John D. Harwell for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Gloria L. Castro,
Assistant Attorney General, Robert McKim Bell and Peggie
Bradford Tarwater, Deputy Attorneys General, for Defendant
and Respondent.

Appellant Sandy Witzling, M.D. (Dr. Witzling) appeals from the trial court's denial of his petition for administrative writ of mandate, in which he sought to have respondent Medical Board of California (Board) vacate its decision denying his petition for termination of probation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1976, Dr. Witzling was issued a physician's and surgeon's certificate. In 2009, the state's Attorney General filed an Accusation with the Board, alleging that between 2003 and 2007, Dr. Witzling engaged in acts of gross negligence, repeated negligence and incompetence regarding five surgical patients, three of whom died.

Dr. Witzling and the Board entered into a Stipulated Settlement and Disciplinary Order (Stipulated Settlement), which became final on March 4, 2011. Pursuant to the Stipulated Settlement, Dr. Witzling's physician's and surgeon's certificate was revoked. The revocation was stayed, and Dr. Witzling was placed on probation for seven years. The probationary period included the following terms: prohibition against surgical practice; completion of a clinical training program such as the Physician Assessment and Clinical Education Program at the University of California, San Diego (PACE); completion of an education course; completion of a medical recordkeeping course; retention of a practice monitor; prohibition against solo practice; prohibition against supervising physician assistants; and cancellation of his certificate if he failed to practice medicine in California for a total of two years during the probationary period.

In 2010, at the age of 65, Dr. Witzling closed his general surgery practice after 31 years in the same location, and found new employment as a medical records reviewer for Accountable Health Care. By all accounts, he excelled at this work and received high marks from his employer. However, during an audit, Blue Cross discovered that Dr. Witzling's medical certificate was restricted. Rather than lose the Blue Cross account, Accountable Health Care terminated Dr. Witzling's employment.

In November 2013, Dr. Witzling filed a "Petition for Penalty Relief" with the Board, seeking termination of his probation. The matter proceeded by way of a full hearing before an administrative law judge (ALJ) on August 5, 2014. Dr. Witzling testified that he was "very sorry for what has happened," that he felt "very remorseful," and that he took his probation "very seriously." He realized that "probation was reasonable and the probation was necessary to protect the public." He had completed more than 500 hours of continuing education, met with a practice monitor, had weekly therapy, read seven medical journals a month, and attended many conferences. He testified regarding two of his five patients, somewhat placing the blame on them. Regarding patient L.N., who bled to death due to a liver laceration, Dr. Witzling said he made mistakes by trusting her and not discovering her methamphetamine use, and by injuring her liver. Regarding patient D.T., who died following gallstone surgery, Dr. Witzling testified he should have insisted on a scan to determine whether there was a cystic duct leak on the day after surgery, but when the patient came into the office, her mother did all the talking and was mostly concerned about the patient's ability to babysit. The patient had multiple medical

problems and her complaints were that she had no appetite and was constipated.

Dr. Witzling testified that he did not intend to return to surgical practice. He did not believe a surgical program would be willing to train him at his then age of 70. He had attempted to find other medical work, but was unable to do so with a restricted license.

Bard Cosnam, M.D., a general surgeon in colon and rectal surgery and a surgical consultant for the PACE program, testified that he reviewed Dr. Witzling's evaluation. He thought Dr. Witzling had a broad and deep experience of general surgery but was not up to date on perioperative guidelines, so he recommended clinical education in that area. Dr. Cosnam thereafter spent close to 10 hours a day for five days with Dr. Witzling discussing cases, seeing patients, and having Dr. Witzling observe in the operating room. Dr. Cosnam "ended up with a high opinion of Dr. Witzling as a clinician and as a person." Dr. Cosnam wrote a letter to the Board suggesting that Dr. Witzling be taken off probation. He testified that Dr. Witzling "needs to be able to review charts, not go back to surgery." Dr. Cosnam did not believe that any hospital would grant clinical privileges to a 70-year-old physician who had not practiced in a few years, and that there would be significant financial barriers to Dr. Witzling performing surgery, such as obtaining malpractice insurance. However, Dr. Cosnam admitted that with an unrestricted license, there would be nothing preventing Dr. Witzling from performing unmonitored, minor surgery in an office setting. Dr. Cosnam could not evaluate Dr. Witzling's technical competence because he did not see him actually operate on a patient.

On August 12, 2014, the ALJ issued a proposed decision granting Dr. Witzling's petition, finding that although Dr. Witzling would be free to practice surgery if his probation were terminated, the evidence that he would not do so was "both convincing and uncontradicted."

After consideration of the administrative record and the parties' written and oral arguments, the Board issued a Decision after Non-Adoption, finding that Dr. Witzling had failed to meet his burden of proving by clear and convincing evidence that he was entitled to termination of probation. The Board stated: "Petitioner is in essence asking the Board to allow him to practice as though he were issued a limited license, in that he seeks to have his practice limited to non-surgical practices. Short of issuing a limited license under [Bus. & Prof. Code] section 2088, which Petitioner does not qualify for, the Board has no ability to terminate Petitioner's probation, while still limiting his practice. The Board's options under these circumstances are either a full unrestricted license, if consumer protection so warrants, or a probationary license. Because Petitioner has not engaged in the practice of medicine since early 2014, and since 2010 has limited his practice to medical records review, and given that the causes for discipline included harm to patients including the deaths of three patients, the Board's consumer protection mandate requires clear and convincing evidence that Petitioner has not only addressed all practice-related deficiencies, but that he is competent to practice both theoretically and clinically."¹

¹ Business and Professions Code section 2088 provides for the issuance of a limited license due to a disability.

Dr. Witzling filed a petition for administrative writ of mandate in the trial court. The court denied the petition, finding the following: “[Petitioner] asserts that there is no evidence that supports the Respondent’s conclusion that granting the Petitioner an unrestricted license would be dangerous to the public, referencing the findings that the Petitioner has no intention to resume surgical practice [citation]. However, the Respondent’s conclusion references the Petitioner’s previous surgical failings, resulting in patient death, the Petitioner’s lack of surgical practice since 2010, and the fact that the PACE (Physician Assessment and Clinical Education) Program could not vet his surgical skills—finding on these grounds that the Petitioner was not qualified as a surgeon [citation]. On this basis, the Respondent reasoned that it could not issue an unrestricted license to a former surgeon who was no longer competent to perform surgery [citation]. Substantial evidence supports this conclusion, and the rationale is not a manifest abuse of discretion. Therefore, the Court shall not issue a writ on this basis.” Judgment was entered accordingly.

Dr. Witzling then filed a petition for writ of mandate in this court. We issued an order denying the petition and holding that Dr. Witzling had an adequate remedy by way of appeal. This appeal followed.²

² Relying on *Sela v. Medical Bd. of California* (2015) 237 Cal.App.4th 221, an opinion by the Second Appellate District, Division Five of this court, Dr. Witzling argues that review should have been made from his petition for writ of mandate rather than by direct appeal. We note that Judge Goodman dissented in that case. In any event, by this appeal, we are reaching the merits of Dr. Witzling’s petition.

DISCUSSION

I. Standard of Review and Relevant Law

In reviewing the petition for administrative writ of mandate, made pursuant to Code of Civil Procedure section 1094.5, the trial court properly employed a substantial evidence standard of review. The trial court noted that while reviews of disciplinary licensing decisions are typically undertaken using the court's independent judgment because the ability to practice one's chosen profession is deemed a fundamental and vested interest (see *Rand v. Board of Psychology* (2012) 206 Cal.App.4th 565, 574), where, as here, an applicant is seeking to alter the terms of probation, there is no vested interest and the substantial evidence standard applies (see *Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1396 (*Flanzer*)). Our review is identical to that of the trial court: We review the administrative record to determine whether the Board's findings are supported by substantial evidence. (*Ibid.*) "If there was such substantial evidence the court has no power to set aside the judgment of the board even though such judgment was not supported by the weight of the evidence." (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315 (*Housman*).)

In seeking to have his probation terminated, Dr. Witzling was required to satisfy a demanding burden. "[I]t is important to bear in mind that in a proceeding for the restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and is entitled to have his license restored, and not on the board to prove to the contrary.' As an applicant for reinstatement, [Dr. Witzling] is not in the position of an untried newcomer, but a fallen licentiate. Under the circumstances, it is not unreasonable for the Board to be

exacting in its requirements as to proof of reform.” (*Flanzer, supra*, 220 Cal.App.3d at p. 1398, quoting *Housman, supra*, 84 Cal.App.2d at p. 315.)

The Board will not reinstate a physician’s medical license unless the physician demonstrates by clear and convincing evidence that he or she has been rehabilitated. (*Housman, supra*, 84 Cal.App.2d at p. 316.) This is so because “the purpose of the Board is to protect the health and safety of the public . . . and [] although the Board must promote the goal of rehabilitating the erring licensee whenever possible, ‘Where rehabilitation and protection are inconsistent, protection shall be paramount.’ ([Bus. & Prof. Code, § 2229], subd. (c)).” (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 9–10.)³

In determining whether Dr. Witzling met his burden, the Board was entitled to “consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner’s activities during the time the certificate was in good standing, and the petitioner’s rehabilitative efforts, general reputation for truth, and professional ability.” (Bus. & Prof. Code, § 2307, subd. (e).) In evaluating a petition for reinstatement, the Board considers the nature and severity of the acts that led to revocation of the license, evidence of any subsequent acts which also could be considered as grounds for denial of the license, the time that has elapsed since commission of the acts, and any evidence of

³ Business and Professions Code section 2229, subdivision (a) provides that “[p]rotection of the public shall be the highest priority” for the Board and ALJs exercising their disciplinary authority.

rehabilitation submitted by the applicant. (Cal. Code Regs., tit. 16, § 1360.2.)

II. Substantial Evidence Supports the Board's Findings

The Board found that Dr. Witzling's acts leading to his probation were "most certainly severe." The evidence supported this finding. The Accusation involved five patients, three of whom died as a result of Dr. Witzling's surgical errors and/or his failure to conduct appropriate follow up care. The evidence also supported the Board's finding that Dr. Witzling has not performed surgery since 2010. The Board found that Dr. Witzling's "training before and during probation alone is not sufficient to demonstrate that he can now safely return to the full and unrestricted practice of medicine." This finding is also supported. Dr. Cosnam, who was Dr. Witzling's PACE evaluator conceded that he could not evaluate Dr. Witzling's clinical surgery skills because PACE participants do not perform surgery.

Dr. Witzling nevertheless argues that the Board's decision is not supported by the evidence because it "is based entirely on the absurd theory that with an unrestricted license, he would pose a danger and might wander around, having a go at surgery." He points out that the Board found credible his testimony that he had no intention of practicing surgery. But the Board also noted that Dr. Cosnam conceded that Dr. Witzling could perform minor surgery in an office-based setting if given an unrestricted license.

Dr. Witzling argues that the Board's refusal to terminate his probation is a "death sentence" because it will result in the termination of his license due to his inability to fulfill his probationary requirement of practicing medicine. The Board noted that "[g]iven his inability to work as a medical records reviewer because he is on probation, and his inability to find

employment outside of direct patient care, [Dr. Witzling] is faced with a difficult decision: Enter the practice of direct but non-surgical patient care, an area in which he has not practiced for between 30 and 40 years, but one which would allow him to meet the practice requirement of his probation, or face the automatic cancellation of his certificate.” This is indeed a difficult position. But as the Board found, because it has no statutory authority to issue a limited license to Dr. Witzling, its consumer protection mandate dictates that it cannot issue “a free and clear license” where he has not rehabilitated his surgical skills and practice-related deficiencies. As the Board notes on appeal, “[t]erminating probation in this case means trusting [Dr. Witzling’s] assertion that he will not practice, and betting the public’s safety on it. The Board’s enforcement mechanisms only exist in tandem with active probation. [¶] Were it to terminate probation, the Board would be abrogating its principal statutory obligation to protect the public. It would be relying on a doctor, whose conduct caused at least three patient deaths, to protect the public by voluntarily refraining from the practice of medicine. Such a delegation of responsibility defeats the essential purpose of a regulatory agency.”

DISPOSITION

The judgment is affirmed. The Board is entitled to recover its costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.