

STATE OF MICHIGAN
COURT OF APPEALS

In re DENNIS ANTHONY BUTLER, DDS.

BUREAU OF HEALTH PROFESSIONS,

Petitioner-Appellee,

v

DENNIS ANTHONY BUTLER, DDS,

Respondent-Appellant.

UNPUBLISHED

April 1, 2014

No. 314196

Board of Dentistry

LC No. 12-000217

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Respondent appeals the final order of the Board of Dentistry Disciplinary Subcommittee (“the Board”), which suspended his license to practice dentistry for a minimum of six months and one day because he violated MCL 333.16221(a) (negligence and failure to exercise due care), MCL 333.16221(b)(i) (incompetence), Mich Admin Code R 338.1632 (violating a final order of the Board), MCL 333.16213(1) (failure to maintain patient records), Mich Admin Code R 338.11120 (failure to maintain dental records), and Mich Admin Code R 338.11117(a) (abandoning a patient). For the reasons stated below, we affirm.

I. FACTS

At the Board hearing, petitioner alleged that respondent violated professional standards of care with respect to Patients J.P., V.P., B.M., and S.E, and that respondent violated the terms of a previous final order that placed him on probation for two years. Patients J.P. and V.P. testified at the hearing, but patients B.M. and S.E. did not. Petitioner’s expert witness testified that after reviewing the information provided to him by the case investigator, including the investigator’s report and the four patients’ dental records, he determined that respondent’s treatment of each of these patients fell below the applicable standard of care. The expert witness additionally determined that the patients’ dental records were inadequate.

Respondent denied that he breached the applicable standard of care or otherwise provided improper treatment to the four patients. Respondent also testified that he complied with the substance of the previous final order. The administrative law judge accepted the testimony of

petitioner's expert witness, and found that petitioner proved seven of the eight counts in its complaint by a preponderance of the evidence.

II. STANDARD OF REVIEW

Judicial review of a disciplinary subcommittee order is governed by Const 1963, art 6, § 28. *Dep't of Community Health v Risch*, 274 Mich App 365, 371; 733 NW2d 403 (2007). Const 1963, art 6, § 28 reads, in relevant part:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

III. EXPERT TESTIMONY

Respondent unconvincingly asserts that the hearing referee erred in accepting the expert opinions of petitioner's expert witness, as the expert witness reviewed hearsay investigative reports before testifying.

In a contested case under the Administrative Procedures Act, "the rules of evidence are followed to the extent practicable." *Michigan Electric Coop Ass'n v Pub Service Comm*, 267 Mich App 608, 623; 705 NW2d 709 (2005), citing MCL 24.275. In addition, "an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." MCL 24.275.

MRE 703 provides in relevant part that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Under MRE 703, an expert's opinion is admissible "only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011) (citation and quotation marks omitted).

Hearsay is generally inadmissible. MRE 802. However, MRE 803(6) "provides an exception to the hearsay rule for records of regularly conducted activity." *Merrow v Bofferding*, 458 Mich 617, 626-627; 581 NW2d 696 (1998). For example, medical records maintained in the regular course of business are admissible under MRE 803(6). See *Id.* at 627.

Here, the expert witness's respective expert opinions were based on dental records, x-rays, and a photograph. Respondent argues that these documents were inadmissible hearsay. However, the x-rays and the photograph were not hearsay because they were not statements. See MRE 801(c) ("Hearsay' is a statement . . ."). Further, while the dental records were hearsay, respondent does not dispute that these dental records were maintained in the regular course of his dental practice. Thus, the dental records were admissible hearsay under MRE 803(6). See

Merrow, 458 Mich at 627. Because respondent does not otherwise dispute the admission of the dental records, x-rays, and the photograph, these documents were properly admitted into evidence. Accordingly, each of the expert witness's expert opinions was based on facts or data otherwise in evidence, and therefore not a violation of MRE 703. See *Fackelman*, 489 Mich at 534.

Respondent correctly observes that the investigative reports—and the expert witnesses's opinions based on those reports—are inadmissible hearsay. Respondent argues that the expert witness's expert opinions were based on facts and data not properly in evidence, as the investigative reports were inadmissible hearsay.¹ But petitioner never sought to admit the investigative reports. And while the expert witness did review the investigative reports, he did not base his expert opinions on them. Rather, the expert witness based his expert opinions on the actual x-rays and dental records themselves, which were “facts or data” properly in evidence. See MRE 703. It is apparent that the expert witness only reviewed the investigative reports as factual background for the case.

Because the investigative reports were not required to be in evidence and the expert witness did not base his expert opinions on the investigative reports, we find no error.

IV. PATIENT TREATMENT

Respondent claims that notwithstanding the admissibility of the expert testimony discussed above, the record nonetheless fails to support the hearing referee's findings that respondent provided negligent and incompetent care to the four patients.² This assertion is without merit.

With respect to Patient S.E., respondent states that the photograph was insufficient evidence to prove that the dentures were improperly crafted. However, the hearing referee's finding in this respect was supported by the expert witness's testimony, who opined that the dentures were neither aesthetically nor technically fit. The expert witness further testified that he could reach this opinion on the basis of the two-dimensional picture. This Court will not reverse an administrative finding of fact when it is supported by witness testimony. See *Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013).

¹ MRE 803(6) was inapplicable because it is apparent that the investigative reports were prepared for the instant litigation, and records prepared for the purpose of litigation are not admissible under this rule. *People v Huyser*, 221 Mich App 293, 297; 561 NW2d 481 (1997). MRE 803(8)(B) (public records) was also inapplicable because this rule “does not allow the admission of investigative reports.” *Bradbury v Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984).

² Respondent does not dispute that the hearing referee's findings, if true, would constitute negligence and failure to exercise due care, incompetence, failure to keep and maintain patient records, failure to maintain dental treatment records, and abandonment of a dental patient.

Respondent also claims that he did not improperly extract several of patient S.E.'s teeth because she executed a Medicaid consent form to these extractions. However, it is reasonable to infer that patient S.E. executed the Medicaid consent form on the basis of respondent's treatment plan and corresponding advice favoring the extractions. A professional may breach the standard of care by giving improper advice. See *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 627; 752 NW2d 37 (2008).

Respondent further argues that he was not held to the proper standard of care with respect to patient S.E. because his treatment options were limited by Medicaid. Respondent suggests that because Medicaid payments are limited, teeth that could be restored must be extracted instead in preparation for dentures. Were we to grant respondent this point, reversal is nonetheless unwarranted because the hearing referee's findings were adequately supported by additional evidence. See *In re Sours*, 459 Mich 624, 640 n 4; 593 NW2d 520 (1999) (reversal is not warranted when a trial court's ultimate finding is "partially based on an erroneous finding of fact" but is otherwise supported by the evidence). Here, the evidence showed that respondent failed to suture patient J.P. after extracting several of her teeth, and he failed to provide patient S.E. with technically or aesthetically fit dentures. The evidence also showed that respondent's records for all four patients fell below the standard of care for dentists because the records did not include necessary information. Accordingly, the Board's findings that petitioner proved negligence and incompetence were supported by substantial evidence. See *Anderson*, 299 Mich App at 598.

With respect to patient J.P., respondent states that it was not a breach of care to fail to notice that certain root tips were missing from the extracted teeth. While respondent did testify to this effect, the expert witness testified that a practicing dentist should examine each tooth after it is extracted for a missing root tip. Again, this Court will not reverse an administrative finding of fact when it is supported by witness testimony. See *Anderson*, 299 Mich App at 598.

With respect to patient B.M., respondent argues that there was no admissible evidence to contradict his testimony that he acted reasonably when she screamed in his face. However, the dental records indicated that respondent yelled at patient B.M. As noted, these dental records were admissible under MRE 803(6).

With respect to patient V.P., respondent argues that her failure to identify specific dates in 2010 when respondent's office closed means that petitioner did not prove abandonment. The expert witness, however, testified that abandonment occurs when a dentist fails to affirmatively inform a patient that his or her office is closing. Because patient V.P. testified that respondent never informed her that Discount Dentures would be closing, her testimony supported the Board's finding that respondent abandoned patient V.P. See *Anderson*, 299 Mich App at 598.

Respondent also asserts that petitioner failed to show that his method of recording anesthetic was below the standard of care for dentistry in the Medicaid field. While it is true that the expert witness did not specifically testify about the proper scope of dental records for Medicaid patients, it is unclear how or why Medicaid payments would have any impact on whether a dentist records the specific units of anesthetic used on a patient, because recording such information would be quick and costless. There is thus nothing in the record to support respondent's contention.

Finally, respondent claims that there was no admissible evidence to show that he violated the Public Health Code or a rule promulgated under the Public Health Code. However, for the reasons explained above, petitioner submitted sufficient admissible evidence to prove the specific violations, which could certainly lead to a finding that he violated the rules promulgated under the Public Health Code.

V. PREVIOUS FINAL ORDER

Respondent's assertion that the record did not contain admissible evidence to support the hearing referee's finding that he violated the previous final order is equally unavailing. Respondent himself testified that he met with the Board member on six occasions, which is clearly fewer than the eight meetings required by the final order. While respondent contends that he met with the Board member at an appropriate frequency due to their conflicting schedules, there is no language in the final order to suggest that the eight-meeting requirement would be excused on the basis of either person's schedule.

Similarly, with respect to the continuing-education requirement, respondent does not dispute that although he completed the necessary coursework, he did not mail proof of doing so to the Department of Community Health—a violation of the final order. Accordingly, in light of respondent's concessions, the hearing referee's finding that he violated the terms of the previous final order was supported by competent, material, and substantial evidence.

VI. DUE PROCESS

Also, respondent argues that the Board violated his due-process rights in suspending his license. Because this argument was not raised below, it is waived for appellate review. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

In any event, it is meritless. A professional has a due-process right in his or her professional license. See *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 360-361; 564 NW2d 519 (1997). Thus, when an administrative agency seeks to suspend or revoke a license to practice dentistry, it may only do so while protecting the dentist's right to due process. See *In re Petition of Attorney Gen for Investigative Subpoenas*, 274 Mich App 696, 706-707; 736 NW2d 594 (2007). To protect this due-process right, Article 15 of the Public Health Code and related administrative rules guarantee the right to present evidence and arguments at a contested case hearing. *Id.* at 707. And a dentist also has the right to appeal an adverse decision to this Court. *Id.*

Here, respondent's due-process argument fails because the record shows that he was provided with due process. Respondent received an administrative hearing, retained counsel, and appealed. Further, respondent's argument that the administrative complaint lacked specificity is also meritless because the complaint explicitly alleged the facts that fell below the professional standard of care referenced in MCL 333.16221(a). Petitioner was not obligated to "set forth a specific professional standard" because MCL 333.16221(a) uses the broad language, "[a] violation of general duty, consisting of negligence or failure to exercise due care"

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter