

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL, BOARD )  
OF MEDICAL EXAMINERS, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 82-578  
 )  
CLARENCE W. LYNN, M.D., )  
 )  
Respondent. )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was held before Arnold H. Pollock, Hearing Officer, on March 3, 1983, in Orlando, Florida. The issue for determination was whether the Respondent's license to practice medicine in the State of Florida should be revoked, suspended, or otherwise disciplined for violations of Chapters 458 and 500, Florida Statutes (1981), as alleged in the Administrative Complaint dated January 20, 1982.

APPEARANCES

For Petitioner: Charlie L. Adams, Esquire  
Department of Professional Regulation  
130 North Monroe Street  
Tallahassee, Florida 32301

For Respondent: William Trickel, Jr., Esquire  
35 West Pine Street  
Orlando, Florida 32801

INTRODUCTION

By Administrative Complaint dated January 20, 1982, the Respondent has been charged with certain violations of Chapter 458, and a violation of Chapter 500, Florida Statutes (1981). In summary form Count One alleges that the Respondent: (a) allowed unlicensed persons to diagnose, treat, operate, or prescribe for the patient's condition without direct supervision of their actions; (b) utilized a course of treatment which, when used to the exclusion of other forms of medical treatment, were fraud, misrepresentation, and were harmful to the patient (without obtaining full, written, and informed consent from her); and (c) engaged in what constituted gross or repeated malpractice. In Count Two, Respondent is alleged to have experimented on a human subject without obtaining informed, written consent; and in Count Three, Respondent is alleged to have used a trick or scheme in the practice or to have made deceptive, untrue, or fraudulent representations in his practice with his patient. In Count Four, Respondent is alleged to have treated a patient with laetrile without informing her of alternative treatments or that laetrile had not been approved by the Federal Food and Drug Administration. In the final Count, Five, Respondent is charged with dispensing DMSO without a prescription.

In support of the factual allegations of the complaint, Petitioner presented the testimony of Robert Brown and Dr. James M. Johnstone and, by deposition, the testimony of Vicki L. Chapman and Dr. Joseph L. Ackerman. In addition, Petitioner's Exhibits 1 through 3 were received. Respondent testified in his own behalf and, in addition, presented the testimony of Joyce Barnett.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence presented at the hearing, the following relevant facts are found:

1. At all times pertinent to the matters considered here, the Respondent was a medical doctor licensed by the State of Florida under license number ME1472. He has been engaged in the practice of medicine for 50 years.

2. While in practice in Orlando, Florida, during the period March 14, 1980, through August 8, 1980, Respondent had as a patient, and acted as treating physician for, Mary Walsh, who was at the time suffering from cancer of the lung.

3. Respondent's treatment of Mary Walsh during the entire period she was his patient included the administering to her of laetrile, dimethylsulfoxide (DMSO) intravenously, enzymes, and megavitamins.

4. Dr. James M. Johnstone (D.O.) had been a physician to Mrs. Walsh over a period of several years for a variety of complaints. (Her lung cancer was detected in December, 1979, however, when she went into his office on a routine visit.) Over the period of time he had treated her, she had suffered from such things as seizures, thyroid problems, and the like, but on this particular December 1979 visit, she complained of a sore throat. Dr. Johnstone referred her for consultation with a Dr. Porth, who ultimately opined she might have cancer of the epiglottis. As a result, in January, 1980, she was admitted to the hospital, where she was diagnosed as having cancer of the left lung. Exploratory surgery conducted during a second period of hospitalization in February, 1980, revealed that the cancer was inoperable and terminal, and the procedure was terminated without any surgical excision.

5. Dr. Johnstone and several other physicians advised Mrs. Walsh and her daughter, Vicki L. Chapman, that conventional-treatments such as radiation therapy were available for, if not a cure, at least palliative treatment to reduce pain and perhaps extend life somewhat, but Mrs. Walsh was afraid of radiation therapy and refused it repeatedly.

6. During this period of diagnoses and tests, Mrs. Walsh and her daughter, Vicki, were told by an acquaintance named Elmer Boener, of the Fairfield Medical Center in Jamaica, which offered the organic approach to cancer control, including the use of diet and vitamins. While Mrs. Walsh and her daughter were deciding whether to go to Jamaica, Mr. Boener informed them that a Dr. Wedel would be working at Respondent's clinic offering the same treatment as available in Jamaica, and they would not have to have the stress of going out of the country.

7. They decided to go to Jamaica, however, because of the stress in this course of treatment on diet and, in March, 1980, went to the Fairfield Clinic for ten days, returning during the first week in April, 1980, at which time Mrs.

Walsh took up treatment of her condition with Dr. Wedel and Respondent at the latter's clinic in Orlando.

8. Mrs. Chapman went with her mother on almost every visit to Respondent's office and was present when Mrs. Walsh talked with either doctor or got her treatment. On one occasion, after looking at some X rays taken of Mrs. Walsh's lungs, in the presence of Mrs. Chapman, Dr. Lynn allegedly told Mrs. Walsh that her cancer was shrinking and getting better. This was not true. Dr. Lynn denies telling her this, saying he told her the amount of fluid in the lungs had reduced, but not the size of the cancer. Considering all the evidence and weighing all the factors, I find that Dr. Lynn did make the statement alleged. However, Mrs. Walsh still had pain, and Respondent would not prescribe medication for her. Because of that, she had to go to another doctor for a prescription for whatever she needed to relieve pain.

9. During the time that Respondent treated Mrs. Walsh, he was assisted by a "Dr." Wedel, who held himself out to be a nutritionist. However, search of the records of the various licensing agencies for the medical disciplines within this state reveals that he is not licensed as a medical doctor, osteopath, naturopath, physical therapist, podiatrist, chiropractor, pharmacist, registered nurse, or licensed practical nurse. His service to Mrs. Walsh consisted of nutritional counselling as to diet, vitamins, etc., and writing prescriptions for vitamins that were subsequently signed by Respondent. Respondent's supervision of Wedel was not regular, but periodic. Wedel was recommended to Respondent by a friend in Oregon and intended to apply for a Florida license as a medical doctor. Dr. Lynn states that before offering Wedel employment, he cleared taking him on with the Orange County Medical Association, which agency interposed no objection.

10. When Mrs. Walsh returned to Respondent's care from Jamaica, she requested that he continue the course of treatment she had been undergoing there, which included diet control and the use of vitamins, enzymes, laetrile, and DMSO. Though Dr. Lynn's medical notes were not introduced at the hearing, he indicated that they fail to reveal he counseled Mrs. Walsh on other, conventional forms of treatment for her condition, such as X-ray therapy or chemotherapy. He is satisfied, however, that she was aware of them.

11. Respondent, due to Mrs. Walsh's request to him that he continue the use of laetrile and DMSO, had her oral consent to do so. However, he did not have, nor did he insure that, his staff secure for him her informed, written consent to treat her with either drug. Further, he did not, prior to utilizing either drug, inform her in writing that neither was approved for use in the treatment of cancer by the Federal Food and Drug Administration of the United States Department of Health and Human Services (FDA).

12. Laetrile, DMSO, enzymes, and megavitamins, either singly or taken together, are unconventional treatments for cancer, as accepted by the medical community, and are generally recognized by that community as being experimental.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these proceedings. Section 120.57(1), Florida Statutes (1981)

14. In Count One of the Administrative Complaint, Petitioner alleges that Respondent is guilty of gross or repeated malpractice, or failing to practice

medicine with acceptable skill, care, and treatment under the circumstances, based upon allegations that Respondent treated his patient, a lung cancer victim, with laetrile, DMSO, enzymes, and megavitamins; allowed unlicensed individuals to treat her without supervision; failed to obtain full, informed, and written consent from the patient; and failed to utilize more acceptable forms of medical treatment for the patient's condition.

15. Section 458.331(1)(t), Florida Statutes (1981), provides disciplinary action may be taken for:

Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph.

Section 768.45, Florida Statutes, defines the standards of recovery for medical negligence, and the accepted standard of care for a given practitioner contained therein is adopted into Section 458.331(1)(t), referenced above.

16. Respondent admits to the use of laetrile, DMSO, enzymes, and megavitamins in the treatment of his patient, Mrs. Walsh. He also admits he did not utilize either X-ray therapy or chemotherapy, but contends that the patient, who was suffering from a terminal and inoperable condition, did not desire they be used and requested exactly the treatment administered Dr. Lynn states that he thoroughly advised Mrs. Walsh of the alternative methods, though by his own admission his records do not reflect this. He admits that though he thought his staff secured the informed consent in writing, it was not done. It is also a fact that "Dr." Wedel, an unlicensed healthcare practitioner employed by Respondent, counseled Mrs. Walsh regarding her diet and subsequently wrote prescriptions signed by Respondent. There was minimal supervision of this conduct which, along with the administration of the drugs, made up the course of treatment.

17. The significant words in Section 458.331(1)(t) Florida Statutes, for consideration here are "similar conditions and circumstances." Here, the physician was confronted with, to all intents and purposes, a woman with diagnosed inoperable and terminal lung cancer who desired not to be treated with conventional therapy, but instead by laetrile and DMSO, and the enzymes and megavitamins prescribed by Respondent. Notwithstanding this, considering the fact that laetrile and DMSO are not conventional treatments for cancer; that the Respondent failed to fully inform the patient that this treatment had not been approved by the FDA as required by Section 458.333(4), Florida Statutes; and failed to secure her informed, written consent to the use, it is concluded that Respondent, at least technically, failed to practice medicine in this case with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

18. In Count Two, Respondent is alleged to have followed a course of treatment on his patient which constituted experimentation without first obtaining full, informed, and written consent in violation of Section 458.331(1)(u) Florida Statutes. This statutory provision prohibits:

Performing any procedure or prescribing any therapy which, by the prevailing standards of medical practice in the community, would constitute experimentation on a human subject, without first obtaining full, informed, and written consent.

In Count Four, he is alleged to have violated Subsections (3) and (4) of Section 458.333, Florida Statutes, which read:

(3) The patient, after being fully informed as to alternative methods of treatment and their potential for cure, and upon requesting the administration of amygdalin (laetrile) by his physician, shall sign a written release, releasing the physician and, when applicable, the hospital or health facility from any liability therefor.

(4) The physician shall inform the patient in writing that amygdalin (laetrile), has not been approved as a treatment or cure by the Food and Drug Administration of the United States Department of Health and Human Services.

This Section prohibits both the Board of medical Examiners and the Board of Osteopathic Medical Examiners from taking disciplinary action against a doctor who administers laetrile to a patient who requests it unless either board has declared it to be harmful. The sanction for use of the substance is made operative when the physician fails to: (1) get the patient's informed, written consent, and (2) inform the patient in writing that the drug has not been approved as a treatment or cure by the FDA. Respondent did neither of these, so it is clear he has violated Count Four.

19. Utilization of a drug or course of treatment on a patient that is neither recognized as conventional by the medical community nor approved by the FDA constitutes experimentation in the technical sense of the word. Respondent admitted to a failure to secure informed, written consent of his patient. Accordingly, it is concluded that he violated this Section of the statute and Count Two.

20. Count Three alleges that Respondent made deceptive, untrue, or fraudulent representations in the practice of medicine which fail to conform to the generally prevailing standards of treatment in the medical community, in violation of Section 458.331(1)(1), Florida Statutes. On one visit of Mrs. Walsh, Dr. Lynn made the statement to her that her cancer was shrinking and getting better, after he had looked at recent X rays. Petitioner 's expert, Dr. Ackerman, while questioning the ethics of doing this, stated it might be an attempt to make the patient more comfortable mentally. This would be a harmless misrepresentation and in fact might give the patient more of an urge to fight, since she would feel that she was defeating her cancer. Nonetheless, in light

of all the other omissions of the Respondent, it is concluded that this misrepresentation was intentional and a violation of the statute.

21. The final allegation, in Count Five, alleges a violation of Section 500.1516, Florida Statutes, by dispensing DMSO without a prescription. It is patently obvious that this provision does not require licensed physicians to write prescriptions to themselves in order to dispense, within their own facility, the drug in question. This Section relates to pharmacists or others who are prohibited from dispensing certain drugs without prescription. There is no culpability here.

22. The Petitioner has submitted a proposed recommended order which includes proposed findings of fact and conclusions of law. The proposed findings and conclusions have been adopted only to the extent that they are expressly set out in the Findings of Fact and Conclusions of Law above. They have been otherwise rejected as contrary to the better weight of the evidence, not supported by the evidence, irrelevant to the issues, or legally erroneous.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Respondent's license to practice medicine in the State of Florida be suspended for a period of one year.

RECOMMENDED this 11th day of April, 1983, in Tallahassee, Florida.

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ARNOLD H. POLLOCK, Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32301  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of April, 1983.

COPIES FURNISHED:

Charlie L. Adams, Esquire  
Department of Professional  
Regulation  
130 North Monroe Street  
Tallahassee, Florida 32301

William Trickel, Jr., Esquire  
35 West Pine Street  
Orlando, Florida 32801

Ms. Dorothy Faircloth  
Executive Director  
Board of Medical Examiners  
Department of Professional  
Regulation  
130 North Monroe Street  
Tallahassee, Florida 32301

Mr. Fred Roche  
Secretary  
Department of Professional  
Regulation  
130 North Monroe Street  
Tallahassee, Florida 32301