

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RICHARD BLAKE KESSLER, P.A.,
Petitioner,

v.

Case No. 2021-CV-350870

**GEORGIA COMPOSITE MEDICAL
BOARD,**
Respondent.

ORDER

Before the Court is the Petitioner's Application for Judicial Review (the "Application") raised pursuant to O.C.G.A. § 50-13-19. The Court received briefs and held an appeal hearing held on August 26, 2022. The Application is GRANTED, as set forth below.

Petitioner's Application was raised pursuant to O.C.G.A. § 50-13-19(h), subsections (1), (3) and (5), which provide:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; ... (3) Made upon unlawful procedure; ...or (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]

Petitioner argues all three subsections were violated when the ALJ admitted several pieces of evidence over Petitioner's hearsay and relevance objections.

Findings of Fact/Background

Richard Kessler was a licensed physician assistant at all times relevant to this matter. R. at 31.¹ In August 2016, while employed at a surgery center in Atlanta, Petitioner was given a

¹ All references to "R" are references to the record.

workplace drug screen (the "Workplace Drug Screen" or "WDS"). R. at 130. The WDS was clearly marked "For medical purposes only. Chain of custody not maintained." *Id.*

In October 2016, Petitioner entered into a contract (the "Agreement") with the Georgia Professional Health Program (the "PHP") for an evaluation. R. at 32. According to the Agreement, Petitioner would accept any recommended treatment, or else be reported to the Georgia Composite Medical Board (the "Respondent" or "Board"). The PHP directed the Petitioner to participate in an evaluation at the Talbott Recovery Center, which Petitioner did. R. at 33 *et seq.* In October 2016, Talbott released a report (the "Talbott Report"), which diagnosed Petitioner with an "opioid use disorder, moderate." R. at 38. Petitioner has argued that he did not have an opioid abuse problem and naturally refused to seek treatment for a condition contends he did not have. Moreover, Petitioner argued that he had cancer and no money to spend on extra, unnecessary medical treatments. R. at 41.

Subsequently, the PHP reported this breach of the Agreement to the Board, that ordered a second evaluation at a different facility. R. at 75-79. Petitioner obtained the second evaluation from Ridgeview Institute (which produced the "Ridgeview Report"). R. at 80-110. Petitioner argued that the results of all Ridgeview's own tests were favorable to him, specifically arguing that every drug test was negative for drugs, and every interview conducted gave positive feedback. R. at 104-108. Petitioner also identified numerous inconsistencies within the Ridgeview Report, raising questions about its reliability.

Ridgeview diagnosed Petitioner with a "history of opiate abuse disorder, moderate." R. at 84. On September 13, 2017, the Board suspended the Petitioner's license. R. at 111 (the "OSS").

On July 7, 2020, the Board produced a copy of the WDS upon which the evaluations are based, more than three years after the suspension. The WDS contains three parts. R. at 130-132.

There was an initial drug screen on August 11, 2016, which was positive for benzodiazepine and an opiate. *Id.* Then, the employer decided to break the chain of custody, a fact that the WDS plainly discloses: "For medical purposes only. Chain of custody not maintained." *Id.* Five days later, on August 16, 2016, the sample was retested at an external lab, which was positive for oxazepam (a benzodiazepine for which Petitioner has a prescription). *Id.* The next day, a third test was performed which came back positive for Fentanyl. *Id.*

Petitioner argued that the WDS contradicted the allegations in the Talbott and Ridgeview Reports, as well as the allegations found in the OSS. *See generally* WDS, R. at 130-132. Petitioner has argued this evidence is unreliable on the basis of these inconsistencies.

On September 21, 2020, Petitioner sought a hearing, which was held before the Office of State Administrative Hearings on January 26, 2021 (the "OSAH Hearing" or the "ALJ"). *See GCMB v. Kessler*, OSAH Case No. 2107052-OSAH-GCMB-PA-60-Malihi. At the OSAH Hearing, the Board presented the testimony of its employee, Jonathan McGehee (the so-called "Investigator"). Through the Investigator, the Board presented the following evidence against Kessler:

- (a) Testimony of the Board's Investigator as to the Employer's allegations;
- (b) Talbott Evaluation Report;
- (c) Ridgeview Evaluation Report; and a
- (d) "breach" of the Agreement Not to Practice.

See R. at 153.²

² The Petitioner objected to these pieces of "evidence" in a timely manner both before the ALJ and the Board. R. at 192 (Transcript of May 6, 2021 hearing) (these objections are the same ones discussed in arguments below). Petitioner also objected at the OSAH Hearing. R. at 130 (the Initial Decision describes objections made as "arguing inconsistencies").

On March 2, 2021, the ALJ issued a Initial Decision indefinitely suspending Kessler practicing as a licensed Physician's assistant and identified the basis of its decision as follows:

Despite Respondent's attempts at the hearing to argue certain inconsistencies in the various tests and assessments, these facts remain: over the course of several months in 2016 and 2017, the Board received a concerning report from Respondent's employer, a report that Respondent had failed to follow through with his PHP agreement and that the PHP was unable to contact him, confirmation that Respondent was working as a physician assistant without evidence that he had ever undergone the recommended treatment, and, significantly, two evaluations indicating that Respondent was not safe to practice.

R. at 153.

Petitioner appealed the Initial Decision to the Board. On May 7, 2021, as part of a regular Board meeting, the Board reviewed the Initial Decision. On May 20, 2021, the Board upheld the Initial Decision (the "Final Decision"). R. at 197. Petitioner filed this appeal in June 2021.

A few months later, minutes of the May Board meeting were publicly released:

Richard Blake, PA, requested a review hearing. Max Changus, Assistant Attorney General, appeared on behalf of the Board. Mr. Blake was represented by Attorney Matt Bass... Dr. Retterbush made a motion, seconded by Dr. Harbin, to uphold the Initial Decision of the Administrative Law Judge. Dr. Reisman and Dr. DeLoach both abstained.

Ruling on Application Raised Under O.C.G.A. §50-13-19(h)(5)

O.C.G.A. § 50-13-19 (h) clearly authorizes appellate review of the sufficiency of the evidence to support the ALJ's decision on questions of law. *Stevens v. Board of Regents*, 129 Ga. App. 347 (1973). Moreover, the Court is empowered to decide whether the administrative court relied on admissible evidence. *See McEver v. Worrell Enterprises*, 223 Ga. App. 627 (1996).

Accordingly, the Court is empowered to consider whether the ALJ relied on admissible or inadmissible evidence in rendering the Initial Decision. Respondent argued and Petitioner does not contest that the Initial Decision was based on the following evidence: (a) the testimony of an

investigator as to the employer's allegations; (b) Talbott Evaluation Report; (c) Ridgeview Evaluation Report; and (d) Breach of the Agreement Not to Practice. *See* Respondent's Reply, dated November 2021.

Petitioner argues that the testimony of the Investigator as to the employer's allegations was inadmissible because it was hearsay within hearsay within hearsay ((i) board's investigator read the allegations in the report, (ii) the report was authored by people who heard the allegations from the Employer representative, (iii) the Employer representative repeated what yet another employee supposedly saw)). The Court finds that this objection was raised before the administrative law judge. The Court finds that the testimony of the Investigator as to the employer's allegations is inadmissible because it is hearsay. The testimony is hearsay because it was offered into the record for the truth of the matter asserted by someone other than the declarant. There being no hearsay exception applicable based upon the evidence presented, this evidence should not have been admitted into the record by the ALJ.

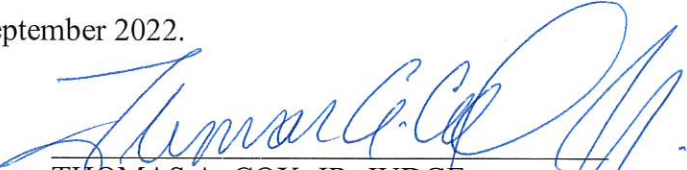
Petitioner argues that the Talbott and Ridgeview Evaluation Reports are also inadmissible because they are *hearsay within hearsay within hearsay* ((i) board investigator reported the allegations in the report as true, (ii) statement in report were authored by people who heard the allegations from the employer representative, (iii) the employer representative repeated statements supposedly made by some other, unidentified employee). Petitioner further argues that the Ridgeview Evaluation compounds the problem by adding yet another layer of hearsay because it reiterates the allegations of the Talbott Report, and is not based on independent information. Petitioner repeatedly argues that both reports had no indicia of reliability because they both misstate the contents of the drug screen they supposedly rely upon for diagnosis. The Court finds that these reports compound the issue of hearsay with direct statements contained within that

misstate findings within the WDS that call into question the level of scrutiny that went into the creation of these reports. The Court therefore finds that both the Talbott Report and Ridgeview Evaluation are inadmissible to prove that Petitioner was unsafe to practice.

As noted above, the ALJ relied only on this evidence as the basis of his decision. Respondent failed to produce any other evidence at the hearing. Accordingly, there is only the breach of the PHP in the record that supports the Respondent's case. The standard of review for issues raised under the "clearly erroneous" language in O.C.G.A. § 50-13-19(h)(5) is "any evidence." Under O.C.G.A. § 50-13-19(h)(5), the "any evidence" standard is the applicable touchstone and the presence of conflicting evidence is sufficient to satisfy that test. *Bowman v. Palmour*, 209 Ga. App. 270 (1993). As stated during an evidentiary hearing, however, the breach of the PHP did not create, in and of itself, any negative consequences besides the Petitioner being reported to the Board that they are not following through with the PHP. As such, this fact, by itself, cannot support a finding that the Petitioner was unsafe to practice, based on the record established below.

Because there is no conflicting evidence in the record that could sustain the Initial Decision, the Court finds that the ALJ's evidentiary rulings were "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The Court therefore GRANTS the Petitioner's request for relief under O.C.G.A. §50-13-19(h)(5) and REMANDS FOR FURTHER PROCEEDINGS IN LINE WITH THIS ORDER.

SO ORDERED, this the 7th day of September 2022.


THOMAS A. COX, JR, JUDGE
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT