

BEFORE THE DENTAL BOARD
OF THE STATE OF IOWA

IN THE MATTER OF

Jack Elder, D.D.S.

Respondent

) Case No. 19-0151
)
) **FINDINGS OF FACT, CONCLUSION**
) **OF LAW, DECISION, and ORDER**
)

On May 6, 2022, a hearing in this case was held before the Iowa Dental Board (“Board”), and Jack Elder, D.D.S., (“Dr. Elder”) appeared. He was represented by Rebecca Brommel. Laura Steffensmeier appeared on behalf of the State. A quorum of the Board was present, and witness testimony was presented. The entire administrative file, including the parties’ exhibits, was admitted into the record, and the matter is now fully submitted.

FINDINGS OF FACT

Dr. Elder was issued Iowa dental license number 05839 on July 3, 1972, and it lapsed in 2008. Ex. 4, at p. 1. During his lengthy career, Dr. Elder practiced dentistry in Minnesota, Wisconsin, and California in addition to Iowa. Id. Dr. Elder regained his Iowa license 2018, and there were some difficulties with his practice. Id. As the Board’s prior order in this matter recounts:

The Wisconsin Dentistry Examining Board revoked the Respondent's Wisconsin dental license in 2011. The discipline stemmed from charges related to billing irregularities and misrepresentations on a licensure application. In 2018, the Board reviewed the Wisconsin disciplinary action, and granted Respondent's request for reinstatement of his Iowa dental license. Respondent's Iowa license is currently active and will expire on August 31, 2022.

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The California Dental Board filed an accusation against Respondent on November 28, 2017. The accusations included charges of negligence, unprofessional conduct, patient abandonment, failure to provide dental records, securing licensure by fraud, and failure to report out of state discipline. The California action was resolved with the entry of a stipulated settlement and disciplinary order on September 10, 2019. The stipulated settlement and disciplinary order revoked Respondent's California dental license, but provided for a stay of the revocation with a probationary term of five years. The California probationary requirements include, but are not limited to, the following: quarterly reporting regarding compliance; required reporting regarding change of residency, practice, and out of state licensure; engagement in the practice of dentistry in California for a minimum of sixteen hours per week or sixty-four hours per calendar month; remedial education related to periodontal disease, caries detection, recordkeeping, and ethics; forty hours per year of community service; and a cost recovery payment of \$11,800. Respondent provided timely notice of the final California disciplinary action to the Board on October 3, 2019.

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Board staff had multiple communications via email with California Board Investigative Analyst David Leary regarding the status of Respondent's probation. The communication

indicated Respondent had not been compliant with the terms of his probation, however, there was no indication that the California Board had initiated any new disciplinary action against the Respondent. . . . A September 8, 2020, letter . . . details the multiple probationary terms that Respondent had failed to comply with and set new deadlines in an effort to help bring him into compliance.

Id., at pp. 2-3. Given these facts, the Board initiated a proceeding that concluded with a decision on November 13, 2020, revoking his license but staying such action pending five years of probations that required, among other things: “Verification of completion of a board approved review and evaluation program, and successful completion of any recommended educational remediation, at an approved facility within six months.” Id., at p. 5.

To date, Dr. Elder has not completed any Board approved review and evaluation program. Indeed, while the pandemic did create some difficulties, Dr. Elder has been unsuccessful in his efforts to comply with this term. More specifically, at the time of the Board’s initial revocation decision in 2020, the “D-Prep” program the Board has historically employed for review and evaluation was “not operational” and is no longer available. Ex. 5, at p. 1. As a result, on April 16, 2021, the Board notified Dr. Elder that a different review and evaluation program would be acceptable, which included the completion of three components. Id. The three components were: (1) the ADA DL OSCE written exam; (2) a clinical licensure exam involving a manikin; and (3) the ethics and boundaries assessment services exam (“EBAS”). Id. Dr. Elder was not successful at timely completing these tasks, prompting a July 22, 2021 letter to him noting the non-compliance and stating a second option would be acceptable, namely a program by Promethean Dental Systems (“Promethean”). Ex. 7, at p. 2. The Board had never publicly approved of option 2. Hearing Recording, at 35:50-36:00. However, the Board chair accepted it as a general proposal, and the completion date given to Dr. Elder was September 2, 2021. Id. 36:00-:45. Of note, a more specific proposal from Promethean was obtained in November of 2021, and a third proposal was sent to Dr. Elder in January of 2022. Exs. N, P. The Board never approved the latter two proposals. Hearing Recording, at 44:00-:18.

On September 1, 2021, Dr. Elder contacted the Board requesting more time to complete the first review and evaluation option because he had only managed to start signing up for the tests by that point. Ex. 8, at p. 1. Dr. Elder received a letter back on September 8, 2021, essentially allowing the requested extension even while noting that there was evidence Dr. Elder could have completed at least some of the action more quickly. See, e.g. Ex. 9, at p. 1 (“After further investigation, it was determined that test dates were available to you prior to the September 2, 2021 deadline and registration was not completed for all required EBAS courses. Registration should have been attempted sooner so that you could have completed the requirements by the deadline provided. Your late registration attempts indicate that you are not taking your probation requirements seriously.”).

On September 17, 2021, and October 1, 2021, Dr. Elder took the EBAS exam, and he failed to secure passing scores. Exs. 11, 12. On November 13-14, 2021, Dr. Elder took the clinical exam, and he failed by not performing well on the first day and failing to attend the second day of the exams. Exs. 14-16. On December 17, 2021, Dr. Elder took the written DL OSCE exam, and he also was unsuccessful. Ex. 15, at p. 2. Of note, Dr. Elder explained his failure on the EBAS as difficulty understanding the computer interface and the difficulty of completing an essay test after so much time has passed since he last did this in school. Ex. 13, at p. 2. He explained his failure on the clinical exam in part as not having experience with the manikins and plastic teeth used in the test and not having an assistant. Hearing Recording, at 2:28:00-2:33:00.

On December 3, 2021, after learning of some of the unsuccessful efforts to complete option 1 and deciding not to pursue the Promethean option further, the Board issued a “Notice of Intent to Lift Stay” that concluded Dr. Elder had not satisfied the probation term of completing a Board approved review and evaluation program and determined the stay on the revocation of his license would be lifted. Ex. 1. Dr. Elder appealed, and during the pendency of the appeal, Dr. Elder attempted to complete a program by Promethean. Ex. 17. Promethean’s program has historically had limited use, as it is relatively new, and in the program it generated for Dr. Elder, he completed the “didactic course” component. Id. The summary of his evaluation indicated he had “no problem understanding information and testing on it.” Id., at p. 2. Unfortunately, Dr. Elder did not possess the same success on the hands-on component, as he struggled in the practice sessions on February 21 and 22, 2022, and ultimately did not complete the testing phase. Id., at p. 2. In the summary report, it did note that some of the difficulty could be from the fact the test uses plastic teeth, which require a slightly different technique than with real teeth, but it found that, even comparing him to other practitioners who had no practices on plastic teeth:

Our professional opinion is that Dr. Elder did not demonstrate the hand skills necessary to meet the criteria of skills common to the practice of dentistry. The anxiety of this knowledge whether conscious or subconscious by Dr. Elder contributed to his inability to return for the exam.

Id., at p. 5. Of note, the documents at the time of the testing indicate Dr. Elder became ill on February 23, 2022, and he went into the hospital during the ensuing days. Ex. B, at p. 7. Dr. Elder since explained his failure in the practice session as again a lack of experience with modern testing devices that do not fully simulate working with real patients despite his training efforts. Hearing Recording, at 2:33:00-2:39:00.

Following his failure at Promethean, the Board held a hearing on May 6, 2022, on whether to lift the stay. In that hearing, the State argued the only issue before the Board is whether Dr. Elder completed this probation term and, since he had not or anything functionally equivalent, the Board should lift the stay and revoke Dr. Elder’s license. In response, Dr. Elder argues the Board should find he has substantially complied with this term because the originally contemplated D-Prep review and evaluation program no longer exists, but he has effectively met this requirement by practicing dentistry without issue for some time and by having experts review his practice. Dr. Elder argues novelty, stress, and illness were the cause of his difficulty performing on the other tests. He urges the Board to look in particular: at the practice monitor’s undisputed affidavit that he has not found any issues; the expert report of Dr. Michael Moffitt—who has extensive experience teaching, mentoring, and reviewing dentists—that concluded his evaluation of Dr. Elder’s practice on April 7, and 8, 2022 revealed no issues; the expert opinion of Dr. Bruce Cochrane—who has a referral relationship with Dr. Elder and has extensive experience in the field—that again concluded no issues with Dr. Elder’s practice based on his experience with his patients and review of numerous files; and the affidavits of Dr. Elder’s employer, coworker, and laboratory that indicates no concerns. See Exs. FF, GG; Hearing Recording, at 1:21:30-1:36:16; Filed affidavits.

CONCLUSIONS OF LAW AND DECISION

A.

Pursuant to Iowa law, the Board was created to regulate the practice of dentistry, dental hygiene, and dental assisting. Iowa Code § 147.13(8). Its authority includes the power to “initiate and prosecute disciplinary proceedings” and “impose licensee discipline.” Id. § 272C.3(e), (f). The statutory ground

allowing discipline in the first instance in this matter was Iowa Code section 153, which allows discipline for a dentist that has been revoked or suspended by the licensing authority of another state. Iowa Code § 153.34(11)(2020) now codified in Iowa Code § 153.34(10)(2021). Discipline can include not only revocation of a license but also probation, additional education or training, and civil penalties. 650 Iowa Administrative Code (“I.A.C.”) § 30.2.

A totality of the circumstances govern the Board’s decision on what form of disciplinary sanction is appropriate, and the governing administrative rules indicate the follow factors may be considered:

1. The relative seriousness of the violation as it relates to assuring the citizens of this state a high standard of professional care.
2. The facts of the particular violation.
3. Any extenuating circumstances or other countervailing considerations.
4. Number of prior violations or complaints.
5. Seriousness of prior violations or complaints.
6. Whether remedial action has been taken.
7. Such other factors as may reflect upon the competency, ethical standards and professional conduct of the licensee or registrant.

Id. § 30.3. The burden of proof in a disciplinary action is on the State by a preponderance of the evidence. See, e.g., Eaves v. Bd. of Med. Examiners, 467 N.W.2d 234, 237 (Iowa 1991) (discussing the issue).

Importantly, though, if a term of probation is violated and license revocation that has been stayed is to be imposed, the Board must provide “timely notice” of its proposed action, provide a contested case hearing, and give the holder of the license “an opportunity to show . . . compliance with all lawful requirements for the retention of the license.” Iowa Code § 17A.18(3).

B.

In this case, the balance of the record indicates Dr. Elder violated a material term of his probation and his license should be revoked. No dispute exists between the parties that the Board’s November 13, 2020 Order is valid and required the “completion of a board approved review and evaluation program, and successful completion of any recommended educational remediation, at an approved facility within six months” of the Order. Ex. 4, at p. 5. No dispute also exists Dr. Elder did not formally comply with this provision because Dr. Elder attempted and did not successful complete all three tests in option 1 that the Board authorized following the end of the D-Prep program and because Dr. Elder failed to successfully complete the Promethean program even assuming the program to which he submitted would be sufficient.

Further, Dr. Elder also did not demonstrate substantial compliance with the review and evaluation requirement such that the failure to technically meet the condition can be overlooked. At its core, Dr. Elder is arguing that the past few years of practice without incident—as evidence in part by the lack of complaints and positive practice monitor reports—along with the experts that reviewed his practice are sufficient to show he has been materially evaluated and shown to be a safe and competent dentist. While this claim does have some force (particularly considering the Board allowed probation), it is not ultimately persuasive. This is in part because the exams contemplated in option 1 evaluate and, thus, ensure more areas of required competency than can be seen from a review of selected patient files, an inspection of an office, or even a lack of complaints from the public or the practice monitor. It is true that a review of Dr. Elder’s day-to-day practice can have some use, which is why the Board ordered it, but it is not the same as

objective exams testing the full scope of required knowledge. For example, the ethics component of option 1 tests a broader set of knowledge than a dentist would typically employ on any given day in the practice, and the overall clinical exam would cover non-routine procedures that a dentist is expected to be able to complete.

Moreover, even if this concern could be overlooked, a material shadow exists over the objectivity of much of Dr. Elder's evidence. For example, Dr. Elder arranged the two expert reviews of his practice, which calls into question the extent to which those reviews are truly objective. Further, Dr. Cochrane has a referral arrangement with Dr. Elder, which enhances the difficulty of accepting the objectivity of his testimony. The other affidavits submitted by Dr. Elder and expert opinions have similar shortcomings, including the financial interest that his employer and staff would have in their positive comments. In short, there was a reason the Board wanted an objective evaluation of Dr. Elder's abilities, and without successfully completing such and with his failing scores when he attempted to do so, the Board cannot have confidence Dr. Elder can safely practice dentistry, including after his probation expires.

It is true Dr. Elder took great umbrage at the testing involved in option 1, stating he should not have "to take the boards again," but it should be noted the reason why the requirement existed was his shortcomings in the past that lead to the original disciplinary action. This is particularly true when it comes to ethics. The action of the Board did not come from the ether; it came from his prior inability to follow the standards of the profession, which makes him differently situated than other dentists. Any claim the Board approved requirements were too stringent since the D-Prep program had fewer components is of no avail because the Board can use what tests are available, particularly the standardized tests in option 1. Once more, Dr. Elder's failures on the tests in option 1 and with Promethean cannot be crafted into an argument supporting substantial compliance. While the Board is cognizant of the fact plastic teeth are not fully equivalent to real teeth thereby making it harder for experienced practitioners to show clinical competency, Dr. Elder's marginal performance and inability to even complete the tests reveal this known shortcoming in testing was likely not the cause of the results. This also ignores the fact he could have more fully prepared himself for the exams. Further, the difficulty associated with plastic teeth does not explain his failure on the ethics exam. In fact, although it appears true that Dr. Elder's frustration, other medical conditions, and difficulty using computers and manikins additionally interfered with his ability to test, this is not a reason to void the testing requirements. Some flexibility in testing is necessary and appropriate, but testing is generally the most objective and comprehensive tool to evaluate skills, which is what the Board needs to have confidence Dr. Elder can fully practice dentistry safely.

Finally, even assuming some residual discretion exists to consider the totality of the circumstances and the factors for the appropriate measure of discipline, the Board's decision would not change for the foregoing reasons. The reason for the objective evaluation was to ensure broad based competency, and the lack of known issues from his ongoing practice cannot demonstrate sufficiency competency in light of his disciplinary history. More time for another chance to complete testing should also not be given because, even if Dr. Elder were willing, the amount of time that has lapsed is significant and Dr. Elder has already failed every attempt. The evaluation requirement cannot last in perpetuity. Once more, a close review of his testimony and demeanor indicates a level of intransigence, and while individual's subject thoughts or personality are generally of no import to licensing proceedings, this trait has manifested in his unwillingness to accept oversight to which he does not agree and be proactive in addressing this probation requirement. Although such inflexibility does not support a revocation on its own, it equally does not provide positive evidence to look past his failed efforts and find he has the ability to understand and adhere to the standards

of the profession or should have another chance at examination.¹ Accordingly, little choice exists but to REVOKE his dental license for failure to adhere to the conditions of his probation.

ORDER

Dr. Elder's dental license is REVOKED.

IT IS SO ORDERED.

Dated this the 3rd day of June 2022.



Gregory Ceraso, D.D.S., Chair
Dental Board of the State of Iowa

cc: Rebecca Brommel, Attorney for Respondent
Laura Steffensmeier, Assistant Attorney General
Christel Braness, Iowa Dental Board
(All parties served by mail and email)

NOTICE

Pursuant to Iowa Code section 17A.19 and Iowa Administrative Code Rule 650-51.31, any appeal to the district court from a decision in a contested case shall be taken within 30 days from the issuance of the decision by the board. The appealing party shall pay the full costs for the transcript of the hearing. 650-51.24.