

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

FRANK SHYU, L.Ac.
Acupuncturist License No. AC850.

Respondent.

Case No. 1A-2012-151

OAH No. 2016051155

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Acupuncture Board, Department of Consumer Affairs, State of California as its Decision in the above-entitled matter.

This Decision shall become effective March 9, 2017.

IT IS SO ORDERED February 7, 2017.

ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By 

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PROPOSED DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California on November 28-29, 2016.

Wendy Widlus, Deputy Attorney General, represented complainant Terri Thorfinnson, Executive Officer, Acupuncture Board (Board), Department of Consumer Affairs.

Respondent Frank Shyu represented himself.

Michelle Tan provided Mandarin interpreter services during the hearing.

The matter was submitted on November 29, 2016.

SUMMARY

Complainant alleges the Board should discipline respondent's acupuncture license for treating a woman he never examined, without determining a diagnosis, obtaining her personal or family health history, or keeping treatment records. Respondent sold an over-the-counter device and herbal capsules to the woman's daughter for the woman's urinary incontinence, but denies this amounted to treatment. Clear and convincing evidence established causes for discipline, warranting a stayed revocation of respondent's license, five years' probation, and an award of costs.

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FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent has been a Board-licensed acupuncturist since August 21, 1978, license number AC850.
2. On November 9, 2015, complainant filed an Accusation in her official capacity, requesting that the Board revoke or suspend respondent's license, and order him to pay the reasonable costs of investigating and enforcing the case.
3. Respondent submitted a Notice of Defense, dated November 25, 2015.

Background Facts

4. In late 2011, Y.S., an adult woman, visited respondent's office at 2162 S. Garfield Avenue, Monterey Park, California, seeking help for her mother's urinary incontinence. She did so after hearing respondent's advertisement for acupuncture services on a Chinese-language radio station. Complainant alleges the advertisement promised either a cure for incontinence or a refund, but offered insufficient evidence to prove the assertion. Y.S. testified the advertisement made that promise, but respondent testified it did not, and offered a supporting statement from the radio station, albeit from December 2015, not 2011. Complainant offered no evidence from the radio station of the advertisement's content.
5. Y.S. told respondent her mother lived in China, and described her health problem. Respondent told her a small "vibration machine" and herbal medicine could help, and were cost-saving alternatives to acupuncture. He did not obtain the mother's personal or family health history, or ask if she had any other health issues.
6. Y.S. agreed to buy the machine and two bottles of herbal capsules. The machine was a transcutaneous electrical nerve stimulation (TENS) device, a non-prescription device that acupuncturists often recommend. The herbal capsules, also non-prescription, were not identified during the hearing, and Y.S. testified she did not know what they were. Respondent provided directions for taking the capsules and using the TENS device, and Y.S. paid respondent either \$260 (as she testified) or \$195 (as respondent asserted).
7. Y.S. sent the device and capsules to her mother, who began using them. When her condition did not improve after several months, Y.S. called respondent, who suggested the mother use the TENS device more. The mother's condition still did not improve, and Y.S. ask respondent for her money back, stating that his advertisement had promised a refund if there was no effect. Respondent denied promising a refund, and would not return her money.
8. Dissatisfied, Y.S. complained to the Board about respondent in August 2012. A few days after complaining, she returned to respondent's office, and refused to leave

without a refund. Respondent would not give her one, but a friend of his offered to pay her \$200 if she would leave the office. She agreed, returned the TENS device, and left.

9. The Board's investigation included interviews of Y.S. and respondent. During his interview on October 7, 2014, respondent stated that he recommended the TENS device to patients for bladder treatment and other health problems. He also stated he had no treatment records for Y.S.'s mother, and shredded records after three years. When asked why he prescribed the TENS unit and herbal capsules to Y.S.'s mother without meeting her, he stated he was wrong in doing it and exercised poor judgment.

Standard of Care Evidence

10. David Chen, a licensed acupuncturist, testified that respondent departed from the standard of care by selling Y.S. the TENS unit and herbal capsules without examining her mother, determining a diagnosis, obtaining a personal or family health history, or keeping records. According to Mr. Chen, the lack of an examination was an extreme departure from the standard of care, because an acupuncturist must always examine a person before providing professional services, and an in-person assessment is even more important for an acupuncturist than for a medical doctor. Mr. Chen also testified that respondent's failure to obtain a personal or family health history was an extreme departure, because Y.S.'s mother could have been taking other drugs or had a pacemaker that would have made using the TENS device or unknown herbal capsules dangerous. However, Mr. Chen's written report stated it was a simple departure from the standard of care. In addition, Mr. Chen stated that respondent's lack of records was a simple departure, as was respondent's recommendation to increase use of the TENS device after several months without an examination.

11. Respondent recognized Mr. Chen as a prestigious "elder" in the field, and did not challenge his opinions, at least directly. Instead, respondent asserted he provided no treatment or medical activity to Y.S.'s mother, and thus did not have to perform a physical examination, obtain a personal or family health history, or keep records. Anyone can purchase the TENS device or herbal capsules over the counter, and his sale of the device and capsules to Y.S. was really just a recommendation for self-help, not professional treatment. Y.S. gave him enough information to determine a diagnosis, and his reference to poor judgment during his Board interview referred to his poor judgment in trying to help a person like Y.S., not to doing anything wrong.

Other Evidence

12. Respondent is 84 years old, and has no disciplinary history with the Board.

13. As of November 18, 2016, the Department of Justice had billed the Board \$7,107.50 for time spent preparing the case, and expected to bill another \$510 before the start of the hearing, at an attorney billing rate of \$170 per hour. The Board's other case preparation costs through early 2016 totaled \$10,071.99, and included 40 hours of

Department of Consumer Affairs investigator services, billed at \$211 and \$235 per hour, and 14 hours of expert witness services billed at \$50 per hour.

14. Respondent makes about \$12,000 a year as an acupuncturist, and pays \$750 a month for his office rent. His wife's salary as a post office supervisor pays most of their bills.

LEGAL CONCLUSIONS

Legal Standards

1. "The board may deny, suspend, or revoke, or impose probationary conditions upon, the license of any acupuncturist if he or she is guilty of unprofessional conduct." (Bus. & Prof. Code, § 4955.)¹ It may also take the same actions if an acupuncturist commits gross negligence, repeated negligent acts, or a fraudulent act. (§§ 4955.1, 4955.2.) "Unprofessional conduct" includes, but is not limited to, "[a]iding or abetting in, or violating or conspiring in, directly or indirectly, the violation of the terms of this chapter [i.e., the Acupuncture Licensure Act] or any regulation adopted by the board pursuant to this chapter." (§ 4955, subd. (d); see § 4925 et seq. [Acupuncture Licensure Act].)

2. Complainant bears the burden of proving the alleged grounds for discipline by clear and convincing evidence to a reasonable certainty. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence "requires a finding of high probability," and has been described as "requiring that the evidence be "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

Causes for Discipline

FIRST CAUSE FOR DISCIPLINE - GROSS NEGLIGENCE

3. Complainant proved respondent committed gross negligence in prescribing treatment for Y.S.'s mother without examining her. Gross negligence is "'the want of even scant care or an extreme departure from the ordinary standard of conduct' [Citations.]" (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 138.) Mr. Chen testified that respondent committed an extreme departure from the standard of care for acupuncturists by selling the TENS device and unknown herbal capsules to Y.S. for her mother without performing a physical examination. (Factual Finding 10.)

¹ Undesignated statutory references are to the Business and Professions Code.

4. Respondent asserts he was merely recommending self-help therapy for Y.S.'s mother, not treating her in a professional capacity. (Factual Finding 11.) But Y.S. visited respondent in response to his advertisement as an acupuncturist, and he sold her the TENS device and herbal capsules for her mother in that capacity, giving his professional advice on how her mother should use them. (Factual Findings 4-7.) While the TENS device and herbal capsules were not acupuncture,² Mr. Chen testified that an in-person physical examination is always required before an acupuncturist provides professional services. (Factual Finding 10.) Respondent provided such professional services.

5. The Accusation also alleges respondent was grossly negligent in failing to obtain a personal and family health history from Y.S.'s mother. But while Mr. Chen testified this was an extreme departure from the standard of care, his written report stated it was only a simple departure. (Factual Finding 10.) Given this conflicting evidence, complainant did not present clear and convincing evidence respondent was grossly negligent concerning this issue.

SECOND CAUSE FOR DISCIPLINE – REPEATED ACTS OF NEGLIGENCE

6. Complainant also proved respondent committed repeated acts of negligence, which means two or more negligent acts. (See *Gilles v. Dental Board of California* (2012) 206 Cal.App.4th 311, 320-321, 326 [repeated acts of negligence for dentists means two or more negligent acts]; *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462, 468 [same for doctors].) Mr. Chen testified that respondent departed from the standard of care by treating Y.S.'s mother without examining her, determining a diagnosis, obtaining a personal or family health history, or keeping treatment records. (Factual Finding 10.) According to Mr. Chen, respondent also departed from the standard of care by recommending increased use of the TENS device after several months without an examination. (*Ibid.*) Respondent did not persuasively rebut this testimony. (See Legal Conclusion 4.)

THIRD CAUSE FOR DISCIPLINE – FAILURE TO MAINTAIN ADEQUATE AND ACCURATE RECORDS

7. The Third Cause for Discipline alleges respondent is subject to discipline under “section 4955, as defined by section 4955.1, subdivision (e),” for failing to maintain treatment records for Y.S.'s mother. Section 4955.1 pertains to discipline for “fraudulent act[s],” and subdivision (e) lists one such act as “[f]ailing to maintain adequate and accurate records relating to the provision of services to their patients.” (§ 4955.1, subd. (e).) The evidence established that respondent failed to maintain records, but did not establish that he

² Unless the context otherwise requires, the term “acupuncture” in the Acupuncture Licensing Act means “the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion.” (§ 4927, subd. (d).)

had any fraudulent intent in doing so. Therefore, complainant did not prove respondent committed a “fraudulent act.”

8. The Third Cause for Discipline also alleges respondent’s failure to maintain adequate and accurate records was unprofessional conduct. An acupuncturist must keep “complete and accurate records on each patient who is given acupuncture treatment, including but not limited to, treatments given and progress made as a result of the acupuncture treatments.” (Cal. Code Regs., tit. 16, § 1399.453.) In the context of the regulation, the term “acupuncture treatment” is properly interpreted to include respondent’s professional treatment of Y.S.’s mother. Furthermore, Mr. Chen testified that the lack of records violated the standard of care. (Factual Finding 10.) Therefore, the failure to keep records was unprofessional conduct. (See § 4955, subd. (d).)

FOURTH CAUSE FOR DISCIPLINE – UNPROFESSIONAL CONDUCT

9. The Fourth Cause of Discipline alleges respondent is subject to discipline for unprofessional conduct “under section 4955.1 subdivision (e) . . . and California Code of Regulations, title 16, section 1399.453 . . . ,” which both concern recordkeeping. As such, it duplicates the Third Cause for Discipline. Complainant proved unprofessional conduct concerning the lack of records to the extent described in Legal Conclusions 7 and 8.

Level of Discipline

10. For gross negligence and repeated negligent acts, the Board’s disciplinary guidelines recommend a minimum discipline of revocation, stayed, with five years’ probation, and a maximum discipline of revocation. (Department of Consumer Affairs, Acupuncture Board “Disciplinary Guidelines” 1996; see Cal. Code Regs., tit. 16, § 1399.469.) The guidelines do not specify a recommended minimum or maximum discipline for recordkeeping violations. (See *id.*) “Deviation from the[] guidelines . . . is appropriate where the Acupuncture Board in its sole discretion determines that the facts of the particular case warrant such a deviation – for example: the presence of mitigating factors; the age of the case; evidentiary problems.” (Cal. Code Regs., tit. 16, § 1399.469.)

11. A stayed revocation and probation are appropriate in this case. Respondent has no prior disciplinary history, and his violations occurred about five years ago. (Factual Findings 4, 12.) His conduct involved a single person receiving professional services, and there was no proof of harm. Complainant’s request for outright revocation of respondent’s license under these circumstances is unwarranted.

12. The Board’s guidelines recommend an actual suspension and several optional probation terms, including a psychological evaluation, practice monitor, clinical examination, and coursework, as the minimum discipline for gross negligence or repeated negligent acts. But neither a suspension nor any of these optional terms was proven to be necessary to protect the public or further respondent’s rehabilitation. Complainant’s

violations were limited in scope, duration, and effect, and the Board's standard probation terms are sufficient to protect patient safety and prevent future violations.

Costs

13. Complainant requests \$17,689.49 in investigation and prosecution costs. (See Factual Finding 13.) "The board may request the administrative law judge, under his or her proposed decision in resolution of a disciplinary proceeding before the board, to direct any licensee found guilty of unprofessional conduct to pay to the board a sum not to exceed actual and reasonable costs of the investigation and prosecution of the case." (§ 4959, subd. (a).) However, the Board must not assess its full costs if doing so would unfairly penalize a licensee "who has committed some misconduct but used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) The Board must consider respondent's "subjective good faith belief in the merits of his . . . position;" and whether he raised a "colorable challenge" to the proposed discipline. (*Ibid.* [quoting *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 342, 345].) Furthermore, the Board must determine that he "will be financially able to make later payments," and "may not assess the full costs . . . when it has conducted a disproportionately large investigation to prove that [a licensee] engaged in relatively innocuous misconduct." (*Ibid.*)

14. Three factors militate against a full cost award in this case. First, complainant did not prove that the maximum possible discipline of revocation is appropriate. Second, the billing rates of \$211 and \$235 per hour for the Department of Consumer Affairs investigator are high, given the nature of the allegations and scope of the investigation. The Board's attorney and expert billed at much lower rates. (Factual Finding 13.) Third, respondent testified he has limited income as an acupuncturist. (Factual Finding 14.)

15. Considering these factors, a partial award of costs \$4,275, payable in monthly installments during the probationary period, is appropriate. This amount equals \$75 per month for four years and nine months of the five-year probation period. Respondent's testimony suggests he will be able to pay this monthly amount from his income as an acupuncturist. (See Factual Finding 14.)

ORDER

License number AC850, issued to respondent Frank Shyu is revoked; however, the revocation is stayed and respondent's license is placed on probation for five years upon the following terms and conditions:

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1. Obey All Laws

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence.

2. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

3. Surveillance Program

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

4. Interview with the Board or Its Designee

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

5. Changes of Employment

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

6. Tolling for Out-of-State Practice or Residence

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

7. Employment and Supervision of Trainees

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisory relationship in existence on the effective date of this probation.

8. Cost Recovery

Respondent shall pay to the Board its costs of investigation and enforcement in the amount of \$4,275. This amount may be paid in equal monthly installments of \$75 per month for the first four years and nine months of the five-year probation period.

9. Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

10. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

DATED: December 28, 2016

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Thomas Heller
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THOMAS HELLER
Administrative Law Judge
Office of Administrative Hearings