IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DAVID M. ODOM, M.D., Appellant, v. STATE OF ALASKA, DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING, Appellee,	)	Case No. 3AN-14-08082CI

ORDER ON APPEAL

I. INTRODUCTION

Dr. David Odom had his Alaska medical license revoked by the Alaska State Medical Board ("the Board") on June 16, 2014, due to substandard care. Specifically, that care involved a phentermine prescription to a patient with known cardiomyopathy, and an excessive prescription dosage of a thyroid hormone. Substantial evidence supports the Board's factual and disciplinary findings. Nevertheless, because the Board violated Dr. Odom's due process rights, the court vacates the decision and remands for further hearings consistent with this Order on Appeal.

This court has jurisdiction over the appeal under AS § 22.10.020 and Alaska Appellate Rule 602(b)(2).

II. FACTS

Dr. Odom operates a practice specializing in anti-aging and weight loss medicine in Fairbanks. He began treating the patient at issue in this case, S.Q., on April 27, 2007, for weight-loss issues and hypothyroidism. At the same time, S.Q. was seeing

Dr. Krauss, a cardiologist at the Alaska Heart Institute, for peripartum cardiomyopathy. S.Q. discontinued her visits to Dr. Odom on September 14, 2007. She subsequently obtained an annual checkup from Dr. Krauss on October 25, 2007.[1] S.Q. passed away from sudden cardiac failure on March 6, 2008.

On March 3, 2009, the Division of Corporations, Business and Professional Licensing ('the Division') received a complaint from S.Q.'s husband regarding Dr. Odom's treatment. The Division notified Dr. Odom of the complaint and began to compile records from S.Q.'s doctors. On July 23, 2009, all of S.Q.'s medical records were forwarded to Dr. Patrick Nolan, a board certified endocrinologist in Anchorage. Dr. Nolan issued his report to the Division on December 7, 2009, criticizing Dr. Odom's treatment of S.Q. Specifically, he disagreed with his prescription of phentermine due to her cardiomyopathy, and he viewed the Armour Thyroid prescription as unnecessary and excessive; all of which resulted in unnecessary risk of harm to S.Q.

The Division interviewed Dr. Odom on December 23, 2009. This interview was forwarded to Dr. Nolan for review, and his response to Dr. Odom's accusation that he is not an expert in Dr. Odom's field of practice.[2] Dr. Nolan admitted his fundamental disagreement with Dr. Odom's mode of treatment but found that the treatment presented an unnecessary risk of harm to S.Q. On April 20, 2012, the Division filed an Accusation against Dr. Odom, specifically alleging that: 1) he did not conduct an adequate abdominal or neurological examination; 2) his prescription of Armour Thyroid

[1] The court notes this visit because Dr. Krauss actually noted an apparent uptick in S.Q.'s health since her last visit, claiming she had experienced a "remarkable year."
[2] Dr. Nolan is an endocrinologist while Dr. Odom is an anti-aging specialist.

was unnecessary and excessive; 3) phentermine[3] is contraindicated[4] in patients with cardiomyopathy, like S.Q.; and 4) Armour Thyroid should not have been prescribed in combination with phentermine; which, collectively, fell below the appropriate standard of care in violation of AS 08.64.326(a)(8)(A), AS 08.64.326(a)(9), 12 AAC 40.967, and 12 AAC 40.970.

A hearing was conducted before Administrative Law Judge ("ALJ") Andrew Hemenway from October 3 through 5, and on November 30, 2012. S.Q.'s husband and mother, the Division investigator, and Dr. Nolan testified for the Division. Dr. Odom, Dr. David Bryman[5], and Dr. Neal Rouzier[6] testified for Dr. Odom. On April 18, 2013, the ALJ ruled in favor of Dr. Odom, concluding that the Division had not proven any of its accusations.

The Division, pursuant to AS 44.64.060(e), filed a proposal for action with the Board, urging it to reject the conclusions of the ALJ and find that Dr. Odom violated the regulations. Dr. Odom, apparently in part due to an address change[7], and acting pro se, did not submit his filing until after the deadline, but several days before the Board hearing. There is nothing in the record to indicate whether the Board considered Dr. Odom's filing. In fact, the Board minutes show that the members only received the

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[3] Phentermine is "[a] sympathomimetic amine related to amphetamine, used as an anorectic; administered orally as a complex with an ion exchange resin to produce a sustained action." Dorland's Illustrated Medical Dictionary 1452 (32nd ed. 2007).

[4] "[A]ny condition, especially any condition of disease, which renders some particular line of treatment improper or undesirable." Dorland's, at 417.

[5] President of the American Society of Bariatric Physicians.

[6] Director of Preventative Medicine, Clinics of the Desert.

[7] Although it is difficult to ascertain in the record, it appears Dr. Odom may have sent the Board and the Division his new address but did not provide it to the Office of Administrative Hearings. Accordingly, he apparently did not initially receive the ALJ's request for proposals and did not learn about his opportunity to file a proposal for action until he received mail forwarded from his old address and the ALJ cover letter sent to the Board.

ALJ proposed decision and the Division's proposal for action. On June 5, 2014, the Board considered the Division's and the ALJ's filings for approximately 25 minutes before deciding to reject the ALJ's conclusions and adopt the Division's proposal. Concluding that Dr. Odom's care was substandard, the Board ordered his Alaska medical license to be revoked.

Parties' Positions

Dr. Odom makes three general arguments as to why the Board's decision to revoke his license was not supported by substantial evidence: 1) his prescription of phentermine to S.Q., a patient with cardiomyopathy, is relatively routine among anti-aging specialists and was not below the standard of care; 2) his prescription and dosage of Armour Thyroid is also routine for physicians in his field; and 3) the Board violated his due process rights by not even considering his proposal for action and by relying primarily upon the expertise of Dr. Nolan, an endocrinologist who is not a specialist in Dr. Odom's area of practice.

The Division responds that substantial evidence supports revocation of Dr. Odom's license because: 1) phentermine is contraindicated in patients with cardiomyopathy; 2) he prescribed four times the recommended amount of Armour Thyroid to S.Q., as set in the product literature and medical treatises; and 3) the Board did not violate Dr. Odom's due process rights because he waived his right to present a proposal, and Dr. Nolan is an appropriate expert.

III. STANDARD OF REVIEW

When reviewing the Board's factual findings, the court must determine if

substantial evidence in the record supports those findings.[8] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] Under this standard, the court does not reweigh the evidence or choose between inferences, it merely determines if sufficient evidence exists in the record.[10]

When an agency encounters a question of law that requires it to use its expertise, the court must apply the reasonable basis standard to that decision.[11] "[D]eference should be granted because the agency, having specialized knowledge in a field, is in a better position than a court to make such determinations."[12] Any questions of law that arise not involving the agency's expertise, including due process claims, are reviewed independently by this court.[13]

The court must also note that, even when it need not defer to the Board's judgment, the Board "is a competent body equipped with the necessary medical knowledge to determine whether a doctor's license to practice should be revoked."[14]

IV. DISCUSSION

A. Substantial evidence supports the finding that Dr. Odom's prescription of phentermine to S.Q., a patient with diagnosed cardiomyopathy, was below the standard of care.

S.Q. had been previously diagnosed with peripartum cardiomyopathy, a condition known to Dr. Odom. Nevertheless, as part of his weight-loss treatment, Dr. Odom prescribed phentermine to S.Q. Dr. Odom claims that this course of action is normal for

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[8] *Halter v. State, Dep't of Commerce & Econ. Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999).
[9] *Storrs v. State Med. Bd.*, 664 P.2d 547, 554 (Alaska 1983).
[10] *Id.*
[11] *Rose v. Commercial Fishers Entry Com'n*, 647 P.2d 154, 161 (Alaska 1982).
[12] *Weaver Bros., Inc. v. Alaska Transp. Commission.*, 588 P.2d 819, 821 (Alaska 1978).
[13] *May v. State, Commercial Fisheries Entry Com'n*, 168 P.3d 873, 879 (Alaska 2007).
[14] *Storrs*, 664 P.2d at 554 ("I see no justification for substitution of my independent judgment for that of...the Board, a majority of whom are professionally trained in the field of medicine.").

other practicing physicians in his field and not below the standard of care. The Division argues that phentermine is contraindicated in patients with cardiovascular disease and cautioned in patients with cardiomyopathy, as supported by the product literature, medical treatises, and other case law. This court finds that the record contains substantial evidence to support a finding that Dr. Odom's prescription of phentermine was below the standard of care.

As discussed above, substantial evidence is evidence that a reasonable person would find adequate to support the conclusion. It is not this court's place to reweigh the evidence, as Dr. Odom seems to request.

By virtue of the ALJ's submission to it, the Board was provided with the following evidence when considering Dr. Odom's case: 1) expert testimony; 2) product literature; 3) medical treatises; and 4) relevant case law. As the ALJ noted, Dr. Nolan testified that, based upon his experience, phentermine can cause a variety of cardiovascular issues, including irregular heartbeat and increased risk of cardiac disease. His informal polling of several cardiologists verified that patients with cardiomyopathy should not receive phentermine. Though those cardiologists never testified, medical experts routinely consult other experts and the court finds no fault in this evidence. Dr. Nolan's own expertise, confirmed by his consultations, led him to the conclusion that such a prescription was below the standard of care.

Next, the product literature states that phentermine is contraindicated, or at minimum discouraged, for patients with cardiovascular disease. Phentermine is a controlled substance that stimulates the central nervous system, similar to amphetamine, and, according to the product literature, can raise blood pressure and

cause negative effects on the patient's cardiovascular system. Dr. Odom attempts to distinguish cardiomyopathy and cardiovascular disease, arguing that the former is a disease of the heart muscle while the latter pertains to veins and arteries. However, he admits that "there [is] considerable disagreement between the experts" regarding such distinctions.[15] His briefing seemingly asks this court to resolve the issue; that is, to classify cardiomyopathy as being outside the risk factors listed in the product literature.[16] This court is ill-equipped to make such a finding. Rather, such issues fall within the expertise of the Board, which, despite the experts' disagreements, found the prescription to patients with cardiomyopathy to be below the standard of care.

And, the medical treatise presented was much more explicit with its warnings and contraindications. The *Drug Information Handbook- A Comprehensive Resource for All Clinicians and Health Care Professionals*, states: "Avoid stimulants [e.g. phentermine] in patients with known serious structural cardiac abnormalities, *cardiomyopathy*, serious heart rhythm abnormalities, or other serious cardiac problems that could increase the risk of sudden death that these conditions alone carry (emphasis added)." Both parties agree that this treatise, endorsed by the American Pharmacists Association, carries considerable weight in the medical profession.[17] Dr. Odom argues that the Handbook states it should not be solely relied upon when making decisions regarding treatment, which is what Dr. Nolan did. However, this assertion is mistaken. As shown above,

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[15] Dr. Odom's Brief on Appeal, at 17.
[16] In *City Council of Baltimore v. Schwing*, 717 A.2d 919, 933 (Md. 1998), the Maryland Court of Appeals classified cardiomyopathy as a cardiovascular disease based upon the American Heart Association's classification (using then current World Health Organization data). However, Dr. Odom argues the most current WHO and AHA updates classify them separately.
[17] Both parties also agree that the Physician's Desk Reference ("PDR") is not a persuasive treatise amongst medical professionals. Because of this, the court does not consider it in this appeal.

Dr. Nolan considered his own experience, plus the advice of other medical professionals, and the supplemental warnings on the product literature when forming his opinion.

Lastly, the Board was presented with case law regarding contraindications and other warnings. This court does not hold that case law sets the appropriate medical standard of care, considering that judges, not doctors, are the authors. But case law certainly identifies which standards already exist and provides more evidence that the Board could rely upon.

For example, in *Thomas v. Hoffman-Laroche, Inc.*, the Fifth Circuit stated that "a contraindication is essentially a direction to the physician not to use the drug in certain circumstances....the manufacturer and the FDA have already balanced the costs and benefits of the drug and determined that...the risks of using the product will always outweigh the benefits."[18] Dr. Odom attempts to distinguish *Thomas* by arguing that the language is dicta in a products liability case and, regardless, still allows doctors to prescribe in particular circumstances, despite contraindications. But the Fifth Circuit's recognition that contraindication, generally, means that the risks outweigh the benefits of a particular drug is further evidence that supports Dr. Nolan's opinion, even if it is not dispositive.

The parties disagree as to the effect of a prior Board holding in *Matter of Bartling*.[19] The Division argues that it establishes that the Board must consider warnings and contraindications in light of other evidence, which the ALJ did not do in

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[18] 949 F.2d 806, 815 (5th Cir. 1992). The Division also persuasively cites *Baker v. St. Agnes Hospital*, 421 N.Y.S.2d 81, 83 (N.Y. App. Div. 1979) and *McCorkle v. Gravois*, 152 So.3d 944 (La. Ct. App. 2014) for similar language.
[19] OAH No. 12-0221-MED (Board Decision, July 19, 2013).

this case. Dr. Odom argues that, in that case, the expert witnesses indicated that warnings are more of a "guide," and it is sometimes appropriate to ignore them, so it favors his position. As the court reads the case, it appears that the experts knew of the warnings at issue and discussed them before deciding whether to heed them or not. Essentially, *Bartling* stands for the proposition that the Board should at least look at all relevant evidence, including warnings, when making its decision. On this issue, the Board did so.

Dr. Odom argues that physicians are not bound by manufacturer and FDA warnings, citing *Weaver v. Reagan*.[20] He asserts that physicians should have flexibility in creating treatment plans, and sometimes, that may mean prescribing a particular drug despite a warning label or contraindication. But, *Weaver* does not stand for the idea that physicians are entitled to completely ignore contraindications and warnings. Rather, it states that "a physician may prescribe [a drug] for uses or in treatment regiments or patient populations that are *not included in approved labeling*."[21] This means it can be prescribed to patients who were not the original targets of the drug's development and marketing. *Weaver* does not support the argument that a contraindicated drug can be prescribed to the types of patients the manufacturer specifically warns against in the label.

The essence of Dr. Odom's arguments on this point essentially seek to persuade this court to second-guess the Board or re-weigh the evidence. But, this court presumes that a board of medical professionals understands that the practice of medicine is constantly evolving and that there are conflicting expert opinions and

[20] 886 F.2d 194 (8th Cir. 1989).
[21] *Id.* at 198 (emphasis added).

studies in many areas. Such conflicts were referenced in the ALJ decision. Yet, the Board still concurred with Dr. Nolan.[22] There was ample evidence for a reasonable person to reach the same conclusion the Board did. That is, substantial evidence supports the finding that Dr. Odom's prescription of phentermine to S.Q. was below the standard of care.

B. Substantial evidence supports the finding that Dr. Odom's prescription to S.Q. of four times the recommended dosage of Armour Thyroid was below the standard of care.

Substantial evidence also supports the finding that Dr. Odom's prescription of Armour Thyroid to S.Q. was below the standard of care. Due to his diagnosis of hypothyroidism, Dr. Odom started S.Q. on a 120 mg daily dose of Armour Thyroid. Dr. Odom increased her dosage every week for five weeks, eventually reaching 240 mg per day.

There is a disagreement between the parties as to whether Dr. Odom's initial diagnosis of hypothyroidism was correct. Dr. Odom argues that he performed a more complete clinical diagnosis of S.Q., whereas Dr. Nolan only relied upon the TSH test. Both parties' experts agree that diagnosing thyroid levels is a serious point of contention amongst medical professionals. The court need not resolve that controversy here. The Board's finding was that "even if she did need thyroid hormone, she received too much thyroid (4 grains of Armour Thyroid daily)."[23]

Dr. Odom began S.Q. on 120 mg of Armour Thyroid per day. The product

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[22] Dr. Odom attempts to argue that because Dr. Bryman and Dr. Rouzier testified that they routinely prescribe phentermine to patients with some form of heart disease, a finding of incompetence would therefore mean that they would be at risk of discipline. The court takes no position on Drs. Bryman and Rouzier's treatment plans. Every patient treated comes with unique facts and circumstances. This court does not direct investigations. Complaints, if any, need to be raised to the Board.

[23] Div. Brief on Appeal, at 24 (citing Dr. Nolan's initial review of Dr. Odom's clinical notes).

literature suggests that the usual starting dosage is 30 mg, so S.Q. was initially receiving four times the manufacturer's suggested dosage. Dr. Odom then increased her dose every week, culminating with a 240 mg daily dose at week 5. The product literature suggests increases of 15 mg every 2-3 weeks. So, S.Q. was still receiving four times the manufacturer's suggested dosage in week 5. And this is only one indicia of overdosing. The Handbook also recommends much lower dosage limits. It suggests that a patient start at 15-30 mg per week, with increases of 15 mg every 2-3 weeks. Thus, both the product literature and a widely accepted medical treatise indicate that Dr. Odom prescribed too much Armour Thyroid to S.Q.[24]

Finally, S.Q.'s symptom-response to the Armour Thyroid helps demonstrate substandard care. The product literature warned that physicians should exercise enhanced caution when prescribing Armour Thyroid to patients with cardiovascular issues. It cautioned, and Dr. Nolan confirmed, that too much thyroid could induce harmful effects and other issues, such as hyperthyroidism. Dr. Rouzier testified that hyperthyroidism causes an array of side effects, one of which is jitteriness. S.Q. had complained of that symptom when taking 240 mg per day. Indeed, because of her complaint, Dr. Odom eventually reduced S.Q.'s daily dosage to 180 mg.

Much of Dr. Odom's briefing on this point also attempts to have this court reweigh the evidence by arguing that his initial diagnosis of hypothyroidism was accurate and therefore, the prescription was appropriate. Essentially, he asks this court to find that his diagnosis evidence outweighed the recommended dosage amounts discussed above. But the court's task is to determine whether substantial evidence

[24] Dr. Odom, and the ALJ, noted that the literature stated that an eventual dosage of 180 mg per day was not necessarily inappropriate. However, S.Q. was receiving almost that much the first week, not several weeks later.

supports the Board's decision. Here, the product literature, the Handbook, and expert testimony supported the notion that regardless of S.Q.'s diagnosis, she was receiving too much Armour Thyroid. Accordingly, substantial evidence supports the conclusion that this treatment, likewise, fell below the standard of care.

C. Dr. Odom's due process arguments are largely unpersuasive, however, the Board's failure to even consider his proposal for action violated his due process rights.

1. Dr. Nolan was an appropriate expert to review Dr. Odom's treatment.

The applicable regulation states that "'professional incompetence' means lacking sufficient knowledge, skills, or professional judgment *in that field of practice.*"[25] In order to set the standard of care, the Division utilized the expertise of Dr. Nolan, who is an endocrinologist, and also certified in internal medicine. He treats patients similarly situated to those treated by Dr. Odom, though their practice methods may differ significantly.

Dr. Odom contends that his practice focuses on weight loss and anti-aging, and as such, his treatment plan should have been evaluated by an expert in those fields, not an endocrinologist. Furthermore, Dr. Nolan openly admitted that he disagreed with Dr. Odom's treatment philosophy and in fact, was a founding member of an organization actively opposed to treatment methods regularly used by anti-aging and weight loss specialists.

Disagreements between medical professionals are not infrequent. Indeed, the oft-repeated advice about seeking a second opinion is premised on the common understanding that doctors routinely disagree. Such disagreements should rarely serve

[25] 12 AAC 40.970 (emphasis added).

as a basis for finding due process violations in medical incompetence cases. However, the court must note that Dr. Nolan is a member of an organization that has actively attempted to remove Armour Thyroid from the marketplace; that he admitted to fundamental disagreements with the treatment plans frequently used by weight loss and anti-aging specialists, like Dr. Odom; and that Dr. Nolan may even be in direct economic competition with Dr. Odom.[26]

But Dr. Nolan was not the only physician who testified at the hearing. Drs. Bryman and Rouzier both testified on Dr. Odom's behalf, and the ALJ summarized their testimony in his proposed decision. Both appear to be highly qualified in the practice areas Dr. Odom argues the Board should have considered. The Board considered the witness testimony and the factual conclusions reached by the ALJ, and adopted those conclusions. Thus, the deck was not "stacked" against Dr. Odom. There was no due process violation, under these facts.

2. The Board revoked Dr. Odom's license because he did not meet the required standard of care, not because of unconventional practices.

Dr. Odom next asserts that his license was revoked purely because he employs unconventional practice, in violation of AS 08.64.326(a)(8)(A). That statute prohibits a finding of professional incompetence "*solely* on the basis that a licensee's practice is unconventional or experimental (emphasis added)."

Dr. Odom's argument is predictable, but not adequately supported in this case.

[26] In licensing hearings, when physicians opposed to a particular practice are used as experts by the Board, the argument that the statutory protection for unconventional treatments has been violated will, predictably, frequently be made. Any profession that is self-policing is ill-advised to invite courts to adopt such arguments through selection of experts that appear to have a fundamental disagreement with, and bias against, licensees that are the subject of administrative proceedings.

The discussion above recognizes that there were concrete and reasonable justifications for the revocation of his license.[27] Disagreement, alone, is not evidence that the Board is stifling unconventional practices. Professional disagreements, typically amongst established, conventional philosophies versus emerging, unconventional philosophies, are often good for the advancement of the medical profession. However, monitoring these emerging fields is exactly why the Division and the Board were created. Courts will serve as checks on those entities when their decisions appear to be unsupported by evidence other than that a licensee was engaged in unconventional practice. But, the Board's decision to revoke Dr. Odom's license was supported by a variety of consistent evidence, not just a disagreement between experts. The Division did not violate AS 08.64.326(a)(8)(A).

3. The Board's decision to ignore Dr. Odom's late-filed proposal for action violated his due process rights.

Dr. Odom contends that he was not given an opportunity to file a proposal with the Board, whereas the Division was, violating his due process rights. First, he cites AS 44.62.500(c), which states that if the Board does not adopt the ALJ decision, it *must* provide the parties an opportunity to respond (emphasis added). Furthermore, he argues that regardless of the above statute, the Division was given an opportunity to respond to the ALJ and he was not.

The Division is correct in its assertion that AS 44.62.500(c) does not apply to this proceeding, as the underlying hearing was conducted by the Office of Administrative

[27] Namely, he ignored the contraindications and cautions set forth on the product literature and the further warnings in a widely accepted medical treatise.

Hearings.[28] Instead, the Board's actions are governed by AS 44.64.060, which provides the Board with five options after receiving the ALJ decision.[29] Amongst the options, the Board is permitted to "exercise its discretion by revising the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case, and adopt the proposed decision as revised."[30] The Board exercised its authority by accepting the ALJ's factual findings but revising the ALJ's conclusions about substandard care and penalties. In doing so, the Board adopted the Division's proposal for action. Dr. Odom's reply brief urges this court to find that the Board rejected the ALJ decision, not revised it, and that the Division requested this remedy in its briefing (asking the Board to reject the findings of the ALJ). The Board did not reject the factual findings of the ALJ; to the contrary, it assessed penalties based on those findings. Both the Board and the ALJ relied on the same set of facts, but the Board found incompetent care where the ALJ did not.

Regardless of the statute, the Board's decision to ignore Dr. Odom's late-filed proposal for action did violate his due process rights. AS 44.64.060(e) allows each party the option to file a proposal for action within 30 days after the proposed decision is served.[31] The Division filed its proposal within the required time limit. Dr. Odom did not. But, Dr. Odom argues that due to an address change, he did not receive notice from the OAH permitting him to file a proposal for action until after the deadline had expired. Furthermore, his counsel at that time had just been appointed to the Bench, so he was

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[28] "This subsection does not apply to a hearing conducted by the office of administrative hearings." AS 44.62.500(c).
[29] Chapter 64 of Title 44 is entitled "Hearing Officers and Office of Administrative Hearings".
[30] AS 44.64.060(e)(3).
[31] The court would expect that the general public be advised of its right to file a proposal, especially if a favorable decision will be overturned, similarly to AS 44.62.500(c).

acting pro se. Inevitably, his pro se proposal was submitted after the deadline and the Board apparently ignored it, only reviewing the ALJ decision and the Division's proposal.[32]

In court, pro se litigants are routinely treated with lenience. "We have indicated that courts must relax certain court procedures for pro se litigants."[33] Certainly, "pro se litigants are expected to make a good faith attempt to comply with the rules of procedure," and "absent this effort, the litigant may be denied the leniency otherwise afforded pro se litigants."[34] But those who do show good cause for late filings typically have their filings accepted.[35] There appears to be no good reason for these principles to be applied more strictly in the administrative context. Indeed, the Supreme Court has shown a willingness to relax deadlines stemming from the administrative sphere. In *Gilbert v. Municipality of Anchorage*, the Supreme Court set forth the factors to consider in relaxing the 30 day deadline to file an administrative appeal in the superior court.[36] Such factors include the importance of the interest sought on appeal, the reasons for the late filing, whether the underlying administrative proceedings was unfair, and the interest in obtaining a final determination.[37]

Dr. Odom's due process rights were violated when the Board ignored his pro-se

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[32] The court does not suggest that the Board, or the Division, acted in bad faith in this regard. The failure to consider Dr. Odom's proposal may have simply been due to clerical decisions. Nevertheless, it occurred and Dr. Odom lost his opportunity.
[33] *Brandner v. Municipality of Anchorage*, 327 P.3d 200, 203 (Alaska 2014).
[34] *Id.* (*citing Farmer v. State, Dep't of Law*, 235 P.3d 1012, 1017 (Alaska 2010)).
[35] *Briggs v. City of Palmer*, 333 P.3d 746, 748 (Alaska 2014).
[36] 2005 WL 3131226 (Alaska Nov. 23, 2005) (summarizing the balancing test created earlier by the Court in the published decision of *Jerrel v. Kenai Peninsula Borough School Dist.*, 567 P.2d 760, 766-67 (Alaska 1978)).
[37] *Id.* at 3. Though these factors are employed in that case to address the deadlines set forth by Alaska Appellate Rule 602(a)(2), the Supreme Court indicated that the Rules are not meant to work an injustice. Flexibility must be afforded to avoid situations where strict adherence to the rules would result in clear error. *See also* Alaska R. Crim. P. 53; Alaska R. Civ. P. 94; Alaska R. App. P. 521

filing, apparently without even considering whether he could show good cause for his untimeliness. Dr. Odom won his case before the ALJ on April 18, 2014, who then filed the proposed decision before the Board in May. Acting pro se, and shortly after learning of his ability to file a proposal for action, Dr. Odom submitted his filing on June 2, 2014. He did so three days before the Board hearing.[38] Because Dr. Odom had obtained a favorable ruling before the ALJ, and was without legal counsel, he was likely unaware that the Board could, without further notice, reverse the legal conclusions and assess penalties.[39] It was not until he received the ALJ cover letter to the Board, and forwarded mail from his old address, that he realized the Division had the option to file a proposal for the Board to change the result, and he then promptly filed a defense of the ALJ's decision. Without explanation, the Board ignored this filing and only considered the Division's proposal in its review of the ALJ decision. Considering only one parties' proposal when both have made submissions violates basic principles of fairness. The essence of due process is the opportunity to be heard.[40] Presumably, such opportunities must be given at each stage when an opponent is heard. Here, the Board should have at least inquired about whether good cause existed for the untimely filing from Dr. Odom, especially considering its Executive Administrator apparently knew of the recent filing.[41]

Considering the factors in *Gilbert*, the Board's decision to ignore Dr. Odom's filing

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[38] It is important that Dr. Odom's proposal for action was filed with enough time for the Board to review it before convening.

[39] Dr. Odom's June 2, 2014, letter to ALJ Hemenway supports this. The letter explains that Dr. Odom had begun a search for a new attorney and had filed his pro se proposal as soon as he discovered it was allowed and that the Division had done so.

[40] *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980) (*citing Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 118 (1940); and other cases).

[41] Deborah Stovern, the Board's Executive Administrator, was cc'd on Dr. Odom's June 2, 2014, letter to ALJ Hemenway explaining his untimeliness.

violated his due process rights. Dr. Odom lost his right to practice medicine in Alaska, after first obtaining a favorable decision before the ALJ. As a physician, he was deprived of his livelihood and source of income. This interest ranks high on the scale of importance in our society, and should be protected. The reasons for his late filing show it was matter of lack of notice coupled with a lack of legal training, not negligence. He thought he had won his case and was unaware that the Board had the right to overturn the ALJ's proposed penalties. He responded promptly once he realized the true situation. It was unfair to not even consider whether his filing should have been accepted. The court will vacate the Board's decision and remand for further proceedings, consistent with this Order on Appeal. The factual findings of the Board remain undisturbed.[42]

Lastly, Dr. Odom argues that because the Division appeared at the hearing and he did not, his due process rights were violated. The court agrees that it would have been inappropriate and a violation of Dr. Odom's due process rights if the Division presented any further *ex parte* evidence or argument before the Board. However, the record contains no evidence of that occurring. Instead, it appears that the Division attended the hearing telephonically in silence. No violation occurred.

[42] This does not mean that the Board is bound by its findings. It may, in its discretion, choose to re-open the evidence.

V. CONCLUSION

Based on the reasoning above, the Board's decision is VACATED and REMANDED for further proceedings consistent with this Order on Appeal.

IT IS HEREBY ORDERED.

Dated at Anchorage, Alaska this 9th day of August, 2015

[redacted]

Kevin M. Saxby
Superior Court Judge

I certify that on 8/20/15 a copy of the above was mailed to each of the following at their addresses of record:

L. Holen
R. Auth

[redacted]

A. Murray, Administrative Assistant