

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH-11-3058-^{DS}-MQA
FILED DATE - 12-14-11
Department of Health
By: Angel Soudes
Deputy Agency Clerk

IN RE: PETITION FOR DECLARATORY STATEMENT
OF ARA J. DEUKMEDJIAN, M.D.

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

This matter came before the Board of Medicine (hereinafter the "Board") on September 30, 2011, in Tampa, Florida, for consideration of the above referenced Petition for Declaratory Statement (attached hereto as exhibit A). The Notice of Petition for Declaratory Statement was published on September 9, 2011, in the Vol. 37, No. 36, in the Florida Administrative Weekly.

The petition filed by Ara J. Deukmedjian, M.D., inquires as to whether his treating of neuromuscular and skeletal conditions related to the spine and joints by prescribing controlled substances for extended use is the prescribing of controlled substances for the treatment of "chronic nonmalignant pain" as that term is defined and used in Section 456.44, Florida Statutes (2011).

FINDINGS OF FACTS

1. Petitioner, Ara J. Deukmedjian, M.D., is a physician licensed pursuant to Chapter 458, Florida Statutes.
2. Petitioner owns and practices medicine in a group practice that treats neuromuscular and skeletal conditions related to the spine and joints and that focuses on assisting patients in ending the use of pain medications by treating patients to the fullest extent possible through the performance of surgical procedures. The practice consists of several surgeons and a neurologist. The practice holds and maintains a registered office surgical facility registration and is currently in the process of establishing a licensed Ambulatory Surgical Center.

3. Although the practice focuses on the surgical treatment and care of patients with osteoarthritis and other degenerative and inflammatory diseases, syndromes, and conditions, which can potentially last a patient's remaining lifetime, many of these patients also require the extended use of controlled substance pain medications, either in addition to surgical procedures or between surgical interventions.

CONCLUSIONS OF LAW

4. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

5. The Petition filed in this cause is in substantial compliance with the provisions of 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

6. For purposes of determining standing in this matter, the Petitioner, an allopathic physicians licensed pursuant to Chapter 458, Florida Statutes, is a substantially affected persons because his failure to comply with the provisions of Section 456.44, Florida Statutes, may result in disciplinary action against his license.

7. Section 456.44(2), Florida Statutes, sets forth who amongst licensed physicians must comply with the new regulatory framework for prescribing controlled substances for the treatment of chronic nonmalignant pain. The provision reads as follows:

2) REGISTRATION. Effective January 1, 2012, a physician licensed under chapter 458, chapter 459, chapter 461, or chapter 466 who prescribes any controlled substance, as defined in s. 893.03, for the treatment of chronic nonmalignant pain, must:

(a) Designate himself or herself as a controlled substance prescribing practitioner on the physician's practitioner profile.

(b) Comply with the requirements of this section and applicable board rules.

8. The phrase "chronic nonmalignant pain" is defined in Section 456.44(1)(d), Florida Statutes, as follows:

"Chronic nonmalignant pain" means pain unrelated to cancer or rheumatoid arthritis which persists beyond the usual course of disease or the injury that is the cause of the pain or more than 90 days after surgery.

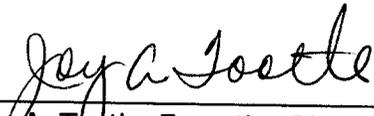
9. The Petitioner in this matter wishes to have the Board of Medicine confirm that the prescribing of controlled substances within the usual course of the disease or injury causing the patient's pain, even if such course is for an extended period of time, is not considered prescribing controlled substances for the treatment of "chronic nonmalignant pain" as defined in §456.44(1)(d), Florida Statutes, so as to require his registration as a controlled substance prescriber as of January 1, 2012, as required in §456.44(2), Florida Statutes.

10. The Board is of the opinion that the generalized factual circumstances presented by the Petitioner is not specific enough nor sufficient to enable the Board to tell him whether he is prescribing controlled substances for the treatment of "chronic nonmalignant pain" as defined in §456.44(1)(d), Florida Statutes. Therefore, the Board declines to answer his inquiry.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this 13th day of December, 2011.

BOARD OF MEDICINE



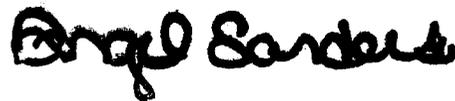
Joy A. Tootle, Executive Director
for George Thomas, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail transmission to: Allen R. Grossman, counsel for the Petitioner, Grossman, Furlow & Bayó, LLC, 2022-2 Raymond Diehl Road, Tallahassee, FL 32308, A.Grossman@gfblawfirm.com; by e-mail transmission to Edward A. Tellechea, Senior Assistant Attorney General, Office of the Attorney General PL-01 The Capitol, Tallahassee, Florida 32399-1050, ed.tellechea@myfloridalegal.com; and by interoffice mail to Nicholas Romanello, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, on this 14th day of December, 2011.



Deputy Agency Clerk

Allen R. Grossman



**STATE OF FLORIDA
BOARD OF MEDICINE**

**FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Angel Sanders
DATE AUG 23 2011**

**PETITION OF ARA J. DEUKMEDJIAN, M.D.
FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BOARD OF MEDICINE
ADDRESSING THE DEFINITION OF CHRONIC
NONMALIGNANT PAIN AS SET FORTH IN
§456.44(1)(d), FLORIDA STATUTES AND USED
IN §456.44(2), FLORIDA STATUTES**

PETITION FOR DECLARATORY STATEMENT

COMES NOW Petitioner, Ara J. Deukmedjian, M.D., a Florida licensed physician and board certified Neurological Surgeon and owner of a registered office surgery facility pursuant to the Florida Board of Medicine's administrative rule 64B8-9.0091, Florida Administrative Code, who by and through undersigned legal counsel and pursuant to §120.565, Florida Statutes, hereby petitions the Florida Board of Medicine (Hereinafter "Board") for a Final Order of Declaratory Statement setting forth that the routine prescribing of controlled substances for the treatment of pain for a period of time that is within the usual course of the disease or injury that is the cause of the pain, is not considered to be the prescribing of controlled substances for the treatment of "chronic nonmalignant pain" as that term is defined and used in §456.44, Florida Statutes. In support thereof, Petitioner states as follows:

1. Petitioner owns and practices medicine in a group practice that treats neuromuscular and skeletal conditions related to the spine and joints and that

focuses on assisting patients in ending the use of pain medications by treating patients to the fullest extent possible through the performance of surgical procedures. The practice consists of several surgeons and a neurologist. The practice holds and maintains a registered office surgical facility registration and is currently in the process of establishing a licensed Ambulatory Surgical Center.

2. Although the practice focuses on the surgical treatment and care of patients with osteoarthritis and other degenerative and inflammatory diseases, syndromes, and conditions, which can potentially last a patient's remaining lifetime, many of these patients also require the extended use of controlled substance pain medications, either in addition to surgical procedures or between surgical interventions. (A list of the conditions treated by the practice is included as Exhibit A.)

3. The 2011 Florida Legislature enacted CS/CS/HB7095, (ch. 2011-122, *Laws of Florida*), requiring among other things that certain physicians register as controlled substance prescribing practitioners on their practitioner profiles maintained and published by the Department of Health.

4. In passing the new laws set forth in ch. 2011-122, *Laws of Florida*, including the newly created §456.44, Florida Statutes, the Legislature specifically defined the term "chronic nonmalignant pain" and specifically limited many of the requirements and standards set forth in the new law only to those physicians who prescribe controlled substances for the treatment of "chronic nonmalignant pain" as defined therein.

5. Newly created §456.44(1)(d), Florida Statutes defines the term "chronic nonmalignant pain" as:

pain unrelated to cancer or rheumatoid arthritis which persists beyond the usual course of disease or the injury that is the cause of the pain or more than 90 days after surgery. (emphasis added)

and subsection 456.44(2), Florida Statutes provides in relevant part that:

Effective January 1, 2012, a physician licensed under chapter 458, chapter 459, chapter 461, or chapter 466 who prescribes any controlled substance, as defined in s. 893.03, for the treatment of chronic nonmalignant pain, must:

(a) Designate himself or herself as a controlled substance prescribing practitioner on the physician's practitioner profile. (emphasis added)

6. In order to fully enforce these newly created statutory provisions, the Legislature also created §456.072(1)(mm), Florida Statutes, providing that failure to comply with this and the other controlled substance prescribing requirements of the newly created §456.44, Florida Statutes, constitutes grounds for which disciplinary actions specified in §456.072(2), Florida Statutes, may be taken against a licensee.

7. The registration requirement of §456.44(2), Florida Statutes is clearly and specifically applicable only to those physicians prescribing controlled substances for the medical care and treatment of chronic nonmalignant pain as defined in §456.44(1)(d), Florida Statutes. As is relevant to this Petition, that statutory definition applies the term "chronic nonmalignant pain" only to pain unrelated to cancer or rheumatoid arthritis which persists beyond the usual course of the disease or injury that is the cause of the pain.

8. Although Petitioner is confident that the only patients for whom he prescribes controlled substances for the treatment of pain are either within 90 days following surgery or within the usual course of the disease or injury causing the patient's pain, because a significant number of such patients are suffering with diseases or injuries for which the usual course of the disease or injury may be well beyond 90 days and can often be life-long, even after surgical intervention, Petitioner wishes to have the Board of Medicine confirm that the prescribing of controlled substances within the usual course of the disease or injury causing the patient's pain, even if such course is for an extended period of time, is not considered prescribing controlled substances for the treatment of "chronic nonmalignant pain" as defined in §456.44(1)(d), Florida Statutes, so as to require his registration as a controlled substance prescriber as of January 1, 2012, as required in §456.44(2), Florida Statutes.¹

9. The Board of Medicine is quite familiar with the Florida case law setting forth the requirements for statutory interpretation of those statutes that provide for penal enforcement. The Board of Medicine has routinely considered and consistently adopted in Final Orders for many of its disciplinary cases and has seen in District Courts of Appeal opinions addressing Board of Medicine cases,

¹ At the last meeting of the Board of Medicine a similar Petition for Declaratory Statement on behalf of hospice physicians was considered in regard to whether prescribing controlled substances for the treatment of hospice patients whose pain would be life-long, but still within the usual course of the disease and its comorbidities that are causing the patient's pain, falls within the definition of "chronic nonmalignant pain" as defined in §456.44(1)(d), Florida Statutes and the Board of Medicine voted unanimously that it does not.

the long-standing and well regarded rule of statutory interpretation that those statutes and rules that can result in the imposition of disciplinary penalties must be strictly construed, with any ambiguity being interpreted in favor of the licensee against whom the disciplinary penalty could be imposed. See, *Colbert v. Department of Health*, 890 So. 2d 1165 (Fla. 1st DCA 2004); *Ocampo v. Department of Health*, 806 So. 2d 633 (Fla. 1st DCA 2002); *Elmariah v. Department of Professional Regulation, Board of Medicine*, 574 So. 2d 164 (Fla. 1st DCA 1990); *Breesman v. Department of Professional Regulation, Board of Medicine*, 567 So. 2d 469 (Fla. 1st DCA 1990); *Farzad v. Department of Professional Regulation, Board of Medicine*, 443 So. 2d 373 (Fla. 1st DCA 1983); and, *Lester v. Department of Professional and Occupational Regulations*, 348 So. 2d 923 (Fla. 1st DCA 1977).

10. The language in §456.44(1)(d), Florida Statutes is clear and unambiguous in providing a very specific definition of the term "chronic nonmalignant pain" and registration is required in §456.44(2), Florida Statutes, only for those physicians who prescribe controlled substances for the treatment of "chronic nonmalignant pain." Because the failure to comply with the registration requirement could result in disciplinary action, including revocation of a physician's medical license, the language in §456.44, Florida Statutes must be narrowly and strictly construed.

WHEREFORE, Petitioner, Ara J. Deukmedjian, M.D., respectfully requests that pursuant to §120.565, Florida Statutes, the Board of Medicine issue a Declaratory Order interpreting ch.2011-122 §3, *Laws of Florida*, and holding both

that the prescription of controlled substances for the treatment of pain during the usual course of the disease or injury causing such pain is not the prescribing of controlled substances for the treatment of "chronic nonmalignant pain" as defined in §456.44(1)(d), Florida Statutes, and that therefore, Petitioner is not required to register as a controlled substance provider as set forth in §456.44(2), Florida Statutes, as a result of such prescribing in the treatment of the conditions listed in Exhibit A.

Respectfully submitted, this 23rd day of August, 2011.



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On behalf of Ara J. Deukmedjian, M.D.

Exhibit A



The following is a list of diagnosed diseases and conditions routinely treated in Petitioner's practice each of which often include as a symptom significant chronic pain and each of which have a natural course which is reasonably and generally expected to last for the life of the patient unless sufficiently treated. Appropriate medical pain management, including use of both controlled and non-controlled substances, is essential to the health and welfare of these patients as they undergo surgical procedures and other modalities of treatment to successfully treat and eliminate the painful symptoms of these diseases and conditions.

1. Facet Joint Osteoarthritis (Facet Syndrome)
2. Sacroiliitis
3. Piriformis Syndrome
4. Dystonia
5. Chronic Lumbosacral Strain
6. Degenerative Disc Disease
7. Spinal Stenosis
8. Radiculopathy
9. Ischemic Limb Pain
10. Non-healing Ulcers
11. Osteoarthritis of large, medium, and small joints
12. Spinal Fractures
13. Spinal Instability and Spondylolisthesis
14. Scoliosis
15. Kyphosis
16. Occipital Neuralgia
17. Complex Regional Pain Syndrome/ Reflex Sympathetic Dystrophy
18. Neuropathy
19. Discogenic Pain
20. Neuropathic Pain
21. Fibromyalgia