



KENTUCKY BOARD OF PHYSICAL THERAPY

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Governor

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Scott D. Majors, Esq.
Executive Director

MINUTES OF MEETING November 15, 2012

Board Members Present: Troy Grubb, PT, Chair
Peggy Block, PT
Charles Clark, PT
Virginia Johnson
Karen Craig Ogle, PT
Tina Volz, PT

Board Staff: Scott D. Majors, Executive Director
Stephen Curley, Investigator

Board Agents: James G. Grawe, Assistant Attorney General, Board Counsel

Guests: Tony Brosky, PT, KPTA Liaison
Dalie Camic
Becky Klusch
Mark R. Brengelman, Esq.

A meeting of the Kentucky Board of Physical Therapy was called to order by Board Chair, Troy Grubb, at 9:07 a.m., Thursday, November 15, 2012, at the Board office. A quorum was present.

Motion was made by Peggy Block, seconded by Karen Ogle, to approve the minutes of the Board meeting of September 13, 2012. Motion carried.

Board Discussions, Committees and Opinion Requests

2012 FSBPT Annual Conference:

Troy Grubb advised that during this conference he expressed concern to a FSBPT representative regarding the manner in which KBPT's professional relationship was described on the Federation's website with ProCert, the continuing competence activity certification program. As a result of this discussion, the language on the Federation's website was changed to more accurately state that ProCert "is currently recognized or accepted by (ten) jurisdictions", including Kentucky.

Peggy Block summarized her observations relating to an educational session conducted during this conference relating to the manner in which education questions are incorporated into the content areas for the PTA examination.

Board Appointments:

2013 KBPT Delegate and Alternate for FSBPT Annual Conference: The Board agreed that its Chair-Elect should serve as the KBPT Delegate at every FSBPT annual conference. The Board agreed that further discussion was needed, however, before an Alternate could be chosen based on the rotation of current Board Officers.

2013 JE Exam Committee: Following considerable discussion, the Board agreed for Troy Grubb and Scott Majors to select a pool of possible candidates, to include present and former Board members as well as educators, to comprise the next Jurisprudence Examination Committee. Mr. Grubb and Mr. Majors agreed to provide a report at the next Board meeting.

Opinion Requests

The Board reviewed the following opinion requests from:

(1) Krista Shake, PT whether she is able to charge a MANUAL charge 97140 ICD9 code if the charge is performed by a massage therapist and not a physical therapist. Upon consideration and discussion, the Board instructed staff to respond by:

- (a) noting that the Board's laws and regulations do not address billing practices, except with respect to engaging in fraud or material deception in the delivery of professional services, per KRS 327.070(2)(h); and
- (b) emphasizing that one must always bill what is appropriate for the particular service provided after determining correct Medicare billing practices and consulting with participating provider (PAR) and CMS guidelines.

(2) PTACorp/Donya whether a PT clinic may rent a TENS machine to Worker Compensation patients for reimbursement, with or without a DME license. Upon consideration and discussion, the Board instructed staff to respond by:

- (a) emphasizing that physical therapists are required to disclose in writing to each patient any financial interest, compensation, or other value to be received by the referral source, as itemized in 201 KAR 22:053 Section 2(10); and
- (b) encourage consultation with the applicable payor contract.

(3) Ron Cole, PT whether the Board "can elongate a probation because the license holder is working in another state, with that other state also holding the individual's license on their own terms of probation, even if such a provision is not part of the original order from KBPT." Upon consideration and discussion, the Board instructed staff to respond by referring Mr. Cole to language found on page 6 of his Settlement Agreement, which he signed on December 14, 2011, which states in relevant part:

"In the event the Respondent should leave Kentucky to reside or practice outside of Kentucky or for any reason should the Respondent stop practicing physical therapy in Kentucky, the Respondent shall notify the Board in writing within ten (10) days of the dates of departure and return or the dates of non-practice within Kentucky.

Non-practice shall be defined as any period of time exceeding thirty (30) days in which the Respondent is not engaging in activities defined in KRS 327.010(1). **Periods of temporary or permanent residency outside of Kentucky or practice of physical therapy outside Kentucky or of non-practice within Kentucky shall not apply to the reduction of the probationary period.**" (Emphasis added.)

(4) Patrick Bray, PT concerning the Board's position as to a physical therapist's practice of Activator technique. Upon consideration and discussion, the Board instructed staff to respond by indicating "yes," as long as the physical therapist's practice is within the scope of the therapist's training, expertise and experience, as set forth in 201 KAR 22:053 Section 1(1).

(5) Karen Stringer, PT whether techs are allowed to perform special tests, such as Tinetti and Timed Up and Go. Upon consideration and discussion, the Board instructed staff to respond by indicating "yes," as long as the physical therapist ensures that the performance of special tests are within the tech's scope of training, education or expertise, as set forth in the Board's regulations in effect at the time the tests are performed.

(6) Phil Williams, PT whether it is lawful for a hospital to bring patients who are listed in swing beds for rehabilitation to the facility's outpatient clinic for increased rehab time, specifically focusing on billing, privacy and cross-contamination issues. Upon consideration and discussion, the Board instructed staff to respond by indicating that KRS Chapter 327 does not address the internal operation of facilities or the issues presented in this inquiry; thus, the inquiry is outside the scope or jurisdiction of the Board to consider or offer an opinion.

(7) Rachel Nieman, PT whether "telerehabilitation", or more specifically, online consultation is permissible provided that the therapist is licensed in the state of Kentucky and following the rules and laws set forth in Kentucky's practice act and, if so, whether there are specific guidelines that should be set out regarding this practice. Upon consideration and discussion, the Board instructed staff to respond by:

- (a) referencing KRS 327.200(3) which defines "telehealth" as it relates to the practice of physical therapy in Kentucky;
- (b) advising that the Board is studying the issue of adopting specific guidelines for telehealth practice, to be formalized in its administrative regulations, but this process has not yet been completed; and
- (c) advising that, pending the adoption of formal guidelines as referenced above, every physical therapist is expected to provide services that meet or exceed the generally accepted practice of the profession.

(8) Tony Brosky, PT, on behalf of the KPTA, whether a credential holder should be permitted to receive course credit to satisfy her continuing education requirements for the next biennium when the course was taken as a component of her Board-approved remediation plan. Upon consideration and discussion, the Board concluded from the facts of this case that the course credit was received in the same biennium of initial licensure, and there is no provision in the Board's laws or regulations that would prohibit the application of course credit received through remediation to satisfy continuing education requirements.

During its consideration of this matter, however, the Board discussed whether it would be appropriate to consider granting Category 1 approval for continuing education of less than three (3) contact hours under any circumstances. Following further discussion and consideration, Troy Grubb moved that the Board Chair, members Tina Volz and Karen Ogle, and the Executive Director serve on a committee to draft an amendment to 201 KAR 22:045 Section 2(2)(a) to allow for Category 1 continuing education of less than three (3) contact hours if the coursework is APTA or FSBPT approved. Tina Volz seconded the motion, which carried.

Civil Matters and Investigations

Complaint Committee #1

C2012-08: The Complaint Committee considered a report from Board Counsel and its Executive Director concerning the status of settlement negotiations. Following consideration of this report, the Complaint Committee reported to the full Board that the case is deferred until the next regularly scheduled meeting at which the credential holder has indicated her intent to attend and address the Board concerning settlement.

C2012-09: Following consideration of a report from its Investigator and a review of records obtained pursuant to subpoena, the Complaint Committee advised that this case is still ongoing and no action is necessary at this time. Linda Pillow recused herself from this case.

C2012-11: Following consideration of a report from Board Counsel and its Executive Director, coupled with information from the IPTPC, the Complaint Committee advised that the credential holder, Thomas McGinnis, PTA was scheduled to appear before the Board at 1:00 p.m. on to address the issue of his administrative reinstatement. The Board also received a report from Brian Fingerson concerning Mr. McGinnis' participation in the IPTPC program, as well as a report from Board Counsel, James Grawe, concerning a proposed settlement agreement. Mr. McGinnis appeared as scheduled. Following

consideration of all information presented, the Board entered an Order approving the parties' settlement agreement.

C2012-12: As the Complaint Committee reported at the last meeting, the Board received a signed Cease and Desist from Mr. Montgomery following the unauthorized use of the protected term "PT". However, the Board also received information suggesting that compliance may not be secured. Thus, the full Board again tabled this case for the next meeting to further investigate whether Mr. Montgomery has fully complied with the Cease and Desist.

C2012-13: Upon summary of the matter, with the assistance of counsel, the Complaint Committee reported that this case is ongoing and more information is expected to be available by the next meeting.

BIC2012-14: Upon summary of the matter, with the assistance of counsel, the Complaint Committee reported that there was insufficient information uncovered during the investigation to support a finding of a violation; hence, the Committee recommended and moved that this investigation be closed. This motion was seconded by Peggy Block, which carried.

C2012-20: Upon summary of the matter, with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting additional information in response to an investigative subpoena.

C2012-21: Upon summary of the matter, with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting additional information in response to an investigative subpoena.

C2012-23: Upon summary of the matter, with the assistance of counsel, the Complaint Committee recommended and moved that an investigation be opened concerning this individual's unauthorized use of the protected terms "Physical Therapy" and "Physiotherapy," and to authorize staff to issue a Cease and Desist if the investigation reveals facts and information to so support. This motion was seconded by Tina Volz, which carried.

C2012-24: Upon summary of the matter, with the assistance of counsel, the Complaint Committee recommended and moved that an investigation be opened concerning this individual's unauthorized use of the protected terms "Physical Therapy" on an advertisement, and to authorize staff to issue a Cease and Desist if the investigation reveals facts and information to so support. This motion was seconded by Tina Volz, which carried.

Complaint Committee #2

BIC2012-16: Following a review of the response filed to the Board Initiated Complaint, and with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting information in response to an investigative subpoena.

BIC2012-17: Following a review of the response filed to the Board Initiated Complaint, and with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting information in response to an investigative subpoena.

BIC2012-18: Following a review of the response filed to the Board Initiated Complaint, and with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting information in response to an investigative subpoena.

BIC2012-19: Following a review of the response filed to the Board Initiated Complaint, and with the assistance of counsel, the Complaint Committee reported that this is an ongoing investigation and the Committee was awaiting information in response to an investigative subpoena.

IPTPC Report

The Board reviewed the IPTPC report submitted and personally presented by Brian Fingerson, R.Ph. Cases that are involved in the IPTPC previously have come to the attention of the Board.

Update on Monitoring Probations

Updates were given concerning probation monitoring for the following: Malton Schexneider, PT (written report); James Rick Roe, PT; Ron Cole, PT (written report); Lawrence Tatem, PT; Tiffiney Bentley, PT; Amanda Mattingly, PTA (written report); Jon-Mark French, PTA (written report); Jeremy Kruger, PT (written report); Shannon Snyder, PT (written report); Karen Snyder, PT (written report); Barack Jonkers, PTA (written report); Art Nitz, PT (written report); and Michael Harris, PTA (written report).

The Board considered Jon-Mark French's written request to seek employment in a home health setting. Following review of Mr. French's settlement agreement, entered November 15, 2011, which provided in part that Mr. French "shall not practice in a solo/independent practice, home health or in a patient's home or school setting for three years unless approved by Board", and after further discussion, Peggy Block moved that the request be denied. Virginia Johnson seconded this motion, which carried. The Board instructed staff to so notify Mr. French.

Troy Grubb advised that he has prepared three monitoring reports relating to Shannon and Karen Snyder. Although the settlement agreement currently in place between the parties calls for an additional visit and report, Mr. Grubb advised that the prior three visits have uncovered no basis for continued concern relating to their practice. Consequently, Mr. Grubb opined that no meaningful or legitimate purpose will be served by requiring another visit and report. Following discussion, Chuck Clark moved that the requirement in the settlement agreement relating to a final monitoring visit and accompanying report be waived. Tina Volz seconded this motion, which carried. The Board instructed staff to so notify Shannon and Karen Snyder.

In the future, the Board requested staff to include with the monitoring reports copies of all applicable settlement agreements that list the specific violations committed to assist the Board in its consideration of these reports.

Director's Report

The Board again reviewed the status of amendments to 201 KAR 22:001, 201 KAR 22:040, 201 KAR 22:045 and 201 KAR 22:053. Scott Majors advised that the Interim Joint Committee on Health and Welfare considered 201 KAR 22:040 and 201 KAR 22:045 at its meeting on September 19, 2012, and these regulations took effect that day. Mr. Majors also reported that the Administrative Regulation Review Subcommittee considered 201 KAR 22:001 and 201 KAR 22:053 at its meeting on November 13, 2012, and they are scheduled to be considered by the Interim Joint Committee on Health and Welfare in December.

Mr. Majors also advised that amendments to Section 1 of 201 KAR 22:070, which took effect on March 21, 2012, did not address needed conforming amendments to Section 2. Following discussion, Chuck Clark moved to correct this omission by filing both an emergency regulation and an ordinary regulation which incorporates the necessary conforming amendments. This motion was seconded by Tina Volz, which carried.

Mr. Majors also advised that, presently, credential holders are not required to notify the Board when changing their email addresses on file with the Board. Staff submitted the issue to the Board for consideration. Following discussion, Virginia Johnson moved to file an amendment to 201 KAR 22:035 Section 2 to require credential holders to notify the Board upon a change in email address (if one is already on file). This motion was seconded by Tina Volz, which carried.

Mr. Majors also advised that KRS 327.200(2) provides that the Board shall promulgate administrative regulations to implement telehealth in the provision of physical therapy and in the provision of continuing

education. Title 201 KAR Chapter 22:160 has been reserved for this purpose. The Board instructed staff to research and provide a report at the January meeting how other jurisdictions and state boards of physical therapy have addressed the subject.

Mr. Majors also reported that, pursuant to KRS 131.1817, effective April 11, 2012, the Department of Revenue ("Revenue") has begun to request information from Kentucky boards, agencies and commissions to verify that all Kentucky taxpayers are filing and paying taxes due the Commonwealth. The Board has not yet received such a request. Mr. Majors advised that he would keep the Board apprised of any contact with Revenue.

Mr. Majors also reported that the Board received from the Department of Insurance, Public Protection Cabinet, a report of health care providers with settlement and/or judgments, dated October 1, 2012, covering the period from July 1, 2012, through September 30, 2012, and no credential holders of the Board were listed.

Mr. Majors also provided a report concerning his attendance at the FARB Attorney Certification Conference in Atlantic Beach, Florida on October 5 – 7, 2012. Specifically, the members were provided a copy of *Edwards vs. Gerstein*, a decision issued by the Missouri Court of Appeals in January of 2012, which addressed the subject of immunity for Board members. The members were also provided materials relating to Virginia's sanctioning referring points, utilized in its attempt to establish consistency in the process of imposing sanctions. Finally, the members were shown two public service announcement videos created by the Florida Department of Health.

The Board reviewed monthly, 3rd quarter and 2012 YTD annual FAS3 financial report addressing the Board's revenues and expenditures.

Mr. Majors reported that Donna Sims offered a report of an educational presentation which Donna Sims and he gave on September 10, 2012, to several foreign-exchange students attending Bellarmine University's Physical Therapy program.

Mr. Majors reported that he and staff Investigator Stephen Curley held a teleconference on September 28, 2012, with Catherine Keyes, a representative with Affiliated Monitoring, a business which works with physical therapists and physical therapist assistants to address concerns with competence, documentation, boundary violations and billing practices. Mr. Majors advised that the costs associated with the services offered by this business greatly exceed that which the Board's credential holders are accustomed to paying. The Board next discussed its historical practice of using current Board members to serve as monitors as a first resort, and the consensus was that this practice should be changed to that of a last resort. Moreover, the Board expressed a preference of using former Board members first, with outside practitioners second. The Board also aspired for consistency and standardization in the format and criteria to be included in monitoring reports.

Mr. Majors circulated to the Board for its review a draft of the latest KBPT newsletter. The members offered a few suggested changes, which staff agreed to incorporate prior to posting online and notifying credential holders.

As a follow-up to the last meeting, Stephen Curley, Board Investigator, demonstrated the latest changes to the Board's proposed new website in the Sharepoint 2010 format, including designs and changes mandated by Kentucky.gov. Mr. Curley explained that the new format will incorporate a new webpage and banners, but the manner by which data is accessed will not change. Following this demonstration and subsequent discussion, the Board instructed staff to delay the transition to the new format until after the 2013 renewal period has expired (i.e., after March 31, 2013) to avoid any potential confusion or interruption in the online renewal process.

Mr. Majors discussed the present job description and classification for a Special Investigative Agent 1, which is the position occupied by Stephen Curley, staff Investigator. Following a summary of Mr. Curley's job duties and performance assessment, Mr. Majors advised that Mr. Curley, based on years of

experience, presently met the requisite qualifications for a Special Investigative Agent 2. Thus, Mr. Majors sought Board approval to have Mr. Curley's position reclassified as such. Following discussion, Chuck Clark moved for staff to seek approval from the Personnel Cabinet to have Mr. Curley's position reclassified, consistent with the request. This motion was seconded by Karen Ogle, which carried. Mr. Curley excused himself from the room during this discussion.

Mr. Majors reported that the Board had received more than one bid in response to the Board's RFP for legal services. Based on his discussions with Finance Cabinet representatives, Mr. Majors sought at least three Board members to join Donna Sims and himself to serve on an Evaluation Committee for purpose of scoring the bids. Following discussion, Chuck Clark moved that Karen Ogle, Tina Volz and himself be appointed to serve on this Committee, and that they convene on December 4, 2012, at the Board's offices for purpose of scoring the bids and, if necessary, to schedule oral presentations by the top three scoring vendors. This motion was seconded by Tina Volz, which carried. Troy Grubb recused himself from all discussion relating to the Board's RFP and the manner by which the bids are to be scored.

The Board discussed the schedule of upcoming conferences, including FARB's Forum in San Diego, California; CAPTASA in Lexington, Kentucky; KPTA Legislative Day; the KPTA Spring Conference; the APTA Annual Meeting; the 2013 FARB Attorney Certification Conference; and the 2013 FSBPT Annual Conference. The Board approved sending up to two staff members to CAPTASA, with travel, registration fees, meals and lodging to be reimbursed by the Board.

Board members reviewed and approved the lists of persons issued licenses and certificates since the last meeting, as well as a list of examinees and reinstatements. The lists are attached to these minutes.

A motion was made by Troy Grubb to adjourn the meeting at 4:30 p.m. Motion was seconded and carried.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Scott D. Majors', with a stylized flourish at the end.

Scott D. Majors
Executive Director