

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In Re: Dr. Louis Frank

Docket No.MPC 135-1209
MPC 44-0410

Board Review and Order

The Hearing Committee (Committee) assigned by the Vermont Board of Medical Practice (Board) conducted a hearing in this matter on June 6, 2011. The Committee submitted its Proposed Findings, Conclusions and Order to the full Board on, or about, June 29, 2011. The Committee's proposals were provided to Dr. Frank's attorney on June 29, 2011.

The Board held a hearing to consider the Committee's proposals as provided in 26 VSA § 1355 (b) on July 6, 2011 in Randolph, Vermont. The State was represented by Assistant Attorney General Terry Lovelace. Dr. Frank did not attend the hearing although he had been provided notice of the hearing through his attorney.

The Board voted¹ to adopt the Committee's Proposed Findings, Conclusions and Order with two minor amendments².

The final Findings, Conclusions and Order adopted by the Board are set out in their entirety below.

¹ Members of the Central Committee which investigated the allegations against Dr. Frank did not vote. Neither did Dr .Michael Drew who was a member of the Hearing Committee.

² The amendments were: (1) "Gifford Memorial Hospital" became "Gifford Medical Center" (p.4) and (2) "more than 150 false prescriptions" became "more than 130 false prescriptions" (p. 25).

Hearing

On June 6, 2011, a hearing committee (“Committee”), consisting of Janice Ryan, RSM, Public Member, Michael Drew, M.D. and William H. Stouch, M.D. conducted a hearing in this matter, pursuant to 3 VSA §§ 809-14 and 26 VSA § 1355, to consider whether the State could prove its allegations by a preponderance of the evidence as required under 26 VSA § 1354 (c). Atty. Robert Simpson served as presiding officer.

Respondent did not attend the hearing. He had given notice in letters dated May 15 and May 24, 2011 that neither he, nor his attorney, Eileen Elliot would attend the hearing. By agreement of the State, Respondent admitted seven letters (exhibits A-F) covering a period from June 8, 2010 through May 24, 2011. These letters explained Respondent’s objections to the process and his response to various claims made against him. These letters were read by Committee members before the start of the hearing and were referred to at times during the hearing.

Assistant Attorney General Terry Lovelace represented the State. The State presented the testimony of two witnesses: (1) Board Investigator, Philip Ciotti and (2) Dr. Lan Nguyen Knoff, who testified by telephone by agreement of the Respondent. The State also admitted twenty exhibits ranging from Dr. Knoff’s “CV” to medical records of ten of Respondent’s patients.

Summary of State Allegations and Supporting Evidence

The State’s evidence focused on Respondent’s contact with, and treatment of, thirteen patients during the period from April, 2008 through January 9, 2011.

The overwhelming majority of the counts (forty-three of forty-seven) involved allegations that Respondent engaged in unprofessional conduct in prescribing Methadone in the treatment of ten of the thirteen patients. These ten patients were identified as patients 1, 2, 3, 4, 5, 9, 10, 11, 12 and 14.³

The State brought four basic unprofessional conduct charges against Respondent for his treatment of *each* of the ten patients. More specifically, with respect to treatment of *each* of the ten patients, the State claimed Respondent had engaged in unprofessional conduct by:

- (1) Failing to use on repeated occasions the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged

³ Committee members were provided with a “key” that gave the name of each patient.

in similar practice under the same or similar conditions, by prescribing Methadone for treatment of “chronic pain” without a thorough patient history, a physical examination and diagnostic studies necessary to verify the particular patient did, in fact, have chronic pain; 26 VSA § 1354 (a) (22)

- (2) Engaging in consistent improper utilization of services by consistently prescribing methadone for treatment of (a particular patient’s) opiate dependence, not for legitimate management of chronic pain; 26 VSA § 1354 (a) (18)
- (3) Intentionally creating a “false record” by writing for “CHRONIC PAIN” on every prescription that he wrote for Methadone when, in fact, the Methadone was to be used to treat the patient’s “opiate dependence”; 26 VSA § 1354 (a) (8)
- (4) Performing “unsafe or unacceptable patient care and/or failing to conform to the essential standards of acceptable and prevailing practice” by treating the particular patient’s “opiate addiction,” or “opiate dependence,” with Methadone “under the guise of treating chronic pain.” 26 VSA § 1354 (b) (1)(2)

The State also charged Respondent with engaging in unprofessional conduct under 26 VSA § 1354 (a) (27) by failing to comply with federal statutes and rules governing the practice of medicine. More specifically the State alleged that Respondent had violated 21 USC 823 and Federal Regulations 42 CFR Part § 8.12 (h) – “federal opioid treatment standards” regulating treatment of opioid abuse with methadone in that he failed to take proper steps to insure that methadone treatment took place in a carefully controlled clinical setting.⁴

Finally, the State charged Respondent with four counts⁵ of unprofessional conduct in violation of 26 VSA § 1354 (a) (24) and (b) (2) for allegedly committing “boundary violations” in his contact with three other patients – patients 15, 16 and 17.

Findings of Fact and Conclusions of Law

After considering all evidence admitted at the hearing⁶, the Committee recommends that the Board adopt the following Findings of Fact, Conclusions of Law and Order.

⁴ In addition, the Board “Opiate Dependence Treatment Rules,” adopted pursuant to 18 VSA 4702 and in effect from 2008-2010, limited treatment for opiate addiction to hospitals, “the medical school facility” and providers who developed “a referral and consultative relationship with a network of agencies and providers” capable of providing services to treat a patient’s behavioral, psychiatric, medical problems.

http://healthvermont.gov/regs/opiate_addict_rules.aspx

⁵ Counts 44-47

⁶ Although two members of the Committee are physicians with expertise in certain areas the testimony touched on, the Committee’s Findings and Conclusions were based solely on the Committee’s evaluation of the evidence presented at the hearing. 3 VSA § 809 (g); *In Re Petition of 24 Utilities*, 159 Vt. 339, 349 (1992)

1. Louis Jay Frank, M.D. (Respondent) holds Vermont Medical License Number 042-0006770, issued in 1980, and was Board Certified in Anesthesiology in 1991.
2. Respondent currently practices psychiatry in St. Johnsbury, Vt.
3. The Board has jurisdiction under 26 VSA §§ 1351-61 and 3 VSA §§ 809-14.
4. Respondent received notice of the June 6, 2011 hearing in this matter through personal service on his attorney, Eileen Elliot. June 6, 2011 Hearing Transcript of Testimony (“T”) 28
5. Respondent acknowledged that he had received the Second Amended Complaint in this matter in his May 15, 2011 letter to Attorney Lovelace. T 28, Respondent’s Exhibit A

Dr. Lan Nguyen Knoff

6. Dr. Knoff is a graduate of the University of Kansas Medical School (1995). She is Board Certified in Family Practice and Certified in Pain Management. T164-65
7. Dr. Knoff has practiced pain management since 2001. She has served as Director of the Pain Management Clinic at Gifford Medical Center in Randolph, Vermont since February, 2008. *Id*
8. She specializes in chronic pain management and medication management. Dr. Knoff is particularly interested in the appropriate management of opioids in managing chronic pain. T166
9. Methadone is a “terribly dangerous medication” that has a high potential for diversion. T 175-76
10. When prescribing opioids, there are basic “guidelines” that have been adopted by the Board and independent experts that physicians ought to follow: (1) obtain a clear, thorough medical history of the patient; (2) conduct a “very thorough physical examination” to find the source of the patient’s pain; (3) obtain the patient’s consent through a “contract” which clearly explains the plan for treatment and what is expected of the patient as far as compliance with the treatment plan and (4) monitor patient progress and compliance (e.g. through urinalysis). T 166-67, 176-77 and 181-87
11. Dr. Knoff reviewed the medical records for Respondent’s patients identified as patients 1, 2, 3, 4, 5, 9, 10, 11, 12 and 14. T 172
12. Respondent’s overall methadone treatment for *each of these patients* was “inadequate” because it failed to meet the accepted professional “guidelines”/ standards outlined in ¶10 (above). T177, 179 and 181-83

Investigator Philip Ciotti

13. Philip Ciotti has served an investigator with the Vermont Board of Medical Practice (Board) for ten years. T23

14. Ciotti also spent two years as supervisor of a community-based program that housed violent sexual offenders who were suffering from mental illness. *Id*
15. Immediately prior to his work with mentally ill sex offenders, Ciotti served as a Sergeant with the Caledonia Sheriff's Department. He began work Caledonia Sheriff's Department in 1985 and by 1992 was supervising drug investigations and teaching in the DARE (Drug Abuse Resistance Education) Program in thirteen schools in two counties. T 24
16. Ciotti regularly reviews medical records as part of job with the Board. Over the course of his ten years with the Board, Investigator Ciotti has reviewed more than one thousand medical records. T 25

Investigation

17. Ciotti began his investigation of Respondent after receiving a complaint from Respondent's former employer, Eric Grims, Director of Northeast Kingdom Human Services (NEKHS) on December 22, 2009. T26-27
18. Respondent was employed as a psychiatrist by NEKHS from April 22, 2008 until December 16, 2009. T 52, Respondent's B
19. At Grims' request, Respondent successfully completed a two-day course (October 23-24, 2009) entitled *Managing Chronic Pain While Putting the Control Back in Controlled Substances*. June 23, 2010 letter from Atty. Eileen Elliot to Philip Ciotti, Respondent's Exhibit C (Exhibit C)
20. At Grims' request (in 2008), Respondent successfully completed a course in *Buprenorphine in the Treatment of Opioid Dependence*. Respondent "did not agree (with Grims) that Buprenorphine was a good idea for NEKHS." *Id*.
21. In December 2009, Grims alleged in a complaint to the Board that Respondent had engaged in "inappropriate prescribing." T27, State's Exhibit I
22. Grims explained further that the NEKHS Medical Director, Richard Edelstein had reviewed charts of Dr. Franks and discussed his concerns with Respondent who had disagreed with Edelstein. NEKHS had asked for advice from Dr. Todd Mandell who ran the suboxone treatment program for the State of Vermont. Mandell had, in turn, agreed with Edelstein. T 30
23. Later, Dr. Mandell called Ciotti and reported that Respondent was prescribing Methadone for pain "yet the charts had no supporting documentation indicating the patient had pain." T 30
24. The Board then subpoenaed charts of Respondent's patients through NEKHS and Ciotti conducted his own review of these records. T31

Patient 9 (Counts 1-4)

Findings of Fact (Facts)

25. On April 22, 2008 Respondent diagnosed Patient 9 with “bipolar depression, poly substance abuse and personality disorder.” T119
26. Respondent began by treating Patient 9 with klonopin, zyprexa and neurontin.” *Id.*
27. After Patient 9 was admitted to Valley Vista for drug detoxification, Respondent diagnosed her as having “opiate dependence.” *Id.*
28. Patient 9 had “cleaned up” using suboxone to treat her opiate dependence but on December 4, 2008, Respondent switched her from suboxone to Methadone for “chronic pain” even though there was no indication in her records that Patient 9 had “chronic pain.” T119-20
29. Respondent wrote *ten* prescriptions for Methadone for Patient 9. Respondent wrote “FOR CHRONIC PAIN” on each of these prescriptions. Exhibit 20
30. Patient 9’s medical records were admitted as Exhibit 11. T 124

Conclusions of Law (Conclusions)

The evidence showed that Patient 9 received residential treatment for “opiate dependence” and that she was treated with suboxone. Respondent later switched Patient 9’s medication from suboxone to methadone to treat “chronic pain.” Respondent wrote ten prescriptions for methadone. Each of the prescriptions said “FOR CHRONIC PAIN” even though there was no evidence in Patient 9’s medical records substantiating the conclusion that she had chronic pain.

The State has proven the following by a preponderance of the evidence:

- Count 1 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 9 for his opiate addiction under the guise of treating her for chronic pain.
- Count 2 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing Methadone for Patient 9 for treatment of “chronic pain” without a thorough history, a proper physical

examination and diagnostic studies necessary to verify Patient 9 did, in fact, have chronic pain.

- Count 3 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing Methadone for treatment of Patient 9’s opiate dependence, not for legitimate management of chronic pain.
- Count 4 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for Methadone - by writing that the Methadone was “FOR CHRONIC PAIN” when, in fact, he was treating Patient 9’s opiate dependence.

Patient 10 (Counts 5-9)

Facts

31. Patient 10’s medical records were admitted as Exhibit 12. T 126
32. Patient 10 was diagnosed with “atypical depression, depression secondary to chronic pain and opiate dependence. T 129
33. Respondent began treatment of Patient 10 with methadone immediately. *Id.*
34. Although there were MRIs for a back injury in the records that had been ordered by other physicians, there is no indication that Respondent did a physical exam or took any other steps to determine for himself whether Patient 10 did, in fact, have “chronic pain” when Respondent prescribed methadone for him. T 130
35. Respondent wrote *twenty-four* prescriptions for methadone for Patient 10. Each of these prescriptions said the methadone was “FOR CHRONIC PAIN.” Exhibit 20
36. Physician members of the Board’s Central Committee reviewed Patient 10’s medical records and determined that treatment with methadone was not justified despite the presence of the MRIs in Patient 10’s medical records. T 131

Conclusions

Respondent's diagnosis for Patient 10 was "depression secondary to chronic pain and opiate dependence." He began treating Patient 10 with methadone immediately. The Board's Central Committee determined that the methadone treatment was not justified. The evidence shows that Respondent wrote twenty-four methadone prescriptions for Patient 10 even though he made no independent effort to determine whether Patient 10 did, in fact, have chronic pain. Each prescription indicated the methadone was "FOR CHRONIC PAIN."

The State has proven the following by a preponderance of the evidence:

- Count 5 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice" by treating Patient 10 for his opiate addiction *or opiate dependence* under the guise of treating him for chronic pain.
- Count 6 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 10 for treatment of "chronic pain" without a thorough patient history, a physical examination and diagnostic studies necessary to verify Patient 10 did, in fact, have chronic pain.
- Count 7 - Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 10's opiate dependence, not for legitimate management of chronic pain.
- Count 9 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) - willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was "FOR CHRONIC PAIN" when, in fact, he was treating Patient 10's opiate dependence.

The State did not prove:

- Count 8 - Respondent committed unprofessional conduct under 26 VSA § 1354 (27) by violating federal rules (42 CFR Part § 8.12 (h) - using methadone to treat Patient 10's opiate addiction outside a dedicated clinical setting.
- The evidence established that Patient 10 was "opiate dependent;" but, it did not establish that Patient 10 was addicted to opiates.

Patient 4 (Counts 10-14)

37. Respondent diagnosed Patient 4, a 57-year old woman, with bi-polar depression, hypothyroidism and "opiate dependence." He treated her from May 2008 to January 2010. T 97
38. Her medical records were admitted as Exhibit 8. T96
39. In November 2008, Respondent discontinued suboxone and began prescribing Methadone for "chronic pain." Exhibit 8
40. Respondent appeared before the Board's Central Committee in April, 2010. Respondent was unable to explain the source of Patient 4's "chronic pain" or point to any evidence in her medical records that articulated the location of the "chronic pain." T 97
41. Respondent denied using Methadone to treat Patient 4's opiate dependence under the guise of treating her chronic pain. T 98
42. Respondent wrote *twenty-four* prescriptions for methadone for Patient 4. Each prescription said the methadone was "FOR CHRONIC PAIN." Exhibit 20
43. In December 2009, Respondent acknowledged that Patient 4's methadone treatments would be "tapered" there were no "definitive radiological findings" that it was necessary to use Methadone for pain control. T98-99
44. According to Investigator Ciotti, Respondent treated Patient 4 with methadone for opiate addiction in an "office-based practice." This practice is prohibited under federal law which requires such treatment to be administered under "controls" in an "approved methadone clinic." T 101-02

Conclusions

Respondent's diagnosis for Patient 4 was, among other things, "opiate dependence." He discontinued Patient 4's treatment with suboxone after several months and began prescribing methadone for "chronic pain." Respondent was unable to point to any medical record which substantiated "chronic pain." Nevertheless, Respondent wrote twenty-four methadone prescriptions for Patient 4's "CHRONIC PAIN."

The State has proven the following by a preponderance of the evidence:

- Count 10 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by failing to perform safe patient care and conform to the essential standards of acceptable and prevailing practice" by treating Patient 4 for her opiate addiction under the guise of treating her for chronic pain.
- Count 11 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 4 for treatment of "chronic pain" without a thorough patient history, a proper physical examination and diagnostic studies necessary to verify Patient 4 did, in fact, have chronic pain.
- Count 12 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 4's opiate dependence, not for legitimate management of chronic pain.
- Count 13 Respondent committed unprofessional conduct under 26 VSA §1354 (27) by violating federal rules (42 CFR Part § 8.12 (h) - using methadone to treat Patient 4's opiate addiction outside a dedicated clinical setting.
- Count 14 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the Methadone was "FOR CHRONIC PAIN" when, in fact, he was treating Patient 4's opiate dependence.

Patient 11 (Counts - 15-18)

Facts

45. Patient 11's medical records were admitted as Exhibit 13. T 133

46. When he came for treatment at NEKHS on May 20, 2008, Patient 11 said that he wanted to “detox” to “get off narcotics” and that he “wanted to get in a Methadone program.” He was suffering from “withdrawal symptoms.” T 133-34
47. Respondent diagnosed Patient 11 as having PTSD and “opiate dependence.” T 134
48. Respondent prescribed methadone for “chronic pain and mood control.” *Id.*
49. Respondent did not do a physical exam that confirmed the “chronic pain.” T 135
50. Respondent wrote *twenty* prescriptions for methadone for Patient 11. Respondent wrote “FOR CHRONIC PAIN” on every one of these prescriptions. T 141, Exhibit 20
51. On November 23, 2009, Respondent determined, after speaking with Dr. Ziobrowski (Patient 11’s primary care physician) that he (Respondent) did not have “sufficient clinical study results” to continue to use methadone to treat Patient 11 for pain. T 137-38
52. At this time (November 23, 2009) NEKHS was in process of reviewing Respondent’s prescribing practices. The record of Patient 11 is one of the records Dr. Mandell reviewed. T 138

Conclusions

The evidence showed that Patient 11 wanted a “Methadone Program.” Respondent’s diagnosis for Patient 11 was PTSD and “opiate dependence.” Yet, Respondent wrote twenty methadone prescriptions “FOR CHRONIC PAIN” despite never having conducted a physical exam to confirm that Patient 11 did, in fact, have chronic pain.

The State has proven the following by a preponderance of the evidence:

- Count 15 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 11 for his opiate addiction or opiate dependence under the guise of treating him for chronic pain.
- Count 16 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in

similar practice under the same or similar conditions, by prescribing methadone for Patient 11 for treatment of “chronic pain” without a thorough patient history, a proper physical examination and diagnostic studies necessary to verify Patient 11 did, in fact, have chronic pain.

- Count 17 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 11’s opiate dependence, not for legitimate management of chronic pain.
- Count 18 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was “FOR CHRONIC PAIN” when, in fact, he was treating Patient 11’s opiate dependence.

Patient 5 (Counts 19-23)

Facts

53. Respondent diagnosed Patient 5 with “mood disorder secondary to chronic pain, atypical depression, atypical anxiety and opiate dependence.” T 106
54. Patient 5 had been on suboxone but Respondent switched Patient 5’s medication to Methadone for “chronic pain.” *Id.*
55. Respondent wrote *sixteen* prescriptions for methadone for Patient 5. Each prescription said the Methadone was “FOR CHRONIC PAIN.” Exhibit 20
56. Respondent treated Patient 5 from September 2009 to December 2009. NEKHS had earlier ordered Respondent to stop treating chronic pain patients because NEKHS was a mental health agency that was not in the “chronic pain business.” T 106-07
57. Respondent left NEKHS on December 17, 2009 after NEKHS management learned that Respondent was treating Patient 5 for chronic pain. *Id.*
58. Dr. Gagnon (orthopedic surgeon) treated Patient 5 before Patient 5 moved to Arizona. Dr. Gagnon notified Respondent in December 3, 2009 that it *was appropriate* to treat

Patient 5 with methadone for chronic pain: “clinical status reasonably justified use of methadone to treat chronic pain caused by underlying pathology.” T 115

59. Respondent should have contacted Patient 5’s treating physician *before* he began prescribing methadone for “chronic pain” in September 2009. T117

Conclusions

Respondent’s diagnosis for Patient 5 was, among other things, “mood disorder secondary to chronic pain” and “opiate dependence.” Patient 5 had been on suboxone. Respondent switched his medication to methadone for “chronic pain.” Patient 5’s former treating physician confirmed methadone treatment for chronic pain was appropriate – but only after Respondent had already written methadone sixteen prescriptions ‘FOR CHRONIC PAIN.’

The State has proven the following by a preponderance of the evidence:

- Count 20 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 5 for treatment of “chronic pain” without a thorough patient history, a proper physical examination and diagnostic studies necessary to verify Patient 5 did, in fact, have chronic pain.

The State did not prove:

- Count 19 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1), (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 5 for his opiate addiction under the guise of treating him for chronic pain.
- Count 21 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 5’s opiate dependence, not for legitimate management of chronic pain.

- Count 22 Respondent committed unprofessional conduct under 26 VSA §1354 (27) by violating federal rules (42 CFR Part § 8.12 (h) - using methadone to treat Patient 5's drug addiction outside a dedicated clinical setting.
- Count 23 Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was “FOR CHRONIC PAIN” when, in fact, he was treating Patient 5's opiate dependence.
- The State did not prove that it was inappropriate to treat Patient 5 for chronic pain.

Patient 12 (Counts 24 -27)

Facts

60. Patient 12's medical records were admitted as Exhibit 14. T 142
61. On September 10, 2008, Respondent began treating Patient 12, a 21 year-old male who had “opiate dependence.” T143
62. Patient 12 was on suboxone and had “recently detoxed from opiates.” *Id.*
63. On October 29, 2008, Patient 12 “relapsed” and was reporting pain. Respondent prescribed methadone for the pain. *Id.*
64. Respondent performed no physical exam or took any other steps to determine the source of the pain. T145
65. Respondent wrote at least *twenty-five* prescriptions for methadone for Patient 12. He wrote “FOR CHRONIC PAIN” on these prescriptions. Exhibit 20

Conclusions

Patient 12 was “opiate dependent” and had “recently detoxed from opiates.” Patient 12 had been treated with suboxone. The evidence showed that when he “relapsed,” Respondent prescribed methadone for the “pain” that Patient 12 had reported. Respondent wrote at least twenty-five methadone prescriptions “FOR CHRONIC PAIN” even though he had taken no reasonable steps to determine whether Patient 12 did, in fact, have chronic pain.

The State proved the following by a preponderance of the evidence.

- Count 24 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 12 for his opiate addiction or opiate dependence under the guise of treating him for chronic pain.
- Count 25 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 12 for treatment of “chronic pain” without a thorough history, a proper physical examination and diagnostic studies necessary to verify Patient 12 did, in fact, have chronic pain.
- Count 26 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 12’s opiate dependence, not for legitimate management of chronic pain.
- Count 27 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was “FOR CHRONIC PAIN” when, in fact, he was treating Patient 12 ’s opiate dependence.

Patient 1 (Counts 28-31)

Findings of Fact (Facts)

66. Respondent began treating Patient 1 in 2008. Patient 1’s medical records were admitted as Exhibit 5. T38
67. Patient 1 received “massive doses of Oxycontin” for pain after an automobile accident in the mid-1980s and had been admitted twice to the Brattleboro Retreat for “nervous breakdowns.” T34
68. Respondent noted that Patient 1 was “a patient with severe addictive potential.” Exhibit 5
69. Patient 1 “*was not on any medications*” when Patient 1 was first seen by Respondent for “mood symptoms.” T34
70. Respondent’s diagnosis was “atypical mood disorder and mood disorder secondary to chronic pain, opiate dependence and PTSD.” *Id.*

71. There was no documentation (e.g., no physical examination, MRI, x-ray) in Patient 1's medical records that supported the diagnosis that Patient 1 suffered from "chronic pain;" nor was there documentation as to where the alleged pain was located (e.g. back, shoulder, hip etc.) T35, T42
72. Respondent treated Patient 1 with methadone from 9/18/08 until 11/17/09. On 11/17/09, Respondent was advised by Larry Berry, who had been providing Patient 1 with "alternative pain management" that there was insufficient basis for prescribing methadone to treat Patient 1. T39, 44
73. Investigator Ciotti reviewed *nineteen* prescriptions for methadone written by Respondent for the treatment of Patient 1. T42
74. Each prescription said that it was being written "FOR CHRONIC PAIN;" yet, there was no documentation in Patient 1's medical records that substantiated the claim that she had chronic pain. *Id.*, Exhibit 20⁷
75. Respondent "always wrote" for "CHRONIC PAIN" on his Methadone prescriptions "and the fact is, if he did not, a pharmacist would not fill it." T 81

Conclusions

Respondent's diagnosis for Patient 1 was, among other things, "mood disorder secondary to chronic pain, opiate dependence and PTSD." He found that Patient 1 had a severe addictive potential. Patient 1 had taken "massive doses" of oxycontin in the past; but, was "not on any medication" when he began treatment with Respondent. Respondent did not take reasonable steps to determine whether Patient 1 did, in fact, have chronic pain. Despite this, Respondent wrote nineteen methadone prescriptions for Patient 1's "CHRONIC PAIN."

The State has proven the following by a preponderance of the evidence:

- Count 28 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performance of unsafe patient care and by failing to conform to the essential standards of acceptable and prevailing practice" by treating patient 1 with methadone despite the fact that Patient 1 had a "severe addictive potential" and had not been taking any medication when Respondent began treating him thereby substantially increasing the chances that Patient 1 would be "re-addicted."

⁷ Exhibit 20, which consists of Methadone prescriptions written by Respondent for patients 1, 2, 3, 4, 5, 9, 10, 11, 12 and 14, was admitted, withdrawn, and then finally admitted once it was clear that all patient names were redacted.

- Count 29 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 1 for treatment of “chronic pain” without a thorough patient history, a physical examination and diagnostic studies necessary to verify Patient 1 did, in fact, have chronic pain.
- Count 30 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) 18) engaging in consistent improper utilization of services by treating patient 1 with methadone despite the fact that Patient 1 had a “severe addictive potential” and had not been taking any medication when Respondent began treating him.
- Count 31 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was “FOR CHRONIC PAIN” when, in fact, Patient 1’s medical records did not substantiate the assertion that Patient 1 had chronic pain.

Patient 2 (Counts 32-35)

Facts

76. Respondent treated Patient 2 from January 2009 through November 2009. Patient 2’s Medical Records were admitted as Exhibit 6. T62
77. Respondent’s diagnosis was that Patient 2 had a mood disorder secondary to chronic pain (motor vehicle accident 2007), atypical bipolar disorder and “opiate dependence.” Exhibit 6, T 78
78. When Patient 2 came to be treated at NEKHS he was engaged in “severe self-medication.” Exhibit 6
79. On July 8, 2009, Respondent discontinued methadone treatment due to Patient 2’s “drug seeking behavior.” Patient 2 became angry and said he “would get drugs on the street.” *Id.*
80. One week later, Respondent prescribed methadone once again –“pain increased without methadone.” *Id.*
81. On three occasions (late August 27, September 3 and November 13) Respondent increased methadone dosage for Patient 2. *Id.*

82. Respondent wrote at least *six* prescriptions for methadone for Patient 2. Each prescription said it was "FOR CHRONIC PAIN." There is no evidence that Respondent gave a physical exam to substantiate Respondent's finding that Patient 2 did have "chronic pain." Exhibit 20, T77
83. Respondent stopped prescribing methadone and recommended residential "detox" for Patient 2 after he learned that Patient 2 "had been opiate drug seeking from another physician and lying about it." Exhibit 6, T 74

Conclusions

Respondent diagnosed Patient 2 with, among other things, "mood disorder, secondary to chronic pain" and "opiate dependence." The evidence showed that Patient 2 was engaged in "severe self-medication" when he began treatment with respondent and that Patient 2 engaged in repeated "drug-seeking behavior" during much of the time he was being treated by Respondent. There was evidence that Patient did suffer from chronic pain as a result of a motor vehicle accident.

The State has proven the following by a preponderance of the evidence:

- Count 33 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 2 for treatment of "chronic pain" without a thorough patient history, a physical examination and diagnostic studies necessary to verify Patient 2 did, in fact, have chronic pain.
- The State did not prove:
- Count 32 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice" by treating Patient 2 for his opiate addiction under the guise of treating him for chronic pain.
- Count 34 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 2's opiate dependence, not for legitimate management of chronic pain.
- Count 35 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for

methadone - by writing that the methadone was "FOR CHRONIC PAIN" when, in fact, he was treating Patient 2's opiate dependence.

- The State did not prove that it was inappropriate to treat Patient 2 for chronic pain.

Patient 3 - (Counts 36-39)

Facts

84. According to the NEKHS therapist who did his initial assessment, Patient 3 posed a "major risk of return to substance abuse." Patient 3's medical records were admitted as Exhibit 7. T 83, 84
85. Respondent's diagnosis for Patient 3 was bi-polar depression and PTSD with a history of substance abuse. T 85
86. Patient 3's medical records indicate that Respondent agreed that the anticipated outcome of treatment was that Patient 3 would gain "more control of managing his extreme mood changes *without the use of substances.*" *Id.* (emphasis added)
87. Although Respondent originally prescribed medication that was appropriate for treatment of bi-polar depression and PTSD, Respondent began, after five months, to prescribe Methadone after making a note in the record of "mood disorder due to chronic pain." T85
88. Patient 3's medical records do not substantiate the "chronic pain" (e.g. no physical exam). *Id.* In fact, medical records indicate that one of Patient 3's complaints is for "back pain for which his primary care physician can find no medical cause." T 86
89. According to Investigator Ciotti, Respondent treated Patient 3 for opiate addiction with methadone without providing the "controlled conditions" in a clinical setting required under Board rules and federal law (e.g. 42 CFR 8.12 (h)). T89-90
90. Respondent wrote *eleven* prescriptions for methadone for Patient 3 during the period from Jun12, 2009 and October 26, 2009. Each of the prescriptions said the methadone was "FOR CHRONIC PAIN." However, although Respondent said that the source of the pain was substantiated with an MRI, the record contained no such MRI. T 91
91. At one point during treatment, after Patient 3 increased his own dosage of methadone and engaged in other drug-seeking behavior. Respondent indicated that he would discontinue methadone. However, Respondent resumed treating Patient 3 with methadone the following month. T 90, Exhibit 7

92. Agent Ciotti testified that he could not recall seeing any urinalysis reports in any of the medical records that he had reviewed. He said there was no record of a urinalysis for Patient 3. T 93

Conclusions

When he first came for treatment with Respondent, Patient 3 was considered a major “risk of return to substance abuse.” The plan was to treat Patient 3’s extreme mood changes “without substances.” Respondent did treat Patient 3 *without methadone* for five months. Respondent then began to prescribe methadone after noting Patient 3’s “mood disorder due to chronic pain.” After that, Patient 3 began to engage in increasingly aggressive drug-seeking behavior. Patient 3’s medical records do not substantiate the “chronic pain” that Respondent noted. Nevertheless, Respondent wrote eleven methadone prescriptions ostensibly to treat Patient 3’s “CHRONIC PAIN.”

The State has proven the following by a preponderance of the evidence:

- Count 36 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (1) (2) by performing unsafe patient care and failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 3 for his opiate addiction or opiate dependence under the guise of treating him for chronic pain.
- Count 37 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 3 for treatment of “chronic pain” without a thorough patient history, a physical examination and diagnostic studies necessary to verify Patient 3 did, in fact, have chronic pain.
- Count 38 – Respondent committed unprofessional conduct under 26 VSA § 1354 (a) (18) by engaging in consistent improper utilization of services by repeatedly prescribing methadone for treatment of Patient 3’s opiate dependence, not for legitimate management of chronic pain.
- Count 39 – Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the methadone was “FOR CHRONIC PAIN” when, in fact, he was treating Patient 3’s opiate dependence.

Patient 14 (Counts 40-43)

Facts

93. Patient 14 is deceased. His wife made the complaint against Respondent to Investigator Ciotti on April 6, 2010. She questioned why husband, who had hypertension, was being treated by a psychiatrist. She did not think the Respondent had done an “adequate job.” T 148-50
94. Patient’s Medical records were admitted as Exhibit 15. T147
95. These records cover the period from December 2008 through January 2010 when he died. Exhibit 15
96. Respondent took over Patient 14’s primary care after the death of Patient 14’s primary care physician. T 150
97. On December 30, 2008, Respondent diagnosed Patient 14 as having an “adjustment disorder mixed and atypical depression.” In early January, 2009, Respondent wrote “mood disorder secondary to chronic pain , adjustment disorder mixed
98. On January 5, 2009, Respondent prescribed methadone for Patient 14 “FOR CHRONIC PAIN.” Exhibit 20
99. Patient 14 had no pain. The medication made him sick. He returned the methadone to Respondent. T 151
100. Respondent failed to take vital signs in 12 for 26 office visits from Patient 14. Physicians at the Board’s Central Committee did not believe, after reviewing the medical records, that Respondent had provided adequate treatment for hypertension. T153-54
101. Respondent specifically denied several of the allegations related to his treatment of Patient 14 in a June 8, 2010 letter from his attorney, Eileen Elliot to Investigator Ciotti. Respondent’s B.

102. Respondent points out that Patient 14 died on January 18, 2010. Respondent resigned from NEKHS on December 16, 2010 and wrote his last prescription for Patient 14 on, or before, December 7, 2010. Respondent says that after “early December” 2009, “all of” Patient 14’s prescriptions were written by NEKHS practitioners William Cody and L. Cargill. *Id.*

103. Respondent says that Patient 14 “did not present with hypertension or cardiac issues nor did he consult a physician for these issues.” *Id.*

Conclusions

Patient 14 had been treated for hypertension by his previous physician. He did not complain of pain, nor did he have a history of pain. Shortly after he began treating Patient 14, he prescribed methadone “FOR CHRONIC PAIN.” Methadone made feel him sick and he returned the medication.

Respondent treated Patient 14 for approximately one year. Patient 14’s medical records support the determination of the physician members of the Board’s Central Committee - Respondent did not provide adequate treatment for Patient 14’s hypertension.

The State has proven by a preponderance of the evidence.

- Count 40 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (2) by failing to conform to the essential standards of acceptable and prevailing practice” by treating Patient 14 for chronic pain when his medical records did not substantiate that he had chronic pain.
- Count 41- Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by gross failure on a particular occasion to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by prescribing methadone for Patient 14 for treatment of “chronic pain” without a thorough patient history, a physical examination and diagnostic studies necessary to verify Patient 14 did, in fact, have chronic pain.
- Count 43– Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (8) – willfully creating a false record in order to deceive a pharmacist to fill the prescription for methadone - by writing that the Methadone was “FOR CHRONIC PAIN” when , in fact, he had no reasonable basis for asserting that patient 14 had “chronic pain.”

The State did not prove:

- Count 42 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (a) (22) by repeatedly failing to exercise the degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, by failing to meet the standard of care for treatment of hypertension in his treatment of Patient 14.
- The State failed to prove that Respondent failed to meet the standard of care for treatment of Patient 14's hypertension.

Patient #15

Facts

104. Respondent treated Patient 15 for ADD and anxiety. T 158

105. While Patient 15 was Respondent's patient, Respondent paid Patient 15's Medicaid co-pay on one occasion, paid Patient 15's cab fare "to get out of the Northeast Kingdom for an appointment and hired Patient 15 to do odd jobs around Respondent's new office. T 157

Conclusions

The State did not prove:

- Count 44 - Respondent engaged in unprofessional conduct under 26 VSA § 1354 (b) (2) by failing to conform to the essential standards of acceptable and prevailing practice.
- The State did not prove that the alleged conduct failed to conform to essential standards of accepted practice.

Patient 16 (Counts 45 and 46)

Facts

106. Mark Beattie of NEKHS brought Patient 16 to Investigator Ciotti. Beattie had been alerted by Gail Middlebrook, also of NEKHS. T 194

107. Patient 16 told Ciotti that Respondent had said things that he made him (Patient 16) feel uncomfortable. For instance:

- “If you keep giving me handshakes and hugs like that, I won’t need to charge you.” T194
- ‘You are a good looking guy and a beautiful human being.’ T 195
- Patient 16 “felt like he was being hit on and that he didn’t want to be treated by Dr. Frank anymore.” T 196

108. Respondent said that he tries to make all his patients feel good about themselves. He reported that Patient 16 had sought Respondent’s services on two occasions “AFTER I allegedly so negatively impacted “Patient 16’s “emotional well being.” Respondent’s A

Conclusions

The State did not prove:

- Count 45 – Respondent engaged in unprofessional conduct in violation of 26 VSA 1354 (24) because he violated 18 USC 1852 (a) (1) by failing to honor and recognize Patient 16’s “personal dignity.”
- Count 46 - Respondent engaged in unprofessional conduct in violation of 26 VSA 1354 (b) (2) because he did not conform to the essential standards of accepted and prevailing practice in his relationship with Patient 16.
- The State, which relied in largely on hearsay evidence, did not prove that the conduct alleged actually took place.

Patient 17 (Count 47)

Facts

109. Patient 17 was in prison pending trial on a sexual assault charge. Respondent had been his treating psychiatrist before Patient 17 was jailed for lack of bail. T 198-99

110. Although the State had evidence concerning recorded conversations that Respondent allegedly had with Patient 17, it elected *not to introduce evidence of these conversations*. T 201-202

111. Respondent made three deposits totaling \$110 in Patient 17's account during a two-month period while Patient 17 was in prison pending trial. T 204

112. Respondent admitted accepting collect calls from Patient 17. He also admitted placing "small amounts of money in his account at jail." Respondent said he was "appalled and discouraged" that this conduct was a basis for an unprofessional conduct charge. He pointed out that this conduct could be considered admirable if he weren't Patient 17's "former psychiatrist." Respondent's A

Conclusions

The state proved the following by a preponderance of the evidence:

Count 47 - Respondent engaged in unprofessional conduct in violation of 26 VSA 1354 (b) (2) because he did not conform to the essential standards of accepted and prevailing practice in his relationship with Patient 17

Order

As the Proposed Findings of Fact demonstrate, the State has proven that the Respondent engaged in repeated acts of unprofessional conduct⁸ during a period from April 22, 2008 through January 9, 2011. These acts included: (1) treating patients with methadone under the guise of treating them for "chronic pain" when, in fact, he was treating their opiate dependence or addiction; (2) writing more than 130 false prescriptions - prescriptions Respondent wrote "FOR CHRONIC PAIN" - when he had failed to substantiate through patient history, physical exams and diagnostic studies that the patients had chronic pain and Respondent was, in fact, treating the patients' opiate dependence or addiction; (3) prescribing methadone for a patient who Respondent had diagnosed as having "severe addictive potential" even though the patient had not been taking any medication when Respondent began treating him, thereby substantially increasing the patient's chances of becoming "re-addicted;" and (4) treating patients with methadone for their opiate addiction outside of a controlled, clinical setting in violation of federal regulations.

⁸ The State proved that Respondent engaged in 36 acts of unprofessional conduct.

Respondent engaged in repeated acts of reckless, often dangerous, practice for a prolonged period. Some of this conduct occurred after he had been warned by his employer that his prescribing practices were inappropriate. The Committee has concluded that Respondent represents a danger to the public as long as he continues to practice medicine.

Accordingly, the Committee recommends that the Board REVOKE Respondent's license to practice medicine pursuant to its authority under 26 VSA §1361 (b).⁹¹ The Committee recommends further that the Board shall not consider a petition for license reinstatement or any other license application from Respondent for a period of at least seven years beginning on the effective date of this order.

The Vermont Board of Medical Practice hereby adjudges and orders that the Committee's Proposed Findings, Conclusions and Order are adopted. Dr. Frank's license to practice medicine is REVOKED pursuant to the Board's authority under 26 VSA §1361 (b). The Board shall not consider a petition for license reinstatement or any other license application from Respondent for a period of at least seven years beginning on the effective date of this order.

Patricia King, M. D., PHD
Chair

⁹ 26 VSA §1361 (b) "In such order, the board may reprimand the person complained against, as it deems appropriate; condition, limit, suspend or revoke the license or practice of the person complained against; or take such other action relating to discipline or practice as the board determines is proper."

The Vermont Board of Medical Practice hereby adjudges and orders that the Proposed Decision and Order of the Hearing Committee are adopted.

Signed on behalf of the Board of Medical Practice pursuant to 3 V.S.A 812(b)

Patricia A. King MD PhD

Patricia A. King, MD, PhD
Board Chair

7/7/11

Date