

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

v.

CASE NO.: 2020-04326

MICHAEL KILCHENSTEIN, M.D.,

Respondent.

ADMINISTRATIVE COMPLAINT

Petitioner, Department of Health, files this Administrative Complaint before the Board of Medicine against Respondent, Michael Kilchenstein, M.D., and in support thereof alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to section 20.43, Florida Statutes; chapter 456, Florida Statutes; and chapter 458, Florida Statutes.

2. At all times material to this Complaint, Respondent was a licensed medical doctor within the state of Florida, having been issued license number ME 106162.

3. Respondent's address of record is 121 Bears Paw Trail, Naples, Florida, 34105.

4. Respondent is Board Certified in Psychiatry by the American Board of Psychiatry and Neurology.

5. At all times relevant to this complaint, Respondent treated Patient M.M., a thirty-five (35) year old male, for Schizoaffective Disorder, Attention Deficit Disorder (ADD), and anxiety.

6. Patient M.M. had a past medical history of schizophrenia, bipolar disorder, and drug use. Patient M.M. had been admitted to the hospital on numerous occasions due to drug overdoses and other medical emergencies arising from substances abuse.

7. Over the course of treatment, Respondent prescribed Patient M.M. benzodiazepines and amphetamines, such as Lorazepam¹, Clonazepam², Xanax³ and Adderall⁴.

8. Respondent failed to create or keep documentation explaining why he prescribed each controlled substance.

¹ Lorazepam, commonly known by the brand name Ativan, is a benzodiazepine used to treat anxiety. According to Title 21, section 1308.14, Code of Federal Regulations, Lorazepam is a Schedule IV controlled substance. Schedule IV substance have medical purposes but also some potential for abuse and dependence.

² Clonazepam, commonly known by the brand name Klonopin, is a benzodiazepine used to treat anxiety. According to Title 21, section 1308.14, Code of Federal Regulations, Clonazepam is a Schedule IV controlled substance. Schedule IV substance have medical purposes but also some potential for abuse and dependence.

³ Xanax, the brand name for Alprazolam, is a benzodiazepine used to treat anxiety. According to Title 21, section 1308.14, Code of Federal Regulations, Xanax is a Schedule IV controlled substance. Xanax, like all benzodiazepines may lead to physical and/or psychological dependence, especially when used at higher doses and/or for longer periods of time.

⁴ Adderall is an amphetamine used to treat Attention Deficit Hyperactivity Disorder (ADHD). According to Title 21, section 1308.12, Code of Federal Regulations, amphetamines are Schedule II controlled substances. Schedule II controlled substances have a high potential for abuse which may lead to severe psychological or physical dependence.

9. Respondent failed to create or maintain documentation identifying Patient M.M.'s specific complaints or medical conditions that would necessitate the use of each controlled substance.

10. Respondent did not perform, or did not create or keep documentation of performing, a thorough medical and/or substance abuse history of Patient M.M.

11. Respondent failed to create or maintain documentation assessing the risk of prescribing controlled substances to Patient M.M.

12. Respondent was informed that Patient M.M. was being treated at the local Veteran Affairs (VA) clinic, however Respondent made no effort to obtain Patient M.M. medical records or speak to the physicians at the VA clinic to coordinate treatment.

13. Respondent did not communicate, or did not create or keep documentation of communicating, with Patient M.M.'s other treating medical providers.

14. Respondent failed to create or maintain documentation periodically reviewing the course of treatment, Patient M.M.'s improvement while taking the prescribed medication, or alternative treatment methods.

15. Respondent refilled Patient M.M.'s prescriptions without explaining why the medication needed to be refilled or documenting Patient M.M.'s symptoms or response to the prescribed medications.

16. Respondent failed to create or maintain documentation identifying a specific a treatment plan with treatment goals for Patient M.M.

17. Respondent failed to monitor, or failed to create or keep documentation of monitoring, Patient M.M.'s compliance with controlled substance prescriptions.

18. Respondent did not create or keep documentation of adequate justification for continuing to prescribe Schedule II and IV controlled substances to Patient M.M.

Standard of Care

19. The prevailing professional standard of care for a physician who is treating a patient for complaints including but not limited to chronic pain in the lower back, neck, shoulder, knee, and headaches requires a physician to:

- a. Perform a thorough medical history of the patient;
- b. Perform a thorough mental health history of the patient;
- c. Perform a thorough substance use history of the patient;

- d. Obtain a release of patient information to access the patient's medical records from the patient's other treating medical providers;
- e. Communicate with the patient's other treating medical providers to verify patient's medical history and coordinate treatment;
- f. Monitor the patient's compliance with controlled substance prescriptions; and/or
- g. Create a treatment plan with treatment goals.

20. The Florida Board of Medicine has also adopted rule 64B8-9.013(3), Standards for the Use of Controlled Substances for the Treatment of Pain, which requires a physician to do the following:

- a. Obtain a complete medical history and physical examination conducted and documented in the medical record;
- b. Develop a written treatment plan that states objectives that will be used to determine treatment success;
- c. Be willing to refer the patient as necessary for additional evaluation and treatment in order to achieve treatment objectives; and

- d. Keep accurate and complete records such as treatment objectives, discussion of risks and benefits of treatments, medications, and drug testing results.

Count I – Violation of Section 458.331(1)(t)

21. Section 458.331(1)(t), Florida Statutes (2011-2019), subjects a licensee to discipline for committing medical malpractice as defined in section 456.50, Florida Statutes. Section 456.50(1)(g), Florida Statutes (2011-2019), states medical malpractice means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Section 766.102, Florida Statutes (2011-2019), provides that the prevailing standard of care for a given healthcare provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

22. Respondent fell below the minimum standard of care in his treatment of Patient M.M. in one or more of the following ways:

- a. By failing to perform a thorough medical history of Patient M.M.;
- b. By failing to perform a thorough mental health history of Patient M.M.;

- c. By failing to perform a thorough substance abuse history of Patient M.M.;
- d. By failing to obtain a release of information to access the Patient M.M.'s medical records from Patient M.M.'s other treating medical providers;
- e. By failing to communicate with the Patient M.M.'s other treating medical providers to verify his medical history and coordinate treatment;
- f. By failing to create a treatment plan with treatment goals for Patient M.M.;
- g. By prescribing Patient M.M. Schedule II and IV controlled substances without a legitimate and/or adequate medical reason; and/or
- h. By failing to monitor Patient M.M.'s compliance with controlled substance prescriptions.

23. Based on the foregoing, Respondent violated section 458.331(1)(t), Florida Statutes (2011-2019), by committing medical malpractice.

Count II – Violation of Section 458.331(1)(m)

24. Section 458.331(1)(m), Florida Statutes (2011-2019), subjects a licensee to discipline for failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

25. Section 458.331(1)(nn), Florida Statutes (2011-2019), provides that violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto constitutes grounds for disciplinary action by the Board of Medicine.

26. Rule 64B8-9.003, F.A.C., the board's rule, states in relevant part, regarding medical records provides in subsection (3):

64B8-9.003 Standards for Adequacy of Medical Records.

(3) The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results;

test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

27. In the alternative to Count I, Respondent failed to create or keep medical records during Patient M.M.'s treatment period in one or more of the following ways:

- a. By failing to create or keep documentation of performing a thorough medical history of Patient M.M.;
- b. By failing to create or keep documentation of performing a thorough substance abuse of Patient M.M.;
- c. By failing to create or keep documentation explaining why he prescribed each controlled substance;
- d. By failing to create or keep documentation of creating a treatment plan with treatment goals for Patient M.M.;
- e. By failing to create or keep documentation of communicating, with Patient M.M. 's other treating medical providers.
- f. By failing to create or keep documentation providing adequate justification for continuing to prescribe Schedule II and IV controlled substances to Patient M.M.; and/or

g. By failing to create or keep documentation of monitoring Patient M.M.'s compliance with controlled substance prescriptions.

28. Based on the foregoing, Respondent has violated section 458.331(1)(m), Florida Statutes (2011-2019), and/or section 458.331(1)(nn), Florida Statutes (2011-2019), by violating Rule 64B8-9.003 F.A.C.

WHEREFORE, the Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate.

[SIGNATURE ON THE FOLLOWING PAGE]

SIGNED this 25th day of February, 2022.

Joseph A. Ladapo, MD, PhD
State Surgeon General

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DEPARTMENT OF HEALTH
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CLERK: *Elizabeth Subanks*
DATE: **FEB 25 2022**

PCP: February 25, 2022

PCP Members: Georges El-Bahri, M.D.; David Diamond, M.D.; Andre Perez

JR/dm

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

A request or petition for an administrative hearing must be in writing and must be received by the Department within 21 days from the day Respondent received the Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code. If Respondent fails to request a hearing within 21 days of receipt of this Administrative Complaint, Respondent waives the right to request a hearing on the facts alleged in this Administrative Complaint pursuant to Rule 28-106.111(4), Florida Administrative Code. Any request for an administrative proceeding to challenge or contest the material facts or charges contained in the Administrative Complaint must conform to Rule 28-106.2015(5), Florida Administrative Code.

Mediation under Section 120.573, Florida Statutes, is not available to resolve this Administrative Complaint.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition to any other discipline imposed.