

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

**WEST VIRGINIA BOARD OF
MEDICINE,**

Petitioner,

v.

Complaint No: 13-138-W

SHIVKUMAR LAKSHMINARAYAN IYER, M.D.,

Respondent.

FINAL ORDER

This proceeding arises pursuant to the West Virginia Medical Practice Act at W. Va. Code § 30-1-1 *et seq.* It is a disciplinary proceeding involving the status of the license to practice medicine and surgery in the state of West Virginia of Shivkumar Lakshminarayan Iyer. The West Virginia Board of Medicine (hereinafter "Board") is the duly authorized state agency to oversee and conduct physician disciplinary hearings pursuant to the provisions of W. Va. Code § 30-3-14.

Pursuant to W. Va. Code R. § 11-3-18.2, and upon review of the record in the above-styled matter, a quorum of the Board at its regularly scheduled meeting on January 11, 2016, considered the Hearing Examiner's recommendations and, hereby **ADOPTS**, in its entirety, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law, and Recommended Decision, dated December 15, 2015, which is attached hereto and incorporated by reference herein.


Final Order
Shivkumar Lakshminarayan Iyer, M.D.


Based on the Hearing Examiner's Findings of Fact and Conclusions of Law, the allegations as outlined in the Board's *Statement of Charges* are sustained in their entirety. Dr. Iyer violated the Board's statutes and rules and is unfit to practice medicine and surgery in the state of West Virginia.

As such, the Board hereby **ORDERS** as follows:

1. That the Respondent's license to practice medicine and surgery in the state of West Virginia is hereby **REVOKED**, effective upon entry of this *Final Order*;
2. That the Respondent shall pay all the costs and expenses associated with these proceedings, including but not limited to, the Hearing Examiner's costs, court reporter, the expert witness, and outside counsel employed by the West Virginia Attorney General's Office, and all other costs of the investigation and prosecution of this matter. Payment shall be made by Dr. Iyer to the Board within thirty dates of issuance of an Invoice by the Board.

WEST VIRGINIA BOARD OF MEDICINE


Ahmed Daver Faheem, M.D.
President


Rahul Gupta, M.D., M.P.H.
Secretary

Final Order

Shivkumar Lakshminarayan Iyer, M.D.

This Order shall be deemed entered on the date that this Order, with all required signatures affixed hereupon, is received in the Board's 101 Dee Drive, Charleston, West Virginia office. The Executive Director of the West Virginia Board of Medicine is hereby authorized to denote the date of entry on behalf of the Board in accordance with this paragraph.

ENTERED this 11th day of January, 2016.

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE HEARING EXAMINER

**WEST VIRGINIA BOARD OF MEDICINE,
Petitioner**

v.

COMP. No. 13-138-W

**SHIVKUMAR LAKSHMINARAYAN IYER, M.D.,
Respondent**

**HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED DECISION**

PROCEDURAL HISTORY

By Order of the Board of Medicine on February 26, 2015, the Respondent's license to practice medicine and surgery in West Virginia was summarily suspended pursuant to West Virginia Code Section 30-3-14 (k). *Hearing Examiner's Exhibit 1*. The Board simultaneously issued a Notice of Hearing to Respondent, instituting proceedings for a hearing upon the summary discipline and the underlying charges, and notifying Respondent that said hearing would commence on March 9, 2015. The purpose of the hearing was to receive evidence regarding the allegations set forth in the contents of the Board's Order of Summary Suspension of License to Practice Medicine and Surgery and Notice of Hearing, and the charges of professional misconduct set forth in the Amended Initiated Complaint, No. 13-138-W. Respondent received personal service of the Order of Summary Suspension of License to Practice Medicine and Surgery and Notice of Hearing on Thursday, February 26, 2015. *Hearing Examiner's Exhibit 1*.

On or about March 5, 2015, Respondent, through counsel, filed a Motion to Continue the March 9, 2015, hearing. Hearing Examiner's Exhibit 2. In association with his request for a continuance, Respondent executed a Waiver of certain rights as set forth in West Virginia Code Section 30-3-14(k): (1) a waiver of the requirement that a hearing be held within fifteen (15) days of the Board's Order of Summary Suspension of License to Practice Medicine and Surgery and Notice of Hearing; (2) a waiver of any implicit or explicit requirement that the rescheduled hearing be convened before a quorum of Board members; (3) agreement that the rescheduled hearing occur before the duly assigned hearing examiner, with an opportunity for the parties to submit proposed findings of fact and conclusions of law for consideration by the hearing examiner after the conclusion of the proceedings and before a recommended decision is issued in conformity with Board Legislative Rule Section 11-3-13.1; (4) a waiver of the requirement that the Board issue a decision regarding the suspension of the Respondent's license within five (5) days of the conclusion of the hearing, and (5) agreement that such a decision shall be rendered in conformity with Board Legislative Rule Section 11-3-18. Hearing Examiner's Exhibit 4. Pursuant to Respondent's Motion and executed Waiver, the proceedings in this matter were continued and subsequently rescheduled by agreement of the parties to commence on May 7, 2015, at 9:30am. Hearing Examiner's Exhibits 4, 6, 7, 8.

This matter came on for hearing on May 7, 2015, in the Hearing Room of the Board of Medicine, 101 Dee Drive, Charleston, West Virginia, and continued on May 8, 2015, June 5, 2015, July 1, 2015, and July 8, 2015. The hearing was recorded by a certified court reporter. See Transcripts 1, 2, 3, 4, 5 [Tr. Vol. 1, 2, 3, 4, 5.] At hearing, the Petitioner, West Virginia Board of Medicine [Board] was represented by Board Attorney, Jamie S.

Alley, Esquire, and by Board Executive Director, Robert C. Knittle. The Respondent appeared in person and was represented by Mark Hobbs, Esquire, and William T. Forester, Esquire. Hearing Examiner's Exhibit 9. To establish and preserve the pre-hearing administrative record, twenty two (22) exhibits, which comprise the prehearing proceedings and filings of the parties, were marked and entered as Hearing Examiner's Exhibits. See Hearing Examiner's Exhibits 1-22. At hearing, the Board offered ninety-three (93) exhibits in support of its complaint against Respondent. Each of the Board's exhibits were admitted into evidence and made part of the record, although some were introduced for limited purposes and/or over the objection of Respondent. See Board's Exhibits 1-93. To the extent that any exhibit admitted into evidence but is not referenced herein, such exhibit has not been considered or relied upon by the hearing examiner in formulating these Findings of Fact, Conclusions of Law or this Recommended Decision. Respondent offered no exhibits into evidence at hearing.

The public hearing was transcribed, and the parties were given the opportunity to request a copy of the transcript. W. Va. Code R. §11-3-12.3. After consultation with counsel, the hearing examiner set a briefing schedule, permitting the parties to provide proposed findings of fact and conclusions of law on or before September 3, 2015, and reply briefs on or before September 17, 2015.

On or about September 1, 2015, counsel for Respondent sought an extension of the deadline to file post-hearing submissions in this matter. Attachment A. On September 3, 2015, Respondent executed an Acknowledgment and Waiver. Attachment B. On September 3, 2015, the hearing examiner granted Respondent's motion and issued an Order to extend the timelines, pursuant to agreement by the parties. Attachment C. The

parties timely filed Proposed Findings and Conclusion on October 20, 2015. Attachment D [West Virginia Board of Medicine's Proposed Findings of Fact, Conclusions of Law and Recommended Decision]; Attachment E [Respondent's Proposed Findings of Fact and Conclusions of Law]. Petitioner filed a timely response on November 3, 2015. Attachment F [Petitioner's Reply in Objection to Respondent's Proposed Findings of Fact and Conclusions of Law]. Respondent filed no Response.

MOTIONS

Upon a motion by the Board, and in accord with West Virginia Code §30-3-14(p), all patient records, prescription data, and exhibits which include personally identifiable information regarding Respondent, third parties, patients and/or former patients of Respondent have been placed under seal to protect the privacy of persons who have not expressly waived the confidentiality of their personal and/or medical information. All references to specific patients in the record and herein shall utilize the confidential patient key designations. The patient key is on file, under seal, as Board's Exhibit 1.

All decisions rendered at the public hearing in this case on motions filed or otherwise made by the parties are hereby affirmed, and all motions filed or otherwise made in this case by either of the parties which were not previously ruled upon by the Hearing Examiner are hereby denied and rejected. After a review of the complete record, any matter of which judicial notice was taken during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the following findings of fact and conclusions of law are hereby made. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. To the extent that these findings of fact and conclusions of law are consistent with

any proposed findings of fact and conclusions of law submitted by either of the parties, the same are adopted by the hearing examiner. To the extent that these findings of fact and conclusions of law are inconsistent with any proposed findings of fact or conclusions of law submitted by the parties, such proposals are hereby rejected. Any proposed finding of fact, conclusion of law or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

FINDINGS OF FACT

1. Respondent, Shivkumar Lakshminarayan Iyer, M.D., holds License No. 18736 to practice medicine and surgery in the State of West Virginia. Respondent is a Psychiatrist. Board's Exhibit 9; Tr. Vol. I p. 196.

2. Respondent's West Virginia medical license was first issued on September 9, 1996. Board's Exhibit 9.

3. On May 13, 2002, the Board entered an Order of Summary Suspension of License to Practice Medicine and Surgery with Notice of Hearing with respect to Respondent. The Order summarily suspended Respondent's West Virginia medical license for alleged violations of the West Virginia Medical Practice Act and/or the West Virginia Board of Medicine Legislative Rules. A public hearing was scheduled in the matter. Board's Exhibit 11, pp. 000484-000494.

4. In lieu of hearing on the allegations set forth in the Order of Summary Suspension, on July 22, 2002, Respondent entered into a Consent Order with the Board. Respondent acknowledged "a lapse in judgment relating to certain behaviors." In such Consent Order, Respondent agreed to the propriety of the continued suspension of his medical license and agreed to undergo evaluation at Colorado Personalized Education for

Physicians to determine his fitness to practice medicine and to determine what, if any, restrictions should be imposed upon his practice. Board's Exhibit 11, pp. 000474-000482.

5. Respondent's West Virginia license remained in suspended status until July 12, 2004. Board's Exhibits 9, 11, pp. 000468-000473.

6. On July 12, 2004, the Board and Respondent entered into a Consent Order subjecting Respondent's medical license to a stayed revocation and an active probationary period of five years. The Consent Order permitted Respondent to return to the active practice of medicine in West Virginia pursuant to the terms, conditions, restrictions and limitations imposed by the Consent Order. Such conditions included the following: a prohibition on solo practice; a requirement that Respondent practice under the supervision and/or monitoring of another physician; a requirement that Respondent remain under the care of a treating psychiatrist for the duration of his stayed revocation/period of probation; and an agreement that Respondent would submit to random and unannounced drug and alcohol testing. Board's Exhibits 9, 11, pp. 000468-000473.

7. Respondent complied with the conditions of the Consent Order and completed the five (5) year period of stayed revocation/probation on July 12, 2009. At that time, Respondent's license was restored to active, unrestricted status. Since that time, Respondent has continually practiced medicine in West Virginia. Tr. Vol. 1, pp. 196-200; Board's Exhibits 9, 11, p. 000467.

8. On or about October 4, 2013, the West Virginia Board of Medicine received investigative reports prepared by the Office of Inspector General Division of Audits and Investigations for the Commonwealth of Kentucky Cabinet for Health and Family Services

[Kentucky OIG] which pertained to three (3) West Virginia Board of Medicine licensees, including Respondent. Tr. Vol. II p. 16; Tr. Vol. III pp. 119-120; Board's Exhibit 12.

9. The Board's Complaint Committee is responsible for reviewing and investigating complaints against Board licensees and/or initiating its own complaints upon receipt of a report or third-party or anonymous concern. The three (3) Kentucky OIG reports were placed on the Complaint Committee's next scheduled agenda for review and consideration. At the Complaint Committee's November 17, 2013, meeting, the committee reviewed and considered such information. Based upon the Kentucky OIG reports, the Complaint Committee initiated complaints to further investigate the reported allegations against each of the three (3) licensees, including Respondent. Tr. Vol. I p. 192; Tr. Vol. II pp. 20-21; Tr. Vol. III p. 120; Board's Exhibits 12, 13.

10. The Complaint Committee directed Leslie Inghram, Supervisor of the Investigation and Complaints Section for the West Virginia Board of Medicine and Investigator for the Board, to investigate the initiated complaint against the Respondent. Tr. Vol. III pp. 104-109; 119-120; Tr. Vol. IV pp. 62-65.

11. The Initiated Complaint against Respondent, Complaint No. 13-138-W, set forth certain areas of concern based upon the Kentucky OIG report and identified potential violations of the West Virginia Medical Practice Act and/or the rules of the Board, including potential violations relating to improper prescribing and/or dishonorable, unethical or unprofessional conduct. Board's Exhibit 13.

12. In early December 2013, Respondent's mailing address of record with the Board was 215 Logan Street, Suite 21 Williamson, West Virginia. Initiated Complaint No. 13-138-W was sent to Respondent, via certified mail, at his address of record. Such

complaint was returned to the Board as unclaimed and unable to forward on December 11, 2013. Tr. Vol. II pp. 21; Tr. Vol. III pp. 120-121; Board's Exhibits 9, 13.

13. When certified mail service of the Complaint Committee's Initiated Complaint was unsuccessful, Investigator Inghram investigated and located Respondent's current place of practice. In December, 2013, Respondent's place of practice was the Logan Treatment Center located on George Kostas Drive in Logan, West Virginia. Investigator Inghram scheduled an appointment and met with Respondent on December 20, 2013, at the Logan Treatment Center, at which time Inspector Inghram personally served the Respondent with Initiated Complaint and a *subpoena duces tecum* for copies of the medical records for each of the patients identified on the Kentucky OIG Report. Investigator Inghram also provided Respondent with a copy of the Kentucky OIG report. Tr. Vol. III pp. 122-125; Tr. Vol. IV pp. 64-65; Board Exhibits 12, 13, 49.

14. The West Virginia Controlled Substance Monitoring Program is operated by the West Virginia Board of Pharmacy and maintains a database of all controlled substances dispensed in West Virginia. Tr. Vol. III pp. 112-113.

15. The West Virginia Controlled Substance Monitoring Program database can be utilized to track controlled substance prescriptions which are dispensed in West Virginia by searching a prescriber's prescribing history or by searching a patient's prescription history. Tr. Vol. III p. 114.

16. Other states have similar prescription monitoring programs. The Kentucky prescription monitoring program which tracks controlled substance prescriptions dispensed in Kentucky is named KASPER. Tr. Vol. III p. 114.

17. A patient is not required to have a prescription dispensed within the borders of the state where it was written. Tr. Vol. III p. 114.

18. On December 31, 2013, and in response to the *subpoena duces tecum* served upon Respondent on December 20, 2013, Respondent submitted a written request for an extension of time to produce the requested medical records. The Board agreed to his request for additional time to produce those records. Tr. Vol. III p. 134; Board's Exhibit 52.

19. On January 10, 2014, the Board received a second extension request on behalf of Respondent with respect to complying with the December 20, 2013, *subpoena duces tecum* for the requested medical records. In that request, Respondent averred that he was unable to produce the responsive records because the landlord was restricting such access due to a dispute. The Board again agreed to extend the response time. Tr. Vol. III pp. 135-136, Board's Exhibit 53.

20. In July, 2012, Respondent rented medical office space in Williamson, West Virginia, from Kapourales Properties, owned and operated by Sam Kapourales. When Respondent vacated the premises, Respondent's patient records remained at that location. In December, 2013, and January, 2014, despite a financial dispute with his former landlord, Respondent had access to his patients' records located in his former Williamson medical office. In February, 2014, Respondent brought a civil action against Kapourales Properties and Sam Kapourales. Such action is pending. Respondent Tr. Vol. I p. 159-186; Tr. Vol. III pp. 133, 144; Board's Exhibit 7, 54, 55.

21. Respondent did not comply with the Board's December, 2013, *subpoena duces tecum* for certain patient records. At the May, 2014, meeting, the Complaint

Committee directed that a *subpoena duces tecum* be issued to Respondent for records relating to his current patients. Tr. Vol. III pp. 144-145; Tr. Vol. IV, p. 75.

22. Patient selection for the newly authorized subpoena was determined by a common method which is similar to the criteria identified by the Kentucky OIG in its report to the Board. Such method includes, but is not limited to, a review of prescriber information for Respondent's controlled substance prescriptions through controlled substance monitoring program data and consideration of the following information: similar names and addresses of patients, patient age, the combination of prescriptions with the potential for diversion or abuse, the length of travel time for the patient to the physician and the number of pharmacies utilized by the patient to receive dispensed prescriptions. Tr. Vol. III pp. 145-149; Board's Exhibits 56, 57.

23. A second *subpoena duces tecum* was issued to the Respondent on June 9, 2014, for copies of the medical records for certain of Respondent's current patients. Tr. Vol. III p. 149; Board's Exhibit 58.

24. Investigator Inghram attempted to personally serve Respondent with the June 9, 2014, *subpoena duces tecum* on June 11, 2014. However, the Inspector was unable to serve the subpoena on June 11, 2014, because the Inspector determined, upon information and observation, that the Respondent was not present at his place of work, Logan Treatment Center, on that date. On June 18, 2014, Investigator Inghram made a second attempt to serve the subpoena on the Respondent. Inspector Inghram made a request to the West Virginia State Police dispatch for a police escort to serve the subpoena. Inspector Inghram routinely coordinates her fieldwork with law enforcement when she believes that a safety concern may exist. Dispatch assigned Sergeant Eric

Sherrill, Mingo County Sheriff's Department, and Special Agent Todd Berry, Federal Bureau of Investigation, to accompany Inspector Inghram while she served Respondent with the subpoena on June 18, 2014, at the Logan Treatment Center in Logan, West Virginia. Tr. Vol. III pp. 47-52, 73-88, 111, 149-150, 154-157.

25. In June, 2014, John Case was an employee of the Logan Treatment Center. Mr. Case's father is a long-time friend of Terry Scott, owner of the Logan Treatment Center. As part of his job duties for the Logan Treatment Center, Mr. Case drove the Respondent between the Treatment Center and his home in Beckley, West Virginia, and also drove Respondent to the grocery store. Respondent customarily slept while Mr. Case drove the approximately one and one half (1 ½) to two (2) hours from Respondent's home to the Logan Treatment Center. Tr. Vol. I at 58-61, 63, 75-76.

26. On June 18, 2014, Respondent arrived at the Logan Treatment Center in a white SUV driven by Mr. Case. Mr. Case and the Respondent exited the vehicle and Investigator Inghram identified Respondent for Sergeant Sherrill and Special Agent Berry. After Respondent exited the vehicle, Investigator Inghram called out to Respondent and approached him. Respondent walked toward Investigator Inghram, Sergeant Sherrill and Special Agent Berry. The Driver, John Case, watched for a few minutes and then went into the treatment center and told an employee that Respondent was speaking with a lady in the parking lot. Tr. Vol. I pp. 52-54, 79-80, 159.

27. Sergeant Sherrill, Special Agent Berry and Investigator Inghram have training and experience in identifying signs and symptoms of impairment and intoxication. Tr. Vol. III pp. 49-50, 75-76, 106-107; Tr. Vol. IV, pp. 73-74.

28. On June 18, 2014, when Respondent approached Inspector Inghram in the parking lot of the Logan Treatment Center, Respondent was disheveled and was wearing visibly soiled clothing. Respondent's gait was unbalanced and uneven and he swayed when standing in one spot. Respondent recognized and spoke to Investigator Inghram about the subpoena. Respondent's speech was slurred and unclear. Respondent was visibly impaired. Tr. Vol. I pp. 60-86; Tr. Vol. III pp. 54-57, 70, 81-84, 90-98 159-161.

29. Respondent was served with the Board's subpoena by Inspector Inghram. Terry Scott came out of the clinic and joined in the conversation with Inspector Inghram and Respondent. Mr. Scott held onto Respondent's arm and walked the Respondent away from Inspector Inghram. Tr. Vol. III pp. 56-57, 163-164.

30. Subsequently, Respondent treated patients at the Logan Treatment Center on June 18, 2014, including prescribing controlled substances to patients. Tr. Vol. III p. 165.

31. Respondent complied with the Board's subpoena served upon him on June 18, 2014. On July 11, 2014, Respondent produced medical records for the sixteen (16) patients identified in the Board's subpoena. Tr. Vol. III p. 179; Board's Exhibits 24-39, 59.

32. Investigator Inghram reported her observations of Respondent's comportment on June 18, 2014, to the Complaint Committee at its next regular meeting on July 13, 2014. Based upon the information regarding Respondent's comportment on June 18, 2014, Respondent's subsequent treatment of patients on June 18, 2014, the Board's obligation to protect the public interest, and out of concern for Respondent's well-being, the Complaint Committee requested that the full Board authorize the issuance of an Order requiring the Respondent to submit to a mental and physical evaluation, to include drug

testing, by a physician or physicians approved by the Board, pursuant to West Virginia Law. Tr. Vol. II p. 83; Tr. Vol. III p. 190; Board's Exhibit 2.

33. On July 14, 2014, the Board ordered that the Respondent, known to the Board at that time only as "Physician A," to participate in a mental and physical examination to determine his fitness to practice medicine safely. Tr. Vol. I p. 85; Board's Exhibit 2.

34. The Board determined that the mental and physical examination should occur as soon as possible, and such examination was scheduled for Thursday, July 17, 2014. Respondent was personally served with the Order Requiring a Mental and Physical Examination at his home in Beckley, West Virginia, on July 14, 2014. Tr. Vol. III p. 191; Board's Exhibit 2.

35. On or about July 16, 2014, through counsel, Respondent requested that the Mental and Physical Examination scheduled on July 17, 2014, be postponed in order for the Respondent to have ample time to exercise his right to be accompanied during such examination by a physician of his choosing. The Board agreed to reschedule such examination on July 31 and August 4, 2014. Board's Exhibits 17, 18.

36. Respondent appeared and complied with the physician's order for a urine drug screening on July 17, 2014. Tr. Vol. III p. 196-198, 200. Board's Exhibits 2, 17, 18.

37. Respondent filed a petition for a writ of prohibition in the circuit court of Kanawha County, seeking to prohibit the mental and physical examination ordered by the Board. Respondent's petition was denied. See Board's Exhibits 19, 20 and 21.

38. The Board contracted with a Ralph S. Smith, Jr., M.D., to conduct the mental and physical evaluation of Respondent. Dr. Smith is board certified in Psychiatry, Child

Psychiatry, Addiction Psychiatry and Forensic Psychiatry. Dr. Smith serves as the Medical Director of Charleston Professional Group. Dr. Smith is a qualified expert in this case in the areas of Psychiatry and Substance Abuse Medicine. Tr. Vol. I pp. 93-100.

39. Dr. Smith conducted the mental and physical evaluations of Respondent on July 31 and August 4, 2014. Respondent was not accompanied by a physician of his choosing during such examinations. As part of such evaluations and under the direction of Dr. Smith, Rosemary Smith, Psy.D., performed psychological testing with the assistance of Psychometrician, Kimberly Carter. Based upon such examinations, Dr. Smith filed a psychiatric report of the Respondent with the Board on or about August 21, 2014. Tr. Vol. I p. 109-112, 120 -121. Board's Exhibit 4.

40. In terms of mental examinations and psychological testing, validity means whether the person being tested is giving a true response and is putting forth adequate effort. During the course of his examination of Respondent, Dr. Smith conducted validity testing to assess the credibility of the substantive testing. The testing administered by and/or at the direction of Dr. Smith indicates that Respondent was providing valid responses. Tr. Vol. I pp. 112-115.

41. Respondent's physical examination was normal. Tr. Vol. I pp. 122, 124, 139-140; Board's Exhibit 4.

42. At the time of examination, Respondent reported to Dr. Smith that he was taking the following medications prescribed by his physician, Brian S. Love, M.D.: Xanax, Adderall, Lunesta, Soma, Hydrocodone, Celebrex, Flonase and Naprosyn.

43. Respondent's test results demonstrated a full scale IQ of 100. Dr. Smith opines that Respondent's overall IQ score is rather low for a physician and is of some

concern. In particular, Respondent performed poorly on timed portions of the testing. Tr. Vol. I pp. 115-118; Board's Exhibit 4.

44. Dr. Smith tested Respondent for cognitive functioning. Dr. Smith opines that Respondent's cognitive functioning scores are "of concern." Dr. Smith could not determine how Respondent's cognitive function could affect Respondent's practice of medicine. Tr. Vol. I pp. 124-125; Exhibit 4, p. 4.

45. Respondent's urine drug screen results were positive for amphetamines and benzodiazepines. His hair test was positive for extended opiates. Because Respondent is prescribed numerous medications, Dr. Smith opines that such results can only be used to confirm use and cannot confirm or deny misuse or abuse of such substances. Tr. Vol. I p. 126.

46. Based upon his examination of Respondent and with a reasonable degree of medical certainty, Dr. Smith diagnosed Respondent with social anxiety disorder, attention deficit hyperactivity disorder and an unspecified personality disorder with avoidance features. Tr. Vol. I p. 129.

47. Dr. Smith undertook a careful and particular analysis of the interactions between Respondent's prescribed medications because of his concern that Respondent had not tested higher on the cognitive testing. Dr. Smith made the following statement regarding such concerns: "I was trying to understand how – what might be operative to cause that and that's why I was looking at these. You know, he's early fifties, certainly didn't appear to have any dementia or something like that, but here we are not functioning up to what would be expected. And so I was looking at perhaps the use of these medicines might be interfering because we know as people get older, for instance, with the

benzodiazepine sedatives, it can cause dementia as you get older if you continue taking it. And so I was particularly concerned about that." Tr. Vol. I pp. 130-131.

48. Dr. Smith opines that the controlled substances, individually or in combination, which were prescribed to Respondent in the summer of 2014 could cause sedation or intoxication, particularly if taken in larger doses than prescribed. Dr. Smith identifies seven (7) specific potentially problematic interactions among the medications Respondent was taking pursuant to prescriptions issued by his physician. Tr. Vol. I p. 133; Board's Exhibit 4.

49. Dr. Smith could not determine with a reasonable degree of medical certainty that Respondent had a substance use disorder. Dr. Smith opines that the controlled substances Respondent was taking at the time of evaluation were inappropriate. Tr. Vol. I p. 134.

50. Dr. Smith opines that Respondent's psychiatric problems should be treated by a psychiatrist and not managed by medication from a primary care provider. Tr. Vol. I p. 135; Board's Exhibit 4.

51. Based upon his examination of Respondent in July/August, 2014, Dr. Smith did not determine that Respondent was unfit to practice medicine and surgery safely. Board's Exhibit 4.

52. The Complaint Committee received the mental and physical evaluation report at its September, 2014, meeting and continued its investigation into the substance of Initiated Complaint No. 13-138-W. As part of such investigation, Investigator Inghram reviewed Respondent's patients' records received by the Board on July 11, 2014, as result of subpoena. Subsequently, Investigator Inghram reviewed Respondent's patients' records

received by the Board on November 11, 2014, provided by the Logan Treatment Center. Tr. Vol. I pp. 35-36.

53. Patient records for twenty (20) of Respondent's patients were reviewed during the investigation. To protect patient privacy, all patients are identified throughout the transcript in this matter and in this document by numbers 1 to 21. Patient 7 and Patient 17 are the same individual [hereinafter Patient 7/17]. Board's Exhibits 1, 24-40.

54. Hope Chaney, LPN, worked at the Logan Treatment Center from approximately June, 2010, until December, 2014. Ms. Chaney testified at the public hearing in this matter pursuant to subpoena issued by the Board. Tr. Vol. IV, p. 127-128.

55. The Logan Treatment Center served two (2) types of patient populations: addiction/substance abuse treatment and general psychiatric care. Tr. Vol. IV, p. 136-137.

56. Ms. Chaney's job responsibilities at the Logan Treatment Center included patient education, assisting Respondent and charting patient records. Tr. Vol. IV, p. 129.

57. Ms. Chaney worked with Respondent throughout Respondent's employment at the Logan Treatment Center. Ms. Chaney continued to work at the Logan Treatment Center after the Respondent left, and until the clinic ceased operations. Respondent was the only physician working at the Logan Treatment Center in the fall of 2014. Tr. Vol. IV, p. 117-120.

58. During the last five (5) or six (6) months of Ms. Chaney's employment at the Logan Treatment Center, Respondent's attendance at the Logan Treatment Center became sporadic. During this time, Respondent and the Treatment Center's owner, Terry Scott, had on-going conflicts. Ms. Chaney observed that the Respondent's demeanor at work changed. Tr. Vol. IV, p. 121-123, 163, 166.

59. During this period of time, Ms. Chaney observed the Respondent become irate, angry and overly emotional in front of patients. Respondent's outburst became more frequent over time. On more than one occasion, Ms. Chaney observed Respondent swear, scream and/or cuss in the presence of patients. Respondent's behavior in these instances would sometimes cause some patients to be upset. Subsequently, Respondent would usually return and attempt to calm upset patients and Ms. Chaney would also attempt to help calm upset patients. Tr. Vol. IV pp. 123-126, 165-166.

60. The Logan Treatment Center did not dispense medication. The Logan Treatment Center policy was not to maintain any medication on site and to turn into the pharmacy any surrendered medications. Tr. Vol. IV pp. 174-175, 179-180.

61. Patient 7/17 was a patient at the Logan Treatment Center. On October 8, 2014, Patient 7/17 was treated by Respondent at the Logan Treatment Center. At the conclusion of her appointment, Patient 7/17 was given three prescriptions for medication. Tr. Vol. IV p. 127-128; Board's Exhibit 40.

62. Patient 7/17 left after her appointment, but returned to the Logan Treatment Center soon thereafter. Patient 7/17 had filled her prescriptions and she believed that two (2) of those prescriptions were written in error. Patient 7/17 requested that Ms. Chaney check the chart. Ms. Chaney reviewed Patient 7/17's chart and confirmed that the Soma [Carisprodol] prescription written by the Respondent for Patient 7/17 on October 8, 2014, was for thirty (30) tablets whereas Patient 7/17's previous Soma prescriptions from the Respondent had been written for ninety (90) tablets. Additionally, Patient 7/17's Celexa prescription was incorrectly written by the Respondent on October 8, 2014, for 20 mg.

tablets whereas Patient 7/17's previous Celexa prescriptions had been written for 40 mg. Tr. Vol. III p. 16, 21, 33; Tr. Vol. IV p. 131-133; Board's Exhibit 40, 48.

63. Ms. Chaney consulted the Respondent about Patient 7/17's prescriptions. Ms. Chaney took Patient 7/17's filled Soma prescription bottle to show the Respondent. Ms. Chaney handed the prescription bottle to the Respondent. Respondent stopped to speak with Patient 7/17 as he was leaving for the day. At the Respondent's direction, Ms. Chaney called the pharmacy to correct the prescription errors by increasing Patient 7/17's Soma, plain, 350 tablets from thirty (30) to ninety (90) tablets and to change Patient 7/17's Celexa prescription for 20 mg. to 40 mg. Tr. Vol. IV, p. 134-137, 150-152.

64. As Ms. Chaney was contacting the pharmacy on the telephone, she observed that the Respondent left the Logan Treatment Center through the front door carrying in his hand Patient 7/17's prescription's bottle for thirty (30) Soma tablets. Tr. Vol. IV, p. 138-139.

65. Before leaving the Logan Treatment Center, Patient 7/17 asked for the return of her Soma prescription bottle. Ms. Chaney attempted to call the Respondent immediately. Ms. Chaney spoke with Respondent's driver, John Case, by telephone as he was driving the Respondent home from work. Ms. Chaney requested to speak with the Respondent but the Respondent did not speak to Ms. Chaney. She left a message for the Respondent that Patient 7/17 was requesting the return of her Soma prescription. Tr. Vol. IV p. 134-139, 151-154.

66. On October 8, 2014, Patient 7/17 had filled the three (3) prescriptions prescribed by Respondent, at the Family Discount Pharmacy in Mt. Gay, West Virginia. Licensed pharmacist, Earl Claycomb, and his staff were subsequently notified by Ms. Chaney that two (2) of Patient 7/17's prescription filled earlier that day had been written

incorrectly by Respondent and that the Respondent had requested that Ms. Chaney call the pharmacy to correct the prescription errors. Mr. Claycomb reviewed Patient 7/17's prescription history and determined that such modifications were consistent with the patients' previous history. Tr. Vol. III pp. 13-21, 29-31, 38-44; Tr. Vol. IV, p. 141.

67. Per the instructions from the Respondent's office, Mr. Claycomb and his staff corrected Patient's 7/17's Soma prescription from a quantity of thirty (30) to a quantity of (90) and corrected Patient 7/17's Celexa prescription from 20 mg. to 40 mg. Patient 7/17 had been previously given thirty (30) Soma tablets on that prescription. The pharmacy dispensed an additional sixty (60) Soma tablets to Patient 7/17. Tr. Vol. III pp. 10-13, 16, 26-34; Tr. Vol. IV p. 141; Board's Exhibit 40, 47, 48.

68. Mr. Claycomb explained to Patient 7/17 that he could only dispense sixty (60) Soma tablets in addition to the initially dispensed thirty (30) Soma tablets, for a total of ninety (90) tablets, as prescribed by the doctor. Tr. Vol. III p. 21-22.

69. On October 8, 2014, Patient 7/17 again returned to the Logan Treatment Center to request the return of her original Soma prescription for thirty (30) tablets. In subsequent weeks Patient 7/17 made numerous inquiries at the Logan Treatment Center about the whereabouts of her Soma prescription bottle. Ms. Chaney alerted the Respondent on several occasions that Patient 7/17 was continuing to inquire about the return of her Soma prescription. Tr. Vol. IV pp. 133-147, 150-161.

70. While working with Respondent at the Logan Treatment Center, Ms. Chaney has personal knowledge of other instances when Respondent has taken possession of part or all of patients' prescriptions. Tr. Vol. IV, pp. 164, 167-168.

71. Approximately twice a month in 2014, Ms. Chaney observed more than one patient of the Logan Treatment Center leave the clinic with written prescriptions for Xanax, Adderall and/or Viagra, come back into the Logan Treatment Center with prescription bottles, go into the Respondent's office, and subsequently leave without any prescription bottles. Ms. Chaney observed Patient 16 transfer prescription medications to the Respondent. Tr. Vol. IV, p. 171-175, 177-178.

72. On November 5, 2014, Investigator Inghram traveled to the Logan Treatment Center to serve a Board subpoena for Patient 7/17's current medical records. Tr. Vol. III p. 204; Board's Exhibit 67.

73. At that time, the Logan Treatment Center was closed. Inspector Inghram was advised by Hope Chaney that the Logan Treatment Center was closed as of November 1, 2014. Respondent's last day working at the clinic was October 31, 2014. As part of the closing of the Logan Treatment Center, Ms. Chaney was instructed by her employer to call local pharmacies to inform them that the Logan Treatment Center was closing and would not be issuing further prescriptions from the clinic. Tr. Vol. III p. 205; Tr. Vol. IV, p. 116-117, 148.

74. An updated version of Patient 7/17's medical record was received by the Board on November 14, 2014. Tr. Vol. III p. 206; Board's Exhibit 40, 68.

75. Investigator Inghram retrieved data from the Controlled Substance Monitoring Program database and determined that the Respondent was continuing to prescribe controlled substances after the cessation of his employment at the Logan Treatment Center on October 31, 2014. Subsequent to November 1, 2014, Respondent utilized prescription pads from the Logan Treatment Center to prescribe scheduled controlled

substances on multiple occasions. Tr. Vol. III p. 210; Board's Exhibits 44, 69, 70, 71, 74, 75, 76.

76. After his separation from the Logan Treatment Center, Respondent continued to write controlled substance prescriptions on the Logan Treatment Center prescription pad for Patient 12 on the following occasions and for the following controlled substances:

Rx Date	Controlled Substance Prescribed	LTC Rx pad no.	Dispensing Pharmacy	Rx Location in the Record
11/07/14	Adderall 10mg, 120ct	6681	Sam's Club Pharmacy South Charleston, WV	Board's Exhibit 74 WVBOM003460- WVBOM003461
11/07/14	Xanax 1mg, 90ct	6676	Sam's Club Pharmacy South Charleston, WV	Board's Exhibit 74 WVBOM003462- WVBOM003463
11/07/14	Soma 350mg, 90ct	6677	Sam's Club Pharmacy South Charleston, WV	Board's Exhibit 74 WVBOM003462- WVBOM003463
12/05/14	Xanax 1mg, 90ct	6689	Sam's Club Pharmacy South Charleston, WV	Board's Exhibit 74 WVBOM003464- WVBOM003465
12/05/14	Soma 350mg, 90ct	6690	Sam's Club Pharmacy South Charleston, WV	Board's Exhibit 74 WVBOM003464- WVBOM003465
12/05/14	Adderall 10mg, 120ct	6688	Wal-Mart Pharmacy South Charleston, WV	Board's Exhibit 75 WVBOM003475- WVBOM003477

77. None of the controlled substance prescriptions identified in the preceding finding of fact contain accurate contact information for the Respondent which would permit

the patient or pharmacist to follow-up in the event of questions or concerns. Board's Exhibits 74 and 75.

78. After his separation from the Logan Treatment Center, Respondent continued to write controlled substance prescriptions on the Logan Treatment Center prescription pad for Patient 16 on the following occasions and for the following controlled substances:

Rx Date	Controlled Substance Prescribed	LTC Rx pad no.	Dispensing Pharmacy	Rx Location in the Record
11/14/14	Adderall 10mg, 120ct	6752	Bypass Pharmacy #2 Beaver, WV	Board's Exhibit 69 WVBOM003368- WVBOM003369
11/14/14	Xanax 1mg, 90ct	6753	Kroger Pharmacy #790 Beckley, WV	Board's Exhibit 71 WVBOM003416- WVBOM003418
12/11/14	Adderall 20mg, 90ct	6696	CVS Pharmacy Beckley, WV	Board's Exhibit 70 WVBOM003379- WVBOM003380; WVBOM003386- WVBOM003387
12/11/14	Xanax 1mg, 90ct	6697	CVS Pharmacy Beckley, WV	Board's Exhibit 70 WVBOM003377- WVBOM003378; WVBOM003384- WVBOM003385

79. None of the controlled substance prescriptions identified in the preceding finding of fact contain accurate contact information for Respondent which would permit the patient or pharmacist to follow-up in the event of questions or concerns. See Board's Exhibits 69-71.

80. Another patient, who shares the same last name as Patient 16, also received prescriptions for controlled substances from Respondent which were written on Logan Treatment Center prescription pads after Respondent was separated from the Logan Treatment Center. On at least one occasion, Patient 16 picked up the controlled substance prescription from the pharmacy for this other individual. After Respondent's separation from the Logan Treatment Center, Respondent wrote prescriptions on the Logan Treatment Center prescription pad on the following occasions and for the following controlled substances with respect to this patient:

Rx Date	Controlled Substance Prescribed	LTC Rx pad no.	Dispensing Pharmacy	Rx Location in the Record
11-3-14	Xanax 1mg, 90ct	6673	Bypass Pharmacy #2 Beaver, WV	Board's Exhibit 69 WVBOM003372- WVBOM003373
12-1-14	Xanax 1mg, 90	6682	Bypass Pharmacy #2 Beaver, WV	Board's Exhibit 69 WVBOM003364- WVBOM003367
1/05/15	Xanax 1mg, 90ct	6598	Kroger Pharmacy #790 Beckley, WV	Board's Exhibit 71 WVBOM003419- WVBOM003421

81. None of the controlled substance prescriptions identified in the preceding finding of fact contain accurate address and practice location information for Respondent which would permit the patient or pharmacist to follow-up in the event of questions or concerns. However, an additional telephone number is written in on the January 5, 2015 prescription. See Board's Exhibits 69 and 71.

82. After his separation from the Logan Treatment Center, Respondent continued to write controlled substance prescriptions for Patient 20 on the Logan Treatment Center prescription pad on the following occasions and for the following controlled substances:

Rx Date	Controlled Substance Prescribed	LTC Rx pad no.	Dispensing Pharmacy	Rx Location in the Record
11/28/14	Adderall 20mg, 90ct	6683	Bypass Pharmacy #2 Beaver, WV	Board's Exhibit 69 WVBOM003370- WVBOM003371
12/24/14	Adderall 20mg, 90ct	6596	Wal-Mart Pharmacy South Charleston, WV	Board's Exhibit 75 WVBOM003473- WVBOM003474

83. The controlled substance prescriptions identified in the preceding finding of fact do not contain accurate address and practice location information for Respondent. Board's Exhibits 69, 75.

84. At its January 11, 2015, meeting, the Complaint Committee authorized the issuance of an Amended Initiated Complaint to ensure that Respondent was on formal notice of allegations which had emerged as part of the investigation the Committee initiated in November, 2013. Respondent submitted an answer to the Amended Initiated Complaint on or about February 8, 2015. Tr. Vol. III pp. 24-27; Board's Exhibits 15, 16.

85. The Complaint Committee referred this matter for review to an independent consultant physician. At the direction of the Complaint Committee, Board Executive Director, Robert Knittle, retained the services of James Abel, M.D., as Board Consultant in this matter. Board Consultants are paid an hourly rate for services rendered. Tr. Vol. II pp. 36-37, 56-63.

86. The Board Consultant, James Abel, M.D., is a duly licensed allopathic physician with a board certified specialty of psychiatry, who practices in West Virginia. Dr. Abel practices psychiatry medicine, including addiction treatment, at Fairmont Regional Hospital where he serves as Medical Director of Behavioral Medicine, Chairman of the Ethics Committee, Peer Review Committee and Credentials Committee. Dr. Abel is Board Certified in Psychiatry and Neurology. Dr. Abel is qualified as an expert in this case in Psychiatry and Substance Abuse Medicine. Tr. Vol. II pp. 99-110; Board's Exhibit 23.

87. The Board Consultant was provided with copies of documents obtained during the course of the Board's investigation and was asked to render an opinion regarding whether or not Respondent has violated the professional standards of physician practice in West Virginia. Tr. Vol. II pp. 99-110, 118-122.

88. Dr. Abel was provided and reviewed copies of the sixteen patient records, including both productions of Patient 7/17's medical records, and board of pharmacy records for those sixteen patients. Based upon his education, training and experience, and after reviewing those patient records, Dr. Abel formed an opinion with regard to the treatment provided by Respondent to these specific patients. Dr. Abel submitted a written report to the Board detailing such findings. Tr. Vol. II pp. 110-115, 122; Board's Exhibits 22, 24-41.

89. Based solely upon his review of those patients' records, Dr. Abel opines that, with respect to the patients whose records he reviewed, Respondent has failed to keep

written records justifying the course of treatment for those patients. Tr. Vol. II p. 137, 233, 280.

90. Based solely upon his review of those patients' records, Dr. Abel opines that the Respondent demonstrates a lack of competence to practice medicine with a reasonable degree of skill and safety for patients. Tr. Vol. II p. 278.

91. Based solely upon his review of those patients' records, Dr. Abel opines that the Respondent has prescribed controlled substances other than in good faith and in a therapeutic manner. Tr. Vol. II p. 279.

92. Based solely upon his review of those patients' records, Dr. Abel opines that the Respondent has failed to meet the standard of care to treat patients safely and appropriately. Tr. Vol. II pp. 210-211, 278-279.

93. Based solely upon his review of those patient records, Dr. Abel opines that the following of Respondent's practice patterns present safety concerns for patients: Respondent's pattern of prescribing of Soma, a centrally-acting muscle relaxant which is FDA approved solely for musculoskeletal pain, to treat panic disorder and insomnia; Respondent's practice of prescribing Soma in combination with Xanax; Respondent's failure to take into account that some of the patients were also being prescribed controlled substance narcotics while Respondent was prescribing Soma and Xanax; Respondent's failure to properly regulate the controlled substances he prescribed; and Respondent's continued prescribing to certain patients despite clear indications that patients were abusing and/or diverting controlled substances. See Exhibit 22.

94. Based upon his review of Respondent's patients' records, Dr. Abel advised the Board that prompt suspension of Respondent's medical license was necessary in order to protect the public. Exhibit 22.

95. In the psychiatric field, an appropriate psychological evaluation includes a patient history, including medication histories, allergies, social history and past medical history. Respondent failed to conduct and/or adequately document comprehensive initial psychiatric evaluations upon which to appropriately base treatment. Dr. Abel opines that of all of Respondent's patient records reviewed, only the medical record for Patient 16 documented an initial psychiatric evaluation. However, even Patient 16's record did not contain an adequate comprehensive initial psychiatric evaluation. Tr. Vol. II p. 144-145, 159, 161-162, 240.

96. With respect to all of the patient records reviewed by Dr. Abel, Respondent failed to conduct and/or adequately document rudimentary mental status examinations. Tr. Vol. II p. 162.

97. Prevailing psychiatric standards provide that psychotherapy plays a huge role as a treatment option for anxiety and mood disorders, either by the treating psychiatrist or in conjunction with a therapist. With respect to all of the patient records reviewed by Dr. Abel, there is no evidence that the Respondent offered, recommended or initiated psychotherapy for such patients. Tr. Vol. II p. 160-164.

98. With respect to each medical record reviewed by Dr. Abel, Respondent failed to inform patients and/or failed to document informed consent of potential side effects of

the medications prescribed and/or alternative treatments available to the patients for treatment. Respondent's failure to provide and/or document informed consent fails to meet the acceptable and prevailing psychiatric medical standards. Tr. Vol. II pp. 132, 138, 144, 181, 252, 253, 255-156, 258, 274, 280; Board's Exhibits 24-40.

99. Based upon acceptable prevailing psychiatric standards, treatment of insomnia, the inability to initiate or maintain sleep most days of the week, should begin with non-pharmacologic remedies, such as therapy involving sleep hygiene and practices. Pharmacological intervention should begin with non-addictive safe medications, such as trazodone, vistaril or melatonin. If these medications do not work, treatment may progress to less benign medications, such as Ambien. Tr. Vol. II pp. 130-131.

100. Based upon acceptable prevailing psychiatric standards, appropriate treatment protocols for anxiety begin with cognitive behavioral therapy and/or with non-addictive, safe medications such as Selective Serotonin Reuptake Inhibitors. Xanax, a benzodiazepine, is typically used to treat severe anxiety and panic disorder. Panic disorder is a disorder in which patients have repetitive panic attacks. Tr. Vol. II p. 128-129, 134

101. With respect to all of the patient records reviewed by Dr. Abel, Respondent diagnosed patients with Panic Disorder without sufficient documentation to justify such diagnosis. Respondent's medical records include the use of the Beck's Anxiety Scale, which is an instrument filled out by the patient which indicates their anxiety level. However, even patients who indicated that they had no anxiety or very minimal anxiety continued to be treated by the Respondent for Panic Disorder. Tr. Vol. II pp. 134-135, 160.

102. Soma is a pain medication which is an FDA approved Schedule IV controlled substance for use for acute musculoskeletal pain for a limited time only. Soma is not FDA approved for the treatment of anxiety disorder or insomnia, nor are there any reputable studies available which indicate the efficacy of the use of Soma for the treatment of psychiatric disorders. Risks associated with the use of Soma include addiction and significant central nervous system depression and psychomotor impairment. Combining Soma with other medications, including benzodiazepines, may magnify the risks associated with the medication. Combining Soma with opioids magnifies the risk of respiratory depression. Tr. Vol. II p. 124-127, 129, 131, 222, 253.

103. With respect to all of the patient records reviewed by Dr. Abel, Respondent routinely prescribed Soma to patients for panic disorder and/or insomnia. Twelve (12) out of the sixteen (16) patients whose records were reviewed were provided prescriptions for Soma on their initial visits: Patients 1, 3, 4, 5, 6 7/17, 8, 9, 12, 13, 14 and 15. Those patients' records do not document any attempt by Respondent to offer FDA-approved therapies and/or alternative treatments. Tr. Vol. II p. 129.

104. Based upon his experience treating substance abuse disorders, Dr. Abel opines that the combination of Soma, benzodiazepines and opioids is a combination persons with addiction may seek for abuse. Dr. Abel explains that such combination is often sought for abuse, "because it gives them the best buzz, that's why. It's got great street value because of that. So, you know, any one of these substances can give you a good high. When you add them all together, it gives you a great high." Tr. Vol. II pp. 127-128.

105. With respect to all of the patient records reviewed by Dr. Abel, Respondent prescribed Soma in combination with Xanax, a benzodiazepine, for twelve (12) out of the sixteen (16) patients whose records were reviewed: Patients 1, 3, 4, 5, 6, 7/17, 8, 9, 12, 13, 14, and 15. Concurrently prescribing Xanax and Soma increases abuse potential and the risk of side effects such as central nervous system depression and psychomotor impairment. Respondent's medical records for those patients do not indicate that he ever discussed the adverse side effects or risks associated with the co-prescribing of Soma and Xanax. In this respect, Respondent's care of such patients deviates from the standard of care. Tr. Vol. II p. 126-129, 134-135, 139, 285; Board's Exhibits 22, 24-40.

106. Patients 2, 4, 8, 14 and 16 were receiving prescriptions for controlled substances such as opioids or stimulants from providers other than from the Respondent. Patients 2, 8, 14 and 16 were being prescribed opioid pain medication by other providers in addition to either Xanax and/or Soma prescriptions from Respondent. Patients 8 and 14, were receiving extremely high doses of OxyContin from other providers while they were provided with moderate-to-high doses of Xanax and Soma concurrently by Respondent. Tr. Vol. II pp. 141-142; Board's Exhibit 41.

107. Respondent's medical records for Patients 2, 4, 8, 14 and 16 provide no documentation that the Respondent was aware or sought to determine whether these patients were prescribed other medications which may interact with or increase the side effects and risks associated with the Soma and/or Xanax which he was prescribing to these patients. Tr. Vol. II pp. 142-143.

108. Respondent did not appropriately regulate the controlled substances he prescribed to Patients 1, 2, 3, 4, 5, 6, 7/17, 8, 9, 10, 11, 12, 13, 14, 15 and 16. Tr. Vol. II pp. 144-145.

109. With respect to each medical record reviewed by Dr. Abel, there was no evidence that Respondent evaluated patients for potential drug interactions or substance abuse issues through the use of controlled substance monitoring programs such as the West Virginia Board of Pharmacy or KASPER. Tr. Vol. II pp. 144-145, 162-164, 246; Board's Exhibits 22, 24-40.

110. Respondent routinely ordered urine drug screens for most of the patients whose records were reviewed by Dr. Abel. Patients 1, 5, 6, 7/17, 8, 9, 10, 11, 12, 13, 14 and 15 failed urine drug screens for one or more controlled substances. Multiple patients failed their urine drug screens, either by having additional medications/drugs present in their urine or by not testing positive for the prescribed medications. Thereafter, Respondent's physician notes for these patients routinely do not mention the failed urine drug test or indicate that patients were "med compliant" despite such failed drug tests. Tr. Vol. II pp. 144-148; Board's Exhibits 22, p. 003346-7, 24-40.

111. Respondent failed to take appropriate actions when Patients 1, 5, 6, 7/17, 8, 9, 10, 11, 12, 13, 14 and 15 failed urine drug screens. Tr. Vol. II p. 140-151.

112. Between November 27, 2013, and June 11, 2014, Respondent prescribed to Patient 1 Xanax, 1 mg., three times per day and Soma PLN, 350 mg., two times per day. During this period, the patient failed four (4) out of five (5) urine drug screens. Three (3) of

these screens showed the presence of buprenorphine, barbiturates, opiates and oxycodone. Three (3) of these screens tested negative for Xanax. Such results provide evidence of abuse of controlled substances and/or potential diversion of controlled substances. Respondent did not document any discussion, counselling or other measures taken regarding Patient 1's failed urine drug screens. Although the nurse's notes in February and June indicate that the patient was counselled or warned, the Respondent continued to provide the patient with the same prescriptions for Xanax and Soma despite Patient 1's recurrent failure of such urine drug screens. Tr. Vol. II p. 147-150; Board's Exhibits 22, 24.

113. Between December 6, 2013, and June 11, 2014, Respondent prescribed to Patient 6 Xanax, 1 mg., three times per day and Soma PLN, 350 mg., two times per day. During this period, the patient failed five (5) out of six (6) urine drug screens. Three (3) of these screens showed the presence of amphetamines, barbiturates, opiates and oxycodone. Such results provide evidence of abuse of controlled substances. Respondent did not document any discussion, counselling or other measures taken regarding such failed urine drug screens and the Respondent continued to provide the patient with the same prescriptions for Xanax and Soma despite Patient 6's recurrent failure of such urine drug screens. Tr. Vol. II pp. 147-158; Board's Exhibits 22, 29.

114. On February 23, 2015, the Board received a copy of correspondence from the New Life Clinic in Summersville, West Virginia, terminating Respondent's employment contract with that entity, effective February 18, 2015.

115. James Todd Bowen testified at the public hearing pursuant to a subpoena issued by the Board. Mr. Bowen is the owner of the New Life Clinics, which primarily treat opioid addiction. However, the Martinsburg, West Virginia, location also offers mental health services. Currently, New Life Clinics is operating out of Martinsburg and Summersville, West Virginia. Mr. Bowen operated a clinic in Oak Hill, West Virginia, under the name New Life, LLC. The Oak Hill clinic location saw patients only on four days. Tr. Vol. IV, pp. 184-195, 245-247.

116. Mr. Bowen met Respondent in approximately October or November, 2014, when Mr. Bowen was attempting to recruit physicians to provide psychiatric services and addiction treatment services to patients at his clinics. Mr. Bowen hired Respondent to work at his clinics. Respondent began working for Mr. Bowen in December, 2014 or January, 2015. Respondent worked a few days for the New Life, L.L.C., in Oak Hill. That location closed after several days and the Respondent began working at the New Life Clinic, Inc., in Summersville. Mr. Bowen provided transportation for the Respondent from his home to the Summersville clinic. Tr. Vol. IV, pp. 186-192, 237, 247-248.

117. Respondent did not update his practice address with the Board until February 12, 2015. Board's Exhibit 10.

118. Mr. Bowen and Respondent had an unconventional financial arrangement with regard to his employment at the New Life Clinics. As part of that arrangement, Mr. Bowen paid for certain of Respondent's household bills from time to time, including rental car payment and house payments. Tr. Vol. IV, pp. 186-192, 238-238, 241-242, 275-277.

119. It was the policy of all of the New Life Clinics that the prescription pads were only to be used for patients of the New Life Clinics and that all prescription pads must be

locked up on the premises at all times. Mr. Bowen advised Respondent of this policy on two occasions. Tr. Vol. IV., p. 193-194.

120. Prior to testifying at the hearing in this matter, Mr. Bowen reviewed his clinics' records to determine whether or not certain individuals were patients of his clinics. Tr. Vol. IV, p. 9.

121. Patient 12 was not, and has never been, a patient of the New Life Clinic in Oak Hill or any other location. On February 7, 2015, Respondent wrote two (2) prescriptions for Patient 12 on a prescription pad from the New Life Center bearing an Oak Hill, West Virginia address: one prescription for sixty (60) tablets of Adderall 20 mg. on prescription number 625; and a second prescription for ninety (90) tablets of Xanax 1 mg., on prescription number 626. Patient 12 filled those prescriptions on February 7, 2015 at the Wal-Mart Pharmacy in South Charleston, West Virginia. The New Life Clinic in Oak Hill was no longer in operation on February 7, 2015. Tr. Vol. IV p. 236-237; Board's Exhibit No. 74, pp. 003470-003472.

122. Patient 16 was not, and has never been, a patient of the New Life Clinic in Oak Hill or any other location. On January 16, 2015, Respondent wrote Patient 16 a prescription for ninety (90) tablets of Xanax 1 mg., on a prescription pad from the New Life Center, prescription number 508. Patient 16 tendered this prescription to Kroger Pharmacy #790 in Beckley, West Virginia for dispensing. Tr. Vol. IV, p. 236; Board's Exhibit No. 71 pp. 003422-003424.

123. On February 3, 2015, Respondent wrote a prescription for ninety (90) tablets of Xanax, 1 mg., for a patient who shares the same last name as Patient 16. Such prescription was written on a prescription pad from the New Life Center, prescription

number 507 and was tendered to Kroger Pharmacy #790 in Beckley, West Virginia for dispensing. Patient 16 collected this prescription from the pharmacy. Board's Exhibit 71 pp. 003425-003427.

124. Patient 20 was not, and has never been, a patient of the New Life Clinic in Oak Hill or any other location. On January 26, 2015, Respondent wrote Patient 20 a prescription for ninety (90) tablets of Adderall 20 mg., prescription number 505. The prescription had the address of 1438 East Main St. Oak Hill, West Virginia. Patient 20 tendered this controlled substance prescription to the CVS Pharmacy in Beckley, West Virginia for dispensing. Tr. Vol. IV, p. 236-237; Board's Exhibit No. 70 pp. 003381-003382; 003388-003390.

125. During the course of Respondent's employment with the New Life clinics, Mr. Bowen developed concerns regarding Respondent's inconsistent personal behavior, including calling Mr. Bowen's home and cell phones repeatedly at inappropriate hours, yelling at Mr. Bowen and threatening Mr. Bowen. Respondent and Mr. Bowen had angry conversations which included cursing. Additionally, in the latter stages of his employment with New Life Clinics, Respondent's reliability regarding work hours became inconsistent. Mr. Bowen terminated the Respondent's employment with New Life clinics on February 18, 2015. Tr. Vol. IV, pp. 195-200, 205-207, 249-256, 267, 271-272; Board's Exhibit 91.

126. At a special meeting of the Board's Complaint Committee on February 17, 2015, a quorum of the Committee reviewed the facts and evidence relating to Complaint No. 13-138-W, including the Board Consultant's Report received by the Board on February 5, 2015. Based upon such review, the Complaint Committee determined that probable cause existed to substantiate charges to disqualify the Respondent from the practice of

medicine and determined to recommend that the full Board impose summary discipline in this matter. Tr. Vol. II pp. 42; Hearing Examiner's Exhibit 1.

127. At an emergency meeting of the Board of February 25, 2015, a quorum of the Board ratified the Complaint Committee's determination of probable cause. The Board determined, based upon the evidence presented that in accordance with the Board's statutory mandate to protect the public interest, that the Respondent's license to practice medicine in West Virginia must be summarily suspended. The Board ordered such suspension effective February 26, 2014 at 11:59 p.m. and set the matter for expedited hearing. Tr. Vol. II pp. 39-55; Hearing Examiner's Exhibit 1.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Facts, I conclude, as a matter of law:

1. West Virginia Code Section 30-3-1 *et seq.* provides the West Virginia Board with the authority to issue licenses to practice medicine and surgery in this state and with the authority to act as the regulatory and disciplinary body for the practice of medicine in this state. WEST VIRGINIA CODE § 30-3-5.
2. Pursuant to regulation, the Board may designate a hearing examiner to conduct hearings. The undersigned hearing examiner is a licensed attorney and was so designated in this case by the Board. Such hearing was conducted pursuant to West Virginia Code and the West Virginia Board of Medicine Legislative Rules. WEST VIRGINIA CODE § 29A-5-1 *et seq.*; W.Va. Code R. § 11-1A-14; W.Va. Code R. § 11-3-11 *et seq.*
3. The West Virginia Board of Medicine is authorized to establish regulations necessary to carry out the purposes of the West Virginia Medical Practice Act.

WEST VIRGINIA CODE § 30-3-7; W.Va. Code R. § 11-1A-1 *et seq.*

4. The West Virginia Board of Medicine is the regulatory and disciplinary body for the practice of medicine and surgery for physicians, podiatrists and physician assistants in West Virginia. W.Va. Code §30-3-5 and §30-3-7(a). Respondent's license to practice medicine and surgery in the State of West Virginia is subject to regulation and discipline by the West Virginia Board of Medicine. WEST VIRGINIA CODE §30-3-5 and §30-3-7(a).
5. It is the purpose of the West Virginia Medical Practice Act to provide for the licensure and discipline of physicians and to provide a professional environment which encourages the delivery of quality medical services within this state. WEST VIRGINIA CODE § 30-3-2; Vest v. Cobb, 76 S.E.2d 885 (W.Va. 1953); See also State ex rel. Hoover v. Smith, 198 W. Va. 507, 482 S.E.2d 124 (1996).
6. The practice of medicine and surgery in West Virginia is a privilege, not a right. WEST VIRGINIA CODE §30-3-1.
7. The West Virginia Board of Medicine may revoke, suspend or otherwise limit a medical license if a physician is unqualified as a result of violating a provision of the West Virginia Medical Practice Act or the Board's Legislative Rules or an Order of the West Virginia Board of Medicine or failure to comply with a subpoena or subpoena duces tecum issued by the Board. WEST VIRGINIA CODE § 30-3-14 (c) (17). In order to maintain the delivery of quality medical care within this state, the West Virginia Board of Medicine is charged with determinations concerning physician licensure in the state. Mingo County Medical Society v. Simon, 20 S.E.2d 807, 809, 124 W.Va. 493 1942; Batoff v. State Board of

Psychology, 750 A.2d 835 (Pa. 2000); See also Modi v. West Virginia Board of Medicine, 465 S.E.2d 230, 240, 195 W.Va. 230 (1995).

8. The Board is authorized to impose one or more of the following disciplinary measures, as appropriate:
 - a. Denial of an application for a license or other authorization to practice medicine and surgery or podiatry;
 - b. administer a public reprimand;
 - c. Issue a suspension, limitation or other restriction upon a license for a period of up to five years;
 - d. Suspend, limit or restrict his or her license or other authorization to practice medicine and surgery or podiatry for up to five years;
 - e. Revoke a license or other authorization to practice medicine and surgery or podiatry or to prescribe or dispense controlled substances for up to ten years;
 - f. Require a licensee to submit to care, counseling or treatment designated by the Board as a condition for initial or continued licensure or renewal of licensure or other authorization to practice medicine and surgery or podiatry;
 - g. Require participation in a program of education;
 - h. Require supervised practice for a specified period of time; and
 - i. Assess a fine.

WEST VIRGINIA CODE §30-3-14(j).

9. At hearings before the West Virginia Board of Medicine, the rules of evidence as applied in civil cases in the circuit courts of this State apply. W.Va. Code R. § 11-3-11.5 (c). At hearing, Respondent objected to the introduction of all evidence pertaining to the Respondent's previous licensing history as prejudicial. Hearing Examiner's Exhibits 9, 10, 11; Tr. Vol. I pp. 32-33. In Proposed Findings and Conclusions, counsel for Respondent states that such evidence should be considered "only for the purpose of history" and not to

bolster the allegations in this proceeding. Attachment E, p. 2. The West Virginia Supreme Court has concluded that in the case of an attorney disciplinary procedure, prior discipline may be considered as an aggravating factor "because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust." Syl. Pt. 5, Committee on Legal Ethics v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986). In the case at hand, the hearing examiner does not consider any evidence regarding Respondent's previous licensing history to strengthen, reinforce or otherwise support any finding regarding the allegations at issue in this matter. However, evidence of Respondent's prior licensing history is deemed relevant and is considered for the sole purpose of determining sanctions in this matter. W.V.R.E. 401, 402, 403; Syl. Pt. 5, Committee on Legal Ethics v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986); See Board's Exhibits 9, 10, 11.

10. Hearsay is defined as an out of court statement offered into evidence to prove the truth of the matter asserted. FRE 801, WVRE 801. Any evidence admitted into evidence which contains hearsay is not considered herein to prove the truth of truth of the matter asserted therein. State v. Maynard, 183 W.Va. 1, 393 S.E. 2d 221 (1990); Salerno v. Manchin, 158 W.Va. 220, 213 S.E. 805 (1974); Moore v. United States, 429 U.S. 20, 97 S.Ct. 29, 50 L. Ed. 2d 25 (1976). To the extent that any exhibit admitted into evidence at the hearing in this matter is not referenced herein, such exhibit has not been considered or relied upon by the hearing examiner in formulating these Findings of Fact, Conclusions of Law or this Recommended Decision. See e.g. Board's Exhibits 45, 46, 87, 88, 89,

90, 92.

11. Board Consultant, James Abel, M.D., was provided a number of documents generated through the Board's investigation in this matter, which documents the hearing examiner has determined to be not relevant and/or inadmissible in this proceeding. To the extent that any document was provided to and/or considered by the Board's Consultant and not specifically referenced in the foregoing findings of facts, they are not considered herein. Such documents are inadmissible and/or irrelevant to the issues presented in this matter and any testimony or opinion relating to such documents is not considered herein. See e.g. Board's Exhibits 45, 46; Tr. Vol. II pp. 110-111; 113-115; 118-119. To the extent that documents provided to Dr. Abel are not specifically referenced in these Findings of Fact, they are not relied upon by this examiner in reaching the Conclusions of Law set forth herein.
12. The Board may enter an Order imposing disciplinary sanctions when, subsequent to notice and hearing, the Board finds that the physician has violated West Virginia Code § 30-3-14(c) and/or the rules promulgated pursuant to the Medical Practice Act. W.Va. Code R. § 11-3-18.
13. Previous disciplinary case orders, as filed by the West Virginia Board of Medicine with the office of the Secretary of State of West Virginia pursuant to West Virginia Code §29A-2-9, are Board considered precedent in Board matters.
14. The Respondent was provided due process in this matter. Procedural due process rights entitle an individual to representation by counsel, notice, an

opportunity to be heard, and the right to present evidence. A due process analysis is founded upon the concept of fundamental fairness. W. VA. CONST. ART. 3 § 10; WEST VIRGINIA CODE § 29A-1-1 *et seq.*; WEST VIRGINIA CODE § 30-3-14 (h), (k); W.Va. Code R. § 11-3-10; W.Va. Code R. § 11-3-11.1; W.Va. Code R. § 11-3-11.5 (a), (d); Webb v. West Virginia Board of Medicine, 212 W.Va. 149, 569 S.E.2d 225. In this case, personal service of the Order of Summary Suspension of License to Practice Medicine and Surgery and Notice of Hearing upon the Respondent was made in accordance with the requirements of West Virginia Code Section 56-2-1. The Respondent had legally sufficient notice of the public hearing. WEST VIRGINIA CODE §30-3-14(k). Respondent affirmatively sought a continuance of the public hearing in this matter, and with the benefit of advice from legal counsel, knowingly and voluntarily waived his procedural and timeline rights pursuant to West Virginia Code §30-3-14(k). See Hearing Examiner's Exhibit 4, Attachments A, B, C. The Respondent had legally sufficient notice of the witnesses which the Board intended to call at hearing in this matter and was provided proper and legally sufficient discovery, as required by the West Virginia Medical Practice Act. WEST VIRGINIA CODE § 30-3-14 (k) and (i); Hearing Examiner's Exhibit 4. The Respondent was adequately and properly notified of the allegations, the basis for such allegations, provided with proper discovery in this matter and was given a full and fair opportunity to respond, satisfying the due process requirement. W. VA. CONST. ART. 3 § 10; WEST VIRGINIA CODE § 29A-1-1 *et seq.*; WEST VIRGINIA CODE § 30-3-14 (h), (k); W.Va. Code R. § 11-3-10; W.Va. Code R. §

11-3-11.1; W.Va. Code R. § 11-3-11.5 (a), (d); Webb v. West Virginia Board of Medicine, 212 W.Va. 149, 569 S.E.2d 225.

15. The Board bears the burden of proving the allegations of professional misconduct. Webb v. West Virginia Board of Medicine, 212 W.Va. 149, 157, 569 S.E.2d 225, 233 (2002).
16. Clear and convincing proof is necessary for actions taken by the Board of Medicine concerning physician licensing. Webb v. West Virginia Board of Medicine, 569 S.E.2d 225, 231-2 (W.Va. 2002). The West Virginia Supreme Court defines clear and convincing proof as that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232 (citing Wheeling Dollar Savings & Trust Co. v. Singer, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978) (quoting Cross v. Ledford, 161 Ohio St., 469, 477, 120 N.E. 2d 188, 123 (1954)); accord In re Carol B., 209 W.Va. 658, 667, 550 S.E.2d 636, 645 (2001).
17. Credibility is determined by the hearing examiner in administrative cases, based upon thorough evaluation of witness testimony. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232; Maxey v. McDowell Co. Bd. of Ed., 212 W.Va. 668, 575 S.E. 2d 278, Syl. Pt. 3 (2002). The hearing examiner is uniquely situated to make such determination and such determinations are binding unless such determinations are without basis in the record. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232; In re Queen, 473 S.E.2d 483, 490 (footnote 6) (W.Va. 1996); Martin v. Randolph County Bd. of Education,

195 W.Va. 297, 465 S.E. 2d 399, 406 (1995); Michael D.C. v. Wanda L.C., 201 W.Va. 381, 497 S.E.2d 531, 538 (1997). Credibility determinations may be based upon many factors, including the following: the general demeanor and comportment of the witness at the hearing; the bias or interest of the witness; the consistency or inconsistency of the statements of the witness; the witness's ability and acuteness to observe; the memory of the witness; the reputation for honesty of the witness; and other factors which tend to cause the trier of fact to believe or disbelieve the testimony of the witness. See Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, §607.02(1) (b) (5th Ed. 2012); see also West Virginia Board of Medicine v. Danine Ann Rydland, M.D., (2013); Martin v. Randolph County Bd. of Education, 195 W.Va. 297, 465 S.E. 2d 399, 406 (1995); Michael D.C. v. Wanda L.C., 201 W.Va. 381, 497 S.E.2d 531, 538 (1997).

18. In this case, the hearing examiner finds the testimony of witnesses Ralph C. Smith, Jr., M.D., Sam Kapourales, Robert C. Knittle, James D. Abel, M.D., Earl Claycomb, Sergeant Eric Sherrill, Special Agent Todd Berry, Inspector Leslie Inghram, Hope Chaney and Todd Bowen to be credible and reliable. Any inconsistency with the foregoing findings of fact or with the testimony of the other credible witnesses was not a result of any deliberate untruthfulness or bias. Rather, any inconsistency was a result of a difference of opinion, lack of knowledge, misperception or misrecollection. *Id.*
19. Respondent's counsel suggests a prejudice or bias on the part of Inspector Inghram during the course of the investigation in this matter and/or in her

testimony in this case because Inspector Inghram had previously investigated allegations against Respondent. See Board's Exhibit 21, p. 4-5; Attachment E, pp. 14-19. However, the hearing examiner finds that Investigator Inghram's investigative methods were reasonable and do not demonstrate bias or prejudice on her part and that Investigator Inghram testified credibly in this matter. West Virginia Board of Medicine v. Danine Ann Rydland, M.D., (2013); Martin v. Randolph County Bd. of Education, 195 W.Va. 297, 465 S.E. 2d 399, 406 (1995); Michael D.C. v. Wanda L.C., 201 W.Va. 381, 497 S.E.2d 531, 538 (1997).

20. The hearing examiner finds not credible the testimony of John Case insofar as such testimony conflicts with the foregoing findings of fact. Specifically, John Case's testimony regarding his recall and/or observations are not credited to rebut or contradict the reliable testimony of Sergeant Eric Sherrill, Special Agent Todd Berry, and/or Inspector Leslie Inghram, each of whom provided specific and credible descriptions of their independent observations of Respondent's demeanor on June 18, 2014. First, Mr. Case testified that he went into the Treatment Center and was not present for at least some portion of the interaction between Respondent and Inspector Inghram. Tr. Vol. I p. 82-83. Secondly, Mr. Case's reliability and acuteness to observe is undermined, particularly by Mr. Case's testimony that Respondent was "probably seventy (70) years old," when the Respondent was fifty-two (52) years of age at the time of hearing. Tr. Vol. I p. 80; Board's Exhibit 9, p. 1.

21. Ralph Smith, M.D., was qualified in this matter as an expert witness, without objection, in the fields of Psychiatry and Substance Abuse. Tr. Vol. II pp. 99-100; W.V.R.E. 702; Benedi v. McNeil-P.P.C., Inc., 66 F3d 1378 (4th Cir. § 1995); City of Wheeling v. Public Serv. Comm'n, 199 W.Va. 252, 483 S.E.2d 835 (1997) (per curiam) (applying rule 702 to administrative proceedings). The expert testimony of Dr. Smith is unrefuted in this case and is deemed credible and relevant to material issues in this case and is entitled to great weight. See also *West Virginia Board of Medicine v. Louis John Del Giorno, M.D.*, (2010); *West Virginia Board of Medicine v. Frank Lenous Turner, D.P.M.*, (2004); *West Virginia Board of Medicine v. Francesco Quarequo, M.D.*, (1999); *West Virginia Board of Medicine v. Swaraj S. Rikhy, M.D.*, (1997); *West Virginia Board of Medicine v. Paul T. Healy, M.D.*, (1997); *West Virginia Board of Medicine v. Boonlua Lucktong, M.D.*, (1996); *West Virginia Board of Medicine v. Thomas E. Mitchell, M.D.*, (1995) *West Virginia Board of Medicine v. Thomas J. Park, M.D.*, (1994); and *West Virginia Board of Medicine v. David C. Shamblin, M.D.*, (1989).

22. James Abel, M.D., was qualified in this matter as an expert witness, without objection, in the fields of Psychiatry and Substance Abuse. Tr. Vol. II pp. 108; W.V.R.E. 702; Benedi v. McNeil-P.P.C., Inc., 66 F3d 1378 (4th Cir. § 1995); City of Wheeling v. Public Serv. Comm'n, 199 W.Va. 252, 483 S.E.2d 835 (1997) (per curiam) (applying rule 702 to administrative proceedings). The expert testimony of Dr. Abel is unrefuted in this case and is deemed credible and relevant to material issues and is entitled to great weight. See also *West*

Virginia Board of Medicine v. Louis John Del Giorno, M.D., (2010); *West Virginia Board of Medicine v. Frank Lenous Turner, D.P.M.*, (2004); *West Virginia Board of Medicine v. Francesco Quarequio, M.D.*, (1999); *West Virginia Board of Medicine v. Swaraj S. Rikhy, M.D.*, (1997); *West Virginia Board of Medicine v. Paul T. Healy, M.D.*, (1997); *West Virginia Board of Medicine v. Boonlua Lucktong, M.D.*, (1996); *West Virginia Board of Medicine v. Thomas E. Mitchell, M.D.*, (1995) *West Virginia Board of Medicine v. Thomas J. Park, M.D.*, (1994); and *West Virginia Board of Medicine v. David C. Shamblin, M.D.*, (1989). In determining the credibility of Dr. Abel, the hearing examiner has considered the unsolicited statement made by Dr. Abel after the conclusion of his testimony. Tr. Vol. II pp. 285-286. While Dr. Abel's statement was appropriate, under the circumstances, Dr. Abel's remark does not diminish his expert testimony regarding the material issues in this matter.

23. The West Virginia Medical Practice Act and the Board of Medicine Legislative Rules mandate that the West Virginia Board of Medicine protect the public interest, safety, health and welfare. WEST VIRGINIA CODE §30-3-1 *et seq.*; W.Va. Code R. § 11-1A-1 *et seq.* (2007).
24. The Board may independently initiate disciplinary proceedings as well as initiate disciplinary proceedings based on information received from medical peer review committees, physicians, podiatrists, hospital administrators, professional societies and others. WEST VIRGINIA CODE §30-3-14 (a); W.Va. Code R. § 11-3-10 *et seq.*
25. Pursuant to Legislative Rules, the Board's complaint committee shall consist of

- three (3) or more members of the Board appointed by the President, one of whom shall be designated as chair. Upon receipt of a complaint submitted to the Board, the matter shall be referred to the complaint committee for further disposition. W.Va. Code R. § 11-3-9.9 (d).
26. On November 17, 2013, the Board's duly appointed Complaint Committee properly initiated a complaint against the Respondent, No. 13-138-W., and directed an investigation into the allegations. The allegations were amended on January 15, 2015. As part of that investigation, the Board properly issued subpoena for the acquisition of patient records. W.Va. Code R. § 11-3-10.1 *et seq.*
27. West Virginia Code authorizes the Board to require a licensee to submit to a mental or physical examination by a physician or physicians approved by the Board. A physician submitting to an examination has the right, at his or her expense, to designate another physician to be present at the examination and make an independent report to the Board. Any individual who applies for or accepts the privilege of practicing medicine and surgery in West Virginia is considered to have given his or her consent to submit to all examinations when requested to do so in writing by the Board and to have waived all objections to the admissibility of the testimony or examination report of any examining physician on the ground that the testimony or report is privileged communication. If a person fails or refuses to submit to an examination, such refusal is prima facie evidence of his or her inability to practice medicine and surgery and in compliance with the standards of acceptable and prevailing

medical practice. WEST VIRGINIA CODE § 30-3-14 (f).

28. On July 14, 2014, the Board properly ordered a Mental and Physical examination of Respondent pursuant to West Virginia Code, based upon sufficient and reliable information. The Board appointed Ralph Smith, Jr., M.D., to conduct such examination. Pursuant to a motion by Respondent, such examination was rescheduled. Respondent submitted to such mental and physical examination as rescheduled. Dr. Smith filed a report with the Board on or about August, 21, 2014. WEST VIRGINIA CODE § 30-3-14 (f).
29. After investigation of Complaint No. 13-138-W and pursuant to Legislative Rule, the Complaint Committee referred this matter for review to an independent consultant for evaluation to Board Consultant, James Abel, M.D. Dr. Abel reviewed information provided to him regarding this case and duly filed a report, including a recommendation and finding on or about February 5, 2015. W.Va. Code R. § 11-3-10.13.
30. Where an imminent danger to the public safety, health or welfare exists, the Board may summarily suspend a physician's license. If the Board determines the evidence in its possession indicates that a physician's continuation in practice or unrestricted practice constitutes an immediate danger to the public, the Board may suspend the physician's license on a temporary basis and without a hearing, if institution of procedures for a hearing before the Board are initiated simultaneously with the temporary action and begin within fifteen days of the action. The Board shall render its decision within five days of the

conclusion of such expedited hearing. WEST VIRGINIA CODE § 30-3-14 (a), (c), (j), (k).

31. Pursuant to West Virginia Code and the Board's Legislative Rules, the West Virginia Board of Medicine, having legally sufficient cause to determine that Respondent's continued practice of medicine in the state constituted an imminent danger to the public safety, health or welfare, properly ordered a summary suspension of Respondent's license to practice medicine and surgery in West Virginia on February 25, 2015, and simultaneously timely and properly notified Respondent of an evidentiary hearing to be held in this matter on March 9, 2015. WEST VIRGINIA CODE § 30-3-14 (a), (c), (j), (k); W.Va. Code R. § 11-3-10-16.
32. Respondent requested that the expedited hearing in this matter be continued to a later date. Respondent waived his right to have such hearing be conducted before a quorum of the Board members, agreed to have the hearing occur before the duly assigned hearing examiner, with an opportunity for the parties to submit proposed findings of fact and conclusions of law for consideration by the hearing examiner after the conclusion of the proceedings. W.Va. Code R. § 11-3-10-16; Hearing Examiner's Exhibits 2, 3, 4, 5, 6, 7, 8; Attachments A, B, C.
33. The West Virginia Medical Practice Act sets forth conduct which may render an individual unqualified for licensure or subject to discipline or other restrictions upon licensure. W.Va. Code §30-3-14.
34. The general provisions applicable to state licensing and examination boards authorize the Board to promulgate legislative rules that "delineate conduct,

practices or acts which, in the judgment of the board, constitute professional negligence, a willful departure from accepted standards of professional conduct and/or which may render an individual unqualified or unfit for licensure, registration or other authorization to practice." W.Va. Code §30-1-8(c).

35. The Board's Legislative Rule Series 1A regarding Licensing and Disciplinary Procedures enumerates additional conduct for which discipline may be imposed, including conduct which constitutes dishonorable, unethical and/or unprofessional conduct. W. Va. Code R. §11-1A-12.
36. The Board shall ensure "a professional environment that encourages the delivery of quality medical services" to protect the public interest. W.Va. Code §30-3-2. Patients entrust health care professionals with their mental and physical well-being and rely upon the clinical skills and the professionalism of the physicians who treat them. The ability of the medical profession to perform the fundamental elements of the vocation would be eviscerated in the absence of public trust. Moreover, protection of the public interest requires that the Board demand a high degree of integrity from members of the medical profession. *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953); *West Virginia Board of Medicine v. Romulo Dela Rosa, M.D.* (1989); *West Virginia Board of Medicine v. Lagrimas B. Sadorra, M.D.* (1988).
37. The Board has proven by clear and convincing evidence that the evidence in the Board's possession, as of February 25, 2015, demonstrated that Respondent's continuation in practice or unrestricted practice constituted an immediate danger to the public. WEST VIRGINIA CODE §30-3-14(k).

38. The Board may deny a license or discipline the license of any licensee who prescribes, dispenses and/or administers a prescription drug, including any controlled substance under state or federal law, other than in good faith and in a therapeutic manner in accordance with accepted medical standards and in the course of the physician's professional practice. WEST VIRGINIA CODE §30-3-14(c) (13).
39. Acts constituting dishonorable, unethical or unprofessional conduct include prescribing or dispensing any controlled substance: (a) with the intent or knowledge that a controlled substance will be used or is likely to be used other than medicinally or for an accepted therapeutic purpose; and/or (b) with the intent to evade any law with respect to the sale, use or disposition of the controlled substances; and/or (c) for the licensee's personal use, or for the use of his or her immediate family when the licensee knows or has reason to know that an abuse of controlled substance(s) is occurring, or may result from such a practice; and/or (d) in such amounts that the licensee knows or has reason to know, under the attendant circumstances, that the amounts prescribed or dispensed are excessive under accepted and prevailing medical practice standards. WEST VIRGINIA CODE §30-3-14(c) (13) and W. Va. Code R. §11-1A-12.2.a.A-D.
40. The Board has proven by clear and convincing evidence that Respondent prescribed controlled substances other than in good faith and in a therapeutic manner in accordance with accepted medical standards and in the course of his professional practice with respect to his treatment of Patients 1, 5, 6, 7/17, 8, 9,

10, 11, 12, 13, 14, 15, and 16. The Board has proven by clear and convincing evidence that Respondent repeatedly prescribed controlled substances to those patients with the intent or knowledge that a controlled substance would be used or was likely to be used other than medicinally or for an accepted therapeutic purpose and/or in such amounts that the Respondent knew or had reason to know, under the attendant circumstances, that the amounts prescribed or dispensed were excessive under accepted and prevailing medical practice standards, in violation of West Virginia Code and the Board's Legislative Rules. WEST VIRGINIA CODE §30-3-14(c) (13) and W. Va. Code R. §11-1A-12.2.a.A-D.

41. The Board may deny a license or discipline the license of any licensee who fails to keep written records justifying the course of treatment of a patient, including but not limited to patient histories, examination and test results and treatment rendered, if any. WEST VIRGINIA CODE §30-3-14(c) (11); W. Va. Code R. §11-1A-12.1.u.

42. The Board has proven by clear and convincing evidence that Respondent failed to keep written records justifying the course of treatment for Patients 1, 2, 3, 4, 5, 6, 7/17, 8, 9, 10, 11, 12, 13, 14, 15, and 16, in violation of West Virginia Code and the Board's Legislative Rules. WEST VIRGINIA CODE §30-3-14(c) (11); W. Va. Code R. §11-1A-12.1.u.

43. The Board may deny a license or discipline the license of any licensee who is unqualified due to professional incompetence and/or has demonstrated a lack of professional competence to practice medicine which a reasonable degree of

skill and safety for patrons. WEST VIRGINIA CODE §30-3-14(c) (20) (21); W.Va. Code R. § 11-1A-12.1.h; § 11-1A-12.1.i; § 11-1A-12.1.j.

44. The Board has proven by clear and convincing evidence that Respondent is unqualified due to professional incompetence. Respondent's treatment of Patients 1, 2, 3, 4, 5, 6, 7/17, 8, 9, 10, 11, 12, 13, 14, 15 and 16 demonstrates a lack of professional competence to practice medicine with a reasonable degree of skill and safety for patrons. WEST VIRGINIA CODE §30-3-14(c) (20), (21); W.Va. Code R. §11A-12.1.h, i, j; Webb v. West Virginia Board of Medicine, 212 W. Va. 149, 569 S.E. 2d 225, 231 (W.V. 2002).
45. The Board may deny a license or discipline the license of any licensee who makes a deceptive, untrue or fraudulent representation in the practice of medicine. WEST VIRGINIA CODE §30-3-14(c) (9); W. Va. Code R. §11-1A-12.1.s.
46. The Board has proven by clear and convincing evidence that Respondent made deceptive, untrue and/or fraudulent representations in the practice of medicine and surgery by writing prescriptions for patients on prescription pads which did not accurately reflect Respondent's place of practice and/or proper contact information. WEST VIRGINIA CODE §30-3-14(c) (9); W. Va. Code R. §11-1A-12.1.s.
47. The Board has proven by clear and convincing evidence that Respondent made deceptive, untrue or fraudulent representations in the practice of medicine by writing prescriptions for controlled substances to Patient 16, which dispensed controlled substances were subsequently transferred to the Respondent. WEST VIRGINIA CODE §30-3-14(c) (9); W. Va. Code R. §11-1A-12.1.s.

48. The Board may deny a licensee or discipline the license of any licensee who fails to practice medicine with reasonable skill and safety due to physical or mental impairment, including deterioration through the aging process, loss of motor skill or abuse of drugs or alcohol. WEST VIRGINIA CODE §30-3-14(c) (21); W. Va. Code R. §11-1A-12.1.h., j.
49. The Board has proven by clear and convincing evidence that Respondent failed to practice medicine with reasonable skill and safety due to physical or mental impairment, including deterioration through the aging process, loss of motor skill and/or abuse of drugs or alcohol on June 18, 2014. WEST VIRGINIA CODE §30-3-14(c) (21); W. Va. Code R. §11-1A-12.1.h.
50. The Board may deny a licensee or discipline the license of any licensee who engages in dishonorable, ethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member of the public; and or engages in unprofessional conduct, including any departure from or failure to conform to the standards of acceptable and prevailing medical practice or the ethics of the medical profession. WEST VIRGINIA CODE §30-3-14 (17); W. Va. Code R. §11-1A-12.1.e; §11-1A-12.1.j; §11-1A-12.2.a.; §11-1A-12.2.d.
51. In the absence of a statutory definition, "dishonorable, unethical and unprofessional conduct" and "conduct which has the effect of bringing the medical profession into disrepute" will be measured by the standards of the medical profession after a hearing. Expert testimony is not required. Mingo County Medical Society v. Simon, 20 S.E. 2d 807 (W.Va. 1942); Batoff v. State Board of Psychology, 750 A. 2d 835 (Pa. 2000), (boards comprised of members

they oversee may base their decision on the collective expertise of those members by filtering expert and documentary evidence presented before the hearing examiner through the lens of its own expertise); Pons v. Ohio State Medical Board, 614 N.E. 2d 748, (1991), (requiring due deference to the Board's interpretation of ethical requirements of its profession); Petition of Grim, 635 A2d 456 (N.H. 1993); Perez v. Board of Regist. For the Healing Arts, 803 S.W. 2d 160 (Mo. App. 1991); Fleishman v. Board of Examiners in Podiatry, 576 A. 2d 1302 (Conn. App. 1990); Craft v. State Board of Dental Examiners, 755 P.2d 1191 (Ariz. App. 1988); Sillery v. Board of Medicine, 378 N.W. 2d 570 (Mich. App. 1985); Davidson v. State, 657 P 2d 810 (Wash. App. 1983); Kundrat v. Com. State Dental Council, 447 A. 2d 355 (Pa. Cmwlth 1982); Ferguson v. Hamrick, 388 S. 2d 981 (Alabama, 1980); Manthey v. Ohio State Medical Board, 521 N.E. 2d 1121 (Ohio App. 1967); West Virginia Board of Medicine v. Harry E. Walkup, Jr., M.D. (2002); West Virginia Board of Medicine v. Francesco Quarequío, M.D. (1999); and West Virginia Board of Medicine v. Rahmet Muzaffer, M.D. (1998).

52. The Board has proven by clear and convincing evidence that Respondent has engaged in dishonorable, unethical and/or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member of the public and/or conduct that has the effect of bringing the medical profession into disrepute, in violation of West Virginia Code and the Board's Legislative Rules. WEST VIRGINIA CODE §30-3-14(c) (17), W. Va. Code R. §11-1A-12.1.e; §11-1A-12.1.j; W. Va. Code R. §11-1A-12.2.d.

53. The Board has proven by clear and convincing evidence that based upon Respondent's violations of the professional conduct standards set forth in West Virginia Code and the Board's Legislative Rules, Respondent is unqualified to practice medicine and surgery in the State of West Virginia. WEST VIRGINIA CODE §30-3-14(c) (9), (11), (13), (17), (20), (21); W. Va. Code R. §11-1A-12.1.e, h, i, j, u, s; §11-1A-12.2.a, d.
54. The West Virginia Board of Medicine has proven by clear and convincing evidence that the continued licensing of Respondent to practice medicine and surgery in the State of West Virginia presents an immediate and continuing danger to the public. West Virginia Code § 30-3-14 (c) (9); § 30-3-14 (c) (17); § 30-3-14(c) (20); § 30-3-14(c) (21); W. Va. Code R. § 11-1A-12.1 (h), (i), (j) (s); W. Va. Code R. § 11-1A-12.2.a.
55. A physician's prior disciplinary sanctions may be relevant and probative in professional disciplinary proceedings, particularly for the purpose of determining whether or not a physician is fit to continue the practice medicine and surgery. Syl. pt. 5, Committee on Legal Ethics v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986) (prior discipline of an attorney is an aggravating factor in a pending professional disciplinary proceeding because the profession is "imbued with a public trust"). In the context of these proceedings, the prior disciplinary Consent Order was in effect until July 12, 2009. Respondent's prior discipline is not so remote in time from the initiation of the charges in this matter that its consideration is irrelevant. Therefore, the hearing examiner considers such evidence in this matter solely in making a recommendation to the Board

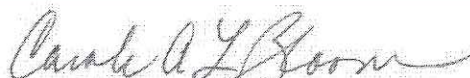
regarding appropriate sanctions. However, even if Respondent's prior discipline history is not considered for any purpose in this matter, including for the purpose of determining appropriate sanctions, based upon the foregoing findings and facts and conclusions of law, the hearing examiner specifically finds that revocation of Respondent's license to practice medicine and surgery in West Virginia is in the public interest and necessary to protect the health, welfare and safety of the public. WEST VIRGINIA CODE §30-3-14(c) (9), (11), (13), (17), (20), (21); W. Va. Code R. §11-1A-12.1.e, h, i, j, u, s; §11-1A-12.2.a, d.

56. As the regulatory and disciplinary body for the practice of medicine, the West Virginia Board of Medicine may consider the evidence and determine whether or not the Respondent has violated his professional and legal obligations as a physician. WEST VIRGINIA CODE § 30-3-(5). The Board of Medicine may adopt, modify or reject any findings of fact and conclusions of law recommended by the Hearing Examiner. The Board may also modify the recommended decision with a reasonable justification, and in the interest of public safety. W. Va. Code R. §11-3-14; Berlow v. West Virginia Board of Medicine, 193 W.Va. 666, 458 S.E. 2d 469 (1995).

RECOMMENDED DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner **RESPECTFULLY RECOMMENDS** that the West Virginia Board of Medicine make the following findings: (1) that Respondent violated West Virginia Code and the Board of Medicine Legislative Rules as set forth herein; and (2) that it is proper and in the public interest, health, welfare and safety to **REVOKE** Respondent's license to practice medicine and surgery in West Virginia; and (3) that Respondent shall pay the costs and expenses of these proceedings as provided in West Virginia Code and the Board's Legislative Rules. Further, the hearing examiner recommends that the Board take such steps as may be necessary to properly redact information, if any, contained in the transcript and/or exhibits in this matter and/or in this Recommended Decision, pursuant to West Virginia Code, prior to publication of such information.

Entered: December 15, 2015



Carole A. Lewis Bloom,
Designated Hearing Examiner
West Virginia State Bar No. 6867
Post Office Box 1652
Charleston, West Virginia 25326

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE HEARING EXAMINER

**WEST VIRGINIA BOARD OF MEDICINE,
Petitioner**

v.

COMP. No. 13-138-W

**SHIVKUMAR LAKSHMINARAYAN IYER, M.D.,
Respondent**

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Recommended Decision** were served upon the following parties and in the matter designated on this the 15th day of December, 2015:

Robert C. Knittle, Executive Director
W.V. Board of Medicine
101 Dee Drive, Suite 103
Charleston, WV 25311

BY HAND-DELIVERY

Jamie S. Alley, Esquire
Board Counsel
W.V. Board of Medicine
101 Dee Drive, Suite 103
Charleston, WV 25311

BY HAND-DELIVERY

Mark Hobbs, Esquire
William T. Forester, Esquire
Post Office Box 974
Chapmanville, West Virginia 25508

BY CERTIFIED MAIL



Carole A. Lewis Bloom, W.V. Bar No. 6867
Hearing Officer
Post Office Box 1652
Charleston, West Virginia 25326