

SOAH DOCKET NO. 578-11-7257
TBVME DOCKET NO. 09-301

TEXAS BOARD OF VETERINARY	§	BEFORE THE
MEDICAL EXAMINERS, Petitioner	§	
	§	TEXAS BOARD OF
v.	§	
	§	VETERINARY MEDICAL
KODY KOTHMANN, D.V.M.,	§	
Respondent	§	EXAMINERS

FINAL DECISION AND ORDER

This matter was heard by the Texas Board of Veterinary Medical Examiners (“Board”) in open meeting on the 27th day of March, 2012.

The Board finds that after proper and timely notice was given, the above-styled case was heard at the State Office of Administrative Hearings by an Administrative Law Judge (“ALJ”) on November 1 and 2, 2011. Respondent Kody Kothmann, DVM (“Respondent”) appeared and was represented by attorney Keith Thompson. The ALJ filed his Proposal For Decision (“PFD”) on December 21, 2011 containing Findings of Fact and Conclusions of Law and finding that Respondent had violated the Board’s Rules of Professional Conduct (“Rules”) 22 TEX. ADMIN. CODE §573.22 and §573.52. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record. Staff for the Board timely filed exceptions to the PFD and Respondent timely filed a response to Staff’s exceptions. On February 1, 2012, the ALJ declined all Exceptions and adopted the PFD as originally written.

The Board, after review and due consideration of the PFD, adopts the Findings of Fact and Conclusions of Law of the ALJ contained in the PFD and incorporates those Findings of Fact and Conclusions of Law into this Final Order as if such were fully set out and separately stated in this Final Order, with the exception of the modified Conclusions of Law and modified penalty set forth below.

A. Modified Conclusion of Law No. 7

Conclusion of Law No. 7 in the PFD is modified and adopted to read as follows:

“7. Based upon Findings of Fact Nos. 14-19, Staff has failed to show that Respondent failed to meet the standard of care by choosing to perform an OE instead of an OHE on the cat.”

Reason for Modification:

In the PFD, Conclusion of Law No. 7 relies on Finding of Fact No. 20, which states: “The cat suffered from no internal complications as a result of undergoing an OE on April 22, 2009.” Rule 573.22, the standard of care, does not include a consideration of

ultimate patient outcome as a result of a veterinarian's treatment and does not require the ALJ to find or consider harm to the patient. The ALJ's Finding of Fact No. 20 would set a novel precedent whereby the Board may have to prove actual physical complications in the future to enforce the standard of care. The Board has consistently found violations of the standard of care in cases where the patient suffered no actual harm as a result of the substandard care.¹ The ALJ's PFD as written would restrict the Board's ability to enforce the standard of care in cases where injury or complications could arise from procedures or treatments not accepted by average members of the veterinary profession. That precedent would hamper the Board's ability to protect the public from substandard veterinary care that may not result in harm in any specific instance, but, if allowed to continue, would result in more negative outcomes than standard care. The ALJ's holding in Conclusion of Law No. 7 is thus an incorrect interpretation of Rule 573.22. Because the ALJ did not properly apply or interpret agency rules, the Board may modify the Conclusion of Law pursuant to §2001.058(e) of the Administrative Procedures Act ("APA"), TEX. GOV'T. CODE Ch. 2001.

B. Removing Conclusion of Law No. 11:

The Board does not adopt Conclusion of Law No. 11, which states:

"11. Based on Findings of fact Nos. 12-13 and Conclusion of Law No. 6, Respondent should receive an informal reprimand from the Board."

Reason for Modification:

A penalty recommendation is not a proper Conclusion of Law, and the Board cannot consider such a recommendation to be binding. Rule 575.8(d)(2) states: "While the Board welcomes the recommendations of ALJs regarding the appropriate sanction, the board does not consider the findings of fact and conclusions of law to be appropriate for stating such recommendations. Therefore, sanction recommendations in the form of findings of fact and conclusions of law are considered to be an improper application of applicable law and these rules." The Texas Veterinary Licensing Act (the "Act"), TEX. OCC. CODE §801.456(a), requires that the Board, not the ALJ, impose an administrative penalty. In all cases, the Board has the discretion to impose the penalty that best accomplishes the Board's legislatively-assigned enforcement goals and falls within the penalty matrix set out in Rule 575.25. No statutory authority exists in the Act or in the

¹ See e.g. Board Order 2001-20 (Violated the standard of care by failing to obtain written consent prior to using a medication for purposes other than those authorized on the label); Board Order 2004-31 (Violated the standard of care by slamming a carrier on a table with the animal inside); Board Order 2005-19 (Violated standard of care by failing to remove the entire uterus as is the accepted medical definition of an ovariohysterectomy); Board Order 2006-48 (Violated standard of care by using a topical steroid ointment on an eye wound instead of performing a fluorescein stain test); Board Order 2007-01 (Violated standard of care for failing to completely remove claws on a cat); Board Order 2008-08 (Violated the standard of care by failing to provide the recommended treatment for ingestion of Advil that could have led to renal failure); Board Order 2009-02 (Violated the standard of care by placing a wet cat outdoors to dry in 55-degree weather after bathing); Board Order 2010-94 (Violated standard of care for making errors in treatment of 1 ½ year old dog that may result in a shortened lifespan); Board Order 2010-90 (Violated the standard of care by failing to remove all of the ovaries during a cat spay).

APA for an ALJ to impose a final sanction. Because the ALJ did not properly apply or interpret agency rules, the Board may modify the Conclusion of Law pursuant to §2001.058(e) of the APA. The Board therefore removes the ALJ's Conclusion of Law No. 11.

C. Removing Conclusion of Law No. 12:

The Board does not adopt Conclusion of Law No. 12, which states:

“12. Based on Findings of fact Nos. 28-29 and Conclusion of Law No. 10, Respondent should receive an informal reprimand from the Board.”

Reason for Modification:

A penalty recommendation is not a proper Conclusion of Law, and the Board cannot consider such a recommendation to be binding. Rule 575.8(d)(2) states “While the Board welcomes the recommendations of ALJs regarding the appropriate sanction, the board does not consider the findings of fact and conclusions of law to be appropriate for stating such recommendations. Therefore, sanction recommendations in the form of findings of fact and conclusions of law are considered to be an improper application of applicable law and these rules.” The Act 801.456(a) requires that the Board, not the ALJ, impose an administrative penalty. In all cases, the Board has the discretion to impose the penalty that best accomplishes the Board's legislatively-assigned enforcement goals and falls within the penalty matrix set out in Rule 575.25. No statutory authority exists in the Act or in the APA for an ALJ to impose a final sanction. Moreover, the ALJ stated in the record that his recommendation of an informal reprimand for the record keeping violation was based on a lack of evidence of Respondent's motive in amending the record. Motive is not a factor in determining a violation of record keeping requirements under Rule 575.52. Because the ALJ did not properly apply or interpret the Act and agency rules, the Board may modify Conclusion of Law No. 12 pursuant to §2001.058(e) of the APA. The Board therefore removes the ALJ's Conclusion of Law No. 12.

D. Adoption of Findings of Fact and Conclusions of Law

All other Findings of Fact and Conclusions of Law contained in the Proposal for Decision that are not expressly modified by this Order are hereby ADOPTED and incorporated by reference in full in this Order.

E. Penalty Justification

The ALJ's Conclusion of Law No. 6 found that Respondent violated Rule 573.22 by failing to meet the standard of care in preparing the cat's surgical site. This was based on Finding of Fact No. 12, which states “The cat's hair around the incision site was matted into the incision site causing an infection,” and Finding of Fact No. 13, which states “Respondent did not shave the cat broadly enough to prevent an infection from occurring at the cat's incision site.”

The ALJ's Conclusion of Law No. 10 found that Respondent failed to properly indicate he had amended a medical record in violation of Rule 573.52. The conclusion was based on Finding of Fact No. 28, which states "Respondent created an amended medical record of the record he originally gave to the owners on April 22, 2009," and Finding of Fact No. 29, which states "Although the amended record contained the original date of April 22, 2009, Respondent added information about the anesthesia he gave to the cat when it was spayed, without indicating the record had been amended."

Under Rule 575.24, a veterinarian subject to disciplinary action by the board may be reprimanded. A reprimand may be formal or informal. The Board is ordering a formal reprimand for Respondent's violation of the standard of care because, according to Findings of Fact 12 and 13 and Conclusion of Law 6, Respondent's substandard care did not meet the Board's standard of care and, in this particular case, resulted in an infection requiring further invasive medical treatment. The Board is ordering a formal reprimand for Respondent's record keeping violation because, according to Findings of Fact 28 and 29 and Conclusion of Law 10, Respondent gave his client a medical record that did not contain the drugs administered to the patient and then later provided the Board with a medical record that was identical except that Respondent had added the drug information without indicating the record had been amended. The Board takes record keeping very seriously, and for good reason: the public needs complete patient records in case they take their animal to another veterinarian who will need to know the animal's history, especially what kind and what quantity of drugs the animal has recently received. The Board requires veterinarians to indicate when they have amended a record so that, in cases like this, the Board can investigate complaints more accurately. If the Board had not received a copy of the original record from the client in this case, the Board would have no way of knowing that Respondent had amended the record at a later date. If the Board had no amendment rule, licensees would be able to create or amend patient records in response to Board investigations of complaints. That situation is unacceptable, and this is why the Board has a rule requiring that all amendments to patient records contain the time and date of the amendment if the amendment was not made contemporaneously to the events described therein. Respondent's failure to indicate when he amended the record to include the anesthesia delivered to the cat is a much more serious record keeping violation than, for example, forgetting to write down the cat's age, and thus, the violation warrants a formal reprimand.

Under Rule 575.25, the Board may order a licensee to take additional continuing education if the licensee is found to have committed a Class B violation. According to 575.25(b)(1)(B), Class B violations include "engaging in veterinary practices which are violative of the Rules of Professional Conduct." Rule 575.25(b)(3)(C) states that the Board may penalize the licensee with "continuing education in a specified field related to the practice of veterinary medicine that the board deems relevant to the violations. The total number of hours mandated are in addition to the number of hours required to renew the veterinary license." Respondent violated the Rules of Professional Conduct by failing to meet the standard of care in preparing a cat for surgery and by failing to maintain proper patient records. Thus, the Board orders Respondent to take an additional 3 hours of

continuing education in small animal surgery and an additional 3 hours of continuing education in record keeping.

The above ordered penalties are consistent with recent Board orders that found violations of the standard of care and patient record keeping.²

ORDER

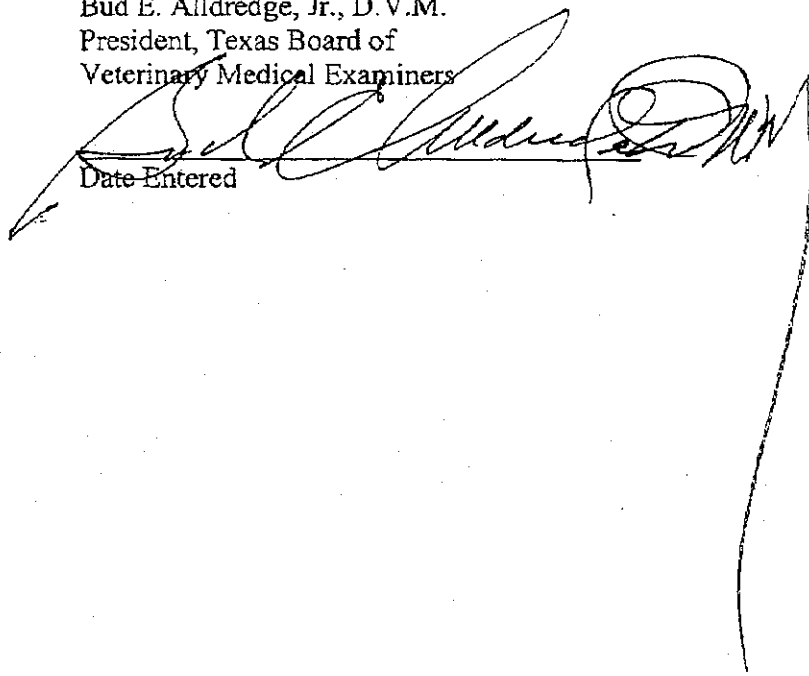
NOW, THEREFORE, it is ORDERED that Respondent be FORMALLY REPRIMANDED for violating the standard of care under Rule 573.22 and for failing to maintain proper patient records under Rule 573.52.

In addition, the Board ORDERS that Respondent complete an additional SIX (6) hours of continuing education within one year of the date of this Order. This is in addition to the seventeen (17) hours required of all veterinarians annually. Three of the additional hours must be in small animal surgery and the other three additional hours must be in record keeping. Documentation of the completion of the continuing education penalty shall be received within thirty (30) days after one year of the date of this order. If Respondent fails to provide documentation of completion within forty-five (45) days of one year of the date of this order, Respondent's license may be suspended until the continuing education penalty is completed and documentation is received by the Board.

Pursuant to Rule 575.10 and §2001.059 of the APA, because Respondent was adjudged by the ALJ after trial to be in violation of the Rules and thus §801.402(6) of the Act, Respondent is ORDERED to pay to the Board, within 45 days of the date of this Order, the costs of litigation totaling FOUR-THOUSAND SIX-HUNDRED AND FORTY-SEVEN DOLLARS AND NINETY-NINE CENTS (\$4,647.99). If Respondent fails to pay the costs within 45 days of the date of this Order, Respondent's license may be suspended until the costs are fully paid.

² See e.g. Board Order 2010-46 (Ordering a formal reprimand, a \$500 penalty, 3 of continuing education in endocrinology and 3 hours of continuing education in record keeping for violations of the standard of care and patient record keeping); Board Order 2010-87 (Ordering a formal reprimand, 3 hours of continuing education in record keeping, and 6 hours of continuing education in pharmacology for violations of the standard of care and patient record keeping); Board Order 2010-88 (Ordering a formal reprimand, 3 hours of continuing education in patient record keeping, 3 hours of continuing education in surgery, and 3 hours of continuing education in pharmacology for violations of the standard of care and patient record keeping); Board Order 2011-63 (Ordering a formal reprimand and 3 hours of continuing education in record keeping for violations of the standard of care and patient record keeping); Board Order 2011-69 (Ordering a formal reprimand, 3 hours of continuing education in record keeping, 3 hours in tissue surgery, and 3 hours in emergency medicine for violations of the standard of care and patient record keeping).

Bud E. Alldredge, Jr., D.V.M.
President, Texas Board of
Veterinary Medical Examiners

A large, stylized handwritten signature in black ink, appearing to read 'Bud E. Alldredge, Jr.', is written over the printed name and title. The signature is highly cursive and extends across the width of the text area.

Date Entered