

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

EDWARD J. SPENCER, M.D.

Physician's and Surgeon's
Certificate No. G 11138

OAH No. 2011070380

MBC Case No. 12-2010-205496

PRECEDENTIAL DECISION
No. MBC-2013-01 DMQ

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Medical Board of California hereby designates as precedential that portion of the decision listed below in the Matter of the Accusation against Edward J. Spencer, M.D.:

*Factual Findings 1, 2, 5, 6, 7, and 8 and
Legal Conclusions 1, 2, 3, 4, and 5.*

This precedential designation shall be effective January 31, 2013.



SHARON LEVINE, President
Medical Board of California

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Respondent.

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, State of California, Office of Administrative Hearings, heard this matter on August 23, 2011, in Oakland, California.

Deputy Attorney General Jane Zack Simon represented complainant Linda K. Whitney, Executive Director of the Medical Board of California.

John L. Fleeer, Attorney at Law, represented respondent Edward L. Spencer, M.D., who was not present.

The record was held open for submission of written argument. On September 2, 2011, respondent's closing argument was received and marked as Exhibit A for identification. On September 8, 2011, complainant's reply argument was received and marked as Exhibit 13 for identification. The record was closed and the matter was deemed submitted for decision on September 8, 2011.

FACTUAL FINDINGS

1. On August 24, 1965, the Medical Board of California issued physician's and surgeon's certificate no. G 11138 to respondent Edward L. Spencer, M.D. The current expiration date is December 31, 2011.

2. On March 24, 2011 complainant filed with the board a Petition for Order Compelling Psychiatric Examination of Licensee, under Business and Professions Code

section 820.¹ The petition alleged that respondent's ability to safely practice medicine may be impaired due to mental illness. In support of this allegation, the petition detailed information the board received from Petaluma Valley Hospital (PVH) in a March 8, 2010, report filed under section 805 and in PVH documents later subpoenaed by a board investigator. When complainant filed her petition with the board, respondent was not given a copy of the petition, nor was he offered an opportunity to present argument in opposition to the petition.

5. On April 7, 2011, pursuant to complainant's petition filed on March 24, 2011, the board issued an Order Compelling Psychiatric Examination, under section 820. The order directed respondent to submit to a psychiatric examination within 30 days to determine whether he "is mentally ill to such an extent as to affect his ability to practice medicine." The order required respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)."

The order and a letter asking respondent to contact the board's Pleasant Hill office were sent to respondent at his address of record. Respondent did not contact the board's Pleasant Hill office, so Investigator Scully went to respondent's residence on April 18, 2011, and personally served him with a copy of the order. Scully also gave respondent a letter informing him that the psychiatric examination was scheduled for May 2, 2011, at 10:00 a.m., with Randall L. Solomon, M.D.

6. Respondent failed to appear for the psychiatric examination on May 2, 2011, and Scully later received a voice mail message from respondent's attorney saying that he planned on filing a petition for writ of mandate challenging the Order Compelling Psychiatric Examination.

7. On May 31, 2011, Investigator Scully served respondent and Nancy Spencer, respondent's wife or ex-wife, with investigative subpoenas requiring them to appear for questioning at the board's Pleasant Hill office on June 8 and June 7, respectively.

On June 4, 2011, respondent's attorney faxed and mailed to Scully a letter objecting to the investigative subpoenas and stating that neither respondent nor Nancy Spencer would appear in response to the subpoenas. He also stated: "I have filed a petition for writ of mandate as to the Board's order compelling a psychiatric examination of Dr. Spencer. (Copy attached.) That matter is pending. Any discovery should occur

¹ All further statutory references are to the Business and Professions Code.

as part of that proceeding. I object to any attempt to circumvent same by way of an 'investigation.'"

8. On May 6, 2011, in the San Francisco Superior Court, respondent's attorney filed on respondent's behalf a Verified Petition for Administrative Writ against the board seeking a peremptory writ of mandate to set aside the Order Compelling Psychiatric Examination. Although Investigator Scully received a copy of this petition with the June 4 letter; the petition has not been legally served on the board. There have been no court proceedings on the petition and no proceedings are scheduled.

LEGAL CONCLUSIONS

1. Sections 820 and 821 provide:

Section 820

Whenever it appears that any person holding a license, certificate or permit under this division or under any initiative act referred to in this division may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency. The report of the examiners shall be made available to the licentiate and may be received as direct evidence in proceedings conducted pursuant to Section 822.²

Section 821

The licentiate's failure to comply with an order issued under Section 820 shall constitute grounds for the suspension or revocation of the licentiate's certificate or license.

2. Respondent's failure to comply with the Order Compelling Psychiatric Examination issued under section 820 constitutes cause to suspend or revoke his physician's and surgeon's certificate under section 821.

² Section 822 authorizes the board to take action against a licentiate when it has determined that the licentiate's ability to practice safely is impaired because of mental illness, or physical illness affecting competency.

3. Respondent's failure to comply with the Order Compelling Psychiatric Examination also constitutes unprofessional conduct, for which his physician's and surgeon's certificate is subject to disciplinary action under section 2234.

4. Respondent contends that he cannot be disciplined for failing to comply with the Order Compelling Psychiatric Examination, because the order "was improperly obtained, is overbroad, and is not authorized by statute." These contentions are without legal merit.

Respondent asserts that his due process rights were violated by not being provided a copy of complainant's petition before the board's order was issued, but section 820 does not require such notice. A due process challenge to section 820 was rejected in *Alexander D. v. State Board of Dental Examiners* (1991) 231 Cal.App.3d 92. The court reasoned that the property interest or license of the dentist who had been ordered to undergo a psychiatric examination would not be at stake unless an action was brought under section 822, and in that adjudicatory proceeding he would have full due process rights. (*Id.* at p. 98.) Furthermore, the licensee's privacy was protected if there was insufficient evidence to bring an action under section 822, because section 828 mandates that all agency records regarding the psychiatric examination would then be kept confidential. (*Ibid.*) Respondent points out factual differences between that case and his, i.e., the dentist in *Alexander D.* was served with both the order and the petition, there were complaints against him of substandard practice, and the order under section 820 did not include "a requirement that the licensee waive all rights to privacy regarding his medical records." These differences do not advance respondent's position.

For the board to compel a psychiatric examination under section 820, there must be information from which "it appears that any person holding a license, certificate or permit...may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness." There need be no evidence of substandard practice or patient harm. In this case, the board had information from which it appears that respondent may be impaired by mental illness and unable to safely practice. The purpose of the psychiatric examination is to determine whether in fact this is the case. The provisions in the order requiring respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)" are reasonable to assure a thorough examination.

5. The mere filing of a petition for writ of mandate does not deprive the board of authority to discipline respondent's license for failing to comply with the Order Compelling Psychiatric Examination. Respondent has not legally served the petition on the board, much less obtained a stay or other court order.

Dated: September 28, 2011

NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings