One-Man Fight: MD Takes On State Medical Board, PHP

Pauline Anderson | November 08, 2016

A physician whose lawsuit against the North Carolina Physician Health Program (NCPHP) and the North Caroline Medical Board (NCMB) was dismissed earlier this year is appealing his case to the US Court of Appeals for the Fourth Circuit, a court second only to the Supreme Court.

Kernan Manion, MD, a practicing psychiatrist for some 30 years, said he's taking on this fight – alone and without benefit of legal counsel – because he believes someone has to "confront the abuse" in the system.

In February, as reported by *Medscape Medical News*, Dr Manion launched a lawsuit against the NCMB and the NCPHP, among others, claiming loss of significant and potential earnings as well as public humiliation, irreparable harm to his professional reputation, and severe emotional distress.

However, in August, Dr Manion's case was dismissed in federal district court because the complaint was deemed to be outside of the statute of limitations and because the court considers that, as a state institution, the NCPHP has "sovereign immunity" and therefore cannot be sued.

But Dr Manion argues that the NCPHP is not a state agency because it does not have any state oversight and is not a legitimate medical corporation that can diagnose physicians under North Carolina state law.

"Rather, it's an educational public charity with no license to practice any form of medicine, such as making diagnoses, referrals, ordering lab tests, and even consulting to the medical board," he said.

He also argues that the statute of limitations should have been delayed or suspended until he was able to learn the nature of the allegations against him and that there was an appeals process.

Dr Manion also pointed out that the NCPHP has no current medical director.

Broke but Not Broken

In his initial lawsuit, Dr Manion, who has never been disciplined by any licensing entity in any state and has never been found liable for malpractice, said he was forced to deactivate his medical license after the NCMB acted upon "wrongful and flawed" diagnoses made through the NCPHP.

He described the experience with the NCPHP and the NCMB as "a Kafkaesque nightmare" and said his 7-year ordeal has driven him into bankruptcy.

Dr Manion was advised by his lawyers not to pursue the appeal because the chances of success are slim. However, he said he is going ahead with it on principle. It is no longer just about him, his license, or compensation for lost time and quality of life, he said.

"It is about whether any private agency has the right to operate independently of the law by claiming to be a state entity, practice medicine in contravention of state law, and recklessly endanger not only the lives of physician licensees but that of their patients."

At least one his patients committed suicide as a result of an interruption of care, said Dr Manion.

Dr Manion's involvement with the NCMB and the NCPHP dates back to his dismissal in September 2009 from his position as a civilian contracted psychiatrist with the Deployment Health Center at Naval Hospital Camp Lejeune, in Jacksonville, North Carolina.

After raising concerns with the Navy and personnel contractor about what he felt was dangerously deficient care of active duty service members who had posttraumatic stress disorder, he said he was "abruptly fired."

He brought a wrongful termination suit under the Whistleblower Protection Act alleging retaliatory discharge. He said he was later harassed and followed. These actions prompted him to meet with the local police chief about concerns for his personal safety.

Shortly after that, Dr Manion said he was notified by the NCMB that an anonymous police source had expressed concern about his mental health and that the NCMB had opened an investigation.

Psychological Evaluations

On a recommendation from the NCMB investigator, Dr Manion obtained an independent comprehensive psychological evaluation, which concluded that he did not have any mental disorder or impairment and that there was no basis to take any action that would restrict his medical license.

Despite this, the NCMB ordered its own assessment of Dr Manion. This assessment, carried out by Warren Pendergast, MD, who was then NCPHP chief executive officer and medical director, as well as a staff social worker, concluded that Dr Manion was mentally ill.

In making this decision, said Dr Manion, the NCPHP "relied upon only the unofficial information provided by the police officer, reviewed no clinical records, and failed to interview any collateral sources as is required in such evaluations."

Dr Manion is appealing the dismissal of his case for several reasons. He notes that the judge in the case is the same one who dismissed his federal whistle-blower suit and who "may have been influenced by contamination bias," according to the appeal brief.

He also maintains that multiple false statements were knowingly made by defendants and that the total lack of oversight and accountability of the NCPHP and the NCMB has allowed "systematic due process deprivation and lack of available recourse" when a physician believes the system has caused harm.

State legislation that was enacted on October 1 of this year apparently authorizes the PHP to evaluate and diagnose physician licensees referred to it by the NCMB.

In a letter to the state governor, attorney general, auditor, and others, Dr Manion and fellow physicians outlined their concerns.

"The law introduces new powers to the PHP that authorizes it to conduct evaluations and make diagnoses, but you can't do that under NC law if you're not a licensed medical entity," said Dr Manion.

"The NCPHP is not licensed to practice medicine, and furthermore, they're not medically trained and there's utterly no oversight or quality assurance."

According to the new law, said Dr Manion, "you can't even sue them – you have to accept that their evaluation and costly out-of-state referrals, which carry mandatory compliance under threat of loss of license, were done in 'good faith.' "

He added that neither that law nor any other law has ever defined the "good faith" practice of medicine.

Auditor's Report

The change in legislation pertaining to the NCPHP comes after a performance audit of the NCPHP was released by the state auditor in April 2014.

Although the auditor found no abuse by the NCPHP, the report notes that there was the potential for undetected abuse to occur.

"Abuse could occur and not be detected...because physicians were not allowed to effectively represent themselves when disputing evaluations...[and because] the North Carolina Medical Board did not periodically evaluate the Program and the North Carolina Medical Society did not provide adequate oversight," the report notes.

Among other proposals, the auditor recommended that the NCPHP ensure that physicians are provided due process and have access to objective, independent evaluations and that the NCMB and the North Carolina Medical Society develop and

implement policies for oversight of the program.

However, two and a half years after the report's release, there has been no follow-up by the auditor's office to determine whether any of its recommendations have been addressed or implemented.

Bill Holmes, a spokesperson for the North Carolina auditor's office, told *Medscape Medical News* that his office intends to revisit the PHP for a follow-up audit within the next 12 months but that that audit has not yet been scheduled.

"We will evaluate whether they have implemented our recommendations when we return for a follow-up," said Holmes.

Medscape Medical News approached the NCMB for an update.

"As the Board has said before, it accepts and embraces the recommendations made by the state auditor," said Thom Mansfield, the NCMB's chief legal officer.

"The Board is working diligently, and in conjunction with the Physicians Health Program and the North Carolina Medical Society, to implement those recommendations."

Mansfield said the medical board is "gratified" by the federal court's decision to dismiss Dr Manion's lawsuit.

"We are aware of Dr Manion's appeal from the District Court's decision. We look forward to filing our response to the appeal."

For its part, the NCPHP says it has "made changes in response to all of the recommendations from the 2014 state audit," according to Joseph P. Jordan, PhD, CEO of the NCPHP.

"Some of them involved legislative and administrative processes beyond our control, but all of those are underway or concluded. All recommended changes to internal NCPHP procedures have been adopted and are operational."

No Medical Director

Dr Jordan stressed that "the audit found no compromising of our data" and "no mistakes in our recommendations.

"We believe the audit helped to make a very good program even better for North Carolina medical professionals and their patients," he said.

Dr Manion and other physicians are also concerned that the NCPHP has not had a medical director since Dr Pendergast announced his resignation June 30, 2016.

"Active oversight by a medical director is a requisite administrative component of a Physician Health Programs structure according to guidelines published by the Federation of State Physician Health Program," Dr Manion and colleagues write in a letter to North Carolina Governor Pat McCrory.

Dr Jordan confirmed that his organization has no medical leader. "We continue to advertise for the position of medical director," he said.

In addition to having no state oversight or legal accountability and being without a medical director, the NCPHP does not have a full-time staff physician, Dr Manion claims. "So this is doubly dangerous," he said.

However, Dr Jordan noted that the NCPHP has had a part-time physician on staff since mid July.

No Due Process?

Reports from other physicians suggest that Dr Manion is not alone in failing to obtain due process from state PHPs.

"These PHPs prevent people from obtaining the report of their diagnostic evaluation, and then deny information about or access to a grievance procedure that would be an integral part of due process protection," said Dr Manion. "State MLBs [medical licensing boards] then rubber-stamp the PHP procedures."

During the past several months, *Medscape Medical News* has spoken with numerous physicians who have faced battles with state PHPs. They tell a similar story – of a system stacked against them.

In August 2015, *Medscape Medical News* published a news report highlighting the growing scrutiny of PHPs and allegations by physicians of coercive tactics with potentially devastating financial and mental health consequences, including suicide.

This was followed by a similar report published in the *BMJ* in June 2016, written by Associate Editor Jeanne Lenzer, that reflected many of the same concerns.

Dr Manion said he is "appalled" at these "horror stories" and is determined to "confront wrongful actions of medical boards and PHPs," which both harm physicians and needlessly jeopardizes patient care.

Fool's Errand?

Dr Manion's arguments, including critiques of several often-cited case law decisions, are laid out in his detailed 87-page appeal to the circuit court.

Arguments from the 14 defendants named in the appeal and from Dr Manion will be presented to a three-judge panel.

"The only thing they are deciding is whether my case was wrongfully dismissed and, if so, giving me the right to go back to federal district court and resume the case on the merits of the complaint," said Dr Manion.

He is pursuing this case on his own behalf, without an attorney. His lawyers have advised him not pursue it because of the costs. He called his decision to fight this case alone as "perhaps foolishly brave.

"Yes, it could be a 'fool's errand,' but I believe that each of us has to confront such challenges as are presented to us. To do nothing is to allow such abuse to continue," he said.

The past 7 years have been "an ordeal," but, said Dr Manion, "given the immensity of the importance of this for physicians and patients, I decided that I'm in it for the long haul. This abuse must be confronted."

He added that he is heartened by the fact that a brief of his appeal is publicly available through PACER (Public Access to Court Electronic Records), which is a service provided by the Federal Judiciary.

"The more people who look at this, the better. They may see commonalities to their own situation and the laws in existing case law."

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