

BEFORE THE BOARD OF MEDICINE

IN RE: The Petition for
Declaratory Statement of:
GENE E. MYERS, M.D.

FILED

Department of Professional Regulation
AGENCY CLERK

CLERK *Michael L. Womack*

DATE *10-25-88*

FINAL ORDER

THIS MATTER came before the Board of Medicine pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on June 4, 1988, in Tallahassee, Florida, for the purpose of considering the Petition for Declaratory Statement filed by Gene E. Myers, M.D.

Having considered the Petition, the letter amending the Petition dated April 14, 1988, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Petitioner is licensed in the State of Florida as a medical doctor, having been issued license number ME 0030363.
2. The factual scenario Petitioner presents is as follows:
Petitioner is a shareholder in a corporation which owns equipment. The equipment would be either leased or sold to the Limited Partnership. The technicians operating the equipment would either be corporate employees leased to the Limited Partnership or employed directly by the Limited Partnership. The Limited Partnership will be formed for the purpose of performing

004110

peripheral vascular laboratory studies. The partnership would offer Limited Partners units through a private placement being conducted under applicable exemptions from registrations under state and federal securities laws. Most if not all of the Limited Partners would be physicians. The General Partner would not be a physician.

3. Each physician who refers a patient to the Limited Partnership would advise that patient that he has an ownership interest in the Limited Partnership. The return on investment of the Limited Partners would be based upon the overall success of the Limited Partnership and based upon the investment made by the Limited Partner. The return on investment would not be based upon the number of referrals by a physician to the facility.

4. This Petition was noticed by the Board in the May 13, 1988, issue of the Florida Administrative Weekly, Vol. 14, No. 19, Pg. 1779.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

2. The Petition filed by Petitioner, as amended by the letter dated April 14, 1988, is in substantial compliance with the provisions of Section 120.565, Florida statutes, and Chapter 28-4, Florida Administrative Code.

3. Petitioner has a requisite interest to maintain this proceeding.

4. Petitioner requests that the Board interpret Sections 458.311(1)(i), (n), and (gg), Florida Statutes, in light of the proposed arrangement and state whether the arrangement set forth above in the Findings of Fact would violate those statutory provisions. Petitioner states that he believes that this arrangement is consistent with the past petitions approved by the Board, such as the Order on the Petition for Declaratory Statement for Melbourne Health Associates, Inc. and John Lozito, M.D., 9 FALR 6295 (Order filed December 3, 1987).

1. The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(i) paying or receiving any commission, bonus, kick-back or rebate or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

(n) Exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee or of a third party, which shall include but not be limited to, the promoting or selling of services, goods, appliances, or drugs.

(gg) Referring any patient for health care goods or services, to a partnership, firm, corporation, or other business entity in which the physician or the physician's employer has an equity interest of 10 percent or more unless, prior to such referral, the physician notifies the patient of his financial interest and of the patient's right to obtain such goods or services at the location of the patient's choice. This section does not apply to the following types of equity interest:

6. Based on the specific facts asserted by Petitioner, it does not appear that the proposed arrangement would violate the provisions of Section 438.331(1)(1), Florida Statutes. Specifically, under the proposal, the return on the investment by the Limited Partners will be based solely upon the overall success of the Limited Partnership and based on the investment made by the Limited Partners. The return on the investment would not be based upon the number of referrals to the facility by any physician who is a Limited Partner. Since the return offered to the Limited Partners is based on the investment and is not in any

001112

that this arrangement is not in violation of Section 458.331(1)(i), Florida Statutes. See In Re: The Petition for Declaratory Statement of: Melbourne Health Associates, Inc. and John Lozito, M.D. 9 FALR 6295 (Order filed December 3, 1987).

7. The Board would point out that there might be a violation of Section 458.331(1)(i), Florida Statutes, if the ability of an individual physician to participate in this investment opportunity were tied in any way to his ability or willingness to make referrals to the facility or the likelihood that he would do so. Since there are no facts asserting that this is the arrangement herein, the Board does not presume that such a limitation exists.

8. With regard to the question of whether the proposed arrangement is a violation of Section 458.331(1)(n), Florida Statutes, the Board finds that it is not. To the extent that a physician limited partner may refer his patients to the Limited Partnership, such arrangement is permissible so long as the referral by the physician is actually medically necessary and the proper disclosures are made under Section 458.331(1)(gg), Florida Statutes. In fact, it is the enactment of Section 458.331(1)(gg), Florida Statutes, which makes clear that a physician is permitted to make referrals to a business entity in which he has an equity interest since this statutory provision presumes the existence of such referrals in requiring disclosure in certain circumstances.

9. Finally, with regard to the propriety of this arrangement in light of Section 458.331(1)(gg), Florida Statutes the Petition clearly asserts that each physician who refers the patient to the Limited Partnership would advise that patient that he has an ownership interest in the Limited Partnership. This disclosure goes only half-way. Subsection (gg) requires not only that the physician notify the patient of his financial interest, but also that the physician notify the patient of the patient's right to obtain the goods and services and the location of the

the patient believes or is led to believe that he must obtain the services only at the Limited Partnership in which the physician has an equity interest, then the conduct of the physician would be in violation of Section 458.331(1)(gg), Florida Statutes.

10. There is competent substantial evidence to support the Board's findings and conclusions.

WHEREFORE

IT IS HEREBY ORDERED AND ADJUDGED:

That Section 458.331(1)(l), (n), and (gg), Florida Statutes (1987), do not prohibit a physician from entering into an arrangement whereby the physician is a shareholder in a corporation which owns equipment, which equipment would be either leased or sold to a Limited Partnership, through which peripheral vascular laboratory studies would be provided to patients, some of whom would be referred by physicians who are shareholders in the corporation. However, any physician who enters into such an arrangement must advise the patient not only of the physician's ownership interest in the Limited Partnership, but also of the right of the patient to obtain the services at a location of the patient's choice. The physician may not require the patient to obtain the services from the business entity in which the physician has an interest.

This Declaratory Statement responds only to the questions asked and interprets only the statutory provisions cited by the party. The conclusion by the Board that the proposal does not constitute a violation of Section 458.331(1)(l), (n), and (gg), Florida Statutes, is not a comment on whether or not the proposal may violate other provisions of Chapter 458, Florida Statutes, or other related obligations of physicians.

DONE AND ORDERED this 17th day of June,
1988.

BOARD OF MEDICINE

Emilio D. Ecsevarria
EMILIO D. ECSEVARRIA, M.D.
CHAIRMAN

001114