

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 12, 2016 Session

**ADEDAMOLA O. ONI v. TENNESSEE DEPARTMENT OF HEALTH,  
ET AL.**

**Appeal from the Chancery Court for Davidson County  
No. 12394IV Russell T. Perkins, Chancellor**

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**No. M2015-01841-COA-R3-CV – Filed August 23, 2016**

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In an earlier proceeding, we determined that a physician violated three different provisions of the Medical Practice Act, Tenn. Code Ann. §§ 63-6-214(b)(1), (2), and (20). We remanded the case to the Tennessee Board of Medical Examiners (the “Board”) to determine the appropriate sanction. On remand, the physician argued the case had become moot because his medical license was not renewed and had become automatically revoked by operation of law. The Board disagreed and voted to revoke the physician’s license as punishment for his violations. The physician appealed, and the chancery court vacated the Board’s decision on the basis that the Board lacked subject matter jurisdiction over the physician’s license once it was automatically revoked. The State appealed, and we reverse the chancery court’s judgment. We conclude that the Board had subject matter jurisdiction to sanction the physician for his conduct while his license was active, even though the license was not active at the time the sanction was imposed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed  
in Part and Reversed in Part**

ANDY D. BENNETT, J., delivered the opinion of the Court, in which RICHARD R. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Sue Ann Sheldon, Senior Counsel, Nashville, Tennessee, for the appellants, Tennessee Department of Health and Tennessee Board of Medical Examiners.

James Warren White, Nashville, Tennessee, for the appellee, Adedamola O. Oni.

## OPINION

### I. FACTUAL AND PROCEDURAL BACKGROUND

Adedamola O. Oni is a physician who obtained a license to practice medicine in Tennessee from the Tennessee Board of Medical Examiners (the “Board”) in 1995. In August 2007, the Board issued a letter of reprimand to Dr. Oni for engaging in unprofessional conduct after it determined that he had inappropriately prescribed a dermatological treatment for a patient.<sup>1</sup> The letter of reprimand served as a settlement in lieu of formal charges. The settlement required Dr. Oni to pay \$3,000 in civil penalties and \$3,692.65 in administrative costs. Dr. Oni paid the civil penalties in a timely manner, but he did not begin paying any of the administrative costs, which were due by December 14, 2007, until May 2010. He paid \$300 on May 13, 2010, and \$300 on July 13, 2010, leaving a balance owed of \$3,092.65.

In addition to being licensed to practice in Tennessee, Dr. Oni obtained a license to practice medicine in New York in 2000. In April 2008, the New York Board revoked Dr. Oni’s license to practice medicine there. The revocation was based on Dr. Oni’s failure to report the Tennessee reprimand to the New York Board and his failure to report criminal charges that had been filed against him in Georgia on an application he submitted to renew his license in New York.

On October 25, 2011, the Tennessee Department of Health filed a notice of charges against Dr. Oni as a result of (1) his non-payment of the remaining balance of the administrative costs that had been assessed against him as a result of the 2007 reprimand and (2) the revocation of his license by the New York Board. Following the filing of the notice of charges, Dr. Oni made additional payments of the administrative costs he still owed: he paid \$300 on December 21, 2011, and \$2,100 on January 20, 2012. This left a balance owed of \$692.65.

The Board held a contested case hearing on January 25, 2012, and it issued a ruling that Dr. Oni’s license should be revoked. The Board concluded that Dr. Oni had violated Tenn. Code Ann. §§ 63-6-214(b)(1), (b)(2), and (b)(20),<sup>2</sup> and it justified its decision to revoke his license, in part, on the following findings of fact:

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<sup>1</sup>We explained in an earlier opinion that the Board’s reprimand was based on allegations that Dr. Oni “misdiagnosed a patient’s skin problem, directly prescribed to the patient a ‘for use by physician only’ drug, failed to refer the patient to a dermatologist, failed to accurately and completely maintain the patient’s medical record, and kept his medical office in an unsanitary condition.” *Oni v. Tenn. Dep’t of Health*, M2012-01360-COA-R3-CV, 2013 WL 3808214, at \*1 (Tenn. Ct. App. July 17, 2013).

<sup>2</sup>These statutory provisions allow the Board to discipline a physician for:  
(1) Unprofessional, dishonorable or unethical conduct;

(continued...)

7. The Hearing Committee for the New York State Board for Professional Medical Conduct unanimously found [Dr. Oni] guilty of all four violations . . . . The panel found “three separate instances of failing to disclose matters that should have been disclosed on the licensing application, namely the Tennessee reprimand and the two criminal charges in Georgia . . . . The panel saw this lack of respect for the truth as a serious defect in his moral character and thus was unanimous in concluding that the only appropriate remedy was revocation of his license to practice medicine in New York.”

8. This Board heard [Dr. Oni’s] testimony today. Based upon the New York Board’s revocation order and this Board’s assessment of Dr. Oni’s credibility, this Board finds [Dr. Oni’s] testimony insufficient to overcome the findings of the New York Board.

The Board ordered Dr. Oni to pay the remaining balance of the administrative costs that were assessed against him in 2007 in the amount of \$692.65; revoked Dr. Oni’s Tennessee license; and ordered him to pay the administrative costs of prosecuting the 2012 proceeding in an amount not to exceed \$5,000.

Dr. Oni appealed the Board’s ruling to the chancery court, and the chancery court:

agree[d] with [the Board] that Dr. Oni’s conduct in failing to pay all of the court costs that the Board ordered him to pay in 2007 violated that order and that he could be disciplined for failing to wholly comply. . . . The Court also agrees with the general proposition that Dr. Oni may be disciplined because of the disciplinary action of the New York licensing body, so long as Dr. Oni could have been disciplined for these particular offenses in Tennessee.

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(2) Violation or attempted violation, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of this chapter or, any lawful order of the board issued pursuant thereto or any criminal statute of the state of Tennessee; [or]

(20) Disciplinary action against a person licensed to practice medicine by another state or territory of the United States for any acts or omissions that would constitute grounds for discipline of a person licensed in this state. A certified copy of the initial or final order or other equivalent document memorializing the disciplinary action from the disciplining state or territory shall constitute prima facie evidence of violation of this section and be sufficient grounds upon which to deny, restrict or condition licensure or renewal and/or discipline a person licensed in this state.

Tenn. Code Ann. § 63-6-214(b).

The chancery court affirmed the Board's decision requiring Dr. Oni to pay the administrative costs still outstanding from the 2007 proceeding and its assessment of administrative costs from the 2012 proceeding. However, the chancery court reversed and vacated the Board's decision to revoke Dr. Oni's license, stating:

This is an instance where the physician has engaged in conduct which might warrant discipline, but the Court concludes that the Board made a clear error in judgment in simply mirroring the revocation sanction levied by its New York counterpart.

The Tennessee Department of Health and the Board appealed the chancery court's decision to this Court, and we issued a decision in July 2013. *Oni v. Tenn. Dep't of Health*, M2012-01360-COA-R3-CV, 2013 WL 3808214 (Tenn. Ct. App. July 17, 2013). We held that the Board "properly subjected Dr. Oni to discipline pursuant to Tenn. Code Ann. § 63-6-214(20)." *Id.* at \*6. However, we found that the Board failed to comply with the administrative law judge's ("ALJ's") instruction to "independently evaluate Dr. Oni's testimony and credibility and to determine the appropriate disciplinary action . . . ." *Id.* at \*7. This Court wrote:

Based on the record, we cannot understand how or why the Board arrived at its choice to revoke Dr. Oni's medical license. The Board's stated policy reason behind its decision — "to protect the health, safety, and welfare of the citizens of Tennessee" — is equally unenlightening. While we are mindful that "the appropriate remedy is peculiarly within the discretion of the agency," *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996), it appears from this record that the Board did not follow the ALJ's instructions to independently evaluate Dr. Oni's testimony and credibility, and that it did not articulate why revocation was appropriate. By simply mirroring the New York Board's choice of discipline, the Board rendered an arbitrary or capricious decision, that is, "one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *City of Memphis v. Civil Serv. Comm'n*, 216 S.W.3d 311, 316 (Tenn. 2007) (quoting *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993) (internal citations omitted)).

*Id.* at \*8. Thus, we remanded the case back to the chancery court with instructions to remand it to the Board for reconsideration of the appropriate sanction to impose on Dr. Oni. *Id.*

The case was remanded back to the Board on August 8, 2013. Dr. Oni filed three motions in March 2014: a motion to recuse the hearing panel, a motion to permit the

introduction of additional evidence at the hearing, and a motion to compel discovery. The ALJ denied each of Dr. Oni's motions by order on June 3, 2014.

Dr. Oni's medical license expired according to its terms on March 31, 2014, and Dr. Oni did not apply to renew his license within the following sixty days. As a result, Dr. Oni's medical license was revoked as a matter of law. *See* Tenn. Code Ann. § 63-6-210(b)(2) (providing that if a medical licensee fails to renew a license within sixty days after renewal becomes due, "the license shall be automatically revoked at the expiration of sixty (60) days"). After he let the time expire for renewing his license and it was revoked as a matter of law, Dr. Oni filed a motion with the Board asking it to dismiss the proceeding based on mootness. He argued that the case against him had become moot because he was no longer a licensee whom the Board could sanction. Dr. Oni also filed a motion to bifurcate the hearing on the motion to dismiss from the hearing on the merits in the event that his motion to dismiss was denied. The Board denied both motions and issued a Final Order on September 14, 2014, in which it determined that the appropriate sanction against Dr. Oni was the revocation of his license. The Board wrote:

8. This Board heard Respondent's live testimony on January 25, 2012. The Board does not find Respondent's explanations for his actions to be credible. Contrary to Respondent's testimony to this Board, the evidence shows that Respondent was intentionally dishonest in failing to report his license reprimand and his pending criminal matters to the New York Board. In addition, despite Respondent's attempted explanations, the evidence shows that Respondent only began paying the bulk of the 2007 costs ordered by this Board after the Department brought charges against him on October 25, 2011.

....

12. The Tennessee Board of Medical Examiners has jurisdiction over Respondent's Tennessee medical license regardless of the fact that Respondent let the license expire while this remand was pending. Respondent's medical license was active at all times pertinent to the violations of law found above.

13. The Board of Medical Examiners takes this action to protect the health, safety, and welfare of the citizens of Tennessee by ensuring that physicians maintain high standards of professional ethics and follow the orders of this Board. The evidence showed Respondent's lack of respect for this Board and for the New York Board, lack of respect for the truth, and failure to take responsibility for his own actions. Therefore, this Board finds revocation of Respondent's Tennessee medical license to be the appropriate remedy.

Dr. Oni appealed the Board's decision to the chancery court, which reversed and vacated the Board's revocation of Dr. Oni's license by order entered on June 9, 2015, on the basis of mootness. The chancery court wrote:

The medical licensing statute, Tenn. Code Ann. § 63-6-201 *et seq.*, does not authorize the Board to revoke a license that has expired according to its terms and that has automatically been revoked by operation of law 60 days after renewal became due, pursuant to Tenn. Code Ann. § 63-6-210(b)(2). After Petitioner's license was not renewed by the due date of March 31, 2014, Petitioner's license was revoked by operation of law on May 30, 2014, 60 days after the renewal due date. The issue whether to revoke Petitioner's license was therefore moot at the time the Board purported to take that action. The Board committed reversible error in denying Petitioner's motion to dismiss as moot. The Board's action was in violation of statutory provisions as prohibited by Tenn. Code Ann. § 4-5-322(h)(1), or alternatively, in excess of the statutory authority of the Board as prohibited by Tenn. Code Ann § 4-5-322(h)(2).

The chancery court issued alternative conclusions of law, in the event an appellate court disagreed with its decision that the proceedings against Dr. Oni should be dismissed due to mootness, to address other arguments Dr. Oni raised in the trial court. Specifically, the chancery court ruled that the Board did not err in denying Dr. Oni's motions (1) to compel discovery from the State, (2) to permit the introduction of additional evidence at the remand hearing, (3) to bifurcate the hearing, or (4) to recuse itself from hearing the matter on remand.

The chancery court further addressed an argument Dr. Oni made regarding paragraph 12 of the Board's order. In paragraph 12, the Board wrote:

The Tennessee Board of Medical Examiners has jurisdiction over Respondent's Tennessee medical license regardless of the fact that Respondent let the license expire while this remand was pending. Respondent's medical license was active at all times pertinent to the violations of law found above.

Dr. Oni objected to the Board's inclusion of the language "let the license expire while this remand was pending" in the "Conclusions of Law" section of the Board's order. The chancery court ruled that the Board committed error, but not reversible error, by including that language. The court explained:

The purported conclusion of law in reality included a factual finding that invited an inference by the Board outside the record that Petitioner had

sought to avoid discipline by not renewing his license. This error was harmless in light of the other evidence that would support the sanction imposed by the Board.

Finally, the chancery court rejected Dr. Oni's arguments that the Board erred by basing its decision to revoke his license, in part, on his late payment of costs from the 2007 proceeding, and it held that if an appellate court determined that the proceeding against Dr. Oni was not moot, the Board was justified in revoking Dr. Oni's medical license.

The Tennessee Department of Health and the Board appeal the chancery court's decision reversing and vacating the Board's revocation of Dr. Oni's license.

## II. ANALYSIS

### A. Standard of Review

We articulated the standard of review we are to apply in this case in our earlier decision:

Disciplinary proceedings against medical licensees are conducted in accordance with the Uniform Administrative Procedures Act ("UAPA"). Tenn. Code Ann. § 63-6-216. The UAPA, Tenn. Code Ann. § 4-5-101 *et seq.*, limits our scope of review of the agency decision to a "narrow and statutorily prescribed review of the record made before the administrative agency." *Crawford v. Dep't of Fin. & Admin.*, No. M2011-01467-COA-R3-CV, 2012 WL 219327, at \*5 (Tenn. Ct. App. Jan. 24, 2012) (no Tenn. R. App. P. 11 application filed) (quoting *Metro. Gov't v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977)). The UAPA's narrow standard of review for an administrative body's factual determinations "suggests that, unlike other civil appeals, the courts should be less confident that their judgment is preferable to that of the agency." *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988). This Court may modify or reverse the administrative agency's decision if the agency's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(h).

*Oni*, 2013 WL 3808214, at \*4. A decision is arbitrary or capricious if it “is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.” *City of Memphis v. Civil Serv. Comm’n of Memphis*, 216 S.W.3d 311, 316 (Tenn. 2007) (quoting *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm’n*, 876 S.W.2d 106, 110-11 (Tenn. Ct. App. 1993)); *see also MobileComm of Tenn., Inc. v. Tenn. Pub. Serv. Comm’n*, 876 S.W.2d 101, 104 (Tenn. Ct. App. 1993) (opining that state agency’s decision is not arbitrary or capricious if there is rational basis to support its conclusions).

#### B. Subject Matter Jurisdiction

Dr. Oni based his motion to dismiss on the assertion that the Board lacked authority to sanction him by the time of the remand hearing because his medical license had been revoked as a matter of law and he was no longer a licensee. The question whether the Board had authority to sanction Dr. Oni once his medical license was automatically revoked, which is another way of asking whether the Board had subject matter jurisdiction, is a question of law; therefore, we review the trial court’s decision on this issue de novo, with no presumption of correctness. TENN. R. APP. P. 13(d); *see Northland Ins. Co. v. State of Tenn.*, 33 S.W.3d 727, 729 (Tenn. 2000) (noting that agency’s subject matter jurisdiction is question of law, which appellate court reviews de novo); *State ex rel. Comm’r of Dep’t of Transp. v. Thomas*, 336 S.W.3d 588, 601 (Tenn. Ct. App. 2010) (same).

An agency derives its authority from the General Assembly. *Wytenbach v. Bd. of Tenn. Med. Exam’rs*, No. M2014-02024-COA-R3-CV, 2016 WL 1045668, at \*7 (Tenn. Ct. App. Mar. 15, 2016) (citing *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988)). As a result, any action an agency takes “must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power.” *Tenn. Pub. Serv. Comm’n v. S. Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977). The Board was created by the legislature, and the General Assembly has authorized the Board to issue medical licenses, Tenn. Code Ann. § 63-6-201(a); to investigate any alleged violation of the chapter governing the practice of medicine and surgery in this State (known as the Medical Practice Act), Tenn. Code Ann. § 63-6-213(a); to hold disciplinary hearings, Tenn. Code Ann. § 63-6-101(a)(3); and to deny an application for a license, Tenn. Code Ann. § 63-6-214(a)(1). In addition, the Board is authorized to reprimand or discipline a licensee, Tenn. Code Ann. §



63-6-214(a)(4), and to permanently revoke a license, Tenn. Code Ann. § 63-6-214(a)(5), if it finds that a licensee has engaged in or been subject to any of the following:

- (1) Unprofessional, dishonorable or unethical conduct;
- (2) Violation or attempted violation, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of this chapter or, any lawful order of the board issued pursuant thereto or any criminal statute of the state of Tennessee; [or]

....

(20) Disciplinary action against a person licensed to practice medicine by another state or territory of the United States for any acts or omissions that would constitute grounds for discipline of a person licensed in this state. A certified copy of the initial or final order or other equivalent document memorializing the disciplinary action from the disciplining state or territory shall constitute prima facie evidence of violation of this section and be sufficient grounds upon which to deny, restrict or condition licensure or renewal and/or discipline a person licensed in this state.

Tenn. Code Ann. § 63-6-214(b).

All physicians licensed to practice medicine in Tennessee must renew their medical licenses every two years by submitting an application to the Board and paying a renewal fee. Tenn. Code Ann. § 63-6-210(a). A licensee has sixty days following the license expiration date to renew his or her license. Tenn. Code Ann. § 63-6-210(b)(2). If the licensee fails to renew his or her license within sixty days of the expiration date, his or her medical license “shall be automatically revoked.” *Id.*

Dr. Oni contends that because he did not renew his license within sixty days of its expiration, his license was automatically revoked as a matter of law, and the Board no longer had jurisdiction over him because he was no longer a licensee. Dr. Oni may not have been an active licensee once his license was automatically revoked, but he was and is still a “licensee” as that term is defined by the Board’s regulations. *See* TENN. COMP. R. & REGS. 0880-02-.01(10) (“Licensee” is defined as “[a]ny person who has been lawfully issued a license to practice medicine in Tennessee by the Board”). Moreover, a physician whose medical license has been automatically revoked as a matter of law “may apply in writing to the board for reinstatement of such license, which may be granted by the board” upon the satisfaction of certain specified conditions. Tenn. Code Ann. § 63-6-210(c). The reinstatement statute does not distinguish between a physician whose license has been automatically revoked and who has engaged in objectionable behavior prior to the automatic revocation, as Dr. Oni did, and a physician who has merely lost track of

time and neglected to apply for a license renewal within sixty days of the license's expiration date. In both cases, the physician's license has been automatically revoked, and in both cases, the physician is able to apply for reinstatement. Physicians in both scenarios are "licensees" even after their licenses are automatically revoked. If the Board permanently revokes a physician's license for cause, however, that physician will not have the opportunity to apply for reinstatement. At oral argument, counsel for the Board clarified that following remand, the sanction it imposed was not permanent revocation, but revocation for cause with the option to reapply for a license.

We decided a case with similar facts earlier this year, and we believe the opinion in that case provides guidance for the outcome here. In *Wytttenbach v. Board of Tennessee Medical Examiners*, No. M2014-02024-COA-R3-CV, 2016 WL 1045668 (Tenn. Ct. App. Mar. 15, 2016), Dr. Wytttenbach was notified of a complaint that had been made against him, and before disciplinary hearings could take place, Dr. Wytttenbach retired his medical license. *Id.* at \*1. Despite the retirement of his license, the Department of Health proceeded with filing a notice of charges and memorandum for assessment of civil penalties against Dr. Wytttenbach based on the complaint it had received while his license was still active. *Id.* at \*2. As Dr. Oni argues here, Dr. Wytttenbach took the position that the Board lacked subject matter jurisdiction because it "is only authorized to hold hearings upon licensed doctors in the state of Tennessee who are currently practicing in Tennessee." *Id.* Like Dr. Oni, Dr. Wytttenbach contended that "he does not practice in the state of Tennessee, nor does he hold a TN medical license" and that "there must be a license for [the Board of Medical Examiners] to have jurisdiction." *Id.*

The Board rejected Dr. Wytttenbach's objections; it conducted a contested case hearing, made findings of fact, and concluded that Dr. Wytttenbach had violated the rules governing the supervision of nurse practitioners while he was licensed to practice medicine in Tennessee. *Id.* at \*2-3. Based on its findings of fact and conclusions of law, the Board revoked Dr. Wytttenbach's license and assessed a civil penalty against him. *Id.* at \*3. The chancery court and this Court affirmed the Board's decision to revoke Dr. Wytttenbach's license. *Id.* at \*7-8. We noted that Dr. Wytttenbach was a "licensee" as that term is defined by the regulations. *Id.* at \*8 (quoting TENN. COMP. R. & REGS. 0880-02-.01(10)). We then explained our reasons for affirming the Board's decision:

The Board had authority over Dr. Wytttenbach even though he retired his license prior to the filing of the Notice of Charges. Despite his claims to the contrary, Dr. Wytttenbach still possessed a Tennessee medical license and remained a licensee when the Notice of Charges was filed. Retirement of a medical license does not amount to a relinquishment or surrender of the license. Instead, retirement of a license places it in a status from which biennial review is no longer required but reactivation is still a possibility. *See id.* § 63-6-210(d) (2010); Tenn. Comp. R. & Regs. 0880-02-.10(3)

(2016). The Board's own regulations describe a retired medical license as a license "retain[ed]" by the licensee. Tenn. Comp. R. & Regs. 0880-02-.10(2) (2016).

The Board also had authority to revoke a retired medical license. The statute granting the Board authority to suspend or revoke licenses does not limit that authority based on the current status of a license. The statute specifies that the Board may "[s]uspend, limit or restrict a *previously issued license*. Tenn. Code Ann. § 63-6-214(a)(3) (Supp. 2015) (emphasis added). The Board may also "revoke a license." *Id.* § 63-6-214(a)(5). Dr. Wytttenbach's argument would have us read into the statute granting the Board authority over medical licenses the word "active" before the word "license." We decline to do so.

*Id.* (footnote omitted).

The analysis we applied to Dr. Wytttenbach applies to Dr. Oni, regardless of the fact that Dr. Oni elected to let his license expire and be automatically revoked rather than to retire his license. That is a distinction without a difference for purposes of this case.<sup>3</sup> Like Dr. Wytttenbach, Dr. Oni's license was active when the Tennessee Department of Health filed a notice of charges against him in 2011 based on his failure to pay the full costs from the Board's 2007 reprimand and the revocation of his New York medical license. *See Oni*, 2013 WL 3808214, at \*2-3. Dr. Oni was and is a licensee, as that term is defined in the Board's regulations, because he has been lawfully issued a license to practice medicine in Tennessee by the Board. *See* TENN. COMP. R. & REGS. 0880-02-.01(10). His status as a licensee is not altered by the fact that his license has been revoked due to his failure to renew his license.

Nothing in the statute granting the Board the authority to sanction a licensee limits that authority to those whose licenses have not been automatically revoked due to a failure to renew. *See* Tenn. Code Ann. § 63-6-214(a). In addition to permanently revoking a license, Tenn. Code Ann. § 63-6-214(a)(5), the Board is authorized to suspend, limit, or restrict a previously issued license, Tenn. Code Ann. § 63-6-214(a)(3), and it can exercise its discretion to reprimand or take other action to discipline a licensee, Tenn. Code Ann. § 63-6-214(a)(4). In this case, the Board exercised its discretion to revoke Dr. Oni's license for cause but not to permanently revoke his license. If Dr. Oni

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<sup>3</sup>We recognize the difference in requirements the statute imposes on physicians desiring to reactivate their licenses following retirement, Tenn. Code Ann. § 63-6-210(d) and TENN. COMP. R. & REGS. 0880-02-.10(3), as opposed to physicians desiring to have their licenses reinstated following automatic revocation, Tenn. Code Ann. 63-6-210(c) and TENN. COMP. R. & REGS. 0880-02-.09(2). These differences are immaterial, however, for purposes of determining that the Board has subject matter jurisdiction over both of these categories of physicians.

were to prevail in his argument, he would be able to avoid any sanction by the Board for his violations and then simply apply for reinstatement as provided by § 63-6-210(c).<sup>4</sup> We note that this Court remanded the case for reconsideration of the sanction. The remand did not require consideration of subsequent events, such as the nonrenewal of Dr. Oni's license. In accordance with our opinion in *Wytttenbach* and the circumstances of this case, we hold that the Board had subject matter jurisdiction over Dr. Oni when the case was remanded for the purpose of imposing a sanction, even though during the intervening time period Dr. Oni's license was automatically revoked due to his failure to seek renewal of it.

### C. Dr. Oni's Motions

Once the Board denied Dr. Oni's motion to dismiss, Dr. Oni filed several other motions that the Board denied. We will address each motion Dr. Oni contends the Board erred in denying.

#### 1. Motions to Compel Discovery and Introduce Additional Evidence

Once the case had been remanded back to the Board for a determination of the appropriate sanction to impose on Dr. Oni, Dr. Oni filed two separate motions on March 28, 2014: one to compel discovery and one to permit the introduction of evidence at the remand hearing. The motion to compel discovery was filed pursuant to Tenn. Code Ann. § 4-5-311(d), which provides that "[a]ny party to a contested case shall have the right to inspect the files of the agency . . . ." The motion seeking the introduction of additional evidence was filed pursuant to Tenn. Code Ann. § 4-5-312(b), which provides:

To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

The ALJ denied Dr. Oni's motion to compel and his motion to introduce additional evidence, stating:

The Motion to Permit Introduction of Evidence at the Hearing and the Motion to Compel Discovery are now pending a decision from the Administrative Judge. In its Order, the Court of Appeals found that the

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<sup>4</sup>At oral argument, counsel for the Board explained that if its decision to revoke Dr. Oni's license is vacated, as the chancery court decided was appropriate, there will be no record at all of Dr. Oni's statutory violations that form the basis for this case.

Respondent was properly subjected to discipline but that the decision on an appropriate sanction was arbitrary and capricious because the Hearing Panel did not make an independent evaluation of the Respondent's testimony but simply mirrored the discipline imposed by another jurisdiction. In order to comply with the Court's Order on remand, the Hearing Panel will be charged with considering an appropriate sanction based upon the entire evidentiary record, including the Respondent's prior testimony.

In objecting to this proposed procedure, the Respondent contends that the evidentiary record is not sufficient to allow the Hearing Panel to fulfill its responsibilities on remand, suggesting that the insufficient deliberations at the end of the proceedings somehow impacted the Respondent's ability or opportunity during the hearing to present testimony on "all of the facts and circumstances of this matter." This contention is not supported by either the evidentiary record or the remand instructions from the Court of Appeals, which in no way suggested that proper deliberations on remand would require further development of the evidentiary record. Accordingly, the Respondent has failed to show that additional discovery and testimony in this matter are either warranted or appropriate. For these reasons, the Respondent's Motions are hereby denied.

On appeal, Dr. Oni contends he was improperly denied an opportunity to "present all of the facts and circumstances to the Board when considering the sanction to be applied against him." We disagree. In our earlier opinion, we concluded that "the Board properly found that [Dr. Oni] was subject to discipline under Tenn. Code Ann. §§ 63-6-214(b)(1) [unprofessional conduct], (2) [violation of Board order], and (20) [out-of-state discipline]." *Oni*, 2013 WL 3808214, at \*8. We remanded the case to the Board for the sole purpose of reconsidering the sanction to be imposed on Dr. Oni and to articulate its reasons therefor. *Id.* The scope of the remand order did not include the introduction of additional evidence.

When the Board heard evidence as part of the contested case hearing on January 25, 2012, Dr. Oni was given the opportunity to testify on his own behalf. Dr. Oni testified about his practice in Tennessee; the reprimand by the Board in 2007; how he came to be licensed in New York but never practiced there; the circumstances that led to the revocation of his license in New York; and the financial hardships he experienced, making it difficult to pay the administrative costs he was assessed in 2007. With respect to the New York medical board's revocation of his license, Dr. Oni testified as follows:

Q: Dr. Oni, let's talk about the New York discipline.

A: Okay.

Q: The New York Board revoked your license, correct?

A: Yes, sir.

Q: And one of the reasons - - they did it for multiple reasons. One of the reasons was that you failed to report this Board's 2007 reprimand?

A: Yes, sir.

Q: And another reason was that you failed to report an accusation filed on or about September 17, 2003, in the State Court of Fulton County Georgia about two counts of simple battery, correct?

A: Yes, sir.

Q: And another reason is that you failed to report an indictment filed on or about February 18, 2003, in the State Court of Fulton County Georgia in which you were criminally charged with three counts of burglary and one count of theft by taking, correct?

A: Yes, sir.

Q: The question on the New York renewal application was, "Are criminal charges pending against you in any court?" You checked "no," correct?

A: Yes, sir.

Dr. Oni testified on redirect that the battery charges and the burglary charge were later dismissed, and he explained how one of the battery charges came about. He further testified that he never had a malpractice complaint filed against him. The Board was given the opportunity to question Dr. Oni following his redirect examination, and in response to these additional questions, Dr. Oni had the opportunity to testify further about the revocation of his New York license. The transcript does not indicate that Dr. Oni was limited in any way from presenting evidence in his defense at the hearing before the Board on January 25, 2012.

The sections of the UAPA on which Dr. Oni relies in arguing the Board erred in denying his motions to compel and to introduce additional evidence, Tenn. Code Ann. §§ 4-5-311(d) and 4-5-312(b), apply to contested case hearings. Contrary to Dr. Oni's argument, the remand hearing was not a contested case hearing. Once the case was

remanded to the Board, the Board members who served on the panel were each provided with a copy of our 2013 decision, a copy of the Board's final order entered on January 31, 2012, a copy of the hearing transcript from January 25, 2012, and a copy of the exhibits introduced at the hearing. The panel members were provided with everything they needed to carry out their additional duties. Dr. Oni has failed to show he was entitled to engage in further discovery or introduce evidence at the hearing on remand. He raised no discovery issues in the earlier proceeding that led to our remand order in 2013 and provided no basis on which to demand additional discovery in the remand proceedings. We affirm the ALJ's denial of Dr. Oni's motion to compel discovery and its denial of his motion to introduce additional evidence at the hearing on remand.

## 2. Motion to Recuse

In addition to other motions he filed on March 28, 2014, Dr. Oni moved to recuse the hearing panel that previously heard his case in January 2012 to prevent them from determining his sanction on remand. Dr. Oni argued that he would be deprived of a fair hearing on remand if the same panel that determined he was properly subject to discipline for engaging in unprofessional conduct, violating a Board order, and being disciplined by another state, also had the opportunity to determine the appropriate way to sanction him for this misconduct. Dr. Oni based his motion on Tenn. R. Civ. P.59.06, which states:

If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon the request of either party the new trial shall be conducted by a different circuit judge or chancellor.

Following a hearing, the ALJ denied Dr. Oni's motion to recuse, writing:

By custom and practice of the Department of Health, a matter to be reconsidered by the Board of Medical Examiners upon remand is reassigned to the original three-member Hearing Panel. On May 20, 2014, the Motion to Recuse was heard and considered by this original Hearing Panel as required by Tenn. Code Ann. § 4-5-302. Each member of the Hearing Panel determined that he/she was capable of following the remand instructions from the Court of Appeals and denied the request for recusal.

On appeal, Dr. Oni argues the hearing panel "had no interest in making an independent determination [of his credibility]" because the panel "made up its mind in advance" of the remand hearing. A problem Dr. Oni faces, however, is that the rule on which he relies applies only to cases where a new trial has been granted, and we did not remand the case back to the Board to conduct a new trial. The remand was for the limited purpose of determining the appropriate sanction and articulating reasons therefor. Thus, Tenn. R. Civ. P. 59.06 is inapplicable to these facts.

Tennessee Code Annotated section 4-5-302 governs the disqualification of ALJs, hearing officers, and agency members, and it provides, in pertinent part, as follows:

(a) Any administrative judge, hearing officer or agency member shall be subject to disqualification for bias, prejudice, interest or any other cause provided in this chapter or for any cause for which a judge may be disqualified.

(b) Any party may petition for the disqualification of an administrative judge, hearing officer or agency member promptly after receipt of notice indicating that the individual will serve or, if later, promptly upon discovering facts establishing grounds for disqualification.

(c) A party petitioning for the disqualification of an agency member shall not be allowed to question the agency member concerning the grounds for disqualification at the hearing or by deposition unless ordered by the administrative judge or hearing officer conducting the hearing and agreed to by the agency member.

(d) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

The Board heard oral argument on Dr. Oni's motion to recuse on May 20, 2014, and following the attorneys' presentation of their positions, the ALJ instructed the hearing panel:

So the question would be upon remand whether or not you believe that you can follow the instructions of the Court of Appeals in reconsidering the disciplinary action that has been imposed upon Dr. Oni for the violations of the law that have been previously determined, that have been previously found, or if for reasons of bias or prejudice you believe that you cannot follow these instructions.

Each panel member was then asked to state his or her decision "in regard to the request for recusal." Each panel member indicated his or her ability to follow our instructions on remand; to treat Dr. Oni fairly, without bias; and each member declined the request to recuse him or herself from the remand hearing.

The Tennessee Supreme Court has recently addressed the issue of when it is appropriate for a hearing panel member to recuse him or herself in an administrative proceeding. *See Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 158-64 (Tenn. 2013). The Court explained that "administrative adjudicators are afforded a presumption



of honesty and integrity,” and that the party seeking recusal carries the burden of overcoming this presumption. *Id.* at 161. The moving party may overcome this presumption “by showing that an administrative adjudicator has a pecuniary interest in the outcome of the proceeding, or has been the target of personal abuse or criticism from the party before him, or has a conflict of interest.” *Id.* (citations omitted). The Court added that another way the moving party may overcome the presumption is “by showing that the ‘probability of actual bias’ in a particular case on the part of the administrative decision-maker is ‘too high to be constitutionally tolerable.’” *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Court declined to find that judicial recusal rules apply to administrative panel members. *Id.* at 160; see *Bobo v. State of Tenn. Real Estate Comm’n*, No. M2013-02037-COA-R3-CV, 2014 WL 1852604, at \*18-20 (Tenn. Ct. App. May 5, 2014) (discussing *Moncier* and rules applicable to party’s motion to recuse panel members of real estate commission).

Despite Dr. Oni’s contention that the panel members “had no interest in making an independent determination,” he has not overcome the presumption of honesty and integrity that automatically applies to the panel members. He has failed to demonstrate that any of the members had a pecuniary interest in the outcome of his case, that any of them had been the target of personal abuse or criticism by Dr. Oni, that any of them had a conflict of interest, or the existence of a probability of actual bias by any of the members. Each panel member affirmatively stated that he or she was able to carry out the duties imposed on him or her by the order of remand, as required by Tenn. Code Ann. § 4-5-302. For these reasons, we conclude the ALJ did not err in denying Dr. Oni’s motion for recusal.

### 3. Motion to Bifurcate Hearing

Dr. Oni filed a motion to bifurcate the hearing once the case was remanded to the Board. Dr. Oni wanted the Board to bifurcate the hearing on the motion to dismiss from the hearing on the appropriate sanction to impose so that he could more expeditiously appeal the Board’s decision on his motion to dismiss if the Board determined that it had subject matter jurisdiction to impose a sanction on him. The ALJ orally denied Dr. Oni’s motion to bifurcate without filing a separate order to that effect.

On appeal, Dr. Oni contends that “[c]onsideration of the motion to dismiss by the Board at the same time that it conducted a hearing on the merits deprived Petitioner of the opportunity for full consideration of the important issue of mootness.” Dr. Oni argues that he was prejudiced by the ALJ’s refusal of his motion to bifurcate. Dr. Oni presents no legal citations in support of his argument, and we find his argument has no merit. Dr. Oni has not shown how either the chancery court’s decision or this Court’s decision has been negatively impacted by the Board’s refusal to bifurcate the hearings.

### 4. Language of the Board’s Final Order

Dr. Oni next contends that the Board impermissibly included the following italicized language in the Conclusions of Law section of its Final Order:

12. The Tennessee Board of Medical Examiners has jurisdiction over Respondent's Tennessee medical license regardless of the fact that *Respondent let the license expire while this remand was pending.* Respondent's medical license was active at all times pertinent to the violations of law found above.

According to Dr. Oni, the Board erred by drawing inferences and reaching conclusions on what he refers to as a "new fact" without permitting him to testify about this new fact. During the 2014 hearing, Dr. Oni's attorney asked that the language be modified to read "... regardless of the fact that the license expired according to its terms while this matter was pending," but the panel members denied this request. Dr. Oni contends that at least one panel member "drew an inference from this *new* fact that Petitioner sought to avoid discipline from the Board based on the fact that Petitioner had not testified about his intentions with respect to his license at the *previous* hearing."

Dr. Oni argues that drawing negative inferences from new facts without permitting Dr. Oni to testify about the new facts "rendered this proceeding fundamentally unfair at the most basic level of the constitutional requirement of due process." We do not agree. Dr. Oni informed the Board that his medical license had been automatically revoked when he filed his motion to dismiss, and the automatic revocation was the basis for his argument that the issue was moot and the Board no longer had subject matter jurisdiction to sanction him. Further, contrary to Dr. Oni's argument, paragraph 12 of the Board's order is a conclusion of law regarding the Board's jurisdiction, not a finding of fact.

At the remand hearing on September 17, 2014, the Board heard several motions, including Dr. Oni's motion to dismiss. Dr. Oni's attorney addressed the reason Dr. Oni waited until August 2014 to file his motion to dismiss:

[T]here is a 60-day grace period after the expiration of a license during which a licensee can apply or have the license renewed after the license has expired. That period was still pending, and *Dr. Oni's determination about not practicing in Tennessee had not been made at that time.*

(Emphasis added.) This statement by Dr. Oni's attorney is simply another way of saying that Dr. Oni was deciding during this sixty-day period whether to continue practicing in Tennessee, in which case he would renew his license, or whether he would discontinue practicing in Tennessee, in which case he would allow his license to expire. Dr. Oni has not established that the expiration of his license was relevant to any issue other than his motion to dismiss or any decision by the Board other than its conclusion regarding its subject matter jurisdiction. There is simply no evidence that the Board members

improperly inferred that Dr. Oni was trying to avoid discipline by allowing his license to expire.

#### 5. 2007 Cost Assessment as Basis for Revocation

Dr. Oni next argues that the Board erred in basing its revocation of his license on his failure to pay the administrative costs that were assessed against him in 2007 because by the time of the remand hearing, he had satisfied this obligation in full.<sup>5</sup> As of October 25, 2011, when the Tennessee Department of Health filed the notice of charges against him, Dr. Oni owed \$3,092.65 in administrative costs dating from the 2007 reprimand. By the time of the contested case hearing on January 25, 2012, and by the time the Board issued its Final Decision on January 31, 2012, Dr. Oni still owed \$692.65 of these costs. Thus, when the chancery court reviewed the Board's first decision to revoke Dr. Oni's license in 2012, and when we heard the first appeal in 2013, the record showed that Dr. Oni still owed \$692.65 in administrative costs. *Oni*, 2013 WL 3808214, at \*3. Our conclusion that Dr. Oni was subject to discipline was based, in part, on the fact that he violated a lawful order of the Board by failing to pay in full the administrative costs that were assessed against him as a result of the 2007 reprimand by the due date of December 14, 2007. *Id.* at \*8.

When the case was remanded to the Board in 2013 and the Board issued the Final Order that is currently on appeal, Dr. Oni had satisfied his cost obligation from the 2007 reprimand in full. Nevertheless, the Board based its decision to revoke Dr. Oni's license in part on the fact that "he only began paying the bulk of the 2007 costs ordered by this Board after the Department brought charges against him on October 25, 2011." The Board concluded that Dr. Oni's failure to pay the majority of these costs until the 2011 notice of charges against him was filed subjected him to discipline pursuant to Tenn. Code Ann. § 63-6-214(b)(1), for engaging in unprofessional, dishonorable or unethical conduct, and § 63-6-214(b)(2), for violating a lawful order of the Board.

When the Board held its remand hearing on September 17, 2014, Dr. Oni did not argue that the Board should not consider the non-payment of costs when determining the appropriate sanction.<sup>6</sup> And, when Dr. Oni appealed the Board's 2014 decision to revoke his license to the chancery court, he did not include an argument in his memorandum of

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<sup>5</sup>The Board made a finding of fact in its Final Order dated September 17, 2014, that Dr. Oni paid the balance of administrative costs dating from the 2007 reprimand in 2012 and that "no balance was currently owed" from the proceeding.

<sup>6</sup>Dr. Oni argued before the Board that the "cost issue does not warrant the remedy of revocation," but that is a different argument than Dr. Oni makes here, which is that the Board improperly considered the cost issue on remand because he had satisfied that obligation by the time of the remand.

law in support of his petition for review that the Board erred in basing its decision to revoke his license on his nonpayment of the administrative costs.

The State argues Dr. Oni has waived this issue on appeal because he failed to raise it before the Board at the remand hearing. We have found that when a litigant is before an administrative tribunal, he or she “must raise in a timely manner the issues and questions he [or she] deems material before he [or she] will be permitted to raise them in a petition for review.” *In re Billing & Collection Tariffs of S. Cent. Bell*, 779 S.W.2d 375, 380 (Tenn. Ct. App. 1989); *see also McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 690 (Tenn. 1996) (“One appearing before an administrative tribunal must make timely objections to procedural errors and must raise the errors at the administrative level in order to preserve them for consideration in a petition for judicial review.”). Because Dr. Oni failed to raise this issue before the Board, he has waived it for purposes of appeal.

However, even if he had not waived this issue by failing to raise it before the Board, Dr. Oni’s argument has no merit. The purpose of the remand was limited to determining the appropriate sanction to impose based on Dr. Oni’s violations of the statutory provisions as of the date when the notice of charges was filed, as established at the contested case hearing on January 25, 2012. The law of the case by the time it was remanded to the Board in 2013 was that Dr. Oni was subject to discipline pursuant to Tenn. Code Ann. §§ 63-6-214(b)(1), (2), and (20). *Oni*, 2013 WL 3808214, at \*8. The remand hearing was not an opportunity for Dr. Oni to retry his case. Dr. Oni’s payment of the administrative costs in full prior to the date of the remand hearing does not affect the Board’s right to base its determination of the appropriate sanction, in part, on the fees that were outstanding as of October 2011, when the notice of charges was filed.

## 6. Board’s Decision to Revoke Dr. Oni’s License

Dr. Oni’s final argument is that the Board was not justified in revoking his medical license when the facts of his case are compared with the facts of other cases in which physicians have been reprimanded by the Board. The law is clear that the Board has discretion to determine the appropriate remedy, and “we will only review whether the remedy is ‘unwarranted in law’ or ‘without justification in fact.’” *Robertson v. Tenn. Bd. of Soc. Worker Certification & Licensure*, 227 S.W.3d 7, 14 (Tenn. 2007) (quoting *Mosley v. Tenn. Dep’t. of Commerce & Ins.*, 167 S.W.3d 308, 321 (Tenn. Ct. App. 2004)). While we may not have chosen the same remedy as the Board did, “‘reviewing courts cannot reverse an agency merely because they might have decided the matter differently.’” *Id.* at 16 (quoting *Humana of Tenn. v. Tenn. Health Facilities Comm’n*, 551 S.W.2d 664, 671 (Tenn. 1977)).

In our earlier opinion, we directed the Board on remand “to independently evaluate Dr. Oni’s testimony and credibility” and to articulate why the sanction it decided

upon was appropriate. *Oni*, 2013 WL 3808214, at \*8. In accordance with our instructions, the Board made the following findings of facts, *inter alia*:

7. The Hearing Committee for the New York State Board for Professional Medical Conduct (“New York Board”) unanimously found Respondent guilty of all four violations specified [in the New York proceeding]. The panel found “three separate instances of failing to disclose matters that should have been disclosed on the licensing application, namely the Tennessee reprimand and the two criminal charges in Georgia . . . . The panel saw this lack of respect for truth as a serious defect in his moral character and thus was unanimous in concluding that the only appropriate remedy was revocation of his license to practice medicine in New York.”

8. This Board heard Respondent’s live testimony on January 25, 2012. The Board does not find Respondent’s explanations for his actions to be credible. Contrary to Respondent’s testimony to this Board, the evidence shows that Respondent was intentionally dishonest in failing to report his license reprimand and his pending criminal matters to the New York Board. In addition, despite Respondent’s attempted explanations, the evidence shows that Respondent only began paying the bulk of the 2007 costs ordered by this Board after the Department brought charges against him on October 25, 2011.

The Board then set forth its policy decision:

13. The Board of Medical Examiners takes this action to protect the health, safety, and welfare of the citizens of Tennessee by ensuring that physicians maintain high standards of professional ethics and follow the orders of this Board. The evidence showed Respondent’s lack of respect for this Board and for the New York Board, lack of respect for the truth, and failure to take responsibility for his own actions. Therefore, this Board finds revocation of Respondent’s Tennessee medical license to be the appropriate remedy.

The Board based its decision to revoke Dr. Oni’s license on his violations of the Medical Practice Act as well as the testimony he gave before the Board at the hearing in 2012. The Board did not find Dr. Oni’s explanations to be credible. It found Dr. Oni was intentionally dishonest in his dealings with the New York medical board, and it found Dr. Oni failed to pay the majority of the administrative costs dating from the 2007 proceeding until the Tennessee Department of Health filed additional charges against him in 2011. The Board’s factual findings are supported by the record, and the Board is authorized by statute to revoke a medical license for the grounds set forth in Tenn. Code Ann. §§ 63-6-214(b)(1), (2), and (20). Tenn. Code Ann. § 63-6-214(a)(5). While not determinative,

the chancery court found that if the Board had jurisdiction over Dr. Oni, “the Board would have been justified in imposing the sanction of revocation on Petitioner.” Dr. Oni has failed to show that the Board’s decision to revoke his license is unwarranted in law or unjustified in fact.

### III. CONCLUSION

For the reasons stated above, we reverse the trial court’s judgment that the Board lacked subject matter jurisdiction to sanction Dr. Oni at the hearing on remand; we affirm the Board’s rulings on all of Dr. Oni’s motions that are on appeal; and we affirm the Board’s decision to revoke Dr. Oni’s medical license. Costs of this appeal shall be assessed against the appellee, Adedamola O. Oni, for which execution shall issue if necessary.

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ANDY D. BENNETT, JUDGE