UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0709

September Term, 2014

DAVID A. GEIER

v.

MARYLAND BOARD OF PHYSICIANS

Graeff,
Arthur,
Leahy,

JJ.

Opinion by Arthur, J.

Filed: July 31, 2015

The Maryland Board of Physicians concluded that David Geier violated Md. Code (1981, 2014 Repl. Vol.) § 14-601 of the Health Occupations Article by practicing medicine without a license. The Board reached that conclusion even though an administrative law judge ("ALJ") had issued a proposed finding in which she recommended that the Board dismiss the charge. In rejecting the ALJ's proposed finding, the Board found that Mr. Geier, who is not a physician, had diagnosed a patient, determined which blood tests to order for the patient, and ordered those blood tests.

On a petition for judicial review, the Circuit Court for Montgomery County upheld the Board's decision. In view of the narrow scope of judicial review of agency determinations, we affirm.

FACTUAL BACKGROUND

The pertinent facts, derived principally from the Board's findings, are as follows:

A. Mr. Geier and Genetic Centers of America

Mr. Geier has a Bachelor of Arts degree from the University of Maryland, Baltimore County. He is not a physician, but he worked with his father, Mark Geier, M.D., in Dr. Geier's medical practice, Genetic Centers of America, Inc. Dr. Geier and Genetic Centers offered treatment for children with autism and related disorders.[1]

[1] "[A]utism 'is a generalized term for a variety of neuro-developmental disorders that range in severity across a spectrum. This variety of disorders, referred to in their entirety as Autism Spectrum Disorder ("ASD"), have symptoms that substantially impact a child's functioning in multiple spheres, including language and social interaction.'" *Geier v. Maryland State Bd. of Physicians*, ___ Md. App. ___, 2015 WL 3440417, at *1

(continued...)

In a related case, this Court recently affirmed the Board's decision to revoke Dr. Geier's license to practice medicine. *Geier v. Maryland State Bd. of Physicians*, ___ Md. App. ___, 2015 WL 3440417 (May 29, 2015).

B. The 2005 Appointment

On July 5, 2005, Parent A brought her ten-year-old son, Patient A, to Dr. Geier's office. Patient A had been diagnosed with autism, and the appointment was for the treatment of his autism. At the office, Parent A and Patient A went into an examination room with both Dr. Geier and Mr. Geier. While Dr. Geier interviewed Parent A, Mr. Geier wrote down Parent A's answers. In addition, someone completed an Autism Treament Evaluation Checklist ("ATEC"), which is used to measure the severity of a patient's autism and, if employed on successive occasions, the effectiveness of the treatment. In the "impression" section of a patient interview form, the author listed "unspecified development delay," "possible childhood exposure to heavy metals (mercury)," and "possible precocious puberty."[2]

[1](...continued)
n.1 (May 29, 2015) (quoting the opinion of an administrative law judge). "'[T]ypical symptoms include stereotypic movements, self-stimulatory movements, and unusual preoccupations with certain objects.'" *Id.* (quoting opinion of administrative law judge).

[2] "Dr. Geier believes that children with autism tend to have a higher rate of premature or precocious puberty." Appellant's Brief at 5 n.3. Dr. Geier attributes some of the children's symptoms to a genetic change that makes them less able to excrete mercury than the general population. In a very brief and condensed summary of Dr. Geier's opinions, the build-up of mercury leads to a build-up of testosterone, which in
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Genetic Consultants recommended that Parent A take Patient A for laboratory testing, but Parent A did not take her son for the tests and did not return for almost three years.

C. The Appointment on May 19, 2008

Parent A made another appointment for her son, then 13 years old, to see Dr. Geier on May 19, 2008. Upon their arrival at the doctor's office, Parent A completed an ATEC form while she and her son waited to be seen.

When a receptionist took Parent A and Patient A into an office in the clinic, Mr. Geier was sitting behind a desk in the seat where a physician would sit. Dr. Geier was not present because he was busy with another patient. No one explained to Parent A that Mr. Geier was not a physician, and Parent A assumed that he was.

Mr. Geier met with Parent A and Patient A for approximately half an hour. The Board found that Dr. Geier did not enter the office while the meeting was taking place. The Board also found that Dr. Geier did not speak to Parent A or Patient A that day.[3]

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[2](...continued)
turn leads to aggressive and hypersexual behaviors. *Geier*, 2015 WL 3440417, at *6.

[3] On the basis of the Geiers' testimony, the ALJ found that Dr. Geier "periodically popped" into the room during Mr. Geier's meeting with Parent A and Patient A. The Board, however, did not adopt that finding. "It is highly doubtful," the Board reasoned, "that in a case where a parent and patient had an appointment with a physician, the physician would enter the room where the discussion of the patient's treatment was taking place without saying a word (including not even greeting the parent and patient) and without being noticed by the parent." Both the ALJ and the Board found that Dr. Geier
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Mr. Geier told Parent A that Patient A looked as if he was 16 years old, though he was only 13. Observing that Patient A was beginning to grow a mustache, Mr. Geier added that he looked "like a typical high-testosterone kid."[4]

Mr. Geier had an extensive discussion with Parent A about laboratory testing, which Dr. Geier contends can determine the course of medical treatment for autism. The testing included various forms of genetic testing. Mr. Geier told Parent A that the testing would require blood samples, which would be taken by laboratories. He also told Parent A that he would send her the orders for the laboratory testing.

After the discussion in the office, Mr. Geier, Parent A, and Patient A went into another room to obtain abdominal and thyroid ultrasound sonograms of Patient A. Patient A refused to cooperate, which prevented the sonographer from conducting all aspects of the procedure. Mr. Geier wrote the patient's name and patient identification number on the abdominal ultrasound report. Dr. Geier made a note on the abdominal ultrasound report and initialed the thyroid ultrasound note, but the Board found that Dr. Geier was not in the ultrasound room when the procedure occurred.

[3](...continued)
did not talk to Parent A that day.

[4] As previously stated, Dr. Geier posits that in children with a specific genetic change, the build-up of mercury leads indirectly to a build-up of testosterone. *See Geier*, 2015 WL 3440417, at *6.

D. The Patient Interview Form

After Patient A's appointment ended on May 19, 2008, Mr. Geier scored the ATEC form that Parent A had completed. The Board found that Mr. Geier wrote a patient interview form concerning Patient A.[5]

The patient interview form is a single-spaced, three-page, typewritten document. It contains notes about Patient A's condition, as gleaned from the appointment, as well as sections for, among other things, diagnoses, impressions, and plans. A section titled "Psychological Evaluation" reads as follows:

> A follow-up evaluation of [Patient A] was undertaken using the Autism Evaluation Checklist (ATEC) completed by [Patient A's] mother and *evaluated by me.* The results indicate that [Patient A] continues to show singificant [sic] overall development delays (overall score at present = 60-6[9]% vs overall score previously = 70-79%). He continues to have significant problems with his sociability and sensory/cognitive awareness skills. [Patient A] has serious problems with hyperactivity and stemming behaviors. In addition, [Patient A] suffers from significant sleep cycle problems and can be destructive, he or injuries [sic] self and others, and is anxious/fearful. *It is apparent based upon examination of the DSM-IV criteria that [Patient A's] present symptoms are compatible with a diagnosis of pervasive developmental delay – not otherwise specific (PDD-NOS).*

(Emphases added.)[6]

[5] In his testimony before the ALJ, Mr. Geier stated that he could not recall whether he had completed the patient interview form. In his brief, however, he said that it was "undisputed" that he "prepared" the form. Appellant's Brief at 14.

[6] PDD-NOS is not an abbreviation for "pervasive developmental *delay* – not otherwise *specific*," as the patient interview form states, but for pervasive developmental

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Another section, titled "Impression," states: "PDD-NOS, Sleep Problems (Insomnia), and Unspecified Metabolic Disorder."

The patient interview form goes on to list four tests to order from LabCorp and 22 tests to order from Quest. Each test was accompanied by a code number. When Patient A first came to the clinic in 2005, Dr. Geier had ordered only five of those 26 tests.

Dr. Geier's name is typed at the end of the report, but he did not sign or initial the report.

E. The LabCorp Order

On May 22, 2008, Mr. Geier completed and initialed a LabCorp order form for four tests for Patient A. Under the diagnosis section of the form, Mr. Geier entered the code for insomnia. In the space on the form for a physician's signature, the words "Dr. Mark Geier" appear, but the Board found that Mr. Geier, and not his father, had signed Dr. Geier's name on the form. The Board observed that "the 'D' in 'Dr. Mark Geier' is extraordinarily similar to David Geier's distinctive 'D' when he initials a document."[7]

[6](...continued)
disorder – not otherwise *specified*.

[7] Although the ALJ acknowledged that "the 'D' in 'Dr.' is remarkably like the formation of the first letter in [David Geier]'s first name," she found that Dr. Geier had signed the order for blood tests. The Board rejected that finding, which it was entitled to do. *See, e.g., Dep't of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302-03 (1994).

Initially, neither Dr. Geier nor Mr. Geier ordered the additional 22 tests from Quest.

F. Mr. Geier's Conversation with Parent A on June 17, 2008

On June 17, 2008, Parent A called Genetic Consultants and spoke with Mr. Geier, because she had received an order only for the four LabCorp tests, and not for the additional tests from Quest. Mr. Geier told Parent A that he would order the other tests. Parent A did not speak with Dr. Geier.

G. The Quest Order

On June 18, 2008, Mr. Geier completed and initialed an order form for the 22 additional tests from Quest. Although Dr. Geier testified that on June 17 and June 18, 2008, he spent a considerable amount of time determining which laboratory should perform the tests, the Board rejected his testimony. The Board found that the form lists the same 22 tests in the same order as they appeared on the patient interview form that, the Board found, Mr. Geier had prepared after Patient A's appointment a month earlier.

H. The Quest Blood Tests

On July 11, 2008, Parent A took Patient A to Quest for the 22 blood tests. After a discussion with a Quest employee, Parent A concluded that the tests would require more blood than could be drawn in a single sitting. She opted only for the tests that she considered appropriate. She did not take her son to LabCorp for additional testing.

Genetic Consultants received the Quest reports, but did not attempt to schedule another appointment with Parent A.

I. Parent A's Complaint

After taking her son to Quest and receiving statements from her insurer that she thought were inconsistent with the services that she had received, Parent A used the internet to investigate Dr. Geier and Mr. Geier. She learned that Mr. Geier was not a physician. She complained to the Board that Mr. Geier was practicing medicine without a license.

PROCEDURAL HISTORY

On May 16, 2011, the Board charged Mr. Geier with practicing medicine without a license in violation of section 14-601 of the Health Occupations Article. The Board based the charge on Parent A's complaint.

In a proposed decision, the ALJ recommended that the Board dismiss the charge. The ALJ based her recommendation, in part, on her finding that Dr. Geier and Mr. Geier were more credible than Parent A, most notably on the issue of whether Dr. Geier had been present during any part of the interview on May 19, 2008.

In an extensive and detailed portion of its final decision and order, the Board rejected those findings, which it is entitled to do. *See*, *e.g.*, *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 385 (2006). Although Mr. Geier cites some of the ALJ's

findings, he does not argue that the Board improperly rejected the ALJ's credibility determinations.[8]

The ALJ had rejected the administrative prosecutor's contention that Mr. Geier gave a diagnosis of Patient A when he said that Patient A "looked like a typical high-testosterone kid." The Board did not reject that finding. Instead, the Board shifted its emphasis and found that Mr. Geier had given diagnoses in the patient interview form, which the Board found he authored, and the LabCorp order, on which the Board found he "forged" his father's name. The Board also found that, "without any involvement or real oversight from a physician," Mr. Geier alone had determined which blood tests to order and had ordered those tests.

In summary, the Board concluded that Mr. Geier had practiced medicine without a license because he diagnosed Patient A, selected the blood tests to order for Patient A,

[8] Parent A did not give live testimony before the ALJ. Instead, the ALJ considered a transcript of Parent A's testimony from a hearing in which the Board sought to summarily suspend Dr. Geier's license. While an agency generally should defer to an ALJ's *demeanor-based* credibility determinations (*see*, *e.g.*, *Elliott*, 170 Md. App. at 387), the Board carefully explained that this consideration did not apply, because the ALJ did not base her credibility determinations on Parent A's demeanor while testifying.

David Geier did testify before the ALJ, and the ALJ found him to be credible. The Board rejected that credibility determination, as it was entitled to do as long as it gave "strong reasons" for its decision. *See*, *e.g.*, *Elliott*, 170 Md. App. at 385. The Board gave "strong reasons" when it explained, at some length, that Mr. Geier's testimony was "misleading, evasive, and implausible"; that it contradicted his father's testimony and the documentary evidence; and that, "often times," his testimony (as well as his father's) was "self-contradictory." Dr. Geier did not give live testimony, and the ALJ made no determination regarding his credibility.

and ordered those tests. As a penalty for practicing medicine without a license, the Board fined Mr. Geier $10,000.

Mr. Geier petitioned for judicial review in the Circuit Court for Montgomery County. One day before argument on his petition, Mr. Geier moved to stay the proceedings or, alternatively, to introduce evidence that he had obtained in discovery in a separate civil suit that he and his parents have brought against the Board, its members, and some of its employees. The circuit court denied his request and affirmed the Board's decision.

Mr. Geier took a timely appeal from the circuit court's decision.

QUESTIONS PRESENTED

Mr. Geier presents five questions, which we have rephrased for clarity and reordered to make them coincide with the order of the arguments in his brief:

1. Is there substantial evidence to support the Board's conclusion that Mr. Geier practiced medicine without a license in ordering blood tests if one considers the COMAR regulations that permit a physician to delegate certain tasks to unlicensed persons?

2. Is there substantial evidence to support the Board's finding that Mr. Geier diagnosed Patient A with PDD-NOS?

3. Did the Board deprive Mr. Geier of due process by changing its legal theory after the ALJ's decision and finding that he diagnosed Patient A by authoring the patient interview form and LabCorp order form and that he signed his father's name on the LabCorp form?

4. Did the Board deprive Mr. Geier of due process by changing its legal theory after the ALJ's decision and finding that he forged his father's name on the LabCorp form?

5. Did the circuit court err by denying Mr. Geier's request for a hearing to present new evidence pursuant to Md. Code (1984, 2014 Repl. Vol.), § 10-222(g) of the State Government Article?[9]

Applying the highly deferential standard of review for agency determinations, we conclude that the Board's findings were supported by substantial evidence. We see no other error. Consequently, we shall affirm.

[9] Mr. Geier presented the following questions:

1. Whether the Board's Final Order is supported by substantial evidence once the proper Code of Maryland Regulations (COMAR) Regulations are applied to the facts in the record.

2. Whether the Board deprived Appellant of due process when it concluded that he must have diagnosed Patient A's illness based on new facts and arguments that were not presented by the State or decided by the ALJ.

3. Whether the Board deprived Appellant of due process when it concluded that he forged Dr. Mark Geier's signature despite no contentions being made at the hearing that such a forgery had occurred.

4. Whether the Board's finding that Appellant diagnosed Patient A with PDD-NOS is supported by substantial evidence.

5. Whether the Circuit Court erred when it did not grant Appellant's request to stay the case to allow for a hearing and presentation of evidence pursuant to Md. Code. Ann., State Gov't § 10-222(g).

STANDARD OF REVIEW

This Court exercises a "narrow" role when it reviews the Board's decision. *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67 (1999). Our role is "'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions,'" and whether "'the administrative decision is premised upon an erroneous conclusion of law.'" *Id.* at 67-68 (quoting *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569, 577 (1994)); *accord Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 536 (2011); *Geier*, 2015 WL 3440417, at *12; *Roane v. Maryland Bd. of Physicians*, 213 Md. App. 619, 630-31, *cert. denied*, 436 Md. 329 (2013).

We measure substantial evidence by looking to "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Banks*, 354 Md. at 68 (citations and internal quotation marks omitted); *accord Kim*, 423 Md. at 536; *Geier*, 2015 WL 3440417, at *12. We limit our evaluation of the agency's role as a fact finder to "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." *Motor Vehicle Admin. v. Weller*, 390 Md. 115, 140 (2005) (citing *Goodrich v. Nolan*, 343 Md. 130, 148 (1996)).

We "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.'"

Banks, 354 Md. at 68 (quoting *CBS Inc. v. Comptroller*, 319 Md. 687, 698 (1990)); *accord Kim*, 423 Md. at 536. This Court may not "substitute its judgment for the expertise of those persons who constitute the administrative agency." *Banks*, 354 Md. at 68 (citations and internal quotation marks omitted). "[A]n administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. . . . [T]he expertise of the agency in its own field should be respected." *Id.* at 69.

DISCUSSION

A. Ordering Blood Tests

COMAR 10.32.12.04 concerns the types of "technical acts" that a physician may delegate to an assistant. In general, if the delegation falls within the permitted scope of COMAR 10.32.12.04, the assistant is not improperly practicing medicine without a license by performing those acts.

Mr. Geier contends that under COMAR 10.32.12.04 he did not engage in the practice of medicine by ordering the laboratory tests. He appears to assert (Appellant's Brief at 12-13) that the regulations do not expressly require a physician's on-site supervision of an assistant who orders laboratory tests at a clinic like Dr. Geier's, as long as a physician approved the order. Consequently, he appears to conclude that ordering the tests was a "technical act" that did not constitute the practice of medicine. Mr. Geier's argument has several flaws.

First, the Board did not find that Mr. Geier had merely ordered the tests (in the sense of performing the ministerial act of completing an order form); the Board found that, without the supervision of a physician, he had determined which specific tests to order. In other words, the Board found that Mr. Geier used medical judgment in selecting the tests. Under the regulations, however, if an act requires the use of medical judgment, it is not a "technical act" that a nonphysican can perform. COMAR 10.32.12.02.B(8) (defining "technical act" to mean "a routine medical or surgical act which does not require medical judgment and is performed with the supervision as specified within this chapter").

Second, even if Mr. Geier had merely ordered the tests at a physican's behest (which the Board found was not the case), his conduct would fall within the category of technical acts only if it were consistent with national standards and with Dr. Geier's policies and procedures. COMAR 10.32.12.04(B). Mr. Geier cites no evidence that either requirement was satisfied.

Third, even under Mr. Geier's formulation, he could still perform a delegated "technical act" only if a physician "approved" what he did. Appellant's Brief at 13; *see also id.* at 14 ("if Dr. Geier approved the tests, there is also no legal impediment preventing Appellant from ordering the tests"). The Board found, however, that Dr. Geier had no role in ordering the blood tests and, by implication, could not and did not "approve" them.

Mr. Geier argues, at some length, that he ordered the tests as a result of directions from his father. He argues that he had frequent opportunities to speak with his father about the tests and that his father had some objectively demonstrable role in Patient A's treatment – Dr. Geier did write a brief note on the sonogram report. On the basis of that evidence, Mr. Geier argues that it is "highly likely" that he conferred with his father "concerning a working diagnosis and appropriate tests." Appellant's Brief at 16. The Board, however, found that no such conversation occurred and that Mr. Geier had ordered the tests on his own "without any involvement or real oversight from a physician."

Although the evidence might have supported a finding that Mr. Geier completed the order forms only after his father had formulated a working diagnosis, identified the appropriate tests, and told his son to order them, the Board was not compelled to make those findings on the evidence before it. Not only was there no objective evidence that the Geiers conferred with one another as Mr. Geier posits, but to the extent that the proof of any such conversation depends on the Geiers' testimony, the Board expressly found that they were not credible witnesses. The Board specifically rejected Dr. Geier's testimony about his role in ordering the second set of tests from Quest in June 2008, because the order form lists the same 22 tests in the same order as they appeared on the patient interview form that, the Board found, Mr. Geier had prepared after Patient A's appointment a month earlier. Additionally, at the time of the patient's first appointment in 2005, Dr. Geier ordered only five of the 26 tests that were ordered in 2008; this fact

amounts to at least some evidence tending to show that Dr. Geier had no role in determining which tests to order in 2008.

Mr. Geier intermittently complains that the Board did not satisfy the burden of proving a negative. *See, e.g.*, Reply Brief at 2 ("there is no evidence in the record demonstrating that Appellant completed the [patient interview form] without the direction of his father"). The Board, however, was not required to disprove every possible inference that Mr. Geier completed the form (or the lab test order) without any direction from his father. Rather, the Board's conclusion must stand if a reasoning mind could conclude that Mr. Geier, more likely than not, completed the form (and the lab test order) without any direction from his father. That standard has been met in view of the proof of Mr. Geier's almost exclusive involvement with Patient A and his mother, the near-total absence of any objective proof of Dr. Geier's involvement with the patient or his mother, and the Board's finding that the Geiers' testimony was unworthy of credence.

Mr. Geier also contends that when the Board rejected the ALJ's credibility determinations, it went so far as to draw inferences opposite from both his and his father's testimony. He cites *Bereano v. State Ethics Comm'n*, 403 Md. 716, 746 (2008), which held that an agency may assign little or no weight to testimony, but may not give the testimony so little weight that the agency shifts the burden to the subject of the administrative action. We disagree that the Board has shifted the burden or that it has employed its rejection of the Geiers' testimony as affirmative evidence of the case against

Mr. Geier. The Board based its findings on Mr. Geier's extensive involvement with Patient A and his mother (including his role in preparing the patient interview form and the blood test orders) and the near-total absence of any objective indication of Dr. Geier's involvement. While a different fact finder might have reached a different conclusion, the record contained substantial evidence to support the Board's conclusion.

Simply put, on the evidence before the Board, a reasoning mind could have found that Mr. Geier determined which tests to order and ordered those tests on his own without the direction or approval of a physician. Consequently, we must affirm the Board's finding. *See Banks*, 354 Md. at 68.

B. The Diagnosis of PDD-NOS

Mr. Geier challenges the Board's conclusion that he practiced medicine without a license by formulating the diagnosis of PDD-NOS in the patient interview form that he prepared after the appointment with Patient A on May 19, 2008. Again, we reject his challenge, because a "reasoning mind" could have reached the conclusion that the Board reached.

The Board based its conclusion that Mr. Geier formulated the diagnosis of PDD-NOS on a number of factual premises:

- The Board found that "Patient A was almost exclusively handled by David Geier." The only objective indication of Dr. Geier's involvement with Patient A is a one-line note on the sonogram report.

- The Board also found that Mr. Geier "wrote the patient interview form." In fact, after a failure of recollection in the hearing before the ALJ, Mr. Geier now agrees that he "prepared" the form (Appellant's Brief at 14), albeit in consultation with his father.
- Although Dr. Geier ordinarily (but not invariably) initials patient interview forms, the Board found it significant that the doctor did not initial the form for Patient A.
- Dr. Geier was unable to explain why Patient A received a diagnosis of PDD-NOS. According to the DSM-IV, PDD-NOS is a "severe and pervasive impairment in the development of reciprocal social interaction or verbal and nonverbal communication skills, or when stereotyped behavior, interest, and activities are present, *but the criteria are not met for a specific pervasive developmental disorder* . . . ." (Emphasis added.) A diagnosis of PDD-NOS is incompatible with a diagnosis of autism, because autism is a *specific pervasive developmental disorder*. Nonetheless, Dr. Geier testified that "it became obvious that [Patient A] had autism." In addition, he appeared to testify that Patient A had a "medium" degree of impairment even though a diagnosis of PDD-NOS is appropriate only when "there is a severe and pervasive impairment." Accordingly, the Board found that Dr. Geier's explanations "were inconsistent and medically unintelligible."

- Finally, the patient interview form incorrectly referred to PDD-NOS as "pervasive developmental *delay* – not otherwise *specific*," and did not use its correct name, "pervasive developmental *disorder* – not otherwise *specified*."[10]

Mr. Geier takes issue with the Board's conclusion that, because his father did not initial the patient interview form, he had no role in the diagnosis. He points out that Dr. Geier did not claim to sign or initial every form: Dr. Geier testified that he "usually" initialed or signed the forms if he remembered and if someone showed the forms to him, but that sometimes they went unsigned. We agree that the Board was not compelled to conclude that Dr. Geier did not make the diagnosis merely because he did not sign the interview form. Nonetheless, the failure to sign the form represents at least some evidence on which a finder of fact could reasonably rely to infer that Dr. Geier may not have reviewed this particular form and did not make the diagnosis contained within it. Together with the other evidence, as well as the Board's determination that Dr. Geier's

[10] The Board also cited an assertion in the patient interview form that the ATEC form was "evaluated by me," as well as David Geier's testimony that he "scored" the ATEC form. Although the Board recognized that "scoring" may differ from "evaluating," it observed that Dr. Geier did not know who had "scored" the ATEC form. That testimony led the Board to infer that Dr. Geier had not "evaluated" the form, but that Mr. Geier had. Mr. Geier attacks that finding on appeal, and we see no defense of it in the Board's brief. Consequently, we do not rely on that finding in evaluating whether there was substantial evidence to support the Board's conclusion.

testimony was not credible, the failure to sign the patient interview form gives some measure of incremental support to the Board's conclusion.

Mr. Geier also takes issue with the conclusions that the Board drew from Dr. Geier's "medically unintelligible" explanation for the diagnosis of PDD-NOS. Mr. Geier, however, does not challenge the unintelligibility of the explanation by explaining how a diagnosis of "pervasive development disorder – not otherwise specified" can be consistent with a diagnosis of a *specified* pervasive development disorder like autism. Rather, he argues that it is "illogical" to conclude, from his father's inability to explain the diagnosis, that Mr. Geier made the diagnosis. To the contrary, the physician's inability to explain the diagnosis supports a reasonable inference that a layperson, rather than a physician, made the diagnosis. As the Board argues (Appellee's Brief at 17), it makes no sense that a physician would make a diagnosis of PDD-NOS when it was (in Dr. Geier's words) "obvious" that the patient had autism.[11]

Finally, Mr. Geier takes issue with the Board's conclusion that a physician could not have made the diagnosis because the patient interview form incorrectly referred to PDD-NOS as "pervasive developmental *delay* – not otherwise *specific*," and did not use its correct name, "pervasive developmental *disorder* – not otherwise *specified*." Mr.

[11] In his reply brief, Mr. Geier argues that the Board needed expert testimony to find that the diagnosis of PPD-NOS was inappropriate. We disagree that the Board needed expert testimony before it could read the DSM-IV and conclude that a diagnosis of "pervasive developmental disorder – not otherwise *specified*" was incompatible with a diagnosis of a specified developmental disorder like autism.

Geier correctly observes that the Board's final decision repeatedly misspelled PDD-NOS as "PPD-NOS." We agree that the Board's typographical errors discredit its assertion that the similar error in the patient interview form makes it "highly unlikely that a licensed physician specializing in the field of pervasive developmental disorders" had made the diagnosis in that form. Nonetheless, in view of the other evidence that supports the Board's conclusion, most notably including Dr. Geier's inability to explain the diagnosis of PDD-NOS, we conclude that the Board had substantial evidence to conclude that Mr. Geier had made the diagnosis.[12]

C. Due Process: Authorship of the Patient Interview Form and LabCorp Order Form

In the hearing before the ALJ, the administrative prosecutor argued that Mr. Geier gave a diagnosis of precocious puberty when he said that Patient A looked "like a typical high testosterone kid." The ALJ's proposed decision asked, "Did [Mr. Geier] 'diagnose' Patient A?" The ALJ resolved this issue in the negative by determining that Mr. Geier's statement did not meet the definition of a "diagnosis" and, accordingly, that he did not practice medicine without a license.

In its final decision, the Board did not challenge the ALJ's finding. Instead, the Board took a different approach, concluding that Mr. Geier had practiced medicine without a license by making the diagnosis of PDD-NOS in the patient interview form and

[12] It makes no difference that Dr. Geier testified that the diagnoses were his: the Board found that his testimony was not credible, as it was entitled to do.

the diagnoses of PDD-NOS, insomnia, and unspecified metabolic disorder in the LabCorp order form. The Board took that approach even though the administrative prosecutor had not advanced that theory in the exceptions to the ALJ's decision.

Mr. Geier contends that the Board deprived him of due process by "abandon[ing]'" the prosecutor's theory (Appellant's Brief at 23), basing its conclusion on "facts and arguments different [from] those presented by the State." *Id.* While the Board's approach gives us pause, we cannot conclude, on the record in this case, that the Board deprived Mr. Geier of due process.

In administrative proceedings, due process entails adequate notice of the charges. *See Reed v. Mayor and City Council of Baltimore*, 323 Md. 175, 184 (1991) (holding that agency must provide notice of "issues involved" in "sufficient detail to enable [the accused] to marshal evidence and arguments in defense of the assertions"). In proceedings before the Board, Md. Code (1984, 2014 Repl. Vol.) § 10-207(b)(1) of the State Government Article dictates the factual content of the required notice: "The notice shall: (1) state concisely and simply (i) the facts that are asserted; or (ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved."

Here, the charging document identifies the charge of "practicing medicine without a license." The document proceeds to list the Board's factual allegations that support this charge. Among the 54 paragraphs are these:

27. [Mr. Geier] documented in "Psychological Examination" section of the [patient interview form]: "It is apparent based upon examination of the DSM-IV criteria that Patient A's present symptoms are compatible with a diagnosis of pervasive developmental delay-not otherwise specific (sic)."

28. [Mr. Geier] documented the following Impression: PDD-NOS, 2) Sleep problems (insomnia) and (3) Unspecified Metabolic Disorder. [Mr. Geier's] plan was to prepare a laboratory work-up after which a follow-up consultation would be scheduled to discuss treatment. Twenty-six (26) laboratory studies are listed in the plan.

These charges gave Mr. Geier the required notice: they informed him that the Board had charged him with "practicing medicine without a license" because he had allegedly documented the diagnosis of PDD-NOS in the patient interview form, and had documented the impressions of PDD-NOS, insomnia, and unspecified metabolic disorder in the LabCorp order form.

Furthermore, it is not entirely accurate to state that Mr. Geier's role in the patient interview form became an issue only after the ALJ had issued her proposed findings. At the ALJ hearing, the administrative prosecutor questioned Mr. Geier about the form and asked whether he had prepared it. At the time, Mr. Geier distanced himself from the form by answering that he did not "recall" whether he had prepared it and did not know whether he was "involved in the actual typing of" the document. By contrast, Mr. Geier now acknowledges that he "prepared" the form. Appellant's Brief at 15. If he had prepared the form at his father's direction and with his father's input, as he now contends, it would have been easy enough for him to say so at the hearing before the ALJ.

The Board is entitled to base its decision on "the record as a whole," *see Banks*, 354 Md. at 67, and we have found that the record contains substantial evidence to support the allegations that the Board charged. For those reasons, we reject the contention that the Board deprived Mr. Geier of due process by concluding that he had practiced medicine without a license by making the diagnoses in those forms.

D. Due Process: "Forging" Dr. Geier's Name on the LabCorp Order Form

Mr. Geier contends that the Board deprived him of due process when it found that he had "forged" his father's name to the LabCorp order form. He correctly observes that the charging document does not contain an allegation of forgery (though it does allege that he had a role in preparing the form). He complains that had he received notice that he was suspected of forging his father's signature, he could have presented evidence to refute the charge, such as evidence that he had signed his father's name with his father's permission.

We reject Mr. Geier's contentions for two reasons. First, the question of whether he signed the LabCorp order form was extensively litigated in the proceedings before the ALJ. Second, if Mr. Geier believed that the Board's decision had blindsided him by belatedly raising the issue of forgery, he had a remedy in the circuit court but failed to pursue it.

In the proceedings before the ALJ, Parent A initially thought that the signature on the LabCorp order form was that of David Geier, not of Dr. Mark Geier. It is not surprising that Parent A held that belief: although the handwritten words on the document read "Dr. Mark Geier," the ALJ herself found that the handwritten "D" "is remarkably like" the "D" that David Geier uses when he initials a document. Indeed, the handwriting is quite similar to the other examples of David Geier's handwriting in the record, while quite dissimilar from the numerous examples of Dr. Geier's handwriting in the record.

Ultimately, the ALJ did not pursue the question of whether Mr. Geier signed his father's name to the form, because on cross-examination Parent A changed her mind and agreed that Dr. Geier had signed the form. She appears to have done so only because the handwriting reads "Dr. Mark Geier," rather than "D. Mark Geier." In these circumstances, Mr. Geier cannot plausibly deny having had notice that the authenticity of that signature was an issue in the case.

In any event, if Mr. Geier had been taken by surprise by an unexpected finding that he had forged his father's name on the form, he had a statutory remedy: under section 10-222(f)(2) of the State Government Article, Mr. Geier could have asked the circuit court to order the Board to take "additional material evidence" on the issue of forgery because "there were good reasons for the failure to offer the evidence in the proceeding

before the presiding officer."[13] That evidence might have included Mr. Geier's testimony that he signed his father's name with his father's authorization, or Dr. Geier's testimony that he authorized his son to sign his name to the form. Because he did not so, he cannot complain of a denial of due process.

E. The Denial of a Hearing to Consider Evidence of "Irregularities and Misconduct"

One day before argument in the circuit court, Mr. Geier moved to stay the proceedings or, alternatively, to admit new testimony or evidence. Mr. Geier and his father had obtained that testimony and evidence in discovery in a separate civil suit that they and Mr. Geier's mother had filed against the Board, its members, and several of its employees. Mr. Geier claimed that the evidence, which largely concerns the Board members' deliberations, would show "irregularities and misconduct by Board members and staff." Appellant's Brief at 29. The circuit court denied the motion.

[13] Section 10-222(f) of the State Government Article provides, in pertinent part:

> (2) The court may order the presiding officer to take additional evidence on terms that the court considers proper if:
>
> (i) before the hearing date in court, a party applies for leave to offer additional evidence; and
>
> (ii) the court is satisfied that:
>
> 1. the evidence is material; and
>
> 2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer.

On appeal, Mr. Geier argues that under section 10-222(g) of the State Government Article, the circuit court was required to consider this evidence. We disagree.

Section 10-222(g) dictates the substance of the proceeding that the circuit court must conduct in an action for judicial review of an agency decision:

> (1) The court shall conduct a proceeding under this section without a jury.
>
> (2) A party may offer testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record.
>
> (3) On request, the court shall:
>
> (i) hear oral argument; and
>
> (ii) receive written briefs.

Mr. Geier appears to argue that once a party offers evidence of alleged irregularities pursuant to section 10-222(g)(2), the mandatory language of section 10-222(g)(3) requires the court to admit that evidence in the form of either oral argument (§ 10-222(g)(3)(i)) or written briefs (§10-222(g)(3)(ii)). Mr. Geier fails to recognize that subsections (g)(2) and (g)(3) are analytically separate segments of the statute.

On the request of a party, subsection (g)(3) requires a court to hear oral argument and to receive briefs. *See also* Md. Rule 7-207 (concerning memoranda in actions for judicial review); Md. Rule 7-208 (concerning hearings in actions for judicial review). Subsection (g)(2), on the other hand, permits a party "to offer testimony on alleged

irregularities in procedure before the presiding officer that do not appear on the record." The court is not required to entertain that testimony unless it meets the relevant statutory criteria.

We have little decisional guidance on the meaning of the phrase "alleged irregularities in procedure before the presiding officer that do not appear on the record." We know that "selective enforcement . . . is not a procedural irregularity." *Consumer Prot. Div. Office of Att'y Gen'l v. Consumer Pub. Co., Inc.*, 304 Md. 731, 750 (1985). On the other hand, if an agency has reached diametrically different conclusions on substantially identical facts, "that evidence *might* be admissible" "because it directly relates to the possible 'arbitrary, capricious, or discriminatory quality' of the administrative body's actions." *Erb v. Maryland Dep't of Env't*, 110 Md. App. 246, 267 (1996) (quoting *Ad + Soil, Inc. v. Cnty. Comm'rs of Queen Anne's Cnty.*, 307 Md. 307, 321 (1986)).

But regardless of where the precise boundaries of subsection (g)(2) may lie, we know that the Board's internal deliberations do not amount to "testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record." "A party challenging agency action is ordinarily forbidden from inquiring into the mental processes of an administrative official." *Public Serv. Comm'n v. Patuxent Valley Conservation League*, 300 Md. 200, 214 (1984) (citing *United States v. Morgan*, 313 U.S. 409 (1941)); *accord Montgomery Cnty. v. Stevens*, 337 Md. 471, 481 (1995)). "'Just as a

judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." *Patuxent Valley*, 300 Md. at 214 (quoting *Morgan*, 313 U.S. at 422). Ordinarily, therefore, "the post-administrative testimony of individual agency decision makers, and any additional post-administrative 'evidence' which such testimony may lead to, do[] not furnish the proper basis for the reviewing court's decision." *Patuxent Valley*, 300 Md. at 217.

In this action for judicial review of the Board's decision against him, Mr. Geier could not have deposed the Board and its members and employees absent a "strong showing" of "bad faith or impropriety." *Patuxent Valley*, 300 Md. at 218; *accord Stevens*, 337 Md. at 484 (in action for judicial review, circuit court could allow depositions of high-ranking administrative decisionmakers only if petitioner "made a strong showing that there was an impropriety, external to the administrative record, which tainted the final agency decision"). Mr. Geier could not obtain such discovery on the basis of a "mere allegation" of "fraud or extreme circumstances which occurred outside the scope of the administrative record." *Stevens*, 337 Md. at 481; *see also Maryland State Bd. of Dental Exam'rs v. Fisher*, 123 Md. App. 322, 328 (1998) (petitioner required to make "strong showing" "in advance of the deposition").

In this case, Mr. Geier did not make any such "showing," much less the requisite "strong showing." Because Mr. Geier, therefore, could not have deposed the Board and its members and employees in this action for judicial review, it makes no sense to

conclude that the court was required to entertain the deposition testimony and other evidence that he managed to obtain from them in his separate lawsuit. The circuit court did not err in declining to permit him to offer that testimony under section 10-222(g).[14]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[14] To the extent that Mr. Geier sought to introduce anything other than deposition testimony – *i.e.*, to the extent that he sought to introduce court orders and other documentary evidence in the separate lawsuit – the circuit court correctly excluded those materials as well: subsection (g)(2) allows a person to offer testimony, but not documentary evidence. *Maryland Gen'l Hosp. v. Maryland Health Res. Planning Comm'n,* 103 Md. App. 525, 538 (1995).