NOT DESIGNATED FOR PUBLICATION

No. 125,052

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JOSE M. BEJAR, M.D.,
Appellant,

v.

KANSAS STATE BOARD OF HEALING ARTS,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed March 3, 2023. Affirmed.

Jose M. Bejar, appellant pro se.

Courtney E. Cyzman, general counsel, Kansas State Board of Healing Arts, for appellee.

Before ATCHESON, P.J., BRUNS, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Seven years after pleading no contest to sexually assaulting several female patients during physical examinations and then surrendering his medical license, Jose M. Bejar sought reinstatement of the license from the Kansas Board of Healing Arts. As the centerpiece of his pitch to the Board, Bejar argued he had been falsely accused of the crimes and had been poorly represented by his lawyers in the criminal case and in the license revocation proceeding. The statute governing reinstatement, however, requires the applicant to show the Board he or she poses "no threat" to the public and has been "rehabilitated." The Board declined to reinstate Bejar's license. The Shawnee County

District Court upheld the Board's decision, leading to this appeal. We find no error and, likewise, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Bejar received a Kansas medical license in 1982 and went to work as a neurologist at the Veterans Administration hospital in Topeka. He worked there for about 30 years, a tenure that appears to have been punctuated by various disputes with higher-ups. The parties are familiar with the details of those confrontations outlined in the reinstatement proceedings. We condense them here. In the 1990s, Bejar pursued a federal claim alleging he had been discriminated against at the VA hospital because of his race and national origin and was then suspended in retaliation for having complained. He was at least partially successful and secured reinstatement with backpay and benefits. Bejar contends various officials at the VA hospital tried to set him up to be fired because of that success.

In 2010, Bejar initiated another discrimination complaint. Beginning in late 2011, five female patients Bejar saw at the VA hospital made complaints to the Topeka Police Department that he had sexually assaulted them during medical examinations by inappropriately touching their breasts, pubic areas, or buttocks. The Shawnee County District Attorney charged Bejar with a host of felonies and misdemeanors. In a deal his lawyer negotiated with the State, Bejar pleaded no contest in March 2013 to one count of aggravated sexual battery, a felony, of one female patient and one count of sexual battery, a misdemeanor, of four other female patients based on incidents charged in the alternative. The district court accepted the pleas and adjudged Bejar guilty of those crimes. The State dismissed a charge of rape and 18 additional counts of sexual battery. Consistent with the plea agreement, the district court sentenced Bejar to consecutive terms of incarceration totaling 44 months and placed him on probation for 36 months. The record indicates Bejar satisfactorily completed the probation.

The convictions prompted the Board to review Bejar's medical license. In May 2013, Bejar, through a second lawyer, agreed to surrender his license. The Board's consent order provided that the surrender would be treated as a revocation of Bejar's license.

In October 2020, Bejar sought reinstatement of his Kansas medical license. Lawyers for the Board and for Bejar submitted numerous documents to the Board. The Board held a hearing on the request in August 2021, at which Bejar appeared with his lawyer and was the only witness to testify. The Board denied the reinstatement request.

Bejar appealed the Board's decision to the district court under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. Bejar represented himself in the district court and does so here, as well. Based on the record compiled in the Board proceeding and the parties' written submissions, the district court found no error and issued a 10-page order in March 2022 affirming the Board's conclusion. Bejar has appealed that ruling to our court.

LEGAL ANALYSIS

The Board's order is an agency action, so the KJRA outlines the specific grounds on which a court may set aside the decision, including errors of law, unsupported factual findings, or an otherwise arbitrary or capricious outcome. K.S.A. 65-2844 (Board's decision on application for reinstatement reviewed under KJRA); K.S.A. 77-621(c) (bases for reviewing court to grant relief from agency action). If the issue turns on an interpretation of a statute or some other question of law, we review without deference to the agency's legal analysis. *Redd v. Kansas Truck Center*, 291 Kan. 176, 187-88, 239 P.3d 66 (2010); *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010). Judicial review is more limited when an agency's findings of fact have been challenged. A reviewing court may reject a factual finding only if it lacks substantial

support in the evidence considering "the record as a whole" in light of the governing standard of proof. K.S.A. 77-621(c)(7) and (d).

Under the KJRA, we consider this appeal from the district court as if Bejar's petition for review of the Board's decision had been originally filed with us. *Powell*, 290 Kan. at 567; *Yeasin v. University of Kansas*, 51 Kan. App. 2d 939, 947, 360 P.3d 423 (2015). In other words, we are to effectively disregard the district court's decision-making and conclusion. In this case, the district court relied solely on the agency record augmented with written submissions. We can review those materials just as well as the district court did. See *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012); *Weber v. Board of Marshall County Comm'rs*, 289 Kan. 1166, 1175-76, 221 P.3d 1094 (2009). Bejar, therefore, bears the burden of showing to us that the Board erred. See K.S.A. 77-621(a)(1); *Powell*, 290 Kan. at 567.

Our task begins with K.S.A. 65-2836, a statute central to the revocation of medical licenses. The grounds the Board may rely on in disciplining a physician, up to and including license suspension or revocation, are set out there. One of the reasons is the physician's conviction of a felony or a class A misdemeanor. K.S.A. 2021 Supp. 65-2836(c). That subsection also contains specific requirements for a physician's reinstatement following a felony conviction: The applicant must persuade two-thirds of the voting Board members by clear and convincing evidence the he or she "will not pose a threat to the public . . . as a licensee and that [he or she] has been sufficiently rehabilitated to warrant the public trust." K.S.A. 2021 Supp. 65-2836(c). Those reinstatement requirements are more stringent than the general ones in K.S.A. 65-2844 and control here because Bejar had been revoked based on a felony conviction. See *Merryfield v. Sullivan*, 301 Kan. 397, 398, 343 P.3d 515 (2015) (specific statute commonly controls over more general statute dealing with same subject).

The Kansas Supreme Court has recognized a set of "relevant" factors to channel the inquiry into whether a physician's license should be restored:

> "(1) the present moral fitness of the petitioner; (2) the demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought the profession; (3) the extent of petitioner's rehabilitation; (4) the nature and seriousness of the original misconduct; (5) the conduct subsequent to discipline; (6) the time elapsed since the original discipline; (7) the petitioner's character, maturity, and experience at the time of the original revocation; and (8) the petitioner's present competence in medical skills." *Vakas v. Kansas Bd. of Healing Arts*, 248 Kan. 589, Syl. ¶ 2, 808 P.2d 1355 (1991).

Those considerations continue to guide physician reinstatement proceedings. See *Myers v. Kansas Bd. of Healing Arts*, No. 121,767, 2020 WL 6815540, at *30 (Kan. App. 2020) (unpublished opinion).

Against that backdrop, we examine the argument Bejar advanced in front of the Board for reinstatement and continues to pursue in this judicial review process—that he is innocent of the criminal charges lodged against him—and find his position wanting both legally and factually. First, K.S.A. 65-2836(c) pins reinstatement following a felony conviction on a demonstrable lack of a present threat to the public *and* on being "sufficiently rehabilitated." Each is a necessary condition for reinstating a physician's license. The legislative choice is clear and unmistakable, so we must give full effect to that determination. See *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022); *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008).

Rehabilitation—as a legislatively required ground for reinstatement—refers to "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." Black's Law Dictionary 1538 (11th ed. 2019). More generally, "rehabilitate" has been defined as "to prepare (a disabled person, an inmate, etc.) for useful employment or successful integration into society by

counseling, training, etc." Websters New World Collegiate Dictionary 1224 (5th ed. 2016). Those dictionary definitions appropriately inform our reading of the statutory language. See *Midwest Crane & Rigging v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). Rehabilitation is not the same as exoneration or proof of actual innocence. In turn, we may fairly conclude that by requiring rehabilitation, K.S.A. 65-2836(c) conclusively presumes the validity of the felony conviction that occasioned the license revocation in the first place. An attack on the conviction itself in the reinstatement proceeding would not constitute a valid ground to reinstate under K.S.A. 65-2836(c).

The *Vakas* factors reinforce our assessment. Several of them specifically look at rehabilitative efforts, such as a conscious acknowledgment of the negative impact of the wrongful conduct and the extent of rehabilitation. Moreover, both K.S.A. 65-2836(c) and *Vakas* rather conspicuously omit proof of actual innocence as a substitute for rehabilitation. There are sound policy reasons for the choice, although it is not our business to supplant the Legislature's policy determinations with our own. See *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 4, 374 P.3d 680 (2016) ("Questions of public policy are for legislative and not judicial determination, and where the legislature declares a policy, and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for that body and not for the courts.").

First, of course, the Board is a 15-member administrative entity composed of five medical doctors, three doctors of osteopathy, three chiropractors, one podiatrist, and three nonmedical public members one of whom happens to have a law degree. By training and experience, they are not skilled in assessing claims of wrongful conviction or actual innocence. And the Legislature did not intend that the Board members make such assessments. They are, however, suited to determining the fitness of a medical practitioner to be licensed and what serves the public interest in that respect.

Second, a claim of innocence would be unwieldy to litigate in an administrative hearing before the Board. The parties likely would wind up replicating the criminal trial that resulted in the felony conviction, perhaps with additional evidence or argument going to the defendant-applicant's innocence. Here, where there was a plea, the parties would effectively try the criminal case for the first time. All of that would be done years after the fact with the inherent problems associated with unavailable witnesses and significantly dulled memories. See *State v. Salcido-Quintana*, No. 105,007, 2012 WL 3289942, at *7 (Kan. App. 2012) (unpublished decision) ("[A]n extended delay generally tends to impair the truth-seeking function of a trial because some witnesses may be lost altogether and the memories of those who testify may well be dulled by the passage of time."). Turning reinstatement proceedings into something like habeas corpus actions would be a perilous course, and it is one the Legislature has closed off.

Third, Bejar had other avenues within the judicial process to challenge the convictions if he wished to assert his innocence. He could have filed a motion in the criminal case to withdraw his no-contest pleas. See K.S.A. 22-3210(d). He could have filed a motion under K.S.A. 60-1507 for relief from the pleas based on ineffective legal representation or some other constitutional deficiency. But Bejar would have lost a favorable plea agreement and would have faced a trial—in which he could have asserted his innocence—on multiple felony and misdemeanor charges with the risk of having to serve a lengthy prison sentence if convicted. His willingness to accept the benefit of the plea bargain and resulting convictions in 2013 followed by his claim of innocence in 2020 to secure a benefit in these proceedings seems, at the very least, to be an indecorous manipulation.

Decorum aside, however, K.S.A. 65-2836 does not permit reinstatement upon a claim or evidence of actual innocence in an administrative hearing before the Board—the approach Bejar has undertaken. Indeed, a claim of innocence is antithetical to the required statutory showing of rehabilitation, since the very assertion conveys the

declarant's belief he or she has done nothing wrong and, therefore, need not be rehabilitated. For that reason, Bejar's asserted basis for reinstatement is legally insufficient.

We have no occasion to delve into a circumstance in which a physician has had his or her license revoked based on a felony conviction and then successfully obtains relief from the conviction on appeal, in a habeas corpus proceeding, or otherwise. We presume the physician could, if necessary, bring a declaratory judgment action against the Board coupled with a request for a mandatory injunction directing the Board to vacate the revocation. That would be legally and factually quite different from what Bejar has attempted here.

Even if we were mistaken in concluding Bejar's request for reinstatement was inadequate as a matter of law, he offered insufficient evidence of his innocence to warrant relief. That furnishes a wholly independent reason to reject the argument. As we have mentioned, Bejar had to present clear and convincing evidence persuasive to a supermajority of the Board to have his license restored. Clear and convincing evidence is a degree of proof greater than a preponderance of the evidence but less than beyond a reasonable doubt. *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 2, 187 P.3d 594 (2008). On appellate review, we ask if the record evidence was such that a reasonable fact-finder could have found the existence of the relevant fact to be "highly probable." 286 Kan. at 705; *Goddard v. Pfeifer*, No. 115,966, 2018 WL 386168, at *1 (Kan. App. 2018) (unpublished opinion).

Here, Bejar has asserted he was the victim of a conspiracy at least among the women who made the police reports against him and some officials at the VA hospital to falsely accuse and convict him of serious criminal charges, leading to the loss of his medical license and, in turn, providing a reason to terminate his employment. It isn't entirely clear whether Bejar contends some law enforcement officers were in on the

purported conspiracy, as well. As we have indicated, Bejar further contends he received bad legal advice from the lawyer who represented him in the criminal case, leading him to take the plea deal. And he says he was similarly poorly advised by another lawyer when he surrendered his medical license and agreed to the Board's order.

Apart from his own conjecture, Bejar offers nothing supporting a conspiracy to oust him from his position with the VA or to frame him for the charged crimes. None of the women who went to the police have recanted their accusations. Bejar suggests two of the women may have surreptitiously videotaped their medical appointments with him and the recordings would exonerate him. But Bejar has provided no direct or circumstantial evidence suggesting such recordings ever existed. He has only his imaginative belief in their existence. Similarly, Bejar has furnished no expert witness opinions that his lawyers failed to adequately represent him.

The dearth of evidence supporting Bejar's elaborately constructed claim of innocence—dependent upon the conspiracy followed by serial substandard representation from different lawyers in the criminal prosecution and in the Board proceeding—is glaringly apparent on appeal. In outlining the supposed factual basis in the record, he cites to his own narrative accounts of the purported frame-up made in written submissions to the Board and the district court. Those accounts, however, have no independent factual or evidentiary support elsewhere in the record. The Board, therefore, properly discarded Bejar's claim of actual innocence.

The question remains whether the Board reasonably could have denied Bejar's request for reinstatement after declining to credit his claim of innocence because it was legally irrelevant, factually unsupported, or both. We turn to the *Vakas* factors in our review of the Board's decision in that context.

We do not belabor the exercise. By making what appears to be an insupportable claim of innocence resting on nothing more than his own assertion of its correctness, Bejar fails to demonstrate "present moral fitness." The representation comes across as either a delusion or a prevarication. While the former may not be wholly incompatible with "moral fitness," the latter is. Bejar has presented no consciousness of having engaged in wrongful conduct. Likewise, he has shown no substantial rehabilitation. Contrary to his suggestion, a successful completion of probation is not the equivalent of rehabilitation "warranting the public trust" that comes with being licensed as a physician. That is especially true given the convictions triggering the revocation proceedings against Bejar. He was convicted of sexually abusing multiple female patients in the course of providing ostensibly necessary physical examinations of them. Bejar's actions were an egregious violation of his moral and ethical duties as a physician and of his patients' privacy and bodily integrity—in addition to their criminal character. Bejar's misconduct was especially serious for those reasons. And he remains unrepentant.

In the seven years since his suspension, Bejar apparently has been law abiding, although he would not have had the means and opportunity to replicate the crimes of conviction that prompted the revocation of his license. Those factors arguably favor Bejar, though marginally, and they do not offset his dismal showing on some of the others. The factor weighing the physician's "character, maturity, and experience" at the time of the behavior resulting in the disciplinary action seems geared toward mitigating some forms of misconduct by newer practitioners who should have known better but apparently didn't. Those considerations have no relevance here, given the especially pernicious character of what Bejar did. The final *Vakas* consideration rests on the physician's present medical competence. The record here is uninformative on this point. But even if Bejar remained technically competent as a neurologist, that would not warrant restoration of his license considering the grounds for revocation and his lack of demonstrated rehabilitation.

We find no reason to disturb either the decision of the Board in declining to reinstate Bejar's medical license or the district court's ruling in upholding that decision.

Affirmed.