

1 **BEFORE THE ARIZONA MEDICAL BOARD**

2 In the Matter of
3 **KENNETH M. FISHER, M.D.**
4 Holder of License No. **12762**
5 For the Practice of Allopathic Medicine
6 In the State of Arizona.

Board Case No. MD-04-0236A

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

(Letter of Reprimand)

7 The Arizona Medical Board ("Board") considered this matter at its public meeting
8 on October 6, 2005. Kenneth M. Fisher, M.D., ("Respondent") appeared before the
9 Board with legal counsel Calvin Raup for a formal interview pursuant to the authority
10 vested in the Board by A.R.S. § 32-1451(H). The Board voted to issue the following
11 findings of fact, conclusions of law and order after due consideration of the facts and law
12 applicable to this matter.

13 **FINDINGS OF FACT**

14 1. The Board is the duly constituted authority for the regulation and control of
15 the practice of allopathic medicine in the State of Arizona.

16 2. Respondent is the holder of License No. 12762 for the practice of allopathic
17 medicine in the State of Arizona.

18 3. The Board initiated case number MD-04-0236A after receiving a complaint
19 regarding Respondent's care and treatment of a forty year-old female patient ("CR"). The
20 complaint alleged Respondent performed unnecessary cryotherapy, failed to secure
21 informed consent for cryotherapy and lacked the qualifications to perform cryotherapy.
22 The cryotherapy resulted in permanent scarring.

23 4. Respondent was asked CR's age when Respondent treated her in June
24 2003. Respondent testified CR was thirty-eight. Respondent was asked CR's ethnic
25 group and whether her ethnic group would make a difference in the way he approached a

1 skin lesion. Respondent testified CR was Caucasian and her ethnic group would make a
2 difference in how he approached a lesion. The Board noted Respondent's medical
3 record for CR's first visit on June 23, 2003 indicates her chief complaint was that she
4 needed prescription refills. CR also complained of night sweats and something growing
5 on the left side of her face. Respondent was asked how he addressed the issue of night
6 sweats. Respondent testified he interviewed CR about the night sweats and the quality
7 of the occurrence, association of fevers, any other medical conditions and, since he had
8 not seen her regularly as a patient, told her that a workup for night sweats would include
9 a more involved work-up with labs. Respondent noted since CR was not fasting that day
10 it was not a good day for laboratory tests so he recommended she come back for a
11 complete physical. Respondent was asked where any of this was documented in his
12 record. Respondent testified he documented CR needed a complete physical.

13 5. Respondent was asked to explain the notation on his chart under "Skin" –
14 "0" with a line through it. Respondent testified when he initially saw CR for the complaint
15 of night sweats she had not mentioned anything about the lesion, it was added near the
16 end of the visit when CR mentioned the lesion and his nursing staff documented it.
17 Respondent was redirected to the top of the note under "Chief Complaint" where it says
18 "[p]atient here for RX refills." Respondent testified his medical assistant wrote that note
19 and his recollection was that as CR added to the complaints the medical assistant added
20 them to the notes. Respondent testified both he and his medical assistant have access
21 to the patient's chart during the visit and both enter data in the chart. Respondent was
22 asked how his entry under the "Skin" portion of the chart was consistent with CR
23 complaining of a lesion. Respondent testified that, because CR presented for night
24 sweats, when he examined her skin he was looking for any indication of a reason for the
25

1 night sweats, rashes or any kind of dermatologic indications that might help explain the
2 night sweats. Respondent documented he did not see anything.

3 6. Respondent was asked if it met the standard of care in family practice to
4 mark the skin examination as normal, or nothing wrong, and then propose to treat a
5 lesion that was not described. Respondent testified he did not know if he could answer
6 that question to everyone's satisfaction and at the time he put the documentation down
7 he was not addressing actinic lesions of the skin. But, after the exam and the visit was
8 nearing completion CR made the "Oh, by the way" type of remark about the lesion and he
9 addressed it. Respondent was asked if he removed the lesion three or four days later.
10 Respondent testified he did not remove the lesion, he treated it. Respondent was asked
11 if the procedure he performed destroyed the lesion. Respondent testified it did.
12 Respondent was asked if the standard of care in family practice when treating a skin
13 lesion required he describe that lesion in a physical exam. Respondent testified it did.
14 Respondent was asked if it would be appropriate to describe the length of time CR had
15 the lesion. Respondent testified it would be important, but he did not do so. Respondent
16 was asked if he described the size of the lesion during the visit on the 23rd. Respondent
17 testified he did not, but on the 27th when he treated the lesion he drew a picture reflecting
18 the size of the lesion.

19 7. Respondent was asked what "patch" means when used to describe a skin
20 lesion. Respondent testified a "patch" is a mounded or pedunculated lesion that can be
21 raised slightly above the surface of the skin, but has a regular border. Respondent
22 testified CR's lesion was distinguished by some modest erythema. It was dry, non-
23 friable. Respondent was asked if he knew what a "macule" was. Respondent testified a
24 "macule" was a lesion that is even with the plane of the skin as opposed to a papule that
25 rises above the skin. Respondent was asked if he would accept the statement of the

1 Board's medical consultant that a patch is a macule greater than one centimeter.
2 Respondent agreed. The Board noted Respondent described CR's lesion as a patch
3 when he found it was raised and less than one centimeter.

4 8. Respondent was asked who was responsible for making sure there was
5 documentation of appropriate consent for the procedure. Respondent testified it was
6 ultimately his responsibility and his recollection was that the consent was there, but there
7 were at least two consents signed that day and he believes that one possibility is that the
8 medical assistant threw away the wrong consent form. Respondent was asked where in
9 the record any consent form could be found. Respondent testified the consent is always
10 on the opposite side of his note describing the procedure. Respondent testified he knows
11 there was a signed consent, but the page that was there for him to write his note on was
12 face up and the consent she did not sign is on the other side. Respondent noted CR
13 originally signed a consent for a different procedure and that consent was discarded.
14 Respondent noted he has taken corrective measures in his office to ensure this does not
15 happen again.

16 9. Respondent was asked to state his differential diagnosis of CR's facial
17 lesion. Respondent testified his number one thought was that it was a solar keratosis
18 and he discussed with CR on the June 23 visit a number of options and possibilities,
19 anything from simple sun damage to actinic keratosis to an invasive sun damage-related
20 skin cancer. Respondent was asked if he agreed a squamous cell carcinoma could be
21 among the possibilities. Respondent testified he told CR that was a possibility and that
22 certainly it looked more like an early actinic lesion than a squamous cell, but he could not
23 be sure. Respondent was asked to confirm his initial plan was to do a punch biopsy.
24 Respondent testified his initial plan for definitive diagnosis was either a punch biopsy or a
25 complete excision or a curette biopsy, which is what he does mostly in his practice.

1 10. Respondent was asked about an earlier written response to the Board
2 where he stated CR did not want the biopsy and wanted cryotherapy. Respondent
3 testified CR was concerned about the cosmetic look of whatever would be done.
4 Respondent testified doing nothing would potentially lead CR to a more serious skin
5 lesion down the line. Respondent testified he discussed with CR, as indicated on the
6 reverse of the June 23 visit note as a drawing to CR, both what the potentials were and
7 what he could have done and what the objectives were. Respondent testified CR was
8 adamant that she did not want any scar that would come from cutting, that when he
9 discussed his preference of a curette biopsy, there was a potential there would be a small
10 divot, a defect in the skin. Respondent was asked if he was letting CR direct the course
11 of treatment. Respondent testified he gave CR his opinion and recommendation to get
12 either a curette or a punch biopsy initially and when CR left his office that was his
13 understanding of what was going to be scheduled. Respondent testified he was not
14 certain how and where she changed her mind and redirected her visit, but on the day she
15 came in the room was set up for the punch biopsy and CR requested cryotherapy.

16 11. Respondent was asked to describe the machine he used to freeze the
17 lesion. Respondent testified he uses a cryoprobe that uses a gel interface with a probe
18 with a nitrous oxide that goes through it from a tank. Respondent was asked to confirm
19 the machine uses nitrous oxide. Respondent testified it uses liquid nitrogen.
20 Respondent was asked if he believed it was important for a physician doing a procedure
21 to have a reasonable idea of the materials and methods that are involved in the particular
22 treatment. Respondent testified he did. Respondent was asked if there was a difference
23 between nitrous oxide and liquid nitrogen. Respondent testified there absolutely was.
24 Respondent was asked to describe the techniques he could have used with the liquid
25 nitrogen. Respondent testified the oldest technique is using liquid nitrogen that is stored

1 in a thermos and applied directly to the lesion with a Q-tip. Respondent testified many
2 family practice offices and clinics use this technique. Respondent testified that a large
3 part of his HIV practice is the dermatologic complications of HIV and he uses a lot of
4 cryotherapy for various types of warts and other skin lesions.

5 12. Respondent was asked if it was correct that CR's ultimate outcome was
6 some scarring and pigmentary changes at the area of the lesion. Respondent testified he
7 believed so. Respondent was asked what he thought happened in this particular case
8 that caused the scarring and pigmentary changes. Respondent testified he was not
9 certain and had never seen this happen before. Respondent testified he treats with the
10 cryoprobe until there is a halo of frost around the tip and then he releases the cryoprobe
11 from the gel interface. Respondent was asked what he is destroying with the freezing –
12 what skin layers he is dealing with. Respondent testified he was not going down to the
13 collagen layers and not affecting fibroblasts that would cause scarring. Respondent
14 testified there is a technique when there is contact with the gel interface that is used that
15 prevents scarring by tenting the skin up to protect the underlying vasculature and
16 collagen layer to prevent scarring. Respondent testified with the technique he uses when
17 he sees the ball – a halo of frost around the tip of the cryoprobe – he releases it and it is
18 the end of the procedure.

19 13. Respondent testified CR's entire cryotherapy treatment lasted for twenty
20 seconds – there was not frozen contact for twenty seconds. Respondent noted it takes
21 sometimes five to ten seconds before the nitrogen goes from the tank through the tubes
22 and causes freezing at the tip. Respondent testified he told CR there would probably be
23 a reddened area that might last several weeks before fading. Respondent testified he
24 had no expectation that this would cause subdermal scarring and has never had a patient
25 experience this effect. Respondent was asked if he documented that CR might have

1 color changes. Respondent testified he did not in his own writing, but in the initial
2 consent CR signed scarring, pain, possible infection, bleeding were all documented as
3 potential outcomes, but that consent form was lost.

4 14. Respondent was asked why he initially recommended a biopsy.
5 Respondent testified even when believes that a lesion is not an invasive cancer, but
6 maybe sun damage or actinic keratosis, he likes to get at least a curette biopsy.
7 Respondent noted it is what he usually does and what CR was originally scheduled for,
8 but then she declined. Respondent was asked if cryotherapy is a proper treatment for a
9 squamous cell lesion. Respondent testified it can be in some instances. Respondent
10 was asked if it was fairly frequent in his practice that he allows the patient to make the
11 decision as to the type of treatment when there is a reason for doing a specific procedure
12 such as a biopsy to know what he is dealing with. Respondent testified he deals with
13 patients who have significant and serious life threatening illnesses. Respondent noted
14 half of his practice is HIV related and there is no one-size-fits-all regimen for everyone
15 that works every time. Respondent testified the culture of his office is to discuss options
16 of medical care and enlist the patient as a partner in making the decision. Respondent
17 was asked how the patient can make that decision without the medical knowledge that
18 Respondent has and how he let a patient persuade him from what he felt was the best
19 treatment. Respondent testified CR refused the biopsy. Respondent was asked if he
20 ever considered telling her "this is what I think and maybe you need to see someone
21 else, get another opinion." Respondent testified CR always had the option of making an
22 appointment with a dermatologist, but such an appointment would take four to six months
23 and she did not want to wait. Respondent reiterated he believed the cryotherapy was
24 better than doing nothing.

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1 15. Respondent was asked what he had done to improve his records since
2 receiving an advisory letter from the Board in 2002 regarding his records. Respondent
3 testified he has an outside service that comes in and randomly picks charts and reviews
4 them for accuracy and completeness. Respondent also testified he has taken steps to in-
5 service his employees more consistently with their important role in helping him maintain
6 records. Respondent testified he makes sure informed consents are always there and
7 complete. Respondent testified he has his patients take the informed consent when they
8 make their appointments for the procedure and it is reviewed again on the day of the
9 procedure. Respondent noted he also takes photographs of any lesions and the photo
10 goes in the chart.

11 16. Respondent was asked to summarize his training in cryotherapy and how
12 many procedures he does. Respondent testified in his residency training program he
13 took dermatologic training and in his post-residency training there is not a major HIV
14 meeting that does not include dermatology procedures. Respondent testified he did
15 maybe ten cryotherapy procedures for actinic lesions per month. Respondent was asked
16 if this occurrence will make him change or alter his practice pattern. Respondent testified
17 from the avoidance of problems he would probably defer to a plastic specialist.

18 17. The standard of care for diagnosing skin lesions requires a thorough
19 cutaneous physical exam followed by a shave or punch biopsy of any suspicious lesion.
20 The standard of care requires application of a cryoprobe for the proper amount of time so
21 as to not cause scarring.

22 18. Respondent deviated from the standard of care when he failed to perform
23 the scheduled biopsy and applied the cryoprobe for a period of time that caused scarring.

24 19. CR was harmed because she suffered permanent scarring.
25

1 **CONCLUSIONS OF LAW**

2 1. The Arizona Medical Board possesses jurisdiction over the subject matter
3 hereof and over Respondent.

4 2. The Board has received substantial evidence supporting the Findings of
5 Fact described above and said findings constitute unprofessional conduct or other
6 grounds for the Board to take disciplinary action.

7 3. The conduct and circumstances described above constitutes unprofessional
8 conduct pursuant to A.R.S. § 32-1401(27)(e) (“[f]ailing or refusing to maintain adequate
9 records on a patient;”) and 32-1401(27)(q) (“[a]ny conduct or practice that is or might be
10 harmful or dangerous to the health of the patient or the public.”

11 **ORDER**

12 Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS
13 HEREBY ORDERED that Respondent is issued a Letter of Reprimand for inappropriate
14 diagnosis and treatment of a skin lesion and for failure to maintain adequate records.

15 **RIGHT TO PETITION FOR REHEARING OR REVIEW**

16 Respondent is hereby notified that he has the right to petition for a rehearing or
17 review. The petition for rehearing or review must be filed with the Board’s Executive
18 Director within thirty (30) days after service of this Order. A.R.S. § 41-1092.09(B). The
19 petition for rehearing or review must set forth legally sufficient reasons for granting a
20 rehearing or review. A.A.C. R4-16-102. Service of this order is effective five (5) days
21 after date of mailing. A.R.S. § 41-1092.09(C). If a petition for rehearing or review is not
22 filed, the Board’s Order becomes effective thirty-five (35) days after it is mailed to
23 Respondent.

24 Respondent is further notified that the filing of a motion for rehearing or review is
25 required to preserve any rights of appeal to the Superior Court.

1 DATED this 12th day of December, 2005.



THE ARIZONA MEDICAL BOARD

By _____
TIMOTHY C. MILLER, J.D.
Executive Director

6 ORIGINAL of the foregoing filed this
7 12th day of December, 2005 with:

8 Arizona Medical Board
9 9545 East Doubletree Ranch Road
10 Scottsdale, Arizona 85258

11 Executed copy of the foregoing
12 mailed by U.S. Certified Mail this
12th day of December, 2005, to:

13 Calvin L. Raup
14 Shughart, Thomson Kilroy
15 3636 North Central Avenue – Suite 1200
16 Phoenix, Arizona 85012

17 Executed copy of the foregoing
18 mailed by U.S. Mail this 12th day
19 of December, 2005, to:

20 Kenneth M. Fisher, M.D.
21 Address of Record

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23 _____
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