DECISION NO. 2012-HPA-120(a)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant

AND: The College of Physicians and Surgeons of BC

AND: A Physician

BEFORE: Lorianna Bennett, Panel Chair

DATE: Conducted by way of written submissions concluding on January 15, 2013

APPEARING: For the Complainant: Self-represented

For the College: Sarah Hellmann, Counsel

For the Registrant: Lindsay Johnston, Counsel

I INTRODUCTION

[1] The Registrant is a physician for a British Columbia security correctional facility. This matter relates to a complaint filed by the Complainant, an inmate, that the Registrant would not prescribe certain pain medication or provide adequate treatment for his chronic neck and back pain.

II ISSUES

[2] The issues I must decide are:

(a) Did the College adequately investigate the complaint against the Registrant?
(b) Was the College’s decision to dismiss the complaint reasonable?

III BACKGROUND

[3] There is no dispute that the Complainant was prescribed Tylenol 3 with codeine prior to his transfer to the correctional facility. Further, there is no dispute that upon his transfer to the facility, the Registrant terminated the Complainant’s prescription for Tylenol 3 with codeine.
In his complaint form dated April 14, 2011, the Complainant says he requested ongoing pain therapy medication, in particular Tylenol 3 with codeine, for chronic pain caused by three bulged discs and degenerative disc disease in his back and neck. He explains that prior to his transfer to the British Columbia correctional facility, he was taking six Tylenol 3 with codeine each day together with Gravol to counteract the nausea.

The Complainant says that upon his arrival at the institution, he was immediately cut off of his medications as a result of the Registrant’s refusal to administer the same drugs. He explains that the Registrant told him that it was the policy of the institution to refuse these medications. He says he was prescribed these medications by four different doctors in Ontario and requires a continuing prescription in order to manage his chronic pain.

The Registrant responded to the allegations in a letter dated June 27, 2011. He explained that he discussed the Complainant’s requests for Tylenol 3 with the Complainant and in doing so explained to the Complainant that he would need to do a chart review as the correctional institution did not use Tylenol 3 for chronic pain. In the meantime, the Registrant offered alternative medications to the Complainant which he declined.

The College completed its investigation and review of the complaint pursuant to section 32(3)(c) of the Act and was critical of the Registrant, in part. In particular, the College concluded that the Registrant did not include enough information in his medical notes for the College to determine whether his decision to withhold Tylenol 3 was justified.

The College, however, was not critical of the Registrant’s medical treatment in terms of the alternative medicinal choices that he offered the Complainant.

As part of its remedial action, the College concluded that it would remind the Registrant that proper documentation is an important requirement of medical care. Further, the College directed that the College disposition letter remain on the Registrant’s permanent file at the College for further consideration should concerns of a similar nature be brought to the College’s attention in the future.

In his application for review the Complainant states:

I feel that my complaint to the College of Physicians and Surgeons of British Columbia ... was not done with an unbias [sic] perspective. I was refused access to medications for non medicinal reasons. Further [Registrant] is acting in a punitive manner; going catrary [sic] to 4 other doctors prescriptions. I will not allow anyone to fry my brain and harm me by stupifying me with Lyrica or any other drug. Health care staff also tryed [sic] to get me to take Methadone. I refused this as well. I am not a junky looking for a fix. I am being persiqueted [sic] because I am a prisoner and for no other reason was I refused these drugs period.

In his written submission to the Review Board dated October 19, 2012, the Complainant alleges that the medical staff began to retaliate against him the moment he walked into the BC institution from Ontario, and that he was cut off of his pain medications without consultation or sound reason. He states:
I think the most relevant issue here is that a medical practitioner [sic]/[Registrant] has made decisions about my health, not based on a sound medical diagnoses [sic], but on a personal belief about the inherent character of all prisoners being lying, cheating, drug addicts who cannot be trusted with opiates. This was made very clear to me by [Registrant] when he said that the reason he would not give me these meds was I would most likely abuse or divert them to another prisoner for gain. This unfounded allegation is not in any file and there is zero history of any accusation or suspicion of this nature.

Also you’ll noticed [sic] that my medical file was not used in it’s [sic] entirety, but selective excerpts were extracted to try to justify (in a very discombobulated fashion) what I contend is an abuse of position. I would ask the Health Professions Review Board to look at my whole file to get a more accurate look at just how many angry accusations have been made against me for complaining to the Collage [sic] and for launching a $5,000,000.00 Tort Claim against CSC. This includes several medical staff at [institutions] in Ontario for the refusal of medical treatment and medication to punish and retaliate against me.

You see I’m not just refused proper pain meds, but I am being refused any kind of medical treatment that would alleviate the cause of the back pain. I believe that much of my back pain may be caused by one of my legs being shorter then [sic] the other...

...Although I have brought this to [Registrant’s] attention and to other prison doctors...I have received no diagnoses, recommendations or even a simple examination to measure to see if I may be right. My goal here is not to get high but to live without pain drug free. So if I must take a drug to help alleviate some of the worst of the pain, codeine works and I am still able to function. Does it make sense that I not only refused proper pain meds, that won’t co ok my brain, but I am also refused medical treatment that may alleviate the pain altogether or the need for the pain meds?...

...I ask you to consider my case, not based on my crimes or the fact that I am a prisoner, but on the fact that I am a human being who needs medical treatment and [Registrant] is refusing to treat me in a professional or humane manner. Please use my file in its entirety to see just how much rancour [sic] my file is polluted with and this will give you a clearer understanding as to why I am refused medical treatment.

IV THE REVIEW BOARD’S ROLE ON APPLICATIONS FOR REVIEW

[12] The Review Board’s powers on a review are limited. Pursuant to s. 50.6(8) of the Act the Review Board may do one of the following on completion of a review of an Inquiry Committee disposition:

(a) confirm the Inquiry Committee’s disposition;

(b) direct the Inquiry Committee to make a disposition that could have been made by the inquiry Committee in the matter; or

(c) send the matter back to the Inquiry Committee to reconsider the matter with specific directions.

[13] Before the Review Board can either direct the Inquiry Committee to make a different disposition or send the matter back to the Inquiry Committee to reconsider the matter, the Review Board must first make a finding that the Inquiry Committee’s investigation was inadequate or the disposition unreasonable. These limits to the Review Board’s jurisdiction are set out in s. 50.6(5) of the Act which reads:
On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:

(a) the adequacy of the investigation conducted respecting the complaint; and
(b) the reasonableness of the disposition.

Section 50.6(6) further requires the review to be “on the record” meaning that the review is not a “trial de novo” (i.e., a fresh hearing of the facts) and must be based on the written record of the College’s investigation and disposition of the complaint.

These limitations are set out for all parties in the Review Board’s letter dated October 9, 2012.

V ADEQUACY OF THE INVESTIGATION

The role of the Review Board in determining the adequacy of an investigation is to assess whether the Inquiry Committee’s investigation provided it with sufficient information to investigate the particular complaint. It is not the role of the Review Board to reinvestigate the complaint or to substitute its decision for that of the Inquiry Committee.

The standard which the Review Board must apply when considering what is “reasonable” or “adequate” has been previously addressed in several Review Board decisions such as Review Board Decision No. 2009-HPA-0001(a)-0004(a) para [89]:

The Legislature’s choice of the words “reasonable” and “adequate” make clear that the Legislature has not tasked the Review Board with the role of determining whether the Inquiry Committee has made the “ideal” disposition or conducted the “perfect” investigation. A disposition will only be unreasonable and an investigation will only be inadequate if it falls below the appropriate standard of review.

Applying the Review Board’s role to the facts of this case, what I must consider is whether the College took reasonable steps to investigate and obtain key information from relevant sources. In other words, I will consider:

(a) Has the College conducted an investigation with a degree of due diligence whereby the College has considered and attempted to obtain evidence from the Registrant that is the subject of the complaint?

(b) Has the College considered and attempted to obtain evidence from relevant collateral sources, and in particular evidence that is directly relevant to the subject Registrant and the particular complaint?

In his application for review, the Complainant makes no specific allegations that there was anything inadequate about the College’s investigation. He does, however, suggest that the investigation was not based on sound medical diagnoses and that it was biased.

In their written submissions, both the College and the Registrant address the issue of adequacy of the investigation, and both suggest that the College’s investigation was adequate.
Turning to the issue of adequacy of the investigation, I will outline the steps taken by the College in the course of its investigation:

(a) By a letter dated June 13, 2011, the College submitted the Complainant’s letter of complaint to the Registrant for his response;

(b) On July 4, 2011, the College received and reviewed the Registrant’s response dated June 27, 2011 together with the clinical notes and charts of the Complainant. These clinical notes commence from when the Complainant entered the BC correctional facility and came under the Registrant’s care;

(c) The College requested and received medical records specific to the Complainant’s care from the former Ontario institution where the Complainant was incarcerated;

(d) The College reviewed the Complainant’s medical records received from the Ontario institution;

(e) By a letter dated September 8, 2011, the College provided the Complainant with a copy of the Registrant’s response;

(f) On September 19, 2011, the College received a response from the Complainant to the Registrant’s letter;

(g) On February 13, 2012 the College advised the Complainant that there was a delay in completing the investigation of his complaint; and

(h) On May 8, 2012 the College provided the parties with a written decision regarding the complaint against the Registrant.

In summary, there were various investigative steps taken by the College. I find these steps were adequate to enable the College to obtain sufficient information to allow it to reasonably assess the allegations raised by the Complainant.

In the circumstances, I find that the investigation was adequate and that it did not fall below the standard of review.

VI REASONABILITY OF THE DISPOSITION

It is not the Review Board’s role to decide whether the College’s decision was right or wrong. Nor is it the Review Board’s role to make a finding of misconduct or to discipline a member of any college.

As noted in the College’s submissions, the Review Board does not have jurisdiction to make an order that falls outside of the parameters of s. 50.6(8) of the Act. In other words, it cannot make findings of negligence, it cannot revoke a physician’s medical license, discipline a registrant of a College, or award monetary damages.

Rather, the Review Board’s role after considering the issue of the adequacy of the investigation, is limited to deciding whether the College or Inquiry Committee’s disposition was reasonable.

In considering the reasonableness of the disposition, the Review Board must determine whether the disposition falls within a range of defensible outcomes based on the evidence it had before it.
[28] The clinical records in this case suggest that the Complainant suffered from a history of severe pain resulting from degenerative disc disease and bulged discs in his neck and back. The clinical records dated March 23, 2011 through to April 18, 2011 suggest that the Complainant made requests for Tylenol 3 as a result of his chronic pain.

[29] The clinical record entry of April 13, 2011 indicates that, by that point in time, the Complainant had not received any Tylenol 3 and that he discussed a referral to a pain clinic with the medical staff. The clinical notes further indicate that the Complainant was in agreement with that care plan.

[30] By April 18, 2011 the Complainant still had not received any Tylenol 3, despite his requests. The entry on this date also states: “…cannot sit up or stand up for more than ½ hour without having a lot of pain.”

[31] At 10:30 that same day a further entry was added: “I’m returned 4 tablets of Lyrica to H/O states the medication ineffective.”

[32] In my view, the clinical records between March 23, 2011 through to April 18, 2011 do not provide sufficient explanation as to why the Registrant would not provide Tylenol 3 to the Complainant particularly given his extreme chronic pain.

[33] Additionally, the records are not clear as to whether the referral to the pain clinic was ever followed up on. In his letter dated June 27, 2011, the Registrant states: “…Healthcare at [institution] subsequently spoke to me about making a referral for him for a pain management clinic which I agreed to…”.

However, given the Complainant’s comments in his letter dated September 12, 2011 “…I have not seen a pain specialist since arriving…” and the similar comments in his written submissions, “…I am being refused any kind of medical treatment that would alleviate the cause of the back pain…”, I can only infer that the pain clinic referral, even if made, was not actively followed up until such time at least as the Complainant filed his complaint with the College.

[34] The College, in disposing of the complaint, recognized these shortcomings:

After careful review, we are critical of [Registrant’s] recordkeeping. For each patient encounter, a physician is required to record a history, physical findings and a treatment plan. [Registrant’s] notes are lacking in any physical examination record.

[Registrant] does not include enough information from his review of the chart to know whether his decision to withhold Tylenol 3 was justified. [Registrant] did attempt to provide alternative treatments, which are often useful in the management of chronic pain. In general, most physicians treating chronic pain avoid the use of short-acting medications such as Tylenol 3 and opioid (narcotic) pain killers generally. In this circumstance, it appears that the medication treatment was sound, but the documentation was lacking. [Registrant], appropriately, is seeking specialist review for your condition and its treatment options.

[35] With respect to the Registrant’s failure to provide the Tylenol 3, the College was not critical of this medical decision. In particular, the College stated:
The College does have a point of view in regard to the long term use of medication for noncancer pain. Recent reviews of the research in medical journals have found little evidence of safety or effectiveness. The Office of the Chief Coroner of British Columbia advises that between 150 and 200 British Columbians die each year as a result of prescription drug misuse. The most common drug used in such cases is codeine in the form of Tylenol #3 and similar formulations.

Accordingly, we expect physicians to be very selective in their use of these drugs. We would normally expect a physician treating a patient in your circumstances to acknowledge your significant suffering, but explain that the drugs available are minimally effective and potentially hazardous. Patients are encouraged to find nonmedical strategies to cope with their pain.

The Health Professions Act and relevant legal precedents anticipate a remedial resolution to issues such as this. We shall therefore remind [Registrant] that proper documentation is an important requirement of medical care. It is our expectation that he will amend his practice accordingly.

This letter will remain on [Registrant's] permanent file at the College, potentially available for further consideration should concerns of a similar nature be brought to our attention in future.

[36] For the reasons given by the College, I find the disposition to be a reasonable and defensible outcome given the evidence before the College and given the relevant safety information and medical findings.

VII ORDER

[37] For the reasons given above, and given my finding that the College investigation was adequate and the disposition reasonable, I confirm the College's disposition regarding this Registrant.

“Lorianna Bennett”

Lorianna Bennett, Panel Chair
Health Professions Review Board

April 23, 2013