UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

67 M.S.P.R. 622

Docket Number PH-0752-94-0750-I-1

DELIA A. HALL, Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

Date: June 2, 1995

M. Jefferson Euchler, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellant.

Dianne N. Parlow, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board on an interlocutory appeal from the administrative judge's discovery-related order issued on December 22, 1994. The administrative judge ruled that 38 U.S.C. § 7332(b)(2)(D) contemplates that a party seeking access to certain confidential patient medical records in possession of the Department of Veterans Affairs would have to apply to an Article III court, i.e., a U.S. district court, because the Board lacks authority to order the release of such records. The appellant requested an interlocutory appeal of the ruling to the Board and the agency did not object. The administrative judge certified his ruling for review by the Board under 5 C.F.R. § 1201.93. For the reasons set forth below, we VACATE the administrative judge's ruling and RETURN the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant from the GS-6 position of Health Technician, at the agency's Medical Center in Martinsburg, West Virginia, effective September 23, 1994. Initial Appeal File (IAF), Tab 3, Subtabs 4,

4a, 4c. The agency based the action on nine charges of misconduct. *Id.*, Subtab 4c. Charge VI alleged that the appellant disclosed certain confidential information about patients at the Medical Center where she worked and that she gained knowledge of the matters she disclosed from her access to the patients' medical records through her employment. *Id.*

On appeal, the appellant denied all of the charges. IAF, Tab 1. She initiated discovery under the Board's procedures set forth at 5 C.F.R. § 1201.71-.75. During this process, she made various discovery requests, including a request for the medical records of the patients in question under Charge VI. IAF, Tab 9. The agency refused to release the records without a court order. IAF, Tabs 9, 11, 13. The appellant then moved to compel the release. *Id.*, Tab 9. She argued in support of her motion, among other things, that she needed access to the records to determine whether they contained the information the agency had charged her with disclosing. She contended that if the records did not contain the information or if the records showed that the alleged disclosures were not true, then this charge must fail. She argued also that the agency was required to provide the records because it implicitly asserted that the information she allegedly disclosed is contained in them and is true, when it brought the charge. She argued further that to allow the agency to maintain the charge but to deny her the opportunity to investigate the assumptions underlying it is a denial of her right to due process. She asserted finally that the Board is empowered to order the release of the records pursuant to its regulations governing discovery. IAF, Tab 9. She made similar arguments in her brief on interlocutory appeal. IAF, Tab 15.

In its response in opposition to the motion, the agency argued that under the provisions of 38 U.S.C. § 7332(b)(2)(D), it is prohibited from disclosing the medical records requested by the appellant unless ordered to do so by a court of competent jurisdiction. The agency asserted that neither a Board administrative judge, nor the Board as an entity, is a court of competent jurisdiction as contemplated by this statutory provision. It contended that to obtain the release of the records, the appellant, as the party requesting the information, was required to obtain a court order from the local U.S. district court. The agency argued finally that, if it released the records without such an order, it would be liable for an action against it by the patients involved. IAF, Tab 11. It raised similar arguments in its brief on interlocutory appeal. IAF, Tab 16. The administrative judge ruled that the statutory provision contemplates that a party seeking access to patient medical records would have to apply to a U.S. district court to obtain release of the records. He certified his ruling for interlocutory appeal to the Board. IAF, Tab 17.

ANALYSIS

The appellant has established that her discovery request was for information that is relevant and material to the preparation and presentation of her appeal.

Discovery is the process by which a party may obtain relevant information from another person or party to an appeal. 5 C.F.R. § 1201.72(a). Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* The scope of discovery generally extends to any non-privileged matter that is relevant to the issues involved in the appeal. 5 C.F.R. § 1201.71(b).

Where a party fails or refuses to respond fully to a discovery request, the requesting party may file a motion to compel discovery with the administrative judge. A party seeking to compel discovery must show that the information she seeks is relevant and material to the presentation of her case. 5 C.F.R. § 1201.73(c)(2)(i).

Here, the appellant sought release of the medical records of the patients referred to by the agency in Charge VI. The agency charged the appellant with disclosing certain confidential information about patients at the Medical Center where she worked and gaining knowledge of the matters she disclosed from her access to medical records through her employment. Specifically, the agency alleged that:

A. Sometime during the period between December, 1993 and April, 1994, you stated to Patient Robert Duncan that D.S., another VA Patient, "has full blown AIDS.", or words to that effect.

B. Sometime during the period between December, 1993 and April, 1994, you stated to Patient Robert Duncan that R.P., another VA Patient, "is HIV positive.", or words to that effect.

C. Sometime during the period between December, 1993 and April 1994, you stated to Patient Robert Duncan that L.D., another VA Patient, "is a lesbian and began her lesbian origins while incarcerated in the Maryland Penal Institution.", or words to that effect.

D. Sometime during the period between December, 1993 and April, 1994, you stated to Patient Robert Duncan that R.B., V.B., V.H., J.C., all of whom are VA Patients, "have received veterans compensation.", or words to that effect.

IAF, Tab 3, Subtab 4c.

The stated purpose of the appellant's request for discovery of the medical records in question is to provide her with access to the basis for the charge and the opportunity to disprove it. IAF, Tab 9. Because the medical records have the tendency for resolving a disputed factual issue, i.e.,

whether the appellant disclosed confidential patient information that she obtained as a result of her employment, we find that the information is relevant to a resolution of whether she committed the misconduct alleged by the agency in Charge IV. Therefore, we find that she has shown that it is relevant and material to the preparation and presentation of her case. *See generally*, 5 C.F.R. §§ 1201.72(b), 1201.73(c)(2)(i).

The agency is limited by statute from providing certain confidential patient medical records on its own initiative without a court order.

The agency has objected to releasing the patient medical records the appellant seeks on the ground that it is prohibited from doing so on its own initiative under the provisions of 38 U.S.C. § 7332(b)(2)(D) without an order from a court of competent jurisdiction.

Title 38 U.S.C. § 7332(a)(1) provides that agency records that describe the identity, diagnosis, or treatment of patients for drug or alcohol abuse and for infection with the human immunodeficiency virus (HIV) may not be disclosed on the agency's own initiative except as authorized by the statute. Title 38 U.S.C. § 7332(b)(2)(D) provides for disclosure by the agency of such records

[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

In discussing an identical earlier version of this statutory provision, the U.S. District Court stated that Congress' intent in drafting this statute was to have the courts consider such documents on an individual basis after a specific application and showing of good cause by the party seeking disclosure. *See* In Re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 575-76 (E.D.N.Y. 1985). The Board, however, is not a court pursuant to the provision at issue here, but an administrative agency created by statute. *See Brumley v. Department of Transportation*, 46 M.S.P.R. 666, 680 (1991). Thus, notwithstanding our finding above regarding the relevance of the information the appellant seeks to discover, if the information is covered by this statutory provision, the Board cannot order its disclosure by the agency.

The Board's discovery regulations provide a procedure for obtaining the release of information covered by this statutory provision.

The Board's regulations, however, do provide a procedure for obtaining the release of information through discovery that is consistent with the statutory limitations on the agency set forth at 38 U.S.C. § 7332(b)(2)(D). Under 5 C.F.R. § 1201.81, a party may request a subpoena to require the production of documents or other evidence under 5 U.S.C. § 1204(b)(2)(A) (which authorizes members of the Board, administrative law judges appointed by the Board, and any employee of the Board designated by the Board, to issue subpoenas requiring, among other things, the production of documentary or other evidence). Such a request is required to be supported by a showing that the evidence sought is relevant and reasonable in scope. 5 C.F.R. § 1201.81. Where a subpoena has been properly effected, but the party upon whom it has been served fails or refuses to comply with its terms, the requesting party may seek enforcement through the administrative judge by the Board. 5 C.F.R. § 1201.85. In accordance with the provisions of 5 U.S.C. § 1204(c), the Board may request the appropriate U.S. district court to enforce compliance. We find that this procedure is consistent with the express authorization of 38 U.S.C. § 7332(b)(2)(D) allowing release of patient medical records pursuant to the order of a court of competent jurisdiction. *See generally*, *Gilbreath v. Guadalupe Hospital Foundation, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

To establish that it is limited by the statute from providing the information the appellant requests, the agency must show that the records are covered by the statutory provision.

To support its opposition to release of the information, the agency submitted an affidavit from the Acting Associate Medical Center Director. The affidavit attests that certain of the patients whose records are at issue in the allegations set forth under Charge VI are or have been patients at the Medical Center where the appellant was employed and describes the nature of the appellant's access to those records. IAF, Tab 11. Although it does not appear that the Board has previously addressed the burden of proof for invoking this specific statutory limitation on disclosure, it has addressed the applicability of statutory limitations against disclosure with regard to a somewhat analogous Federal statute that restricts disclosure of information during discovery. The Privacy Act (5 U.S.C. § 552a) (the Act) prohibits disclosure of information to any person or agency from systems of records without the written consent of the data's subject or of a court. *Id.* With regard to those records, the Board has held that to properly invoke the Act, the agency has the burden of proving that its records are covered by the Act. *Eaks v. Department of Justice*, 18 M.S.P.R. 328, 333 (1983). Moreover, the Board has ruled that a conclusory assertion that they are covered is not sufficient to meet that burden. *Id.* By analogy, we find that the agency here must show that the records it seeks to protect from disclosure fall within the provision of 38 U.S.C. § 7332(a)(1). If the agency

can make such a showing, then it will have established that it is limited by the statute from providing the information the appellant requests without a court order.

Accordingly, we return this appeal to the regional office for further proceedings. We have already determined that the information the appellant seeks is relevant and material to the preparation and presentation of her appeal. On return, the administrative judge must determine whether the agency has established that the records in question meet the requirements of the statute limiting disclosure. If he finds that it has met that burden, he shall provide the appellant with the opportunity to seek release of the patient medical records by subpoena. If she does so and the agency does not release them, then the administrative judge shall initiate appropriate action to enforce the subpoena in accordance with the provisions of 5 U.S.C. § 1204(c). 5 C.F.R § 1201.85; *Gilbreath*, at 791.

ORDER

This is the final order of the Merit Systems Protection Board in this interlocutory appeal. *See* 5 C.F.R. § 1201.91.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.