Circuit Court for Montgomery County
Case No. 481394V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1441

September Term, 2020

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CRAIG BASH

v.

MARYLAND STATE BOARD OF PHYSICIANS

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Graeff,
Ripken,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: July 22, 2022

Craig Bash, M.D. ("Dr. Bash"), self-represented appellant, challenges the decision of the Maryland State Board of Physicians (the "Board"), appellee, concluding that he was guilty of unprofessional conduct in the practice of medicine in violation of Md. Code Ann., Health Occ. Art. ("HO") § 14-404(a)(3)(ii) (2014 Repl. Vol.), and ordering that he be placed on probation for two years, pay a fine of $50,000, complete a course in medical ethics, and submit changes to his website to the Board for approval. Dr. Bash sought judicial review of the Board's decision, and the Circuit Court for Montgomery County affirmed.

On appeal, Dr. Bash presents the following questions for this Court's review, which we have consolidated and rephrased, as follows:

1. Did the fine imposed by the Board deprive Dr. Bash of his constitutional right to due process?
2. Did the circuit court err in its recitation of evidence?
3. Did the fine imposed by the Board violate Dr. Bash's rights as a disabled person under the Rehabilitation Act and the Americans with Disabilities Act?
4. Did the Board violate mandatory agency regulations in the proceedings below?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

Dr. Bash received his medical degree from the Uniformed Services University of the Health Sciences in 1986, and he is a licensed physician in the State of Maryland. In 1999, he founded Veterans Medical Advisor, Inc. He was the owner and president at the

time of these proceedings. Mr. F, the complainant in the proceedings below, was a combat veteran of the United States Marine Corps.

In 2017, Mr. F filed for disability compensation with the United States Department of Veterans Affairs ("VA"), which was denied in part and granted in part. Mr. F received a "disability rating," which determines the amount of disability compensation for the veteran, of 50 percent. A disability rating is assigned "based on the severity of [the veteran's] service-connected conditions," which is then used to "determine how much disability compensation [the veteran] will receive." *About VA Disability Ratings*, U.S. Dep't of Veterans Affairs, https://www.va.gov/disability/about-disability-ratings [https://perma.cc/5C6R-B6BU] (last visited July 20, 2022). Mr. F hoped to obtain a disability rating of 85 to 100 percent.

Mr. F then contacted Dr. Bash through Dr. Bash's website, seeking help with his disability claims with the VA. The two had a phone conversation, which, in large part, is the focus of this case. Mr. F alleged that, as a result of this phone conversation, Dr. Bash agreed to write a nexus letter, a letter that would connect Mr. F's disabilities to his service in the military, for $4,000 without an office visit. Dr. Bash alleged that no such agreement was reached.

On November 2, 2017, Dr. Bash sent Mr. F an email, which referenced that the two had talked earlier, and he attached his curriculum vitae ("CV") and an example of a "lay letter." In response to this email, on November 2, 2017, Mr. F emailed Dr. Bash, attaching "a brief supplement of what [he] submitted to the VA" and his medical records from other

doctors. He stated: "My issue isn't that I don't have the medical documentation [of his disabilities] but one of how to establish a nexus to my Marine Corps service." He provided an example that he suffered hearing loss that required the use of hearing aides due to the noise exposure of working as an aircraft mechanic, but the VA stated that his hearing loss was not connected to his service. He hoped to establish a 100 percent disability rating, but he was willing to accept a rating of at least 85 percent.

On November 3, 2017, Mr. F sent a payment of $4,000 via his American Express card to Dr. Bash's assistant, Alice Burns, who was located in California. Mr. F mailed Dr. Bash his letter from the VA, granting and denying him VA benefits, and sent Dr. Bash Disability Benefits Questionnaires ("DBQs"), which Mr. F filled out himself, for his disabilities. Dr. Bash signed five out of six of them, and on one of the questionnaires that he signed, Dr. Bash wrote, under Section XII – Remarks, "See Lay & Nexus Letter." On November 27, 2017, Mr. F received the DBQs from Dr. Bash in the mail and a note that he would require $10,000 for the nexus letter.

On the same day, Mr. F sent Dr. Bash a text message informing him that he previously sent Dr. Bash $4,000, and he had retained a lawyer to represent him in addition to Dr. Bash to "have the 'A' team on [his] side." Mr. F asked Dr. Bash whether his balance due was $3,000. On November 29, 2017, Dr. Bash tried to discourage Mr. F from using an attorney and said:

[DR. BASH]: – Se

[DR BASH]: nd me 10k total and Alice and I can help you thru it[.]

Mr. F responded that he started a new job at the VA in Baltimore, and he wanted the attorney so he would not have to speak directly with his employer. He again asked if he owed "an additional 6k in addition to already pd 4k for a total of 10k[.]"

Dr. Bash responded that Mr. F's new job with the VA was a "non issue" and that he had "never seen that conflict of interest happen in 20 years." Dr. Bash included that "yes is 6000 doable if do pls call Alice 925-4o8-7984 in Calif." Dr. Bash then sent a message reading: "Who dis?" Mr. F responded that he was "going to try and come up with the 6k." Dr. Bash asked, "Ok thx soon?" Mr. F wrote that he was hoping to do so on Friday, but he needed to receive his first check from his job.

On December 1, 2017, Mr. F texted Dr. Bash that he discussed the DBQs with his attorney, and his attorney advised that the DBQs were only necessary to support his claim if Mr. F did not have supporting medical records, which he did. His attorney further advised that, if he did need DBQs in the future, he should ask the same doctor who authored his medical report, who would likely charge much less. He stated that he had not yet been paid from his job, so he was unable to afford the additional $6,000, and $4,000 was his "maximum budget for the agreed upon nexus."

Dr. Bash responded:

> /- he is just slowing down claim asking for info later adding time cycles 😔((. All cases need DBQ pls read internet
>
> [DR. BASH]: 4 k … If that works call Alice today if you want to pay plan last 2 k or not 925/408-7984. . Atty sounds rookie How many cases has he done I have 40,000

Mr. F responded that he wanted his attorney to represent him, and the VA scheduled a Compensation and Pension ("C&P") exam. He wrote to Dr. Bash that he did not have an additional $4,000, especially with it being the holiday season. Dr. Bash responded:

> The higher u go need DBQs.. If va turns you down does not mean bad claim as va docs work for va so very biased – I don't like talk money pls call Alice[.]

Mr. F responded that he was unsure of why Dr. Bash wanted him to call Ms. Burns because he could not afford to pay Dr. Bash any additional payment. Mr. F asked Dr. Bash if he should contact Ms. Burns to request a refund of the $4,000 he had already paid.

On December 5, 2017, Ms. Burns and Mr. F had a phone call over the disputed additional money owed to Dr. Bash. As a result of this conversation, Ms. Burns sent the following text message to Dr. Bash, with Mr. F copied on the message: "Dr. Bash Do not do [Mr. F]. Write to VA and advise them nonpayment[.]"

Mr. F responded to the message: "I will also write the VA regarding the fees and exam process[.]"

Dr. Bash later sent a text to Mr. F, which read as follows: "Hey [Mr. F] Dr. Bash here – Do you still need help .. what fee works for you ? as Alice said you pulled back square payment .. what reason? as I like to always have happy pts ? Thx dr b[.]"

On December 11, 2017, Mr. F filed a complaint with the Board alleging that Dr. Bash agreed to write a nexus for him for $4,000. Mr. F alleged that Dr. Bash "acted in an illegal, unethical, and immoral manner" by charging "excessive" fees and charging "one fee at the onset and once getting the veteran on the hook."

On January 25, 2018, Dr. Bash responded to the Board's subpoena duces tecum, attaching all relevant information about his interaction with Mr. F. Counsel for Dr. Bash wrote in a letter to the Board that Dr. Bash helped Mr. F review and edit his DBQs only for Mr. F to rescind payment, and then Dr. Bash did not continue working for Mr. F. Dr. Bash did not provide medical care for veterans, but "[h]e merely interprets a veteran's existing medical history and helps establish a nexus between an existing disability and the veteran's military service." Dr. Bash accomplished these tasks by "reviewing and updating the veteran's DBQ and disability claim" and creating a nexus letter.

On August 29, 2018, the Board issued charges against Dr. Bash for violating HO § 14-404(a)(3)(ii), committing unprofessional conduct in the practice of medicine. In its allegations of fact, the Board stated that "Dr. Bash told [Mr. F] that he would write a favorable nexus letter for $4,000 without an office visit." Mr. F paid Dr. Bash the $4,000, and Dr. Bash sent Mr. F DBQs, which Mr. F filled out and returned to Dr. Bash to assist him in writing the nexus letter. Dr. Bash completed the "Physician's Certification and Signature" on one of the DBQs, but on the rest, he signed them and sent them back to Mr. F directing him to complete the missing physician certification section. Then, he advised Mr. F that he required an additional fee to complete the nexus letter. The Board then recounted Dr. Bash and Mr. F's text conversation as detailed above. The Board noted that Dr. Bash never met with or physically examined Mr. F, apart from a Skype conversation during which Dr. Bash looked at Mr. F's back and knees, which were subject to a disability claim denied by the VA.

The charging document also noted that, on Dr. Bash's website, "Veterans Medical Advisor," Dr. Bash claimed that he had a "[h]igh success rate in helping veterans get a position decision," that he was the "only doc doing his work full time in the USA," and that he had been working "with a (*sic*) 4000 patient cases (40,000 different claim (*sic*)) for a 90% success rates (*sic*)." He further claimed that he did work for the Veterans of Foreign Wars ("VFW") and obtained a "near 100% success rate at the . . . appeals level where usually the success rate is in the 20 – 26% range." The website stated that other "inexperienced" doctors doing this work were limited by not performing "a physical exam (IME)," not taking a flat fee, and "not routinely review[ing] the full claims file[.]"

The charges stated that Dr. Bash's conduct, "in whole or in part, constitute[d] unprofessional conduct in the practice of medicine, in violation of [HO] § 14-404(a)(3)(ii)." The Board provided Dr. Bash notice of possible sanctions of license revocation, suspension, reprimand, and probation, as well as a possible civil monetary fine.

**A.**

**Proceedings in Front of Administrative Law Judge**

From March 26, 2019, to March 27, 2019, an Administrative Law Judge ("ALJ") for the Office of Administrative Hearings ("OAH") held a hearing for this matter. Mr. F testified that he had been given a 50 percent disability rating from a VA doctor. Mr. F saw Dr. Bash's website, and he wanted to "get a similar opinion from medical professionals of why the conditions that were not granted in the initial deal . . . should be granted." When

Mr. F reached out to Dr. Bash, he explained that he did not need any more medical documentation, but he needed his disabilities to be connected to his Marine Corps service.

After texting with Dr. Bash, Mr. F believed that he had an agreement with Dr. Bash, whereby Dr. Bash would provide the nexus letter for $4,000. He believed that $4,000 for Dr. Bash's service was "kind of high," especially because the medical examinations and documentation (the most expensive of which was $1,500) were already completed, but he decided that this was the accepted rate for nexus letters for the VA. He was, however, worried that this was a scam, so he used his American Express credit card to make the payment.

During a Skype call, Dr. Bash asked him to send supporting medical documentation for the disabilities that were relevant for the nexus letter. Mr. F provided the DBQs and the medical documentation for Dr. Bash. Mr. F's understanding was that completing the DBQs would assist Dr. Bash in completing the nexus, as Dr. Bash "was going to prepare the [n]exus letter for [Mr. F], and in order for [Dr. Bash] to prepare the [n]exus letter, he had to know all of the conditions."

During the initial phone call conversation in which Dr. Bash and Mr. F allegedly agreed to $4,000 for the nexus, the pricing conversation began with Dr. Bash asking Mr. F how much he could afford to pay. Mr. F originally said $2,500, Dr. Bash asked for $3,000, and eventually they arrived at $4,000.

After Mr. F sent Dr. Bash the DBQs, Mr. F asked Dr. Bash what his balance was because "Dr. Bash was all over the place with . . . money." Mr. F thought they agreed to

$4,000 for the nexus letter, but the price was "fluctuating." Mr. F "never knew . . . what [he] was required to pay or what [he] was paying for."

Mr. F testified that he understood that he paid Dr. Bash $4,000 for him to complete a nexus letter. He never expected or intended for Dr. Bash to sign the DBQs. He did not expect Dr. Bash to perform any examination of him, and he thought that Dr. Bash would take the reports from other doctors and complete the nexus letter. Mr. F testified that he texted Dr. Bash: "4k is my maximum budget for the agreed upon nexus," and Dr. Bash never said that Mr. F actually did not pay for a nexus. At no point did Dr. Bash author a nexus letter.

Mr. F explained that he texted Dr. Bash that he got an attorney to represent him because he wanted to have his best case of making a successful appeal, and he decided that Dr. Bash's nexus letter and retaining a law firm would give him his best chances of succeeding. He interpreted Dr. Bash's response as saying that, although a doctor would charge a flat fee, an attorney would get money based on what Mr. F recovered from the VA as part of a contingency fee.

Mr. F testified that Ms. Burns "tried to bully [him] into paying this additional money . . . for this [n]exus letter" during their phone conversation on December 5, 2017. Even after the conversation, he was still unclear as to whether Ms. Burns expected him to pay $10,000 more, or $6,000 additional to what he already paid. Ms. Burns told him that Mr. F paid for "Dr. Bash's signature, not for him to complete the DBQs," and Mr. F owed Dr. Bash for his signatures. The two were unable to come to an agreement, so later that day,

on December 5, 2017, Ms. Burns sent the text to Dr. Bash, copying Mr. F, advising Dr. Bash not to do any work for Mr. F and to contact the VA and "advise them [of] non payment."

American Express issued a refund when Mr. F disputed the charge. Dr. Bash then texted Mr. F to try to reach an agreement on the price Mr. F would pay. Dr. Bash was "evasive," and Mr. F felt that he was never able to get a price from him.

With regard to Dr. Bash's website, Mr. F testified that the statistics regarding Dr. Bash's success rate "caught [his] eye." The website stated that Dr. Bash had a 90 percent success rate, and his work for the VFW resulted in a nearly 100 percent success rate.

Ms. Burns, Dr. Bash's administrative assistant, testified that she paid the bills for him, managed the accounts receivable, and collected payments for him. Ms. Burns estimated that Dr. Bash performed approximately 97 percent of his business on the phone, noting that he had clients all over the United States and even some international clients.

Ms. Burns had three phone conversations with Mr. F. In the first, she asked Mr. F about the price to which Dr. Bash and Mr. F agreed, and Mr. F replied that they agreed to $4,000. In the second conversation, Mr. F said that he was confused as to whether he was paying for a nexus letter, signatures on the DBQs, or anything else. Ms. Burns told Mr. F that the $4,000 was likely for the DBQs, but she could ask Dr. Bash for clarification. Ms. Burns was not able to contact Dr. Bash to discuss this matter before Mr. F called her again, this time "extremely agitated." In this third phone call, Mr. F "used a lot of profanity" and "accused Dr. Bash of being a criminal" and "raping people." He said a few times that he

refused to pay $14,000 for this service, and Ms. Burns attempted to explain that Dr. Bash requested $10,000 in total, with an additional $6,000 to the $4,000 that he already paid. Mr. F ended the conversation by saying that he would go to the Attorney General, district attorney, and the VA. Ms. Burns then sent the text to Dr. Bash that advised him to "[w]rite to the VA and advise non-payment" because, during the phone conversation, Mr. F said that he was going to use the DBQs because he, himself, filled them out, but he was not going to pay Dr. Bash for his signature.

Ms. Burns received the disputed charge from American Express, and although she could have disputed the challenge, she refunded the money without a dispute. Ms. Burns believed that they learned of the dispute on Sunday, and the money was refunded by either Monday or Tuesday.

William B. Creager, Jr., who had more than 40 years' experience in VA claims and was accredited by the Marine Corps to prepare and present claims to the VA, testified as to VA procedures.[1] He testified that an IME is an Independent Medical Expert, and many veterans used IME and independent medical *examination* interchangeably. The correct interpretation of an IME, though, is not an opinion like a DBQ, but it is "a medical expert who is explaining . . . how [we are] able to determine the diagnosis applicable to these

[1] Dr. Bash's attorney attempted to qualify Mr. Creager as an expert witness to testify that the DBQs, the Nexus, and the IME "are separate and one does not go hand in glove as [Mr. F] thought." The Board argued against qualifying Mr. Creager as an expert, due to a lack of an expert report and the fact that it had not received Mr. Creager's CV until that morning. The ALJ decided that it would "allow him to testify about the procedures, but not as an expert," meaning that Mr. Creager could not "give any opinions about what should be done . . . or whether those laws were complied with by [Dr. Bash]."

manifestations." An IME "would not be included, and is not requested on a DBQ." DBQs are not the same as an IME because it is "specifically created and designed by [the] VA to solicit responses from an examining physician that would answer questions in direct response to the criteria found in VA's schedule for rating disabilities." The forms contain questions about the disability that lead the VA to the exact rating afforded to that disability. The VA created DBQs with the intent that the veteran could submit these DBQs to his or her private physician, so the VA would not have to shoulder the burden of providing examinations for such a large number of disabled veterans. Mr. Creager testified that DBQs have no value without a physician's signature.

Mr. Creager testified that, in order for a veteran to establish a service connection for a disability, the veteran must show (1) medical diagnosis of the disability, (2) an event or manifestation of disability during the military service, and (3) "evidence of a link or [n]exus between the current disability and those events or observations from military service." The nexus opinion, then, would require the physician "to identify not only just the diagnosis . . . but the complications that have subsequently arose." Mr. Creager said that it is "absolutely not" the case that the doctor who does the IME and the nexus must be the same doctor, and "[i]t certainly is" the case that these doctors can be two different individuals. Mr. Creager testified that the VA anticipates that a doctor will be the one to complete the DBQ. A nexus letter would be a separate document from the DBQ, and it could incorporate information in the DBQs.

Dr. Bash testified that, as a senior in medical school, he suffered a cervical injury and lost his ability to walk. He did his residency at the VA for three or four years. Dr. Bash began doing work for veterans in 1994 and 1995, working for Paralyzed Veterans. Later, he decided to work for himself and do medical opinions and nexuses for veterans.

On Dr. Bash's CV, which he sent to Mr. F, under the section "VA Opinions," Dr. Bash wrote that he dealt with "4000+ cases as of 2015." Dr. Bash testified that this figure was a result of him working "every day about six hours, four to six hours a week. And if [he did] one or two cases a day over a year, [he did] 3– to 500 cases a year[,]" with him working over 23 years. Dr. Bash testified that this number was likely conservative, as he did a lot of work and his income showed that he dealt with more cases than the 4,000 figure he provided.

Dr. Bash did not dispute that Mr. F's statement was that $4,000 was his maximum for the nexus, but Dr. Bash told Mr. F multiple times that the price was going to be $10,000. Dr. Bash could not recall, however, when he first told Mr. F that his fee was $10,000. Dr. Bash thought that Mr. F did not need a nexus letter, but DBQs, as Mr. F sent him medical records, filled out the DBQs, attended a Skype appointment, and provided Dr. Bash his address to return the DBQs.

Dr. Bash testified that, in the texts with Mr. F, it was clear to Mr. F that Dr. Bash was requesting an additional $6,000 to the $4,000 that Mr. F already paid. Mr. F wrote in his texts that he would try to come up with the $6,000, which signified to Dr. Bash that Mr. F was clear on the price. Dr. Bash never intended that Mr. F pay $10,000 for signatures,

but the $10,000 charge was for "the DBQs plus the nexus, the whole package, plus the lay letters, plus everything[.]" The agreed-upon $10,000 was why Dr. Bash wrote "see lay letter and nexus" on one of the DBQs. Dr. Bash testified that, if Mr. F was being honest about his state of mind during his testimony, then Mr. F and Dr. Bash did not come to an agreement in November and December of 2017.

Dr. Bash testified that he did pro bono and discounted work for veterans, and Dr. Bash asked Mr. F what he could afford because he also wanted to help disadvantaged veterans. He remembered getting "a big pile of records" from Mr. F, reviewing the records, reviewing the DBQs, and asking Mr. F questions via Skype. He testified that he and Mr. F "never came to a full mutual agreement on the price." This was not, however, an issue, as Dr. Bash called his business "a dynamic process," and Dr. Bash looked at the $4,000 as a "deposit" that would adjust as Dr. Bash continued to work for Mr. F. Moreover, Dr. Bash testified that a lot of the doctors who represent veterans "do one issue for $1,500[,]" but Dr. Bash was doing "six issues" for Mr. F, and "$1,500 times 6 [gave] [him] [$]10,000, roughly."

Dr. Bash discouraged Mr. F from getting an attorney because he was advising Mr. F on how to proceed, and he did not believe that the attorney would help Mr. F. In these texts, he was attempting to tell Mr. F that he could "do the whole thing for one price."

Regarding the claims on his website, Dr. Bash said that his numbers were factual, not puffery. As for the number of cases he purported to have handled, Ms. Burns had been recording his data for the past two years, and they "had 1,000 phone calls and 500 patients

for each year." His workload had been able to increase since he hired Ms. Burns. His success rates on his website, too, were "data," rather than estimates. He calculated the numerator, which would be his "wins," through searching his own name through the Board of Veterans' Appeals when the VA still listed cases this way; however, "[a]fter a while, the VA decided that . . . [he] was hurting them too bad, and so they took [the] names out of there." After this adjustment, he could no longer access the numerator. Dr. Bash explained that the VFW kept track of the cases and their results, and his former associate told him that, of the 42 cases that Dr. Bash handled, he estimated that Dr. Bash lost either one or two cases. This led Dr. Bash to believe he had a 95 percent success rate, which led him to write that he had a "near 100 percent" success rate on his website.

**B.**

**ALJ Proposed Decision**

On June 18, 2019, the ALJ concluded that the charges against Dr. Bash should be upheld. The ALJ found that Mr. F requested a nexus letter to the VA from Dr. Bash, which "is a statement from a medical professional causally connecting a current medical condition to the applicant's military service." Dr. Bash "told [Mr. F] that he could assist him in the claim process and asked for a payment of $4,000.00," and Mr. F agreed. Mr. F never received the nexus letter from Dr. Bash. Dr. Bash did not oppose Mr. F's request for refund through American Express. The ALJ also found that Dr. Bash's website advertised that he had done more than 4,000 patient cases with the VA, encompassing 40,000 different

claims, and had a 90 percent success rate before the VA and a near 100 percent success rate before the Board of Veterans' Appeals.

The ALJ noted that the charging document did not "state exactly what actions of [Dr. Bash] the State consider[ed] unprofessional." At the hearing, the administrative prosecutor focused on Dr. Bash's website, which states that he charges a flat fee and reviews all medical documentation, neither of which Dr. Bash did in this case. Moreover, the administrative prosecutor stated that here, Dr. Bash took the $4,000 from Mr. F, considered it a deposit, later requested additional payment to complete the agreed-upon work, and never completed the requested nexus letter.

The ALJ stated that Mr. F's testimony was that he was certain that Dr. Bash agreed to author a nexus letter for $4,000. The documentary evidence, however, was "less certain." In his first email, Mr. F wrote that he did not need medical documentation of his disabilities, but documentation to establish the nexus to his service, which was "not exactly a request for a nexus letter, but it certainly let [Dr. Bash] know what [Mr. F] was seeking and bolsters [Mr. F's] testimony that he asked for a nexus letter." At this point, when Mr. F thought he had an agreement for $4,000 for a nexus letter, he "muddied the waters by sending the DBQs to [Dr. Bash]." The ALJ noted that Mr. Creager, who had "several decades of experience in preparing and deciding VA disability claims," testified that DBQs must be signed by a physician in order for the VA to consider them, but they are not necessary in many cases and "are used to determine factually what the veteran's condition is."

The ALJ recounted that Mr. F alleged that he used the DBQs as a way of explaining his condition to Dr. Bash, and he did not request that Dr. Bash sign them. The expectations between Dr. Bash and Mr. F were "apparently different" at this point, as Mr. F expected a nexus letter, and Dr. Bash "may have felt that he had been retained to review medical records and sign the DBQs." Although Dr. Bash may have reviewed the DBQs or Mr. F's other medical records, the "proven facts are that [Dr. Bash] had received $4,000.00 and produced just four signatures on the DBQs." Although there was no "documentary evidence" supporting Mr. F's claims that Dr. Bash was retained to produce a nexus letter for $4,000, Mr. F was experienced in the VA claims process, knew what he needed, and the ALJ found that his testimony that he asked Dr. Bash for a nexus letter was "altogether credible."

The ALJ stated that confusion over the term "IME" caused "the failure in the meeting of the minds" between Dr. Bash and Mr. F. Mr. F testified that he believed the term meant independent medical examination, which suggested that he expected Dr. Bash to examine him, leading to a nexus letter. Mr. Creager testified that IME stood for an independent medical expert, and Dr. Bash "apparently agreed" to act as Mr. F's independent medical expert.

The ALJ found that Dr. Bash "initially agreed to assist [Mr. F] in return for a fee of $4,000.00." He knew or should have known that Mr. F needed a nexus letter, and he did not provide the nexus letter and then tried to increase the fee to $10,000, without providing an explanation for the increase other than to "'help you thru the whole thing.'"

The ALJ found that Dr. Bash's approach suggested that he "took an 'all the traffic will bear' approach in an attempt to get as much money as he could from [Mr. F]." This, the ALJ found, was unprofessional conduct

> not because [Dr. Bash] was trying to maximize his profits, but because he misled [Mr. F] into thinking that he would provide a nexus letter for $4,000.00. He did not provide the service for which he was retained, and, after failing to write the nexus letter, tried to extract an additional $6,000.00 that [Mr. F] had never agreed to. [Dr. Bash's] actions border upon dishonesty and bring disrepute to the medical profession.

With regards to Dr. Bash's website, the ALJ noted how Dr. Bash came to his success rate, by totaling the successful claims in 40 out of 44 cases, while also listing that he had handled 4,000 cases with 40,000 separate claims. This was "meager statistical evidence." Code of Maryland Regulations ("COMAR") 10.32.01.13B(2) prohibits physicians from advertising with statements that cannot be verified by the Board for truthfulness, and here, Dr. Bash's statements regarding the volume of claims he handled and his success rate could not be verified by the Board. The ALJ, therefore, found that Dr. Bash violated this regulation.

The ALJ found that Dr. Bash's "major fault" with his medical practice was "a desultory and somewhat chaotic approach in the methods he uses to provide service." His method of communication, text messages and email, were imprecise, led to misunderstandings, and Ms. Burns' being located in California also added to the confusion. Dr. Bash's failings might not be a result of willful wrongdoing, but they were "certainly unprofessional."

The ALJ concluded that Dr. Bash committed unprofessional conduct in the practice of medicine. **[E 56]** He proposed a sanction of probation, including "an in-person tutorial and a review of Dr. Bash's website by the Board," and a fine of $20,000.

**C.**

**Exceptions Proceeding**

Dr. Bash filed exceptions to the ALJ's proposed decision, arguing that his business model, which the ALJ found unprofessional, "permit[ted] flexibility necessary to accommodate a broad spectrum of client needs, including limited financial resources." With regard to his website, he argued that, "[a]fter capturing 100% of Dr. Bash's documented cases (591) with thorough research on the VA's [B]oard of Veterans [A]ppeals (BVA) site and the VA's court of appeals (COVA) site, the data shows that [Dr. Bash] did not intentionally mislead the public," and his assertions were in fact correct. Dr. Bash provided "a visual snapshot of the data collected."

At the exceptions hearing on November 6, 2019, Dr. Bash attempted to provide for the Board a handout that explained the history of his website, but as this document was not provided to the Board or the State prior to this hearing or in his exceptions, the Board denied admission of the handout. Dr. Bash argued that, over the years, he had received complaints about his website, and he asked the Board what he had to do to fix his website so that it met the requirements of Maryland law. Dr. Bash's counsel also informed the Board that Dr. Bash was willing to work with the Board to fix his website, Dr. Bash had

attended "an in-person ethics class in California," and he had reached out to other professionals for advice.

Regarding the fee dispute with Mr. F, Dr. Bash's counsel argued that what happened between Mr. F and Dr. Bash was nothing more than a misunderstanding, which resulted in Mr. F receiving a refund. The two of them had a different understanding of what a nexus and an IME were. Because the ALJ referenced in his decision that there was no willful misconduct by Dr. Bash, Dr. Bash's counsel requested that the Board "measure the sin with a proper punishment."

The State argued that the ALJ's findings with regards to Dr. Bash's business practices were correct. Regarding Dr. Bash's website, the State argued that the Board should disregard the graph that Dr. Bash filed with his exceptions, as this "constitute[d] new evidence under the Administrative Procedure Act." Exceptions must be based on the record of the hearing, and Dr. Bash did not bring this evidence to the hearing, and instead testified that these numbers were difficult to calculate because of the way the VA filed its claims. The State questioned the accuracy of this graph and argued that, as a matter of law, the Board should not consider it.

On March 10, 2020, the Board issued its Final Decision and Order, adopting the ALJ's proposed Findings of Fact and Discussion. It agreed with the ALJ that Dr. Bash "misled [Mr. F] into thinking he would provide a nexus letter for $4,000.00, failed to write the nexus letter, and tried to extract an additional $6,000.00 to which [Mr. F] had not agreed." Dr. Bash's communications with Mr. F "were unprofessional, because they were

imprecise, with significant potential for creating confusion and misunderstanding." Finally, Dr. Bash violated the Board's advertising regulations under COMAR 10.32.01.13B(2). The Board also adopted the ALJ's credibility determinations regarding the conflicting testimony from Mr. F and Dr. Bash, finding that the emails and communications reflect that Mr. F expected to receive a nexus letter for $4,000.

Regarding Dr. Bash's filed exceptions, the Board "agree[d] with the ALJ that the Board could not possibly verify the truthfulness of Dr. Bash's claims of a ninety percent success rate, and thus, Dr. Bash violated the Board's advertising regulations." Dr. Bash testified at the hearing before the ALJ that he calculated his numbers based on the statistics he had, which was the data from 44 cases, when he wrote on his website that he handled 4,000 cases, with 40,000 separate claims. He testified that the numerator was "'hard to come by.'" Later at the exceptions hearing, Dr. Bash tried to introduce new information regarding the success rate. The Board gave "no weight to the newly-created graph and information generated by Dr. Bash, and reject[ed] his contention that this new information provides meaningful statistical data to evaluate his website claims regarding his success rate."

With respect to sanctions, the Board found that Dr. Bash failed to be honest in his interactions with Mr. F, which is a fundamental principle of the Code of Ethics promulgated by the American Medical Association. It found as follows:

> [Dr. Bash's] imprecise methods of communication in this case regarding the nature and scope of the services he provides, his fees, and his purported success rate as advertised on his website, were misleading and unethical, compromised his professional integrity and his professional responsibilities

> as a physician, and are inimical to the standards of the medical profession. Dr. Bash's justifications for his actions in this case were not accompanied by any meaningful sense of responsibility for his actions and demonstrate a troubling lack of candor. His methods were conducive to increasing his financial gain to the detriment of the veteran [Mr. F] who sought his assistance.

The Board expressed its concerns that Dr. Bash's methods had the potential to mislead vulnerable veterans, and it stated that it would not "ignore its deterrent function in this case." It imposed "a reprimand, two years of probation, and a $50,000 fine." The Board also required Dr. Bash to complete a Board-approved course in medical ethics and submit changes to his website for the Board's review and approval.

**D.**

**Circuit Court Proceedings**

On April 17, 2020, Dr. Bash petitioned for judicial review in the Circuit Court for Montgomery County. On January 21, 2021, the circuit court issued its decision affirming the Board's decision. The court found that the Board's decision that Dr. Bash engaged in unprofessional conduct in the practice of medicine was not only supported by sufficient evidence, but ample evidence.

This appeal followed.

## STANDARD OF REVIEW

"Judicial review of an administrative decision 'generally is a narrow and highly deferential inquiry.'" *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 430 (2015) (quoting *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 733 (2010)) (cleaned up). We determine "'if there is substantial evidence in the

record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Id.* (quoting *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012)) (cleaned up).

We use the following standards of review:

> With respect to the Board's factual findings, we apply the substantial evidence test, which "'requires us to affirm an agency decision, if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Miller v. City of Annapolis Historic Pres. Comm'n*, 200 Md. App. 612, 632 (2011) (quoting *Montgomery* [*County*] *v. Longo*, 187 Md. App. 25, 49 (2009)). Administrative credibility findings likewise are entitled to great deference on judicial review. Credibility findings of hearing officers who themselves have personally observed the witnesses "'have almost conclusive force.'" *Kim v. Maryland State Bd. of Physicians*, 196 Md. App. 362, 370 (2010), *aff'd*, 423 Md. 523 (2011) (quoting *Anderson v. Dep't of Pub. Safety and Corr. Srvs.*, 330 Md. 187, 217 (1993)). A reviewing court "'may not substitute its judgment for the administrative agency's in matters where purely discretionary decisions are involved.'" *Mueller v. People's Counsel for Baltimore Cnty.*, 177 Md. App. 43, 82–83 (2007) (quoting *People's Counsel for Baltimore Cnty v. Surina*, 400 Md. 662, 681 (2007)), *cert. denied*, 403 Md. 307 (2008). With respect to the Board's conclusions of law, "a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers." *Employees' Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 111 (2013). "We are under no constraint, however, 'to affirm an agency decision premised solely upon an erroneous conclusion of law.'" *Id*. (quoting *Thomas v. State Ret. & Pension Sys.*, 420 Md. 45, 54–55 (2011)).

*Geier*, 223 Md. App. at 430–31.

Our role in reviewing an agency decision "'is precisely the same as that of the circuit court.'" *Mid-Atlantic Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 432 (2002) (quoting *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303–04 (1994)). We do not consider the circuit court's findings of fact and conclusions of

law. *Id. Accord Md. Off. of People's Couns. v. Md. Pub. Serv. Comm'n*, 226 Md. App. 483, 500 (2016).[2]

## DISCUSSION

### I.

### Due Process and Arbitrariness of Fine

Dr. Bash contends that the $50,000 fine imposed by the Board violated his constitutional right to due process because the Board did not provide any reasoning for increasing the fine from the $20,000 proposed by the ALJ. He further argues that the fine was arbitrary and capricious because the Board did not provide support for its decision to fine the maximum $50,000. He argues, without support, that the Board imposed the "increased" fine as a punitive measure because Dr. Bash exercised his right to appeal the ALJ's decision.[3]

[2] To the extent that Dr. Bash argues that the circuit court erred in its ruling, we will not consider these arguments. Instead, we will focus on the arguments relating to the propriety of the Board's decision.

[3] Dr. Bash also references an original fine of $1,000.00. The Board states in its brief that this was an offer as part of mediation in front of the Board's Disciplinary Committee for Case Resolution ("DCCR"), and the Circuit Court for Montgomery County noted in its judicial review that this was "an offer at mediation that Dr. Bash turned down." Code of Maryland Regulations ("COMAR") 10.32.02.03E(9)(c) states that a party "may not make use of any commentary, admissions, facts revealed, or positions taken, including any disposition recommended by the DCCR, in the subsequent stages of the disciplinary proceedings unless the subject matter is available from other sources or is otherwise discovered." Accordingly, we will disregard any reference to a mediation that Dr. Bash turned down.

The Board contends that the imposed sanction was within the sanctioning guidelines found in COMAR 10.32.02.09 and 10.32.02.10 and was "appropriately tailored to the nature of his violations." It explained its reasoning for imposing the $50,000.00 fine, stating that Dr. Bash's methods of communication and website were "misleading and unethical" and that his approach to Mr. F showed his goal of "increasing his financial gain to the detriment of the veteran."

**A.**

**Due Process**

The Fourteenth Amendment to the United States Constitution, and Article 24 of the Maryland Declaration of Rights, "guarantee that a person will not be deprived of life, liberty, or property without due process of law." *Regan v. Bd. of Chiropractic Exam'rs*, 120 Md. App. 494, 509 (1998), *aff'd*, 355 Md. 397 (1999). An individual with a professional license has a property interest in the outcome of an administrative or regulatory proceeding regarding his or her license. *See Mesbhai v. Md. State Bd. of Physicians*, 201 Md. App. 315, 337 (2011). Therefore, "due process requires that an individual against whom proceedings are instituted be given notice and an opportunity to be heard," and as such, "reasonable notice of the nature of the allegations must be given to the party so that it can prepare a suitable defense." *Regan*, 120 Md. App. at 519. Notice is sufficient as long as the person charged is able to "marshal evidence and arguments in defense" of the allegations. *Reed v. Mayor of Balt.*, 323 Md. 175, 184 (1991).

The Board charged Dr. Bash with conduct that constituted "unprofessional conduct in the practice of medicine, in violation of [HO] § 14-404(a)(3)(ii)." It referenced Dr. Bash's conversation with Mr. F and his website, including the exact language regarding his purported success rate. It listed that the possible sanctions under HO § 14-404(a)(3)(ii) included license suspension or revocation, reprimand, probation, and a "civil monetary fine."

Dr. Bash was given adequate notice of the basis of the charges, he was represented by counsel and participated in the evidentiary proceeding, and he was given an exceptions hearing before the ultimate sanctions were imposed. Other than asserting, with no support, that the Board penalized him for exercising his right of appeal, Dr. Bash failed to articulate how his right to due process was violated. Accordingly, we reject this argument.

**B.**

**Arbitrariness of Fine**

HO § 14-404(a)(3)(ii) states that a disciplinary panel of the Board "may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee" is found after a hearing to be guilty of "[u]nprofessional conduct in the practice of medicine." For unprofessional conduct in the practice of medicine that consists of ethical violations not sexual in nature, the Board can, as a maximum sanction, revoke a physician's license and impose a fine of $50,000, or as a minimum sanction, reprimand a physician and impose a fine of $5,000. COMAR 10.32.02.10B(3)(c).

As this Court has explained:

> When an agency is acting in a discretionary capacity, such as when it fashions a sanction, then the standard is more deferential than either substantial evidence or *de novo* review. An agency's discretion in fashioning a sanction should only be overturned if the decision is arbitrary or capricious. *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 581 (2005). The arbitrary or capricious standard is "highly deferential." *Maryland Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 121 (2016) (citation omitted).

*Md. Real Est. Comm'n v. Garceau*, 234 Md. App. 324, 350 (2017). This Court will not substitute its own judgment for that of the agency and will affirm decisions as long as we "can reasonably discern the agency's reasoning." *Md. Dept. of the Env't v. Cnty. Comm'rs of Carroll Cnty.*, 465 Md. 169, 202 (2019) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (2011)).

Here, the Board noted that it had "serious concerns" about Dr. Bash's potential to mislead and take advantage of ill-informed and disadvantaged veterans. Accordingly, it refused to "ignore its deterrent function in this case," and imposed the maximum $50,000 fine. Thus, the Board did give a reason for its decision, and it stayed within the guidelines in COMAR. The sanction, then, is not arbitrary or capricious.

## II.

## Substantial Evidence

Dr. Bash's second and third issues essentially challenge the Board's factual findings in this case. Dr. Bash contends that the circuit court failed to consider "exonerating evidence," in which Mr. F admitted to his "intent to commit fraud" when he testified that he put the $4,000 charge on his credit card on the chance that he had to dispute the charge. He further claims that Mr. F has a "lengthy history of workman's compensation claims"

and "abusive behavior and billing fraud." He argues that the circuit court should have declared the matter "void ab initio" because Mr. F's complaint was "based on fraud" and a billing dispute that had been resolved.

The Board contends that Dr. Bash never presented this argument to the Board, and therefore, it is not preserved for our review. In any event, it asserts that Dr. Bash's arguments are not supported by the record because nothing, other than Mr. F using his credit card, shows that Mr. F attempted to defraud Dr. Bash.[4]

We agree with the Board that this issue is not preserved for our review. "[I]n an action for judicial review of an adjudicatory administrative agency decision, the reviewing courts should decline to consider an issue not raised before the agency." *MVA v. Shepard*, 399 Md. 241, 260 (2007). *Accord Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 600 (2022). Instead, he argued that the issue arose out of a misunderstanding because Mr. F did not understand VA terminology, in particular the difference between and IME and a nexus. In his opening statement to the ALJ, counsel for Dr. Bash stated that Mr. F was "confused," which led him to jump to conclusions about Dr. Bash. In closing argument, counsel for Dr. Bash stated that Mr. F testified that he believed that an IME and a nexus letter were essentially one in the same, and Mr. Creager

[4] Dr. Bash's argument challenges the decision of the circuit court, rather than the Board's decision. When we review an agency's decision, we are in the same position as the circuit court, and we look directly to the agency's decision. *Mid-Atlantic Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 432 (2002). *Accord Md. Off. of People's Couns. v. Md. Pub. Serv. Comm'n*, 226 Md. App. 483, 500 (2016). We could reject his arguments on this ground, but we will proceed as if he challenges the Board's decision.

testified that they are two different things, and as a result, although the two failed to come to an agreement, Dr. Bash did not engage in unprofessional conduct.[5] Dr. Bash took exception to all of the ALJ's proposed factual findings, but he never argued that Mr. F engaged in fraud, instead focusing on the timeline of events and his website. At the exceptions hearing, counsel for Dr. Bash again stated that the issue between Dr. Bash and Mr. F was a misunderstanding of VA terminology.

Because Dr. Bash did not raise the issue of fraud below, his claim that the Board failed to consider it is not properly before us, and we will not address it.

## III.

## ADA and Rehabilitation Act

Dr. Bash argues that the circuit court erred "when it refused/failed to address the *prima facie* egregiousness of a fine that increased fifty-fold against a disabled person" in violation of the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disabilities Act of 1990 ("ADA"). Dr. Bash contends that the Board allowed Mr. F to "commit perjury repeatedly in this matter without any State professional performing a Rehabilitation Act."

The State argues that this argument is not preserved for review. In any event, it argues that Dr. Bash failed to "explain how these remedial statutes apply here or how

[5] Counsel for Dr. Bash even went so far as to state: "I will always give credit to a former Marine that he's honest, and I believe [Mr. F]. He thought that he was paying for a nexus and yet, black and white in his own complaint, he again conflates an IME with a nexus letter, two completely different animals."

specifically they were violated." Instead, Dr. Bash insinuates that, as a disabled person, he should be insulated from investigation from the Board.

We agree with the State that this argument is not preserved for our review. Dr. Bash's counsel did note that Dr. Bash is disabled, and at the exceptions hearing, counsel for Dr. Bash did state that Dr. Bash's speech suffered as a result of him being a quadriplegic, and thus, he opted to communicate via text messages and email. Dr. Bash never argued, however, that the imposition of a fine would violate the Rehabilitation Act or the ADA. As the Board correctly stated in its brief, "questions, including Constitutional issues, that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in an action for judicial review." *Bd. of Physician Quality Assur. v. Levitsky*, 353 Md. 188, 208 (1999). *Accord McDonnell v. Harford Cnty. Hous. Agency*, 462 Md. 586, 603–04 (2019). Accordingly, Dr. Bash may not raise this issue for the first time in this Court.

Even if this argument were preserved, we would conclude that it is without merit. The ADA, which applies to "any . . . agency . . . of a State or . . . local government," 42 U.S.C. § 12131(1)(B), provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *Accord Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 416 (1999), *aff'd*, 366 Md. 597 (2001), *cert. denied*, 535 U.S. 1055 (2002).

Dr. Bash fails to state the services of which he was deprived or how he was discriminated against as a result of his disability. Accordingly, even if preserved, we would conclude that this claim is devoid of merit.

## IV.

## Peer Review

Dr. Bash contends that the Board's decision to place him on probation violates mandatory agency regulations. Dr. Bash does not specify which regulations the Board failed to follow, stating merely that "none of the requirements were followed and there is no truth to the theory."

The Board interpreted Dr. Bash's argument to mean that the Board failed to provide him with a peer review process.[6] It contends that this argument is not preserved for our review because it was not argued in the administrative proceedings. Moreover, the State argues that the unprofessional conduct committed by Dr. Bash does not require peer review, as only HO § 14-404(a)(22), (40), require peer review.

HO § 14-404 allows the Board to reprimand a licensed doctor if he or she is guilty of unprofessional conduct in the practice of medicine. HO § 14-404(a)(3)(ii). A person who is charged as administering unprofessional conduct in the practice of medicine has the opportunity to participate in a hearing before a hearing officer, who then refers his or her

[6] The Board's interpretation of this claim likely came from the heading of the fifth issue: "Whether the Board's decision to place [Dr.] Bash's license on probation was based on a *peer review process* which violated mandatory agency regulations," (emphasis added). Dr. Bash does not argue in the ensuing argument, however, that he was entitled to peer review.

proposed factual findings to the Board. HO § 14-405(a), (e). If, after the hearing, the Board finds that there is reason to reprimand the licensed doctor, then it may impose a fine subject to the Board's regulations. HO § 14-404(d)(1); COMAR 10.32.02.10. For unprofessional conduct in the practice of medicine consisting of an ethical violation that was not sexual in nature, the maximum fine is $50,000. COMAR 10.32.10B.

Dr. Bash does not explain what requirements were not followed. Our review indicates that the Board complied with the statute and the corresponding regulations.[7]

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

[7] To the extent that Dr. Bash is arguing that a "peer review" process is required, we disagree that a charge of unprofessional conduct in the practice of medicine requires peer review. *See* HO § 14-404(a)(3). There are only two charges requiring a peer review process, i.e., "[failing] to meet appropriate standards . . . for the delivery of quality medical and surgical care performed in an outpatient surgical facility, office hospital, or any other location in this State," and "[failing] to keep adequate medical records." HO § 14-404(a)(22), (40). The charges here did not require a peer review process.