



Hospital Appeal Board

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DECISION NO. 2015-HA-002(e)

In the matter of an appeal under section 46 of the *Hospital Act*, R.S.B.C. 1996, c. 200

BETWEEN: Dr. David Kates **APPELLANT**

AND: Interior Health Authority **RESPONDENT**

BEFORE: A Panel of the Hospital Appeal Board
Cheryl L. Vickers, Panel Chair

DATE: Conducted by way of written submissions
concluding on October 5, 2016

APPEARING: For the Appellant: Susan Precious, Counsel
For the Respondent: Ryan Berger, Counsel

DECISION ON APPLICATION FOR DOCUMENT DISCLOSURE AND EXTENSION OF TIME TO FILE AN EXPERT REPORT

[1] This is an application by the Respondent, Interior Health Authority (IHA), for an order for the production of neuropsychological testing data from the records of two doctors with respect to services provided to the Appellant and referenced in other medical reports produced in these proceedings, and for an order extending the time to produce an expert report responsive to the report of Dr. S.

[2] The Appellant takes no position on the release of the neuropsychological data requested other than disclosure be subject to similar terms respecting redaction of personal information and confidentiality as imposed by the Hospital Appeal Board (HAB) in its decision of July 14, 2016 in this appeal, and to ensure the costs of Dr. S in retrieving and sending the records are paid by the IHA. The Appellant opposes the application for an order extending the time to produce an expert report responsive to the report of Dr. S.

[3] Counsel for both parties have provided submissions and affidavit evidence which I have thoroughly reviewed and considered. In the interest of time given the fast approaching date of the hearing of this appeal I will not set out the competing submissions in any detail in this decision, and have only provided brief reasons for the orders that follow.

Neuropsychological Testing Data

[4] The neuropsychological testing data of Dr. M is relevant as it provides the baseline from which any assessment of improvement in the Appellant's condition since 2013 can be made. Dr. M's report of February 15, 2013 has been produced as part of these proceedings, and I understand it was part of the record before Health Authority Medical Advisory Committee. I have not reviewed Dr. M's report but I understand it to have been Dr. M's opinion that, at the time, the Appellant suffered from profound cognitive impairments. I understand Dr. M's testing data to already be in the possession of counsel for the Appellant.

[5] The neuropsychological testing data of Dr. S is relevant and forms the basis of Dr. S's opinion which I understand has been tendered as an expert report in these proceedings. I have likewise not reviewed Dr. S's report but I understand it to provide the opinion that the Appellant is no longer cognitively impaired, or that any cognitive impairment does not exist to the same degree as before.

[6] The raw neuropsychological testing data relating to the assessments of the Appellant by Dr. M and Dr. S must be produced to IHA forthwith. As it is raw data being produced for the purpose of review by another neuropsychologist, I am not convinced there is any need for a redacting order. IHA must treat the records in accordance with its duty to maintain confidence over them and may only use them for the purpose of review by a neuropsychologist. IHA shall cover the reasonable costs of Dr. S in producing the data. Dr. S should produce an account along with the data. If there is any dispute as to the reasonableness of Dr. S's account, that dispute may be referred to me for resolution.

Extension of time to produce an expert report

[7] The HAB ordered expert reports be tendered by September 26, 2016. On that date, the Appellant tendered an expert report from Dr. S providing an opinion with respect to improvement in the Appellant's cognitive ability. IHA is entitled to test that opinion.

[8] The HAB Rules do not expressly provide for the provision of responsive expert reports. Rule 10(13) provides that before or at a hearing, the Board may extend or abridge the time limits pertaining to expert evidence. Rule 1(4) allows the HAB to extend any time limit "as the board considers fair and appropriate in the circumstances". The HAB has the discretion, therefore, to

extend the time for filing an expert report. I am satisfied that it is appropriate to extend the time for the IHA to provide a report responsive to Dr. S's report.

[9] Counsel for IHA submits they will not be in a position to advise whether the IHA intends to file a responsive report until the testing data ordered above has been reviewed by their expert, nor are they able to provide a specific timeline for the provision of any report until their expert has had the opportunity to review the data. I accept this is so, but am not willing to leave production of any responsive report completely open ended or without disclosure to the Appellant in advance of it being tendered in evidence. The order below sets timelines for the notification and production of any responsive report.

ORDER

[10] The neuropsychological testing data from Dr. M in relation to his assessment of the Appellant must forthwith be produced to the IHA's counsel.

[11] The raw neuropsychological testing data of Dr. S in relation to her assessment of the Appellant must forthwith be produced to IHA's counsel.

[12] IHA must treat the data produced in accordance with the orders above in accordance with its duty to maintain confidence over them and may only use them for the purpose of review by a neuropsychologist.

[13] The Board extends the time for IHA to file an expert report responsive to the report of Dr. S. IHA must advise within two weeks of receiving the data ordered above, if it intends to file a responsive report and indicate the date by which any such report will be produced to the Appellant. Any responsive report must be disclosed to the Appellant at least one week in advance of it being tendered to the panel hearing the appeal to be marked as an exhibit.

"Cheryl Vickers"

Cheryl L. Vickers, Panel Chair
Hospital Appeal Board

October 6, 2016