

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DWIGHT E. HAND, M.D.,

Plaintiff,

v.

THE AMERICAN BOARD OF SURGERY, INC.

Defendant.

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CIVIL ACTION
NO. 01-2172

Memorandum and Order

YOHN, J.

April , 2002

Dwight E. Hand, M.D., brought suit against the American Board of Surgery, Inc. (the Board) on two counts of alleged breach of contract after he failed to pass the examination required for a certificate from the Board. The Board moved for summary judgment. I granted its motion and entered judgment against the plaintiff. *Hand v. American Board of Surgery, Inc.*, 2002 WL 227174 (E.D.Pa. 2002).

Now before me is the Hand's motion for reconsideration (Doc. No. 19), the Board's memorandum in opposition (Doc. No. 20), Hand's reply (Doc. No. 23), and the Board's sur-reply (Doc. No. 26). Hand's motion for reconsideration will be denied because he has not established, under the standards promulgated by the Third Circuit, that I should reverse my decision because it contained a clear error of law or will cause manifest injustice. *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 218 (3d Cir. 1995).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) provides that a party may bring a motion for reconsideration within ten days of the entry of the judgment. Fed. R. Civ. P. 59(e) (2001). According to the Third Circuit, the “purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). A motion for reconsideration will be granted only if: (1) new evidence becomes available; (2) there has been an intervening change in controlling law; or (3) a clear error of law or manifest injustice must be corrected. *NL Indus. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n. 8 (3d Cir.1995); *Jubilee v. Horn*, 959 F. Supp. 276, 278 (E.D.Pa. 1997); *New Chemic, Inc. v. Fine Grinding Corp.*, 948 F. Supp. 17, 18-19 (E.D.Pa. 1996); *Smith v. City of Chester*, 155 F.R.D. 95, 96- 97 (E.D.Pa. 1994).

Motions for reconsideration are not to be used to reargue or relitigate matters already decided. *Waye v. First Citizen's Nat'l Bank*, 846 F. Supp. 310, 314 n.3 (M.D.Pa.), *aff'd*, 31 F.3d 1175 (3d Cir.1994); *see also Moyer v. Italwork*, 1997 WL 312178, *3 (E.D.Pa. 1997) (“A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of.”) (citing other cases). Particularly as in regard to alleging error, “any litigant considering bringing a motion to reconsider based upon that ground should evaluate whether what may seem to be a clear error of law is in fact simply a disagreement between the Court and the litigant.” *Reich v. Compton*, 834 F. Supp. 753, 755 (E.D.Pa. 1993) (citation omitted), *aff'd in part, rev'd in part*, 57 F.3d 270 (3d Cir.), *reh'g denied*, (3d Cir. 1995). In other words, such a motion cannot properly be grounded merely on a request that a court “rethink a decision it has already made.” *Drysdale v. Woerth*, 153 F. Supp.2d 678, 682 (E.D.Pa. 2001) (quoting *Tobin v. Gen. Elec. Co.*,

Civ. A. No. 95-4003, 1998 WL 31875, *2 (E.D.Pa. 1998)); *see also Progressive Cas. Ins. Co. v. PNC Bank, N.A.*, 73 F. Supp.2d 485, 487 (E.D.Pa. 1999) (“Mere dissatisfaction with the Court's ruling . . . is not a proper basis for reconsideration.”). Moreover, because federal courts have a strong interest in the finality of judgments, “motions for reconsideration should be granted sparingly.” *Continental Casualty Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D.Pa. 1995); *Rottmund v. Continental Assurance Co.*, 813 F. Supp. 1104, 1107 (E.D.Pa. 1992).

BACKGROUND

Factual Background

The factual background of this case has already been set forth at length in my original memorandum and will not be repeated here except to be referred to in the explanation of my analysis.

Procedural History

Hand originally sought an order declaring the result of the February 14, 2000 certifying examination to be null and void and directing the Board to immediately allow him to retake the examination. Pl’s Reply Br. at 2. He alleged breach of contract for misrepresenting the results of the examination and for the Board not properly following its own process for appeals. Pl’s Amend. Compl. at ¶¶ 6, 14; *Hand v. American Board of Surgery, Inc.*, 2002 WL 227174, * 1 (E.D.Pa. 2002). I granted the Board’s motion for summary judgment, finding that Hand had not presented evidence to show how his memory of his answers in the examination differed from those allegedly evaluated by the examiners, and that Hand had not presented evidence to show

that he suffered prejudice from the Board's breach of administrative procedure. *Hand*, 2002 WL at **4 - 6.

DISCUSSION

In the motion for reconsideration now before me, Hand does not claim that there was a change in controlling law or that new evidence has become available. Pl's Memorandum in Support of His Motion for Reconsideration at 2 [hereinafter Doc. No. 19]. Rather, his contention is that there was a clear error of law and that reconsideration is necessary to prevent manifest injustice. *Id.*

To support his motion, Hand claims that there were four errors of law in my previous decision granting summary judgment that should be corrected. *Id.* at 2 - 14. First, Hand contends that a genuine issue of material fact still exists concerning the substance of the last examination he took and his responses to it. *Id.* at 2 - 5. Second, Hand contends that I should have drawn an inference from the Board's destruction of notes and tapes on its regular schedule that those records were unfavorable to the Board's position. *Id.* at 5 - 9. Third, Hand contends that I should have found that a contract existed between himself and the Board for the Board to grade and evaluate the examination in an accurate manner and in accordance with its rules. *Id.* at 9 - 12. Fourth, Hand contends that I should have found that the Board violated this contract when it did not follow its own appeals procedures in Hand's challenge to the outcome of his examination. *Id.* at 12 - 14.

Hand's First Objection

Hand's first objection is an allegation that genuine issues of material fact still exist concerning the substance of the last examination he took and his responses to it. *Id.* at 2 - 5. In his motion for reconsideration, he contends that Dr. Ritchie's description of the scenarios presented to him and of his responses "did not accurately reflect the scenarios and responses [he] recalls were the subject matter of the exam[ination]." *Id.* at 2. Hand notes that as part of the summary judgment record, he provided a detailed description of what those discrepancies were. *Id.* at 2 - 3.

But Hand made precisely this assertion in opposing the motion for summary judgment and he retains the same problems with this assertion that I documented before. *See Hand v. American Board of Surgery, Inc.*, 2002 WL 227174, *4 (E.D.Pa. 2002). As I explained in my previous opinion, Hand's evidence is that his memory of the examination differed from the independent critique developed by the Board for his benefit, *and not from the examination itself*. *Id.* Requiring the presentation of evidence that Hand's recollection differed from the examination itself is not to sit as a "Super-Board" over the results of the examination, as Hand contends, but rather to cut to the heart of the issue. Pl's Reply Memorandum in Support of His Motion for Reconsideration at 3 [hereinafter Doc. No. 23]. Hand's argument about the independent critique is a red herring: that critique had nothing to do with the grading of the examination. Material Facts at ¶¶ 41 - 44, 46; Ritchie Dep. at 35. The independent critique was compiled at Hand's request by someone who, as the plaintiff himself concedes, was neither present at the examination, nor participated in recording grades from the examination, nor in any way reviewed the substance of the examiners' grades before they were reported to him. Doc.

No. 23 at 5; Material Facts at ¶¶ 41 - 44, 46; Ritchie Dep. at 35. As a legal matter then, it simply has no relevance that Hand contests the accuracy of the independent critique. To have survived a motion for summary judgment and to have properly alleged inconsistencies in the grading and evaluation of the examination, he had to contest the accuracy of the examination itself.

Accordingly I do not and did not, as Hand contends in his motion for reconsideration, sit as a “Super-Board” to determine whether Hand’s actual responses in the examination were accurate. Doc. No. 23 at 3. Neither in my memorandum and order granting summary judgment nor here do I proffer any judgment on the quality of Hand’s answers in the examination. *See Hand v. American Board of Surgery, Inc.*, 2002 WL 227174, *1 - *6 (E.D.Pa. 2002). My function as a court ruling on a motion for summary judgment was solely to determine whether Hand had presented sufficient evidence to survive its bar. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Without presenting any evidence of the conduct he alleged, Hand’s case could not have survived summary judgment regardless of whether his answers in the examination should have enabled him to pass or not. I thus entered summary judgment against Hand as a party “who fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he would] bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). I here reaffirm that ruling on Hand’s motion for reconsideration. *See Wayne*, 846 F. Supp. at 314 n.3; *Moyer*, 1997 WL at *3.

Moreover, motions for reconsideration are not, barring the presentation of new evidence or the identification of a clear error of law, an appropriate forum for disputing matters already settled and decided. *Harsco Corp.*, 779 F.2d at 909; *NL Indus.*, 65 F.3d at 324 n.8; *Wayne*, 846 F. Supp. at 314 n.3. As I noted in February in deciding the motion for summary judgment, and as

I note again today, “[n]othing in Hand’s complaint, brief, or deposition establishes a factual dispute about the sufficiency of his answers in the examination itself.” *Hand v. American Board of Surgery, Inc.*, 2002 WL at *4. Hand never contended that the grades the examiners reported to Dr. Numann at the appraisal session were any different from the grades the examiners recorded at the time Hand left the rooms after each interview during the examination. *Id.* at 3. Indeed, Hand never alleged that there was an actual deficiency in how the Board graded and evaluated his examination at all. *Id.* To have survived summary judgment, Hand had at least to provide specific evidence to create doubt that the Board did not grade and evaluate the examination in an accurate manner and in accordance with its rules. *Securities and Exchange Comm’n v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980); Fed. R. Civ. P. 56(e) (2001). He could not press his case on summary judgment in the form of legal conclusions without substance, and he cannot do so again in his motion for reconsideration. *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3d Cir. 1985) (establishing the threshold standard for motions for summary judgment); *see also Reich*, 834 F. Supp. at 755 (establishing the threshold standard for motions for reconsideration); *Tobin v. Gen. Elec. Co.*, 1998 WL 31875, *2 (E.D.Pa. 1998) (same). I therefore find Hand’s first objection to be without merit.

Hand’s Second Objection

Hand’s second objection is that I should have drawn an inference from the Board’s destruction of notes and tapes on its regular schedule that those records were unfavorable to the Board’s position. Doc. No. 19 at 5 - 9. Hand cites *Gumbs v. International Harvester, Inc.* for the proposition that “[t]he unexplained failure or refusal of a party to judicial proceedings to produce

evidence that would tend to throw light on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.” *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1993).

Yet the language of *Gumbs* itself demonstrates why such a presumption is not appropriate in Hand’s case. Most fundamentally, there has been no “unexplained failure or refusal of a party” to produce evidence in Hand’s case. *Id.* In *Gumbs*, a truck manufacturer allegedly had no good explanation for why it failed to produce a bolt at issue in an accident or photographs of the damaged chassis. *Gumbs*, 718 F.2d at 96. In Hand’s case though the Board explained that it had recycled the tapes in accordance with its standard policy 90 days after mailing the results of the examination. Material Facts at ¶¶ 48 - 49; *see also* Pl’s Counter at 3. As the Third Circuit continued in *Gumbs*, for a negative inference to be made “it must appear that there has been an *actual suppression* or *withholding* of the evidence; no unfavorable inference [can arise] when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for.” *Gumbs*, 718 F.2d at 96 (emphasis added).

It is thus irrelevant to the Third Circuit’s formulation of the issue whether, as Hand now argues in his motion for reconsideration, he did not know of the Board’s policy to recycle its tapes. Doc. No. 19 at 6. He at no point during summary judgment proceedings presented evidence to contest the applicability of the Board’s policy, and now attempts to throw the burden on the Board to defend itself against his motion for reconsideration by proving that it informed him of the policy. *Id.* But, by asserting this type of argument, Hand continues to miss how crucial timing is in the narrative. *Id.* At the time the Board recycled its tapes, Hand had not

lodged an appeal. Id. There is no hint in the record that the Board actually suppressed or withheld evidence in the face of a contest with Hand. *Gumbs*, 718 F.2d at 98. Further, given that Hand had failed numerous other examinations before the Board in the past and had not appealed, it is far from availing to imply that the Board had constructive notice that Hand would appeal and thus acted in bad faith in recycling its tapes. Material Facts at ¶¶ 48 - 49, Pl's Counter at 1 - 4; *Gumbs*, 718 F.2d at 98. Hand chose the timing of his appeal, and cannot hold the Board responsible for the procedural consequences of his inaction. *Id.* at 2 - 3; *Hand*, 2002 WL at * 5.

Accordingly, as Hand seeks to relitigate this facet of his case without new evidence or relevant new legal arguments, he cannot sustain his argument that an inference of wrongdoing should be read into the Board's actions in recycling the tapes. *Gumbs*, 718 F.2d at 96; *Moyer*, 1997 WL at *3 ("A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of."). Hand's second objection to the summary judgment decision fails. *Continental Casualty Co.*, 884 F. Supp. at 943.

Hand's Third Objection

Third, Hand contends that I should have found that a contract existed between himself and the Board for the Board to grade and evaluate the examination in an accurate manner and in accordance with its rules. Pl's Memorandum at 9 - 12. The oddity of Hand's position here, however, is that in my opinion I found that Hand had not presented sufficient evidence to assert a material breach of an enforceable contract between Hand and the Board, *regardless* of whether such a contract existed. *See, e.g., Hand*, 2002 WL at *4, *6. In compiling his record for the motion for summary judgment, Hand simply had not provided enough details to the court about

what his answers had been in the underlying examination and how they differed from what answers the examiners allegedly evaluated.¹ *Id.* at * 4. I discuss this problem in response to Hand's first objection, and here refer to that analysis in holding that as Hand's third objection had no bearing on my previous decision, his objection here is inapplicable to his case.

Hand's Fourth Objection

Hand's fourth objection is that I should have found that the Board violated the contract as it existed between himself and the Board when it did not follow its own appeals procedure in his challenge to the outcome of the examination. Doc. No. 19 at 12 - 14. Hand repeats his assertion that the Board erred in referring his case to the Credentials Committee rather than the Examination Committee, and emphasizes the damage to his professional standing which will result should this court not grant him another opportunity to sit for the examination. Doc. No. 19 at 13 - 14. In making this argument in his motion for reconsideration, however, Hand overlooks the same need for logical connection between these two events that was the critical failure of his case on summary judgment. Assuming, *arguendo*, that there was a contract between Hand and the Board, Hand must prove that the Board's omission was *material*. *Sgarlet v. Griffith*, 36 A.2d 330 (Pa. 1944). In other words, Hand must prove that his damages *resulted from* the Board's decision to refer his case to one committee rather than another. *Reformed Church of the*

¹ Hand raises an argument about the implied covenant of good faith and fair dealing for the first time in his motion for reconsideration, although he states he intended to raise this point in his opposition to the Board's motion for summary judgment. Doc. No. 19 at 10 - 11. Hand, however, did not raise the argument in his opposition to the Board's motion for summary judgment, see Pl's Counter, and raising it for the first time in his motion for reconsideration is unavailing as it is no longer germane to the outcome of his case. *Hand*, 2002 WL at *4, *6.

Ascension v. Theodore Hooven & Sons, Inc., 764 A.2d 1106, 1109 (Pa. Super. 2000); *CoreStates Bank N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super 1999). Hand certainly suffered damages as a result of failing his third and final oral examination, but printing these damages in bold letters in repeated legal memoranda to the court alone will not carry his case. *See, e.g.*, Pl's Reply Memorandum in Support of His Motion for Reconsideration at 9 [hereinafter Doc. No. 23].

As documented in the decision on summary judgment, Hand received three levels of procedure within the Board's review process, the last two of which, his informal and formal hearings before the Board, as opposed to a committee of the Board, were identical to what he would have received had his claim been referred to the Examination Committee. *Hand*, 2002 WL at *6; Material Facts at ¶¶ 87, 88; Pl's Counter at 3; Hand Dep. at 64. He had the opportunity to present any evidence available to him and to testify before the Board in his last two hearings. *Hand*, 2002 WL at *6; Hand Dep. at 64. At the formal hearing, Hand was even represented by counsel. *Hand*, 2002 WL at *6; Hand Dep. at 65. Moreover, that counsel was, in Hand's words, "of eminent repute in this community." Hand Dep. 65. I review these facts again on Hand's motion for reconsideration and find that Hand has presented no new argument to establish he suffered prejudice as a result of the Board's initial referral of his case to the Credentials Committee. Hand's final objection to the summary judgment decision is without merit.

CONCLUSION

For the reasons stated above, I find that Hand has failed to proffer new relevant legal arguments or otherwise demonstrate error which would result in manifest injustice. I therefore deny his motion for reconsideration. An appropriate order follows.

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Plaintiff,

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THE AMERICAN BOARD OF SURGERY, INC.

Defendant.

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CIVIL ACTION
NO. 01-2172

Order

And now, this day of April 2002, after careful review of the plaintiff's motion for reconsideration (Doc. No. 19), the defendant's memorandum in opposition (Doc. No. 20), plaintiff's reply memorandum (Doc. No. 23), and defendant's sur-reply (Doc. No. 26), for the reasons set forth in the accompanying Memorandum it is hereby ORDERED that the plaintiff's motion for reconsideration is DENIED.

BY THE COURT:

William H. Yohn, Jr., Judge