BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Petition to Revoke Probation Against: Anthony James Musielewicz, M.D. Physician's and Surgeon's Certificate No. G 74503 Respondent.	Case No. 800-2022-085337

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on October 17, 2022.

IT IS SO ORDERED September 15, 2022.

MEDICAL BOARD OF CALIFORNIA

Richard E. Thorp, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Petition to Revoke Probation Against:

ANTHONY JAMES MUSIELEWICZ, M.D.,

Physician's and Surgeon's Certificate No. G 74503

Respondent.

Case No. 800-2022-085337

OAH No. 2022050749

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on July 21, 2022, by videoconference.

Deputy Attorneys General Kendra Rivas and Greg W. Chambers represented complainant William Prasifka, Executive Director, Medical Board of California, Department of Consumer Affairs.

Respondent Anthony James Musielewicz, M.D., represented himself.

The record closed and the matter was submitted for decision on July 21, 2022.

FACTUAL FINDINGS

Procedural Background

1. Complainant William Prasifka filed the First Amended Petition to Revoke Probation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On June 30, 1992, the Board issued Physician's and Surgeon's Certificate Number G 74503 to respondent Anthony James Musielewicz, M.D. The certificate was in effect at all times relevant to the charges in the petition. It is scheduled to expire on May 31, 2024, unless renewed. On December 6, 2021, the Board issued a Cease Practice Order prohibiting respondent from engaging in the practice of medicine.

3. In a previous disciplinary matter, respondent entered into a stipulated settlement and disciplinary order, effective August 12, 2021, in which his certificate was revoked, the revocation was stayed, and the certificate was placed on probation for seven years with standard and substance abuse terms and conditions, including abstaining from alcohol and controlled substances and biological fluid testing.

4. Respondent was placed on probation due to a history of substance abuse, which included attending two residential treatment programs, in 2017 and 2018.

5. On July 12, 2021, Jennifer Saucedo, a Biological Fluid Testing Analyst for the Board's probation program, sent a letter to respondent advising him to enroll in FSSolutions[1] (FSS), the Board's biological fluid monitoring program, by August 12,

[1] FSSolutions is now called Vault Health.

2021. This letter informed respondent of his obligation to check in daily with FSS, by 5:00 p.m. California time, to determine whether he had been selected for testing, and that if selected, to provide a sample that day. Respondent was provided with chain of custody forms and was advised to maintain an ample supply of the forms at all times.

Respondent was also provided with a "Participant Disclosure and Information when Monitoring with EtG/EtS" Form (Participant Disclosure Form) and was asked to sign and return it by the commencement of probation, August 12. This form advised respondent to avoid incidental alcohol exposure to avoid a positive test result for EtG or EtS (metabolites of alcohol). The Participant Disclosure Form cautioned that over-the-counter products such as mouthwash, cough syrup, and nutritional supplements can contain alcohol, and advised respondent that it is his responsibility to read product labels. The form further cautioned that certain foods, drinks, and desserts contain enough alcohol to cause a positive test result. Respondent did not return the form by August 12.

6. Respondent did not sign up for FSS by August 12, 2021. At hearing, respondent explained that he was practicing in Louisiana and had been incorrectly informed by a Board employee that he was not required to comply with the biological fluid testing condition of his probation until he resumed practice in California. After being informed by Saucedo in a telephone conversation of his obligation to begin biological testing even when living or practicing out-of-state, respondent enrolled by the end of September 2021.

7. Respondent failed to check in on October 2, 11, 12, and 14, 2021. Respondent was selected to test on October 12 and failed to submit a sample that day. Letters were sent to respondent on October 5 and 12 regarding his failure to check in on October 2 and 11.

8. On October 26, 2021, respondent was directed to submit a urine sample for testing. Respondent's sample tested positive for alcohol metabolites and methamphetamine. Saucedo wrote to respondent on November 2, 2021, asking him to provide an explanation for the test results and his plan to ensure no more positive tests.

9. Respondent submitted a statement dated November 4, 2021, in which he explained that he had attended a potluck reception and inadvertently consumed tiramisu prepared with brandy. He denied knowingly consuming controlled substances. He added that the collection site did not follow protocol, noting that he was not asked to empty his pockets, was not given the opportunity to wash his hands, and that the observer was not in his line of site when he provided the sample.

10. Saucedo contacted James Ferguson, D.O., the Medical Review Officer for FSS, regarding the October 26 positive test results. At Dr. Ferguson's direction, the urine sample was reconfirmed as positive for methamphetamine, and respondent was required to have a PEth[2] test performed on November 4. The PEth test was negative. Dr. Ferguson opined that the results were consistent with methamphetamine ingestion and with a low-level incidental exposure to alcohol.

11. On November 1, 2021, respondent failed to show up for testing when selected. Respondent was asked to provide an explanation and wrote that he had

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[2] PEth (phosphatidylethanol) is an alcohol biomarker detectable in the blood for a longer time after the consumption of alcohol than EtG and EtS can be detected in a urine sample.

come home from work at 6:30 a.m. that day, fell asleep, and woke up after the testing site had closed for the day.

12. Respondent failed to check in for testing on November 6, 2021. A letter was sent to respondent.

13. On November 9, 2021, citation number 800-2021-082779 was issued to respondent, based on two missed check ins and one missed test in October. A $350 fine was imposed.

14. As a result of the October 26 positive test, a Cease Practice Order was issued on December 6, 2021. Respondent was ordered to cease the practice of medicine until notified by the Board, in writing, that he had completed 30 days of continuous negative biological fluid tests, indicating that he has not used, consumed, ingested, or administered to himself any substance prohibited by his probation.

15. Respondent failed to provide a sample when directed to do so on December 3, 2021. On January 2, 2022, he sent an explanation to the Board, stating that he got home from work at 6:00 a.m., checked in with FSS, fell asleep before the testing site opened at 9:30 a.m., and woke up after the site had closed for the day. He promised to set an alarm in the future and also noted that he would no longer be working night shifts.

16. Respondent tested positive for alcohol on December 17, 2021. Respondent was asked to provide an explanation. Respondent replied on January 2, stating that he had used over-the-counter NyQuil and DayQuil to treat an upper respiratory infection, would discontinue using such products, and was now keeping a daily log of everything he consumes.

17. On December 28, 2021, respondent was directed to provide a blood sample but provided a urine sample instead. Respondent was asked to provide an explanation. He responded on January 2, 2022, stating that when he checked in for testing he had not noticed that he was directed to provide a blood sample and assumed he was supposed to provide a urine sample.

18. On January 3, 2022, Saucedo sent respondent a letter advising him that consuming over-the-counter products containing alcohol is a violation of his probation. She also noted that he had not returned the Participant Disclosure Form (described above in Factual Finding 5). She enclosed another copy of the form and directed respondent to sign and return it by January 5. Respondent failed to do so, and as of the date of the hearing has never submitted a signed Participant Disclosure Form.

19. On January 10, 2022, a PEth test was performed on respondent's sample and the result was negative. Saucedo consulted with Dr. Ferguson, who opined that the December 17 test results and subsequent negative PEth were consistent with respondent's explanation that he had used over-the-counter cold medication.

20. On January 31, February 4, and February 8, 2022, respondent was selected for testing but did not provide a sample.

21. Respondent failed to check in with FSS on February 1, February 7, February 8, and February 9 through February 13. Saucedo sent a letter to respondent on February 14, regarding the missed tests in January and February, and his failure to check in. Respondent notified Saucedo that he was in a residential treatment program. Saucedo confirmed that respondent entered Origins Behavioral HealthCare on

February 9, and he was excused from participating in the Board's biological fluid testing while receiving inpatient treatment.

22. By May, respondent had completed inpatient treatment. Respondent failed to check in with FSS from May 9 through May 14. He was selected for testing on May 12 and did not submit a sample. Saucedo contacted respondent on May 13 regarding his ongoing non-compliance. Respondent stated that he was being tested in an outpatient rehabilitation program and thought he did not need to test with the Board. Saucedo informed respondent that now that he was no longer in an inpatient treatment program, he was required to check in daily and test when directed.

23. On June 21, 2022, respondent was selected for testing. He was in Minnesota for medical care. He had not notified FSS in advance of travel so that they could help make arrangements and he had failed to bring chain of custody forms with him. Respondent went to several testing sites in the area but they were unable to accommodate him without a chain of custody form. No sample was provided.

24. On June 22, 2022, FSS notified the Board that respondent's June 8, 2022, urine sample tested positive for methamphetamine. Respondent was asked to provide an explanation. He responded that he had no explanation, that the testing site did not allow him to wash his hands prior to providing the sample, and that he is committed to being drug free. Saucedo consulted with Dr. Ferguson, who opined that the test result was consistent with ingestion of methamphetamine.

Respondent's Evidence

25. Respondent did not deny the allegations. He attributed some missed tests to oversleeping due to working night shifts, and he attributed some missed tests to difficulty providing a sample or arriving at the site too late. Respondent continued

to assert that his two positive tests for alcohol metabolites were due to inadvertent consumption in food and over-the-counter medication, but acknowledged that he should have known these items could contain alcohol. He denied any other alcohol use and adamantly denied consuming methamphetamine since he has been on probation. This denial was not credible in light of the two positive tests and the fact that he sought treatment in a residential rehabilitation program after the first positive test.

26. Respondent is an emergency medicine physician. After practicing most of his career in California, he began working in Louisiana in 2019, maintaining his residence in California and travelling back and forth frequently.

27. Respondent was diagnosed with a brain aneurysm in December 2021. He was seeking follow up treatment in Minnesota in June 2022, when he was unable to test as described in Factual Finding 23.

28. Respondent stated that he is committed to being drug-free and that he attends Narcotics Anonymous meetings daily.

29. Respondent would like to resume practicing, stating that he loves his work. He apologized for "taking a wrong turn" and stated that he is "committed to righting it." Respondent stated that he is willing to do anything asked of him by the Board, including testing daily, with the hope that he can complete probation and have the restrictions lifted. Respondent added that he believes it would be difficult for him to find work in California while on Board probation because of the prohibition against supervising physician assistants.

30. Respondent insisted that he is a safe doctor and presents no risk to patients. He stated that he has never worked while under the influence and that he has never had any patient complaints.

31. Respondent expressed frustration with having been placed on probation as the result of an anonymous, false complaint. He also expressed disappointment with the Board, which he believes is falling short in its mandate to aid in the rehabilitation of licensees.

LEGAL CONCLUSIONS

1. Complainant has the burden of proving each of the grounds for revoking probation alleged in the First Amended Petition to Revoke Probation, and must do so by a preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441.)

2. Condition 1 of respondent's probation requires him to abstain from use of controlled substances. A preponderance of the evidence established that respondent violated Condition 1 of his probation by failing to refrain from the use of controlled substances. Respondent submitted samples which tested positive for methamphetamine on October 26, 2021, and June 8, 2022. Cause for probation revocation was established in light of the matters set forth in Factual Findings 8, 10, 24 and 25.

3. Condition 2 of respondent's probation requires him to completely abstain from the use of beverages or products containing alcohol. Respondent submitted samples which tested positive for alcohol metabolites on two occasions, October 26, 2021, and December 17, 2022. Crediting his explanations, respondent's

failure to exercise diligence to prevent accidental exposure to alcohol constitutes a violation of probation. Cause for probation revocation has been established, in light of the matters set forth in Factual Findings 8 and 16.

4. Condition 6 of respondent's probation requires him to participate in the Board's biological fluid testing program. Respondent violated this condition on numerous occasions by failing to check in and failing to report for testing. He also violated this condition by providing a urine sample instead of a blood sample on December 28, 2021. Cause for probation revocation has been established, in light of the matters set forth in Factual Findings 7, 11, 12, 15, 17, and 20–23.

5. The Board's Disciplinary Guidelines provide for license revocation as the maximum penalty for a probation violation. The Guidelines advise that the maximum penalty should be given for repeated similar offenses or for violations revealing a cavalier or recalcitrant attitude.

6. Due to his history of substance abuse dating back to at least 2017, respondent's certificate was placed on probation in August 2021. Respondent failed to enroll in the Board's drug testing program in a timely fashion. Once enrolled in September 2021, he failed to check in and failed to show up for testing on numerous occasions. Respondent tested positive for alcohol twice and for methamphetamine twice. Respondent attributes the positive alcohol tests to inadvertent, incidental consumption and has no explanation for his positive tests for methamphetamine. He steadfastly denied knowingly ingesting any substances prohibited by the terms of his probation. His denials were not credible.

Respondent demonstrated a cavalier attitude towards probation. Despite a citation and cease practice order, he continued to violate the terms of probation. He

does not fully accept responsibility for his non-compliance, offering uncompelling excuses and blaming others.

Business and Professions Code section 2229, subdivision (b) provides that when exercising its disciplinary authority, the Board, whenever possible, shall take action that aids in the rehabilitation of the licensee. Protection of the public, however, remains the Board's highest priority. (Bus. & Prof. Code, § 2229, subd. (a).)

Respondent asserted a commitment to abstinence but provided no corroborating evidence of his rehabilitation. Unfortunately, it does not appear that respondent is able to comply with the terms and conditions of his probation at this time. Under these circumstances, revocation is the appropriate penalty. It would be against the public interest to permit respondent to retain his certificate.

ORDER

The First Amended Petition to Revoke Probation concerning Physician's and Surgeon's Certificate Number G 74503 to respondent Anthony James Musielewicz, M.D., is granted. The stay of revocation is lifted and the certificate is revoked.

DATE: 08/01/2022

Karen Reichmann

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings

ROB BONTA
Attorney General of California
STEVE DIEHL
Supervising Deputy Attorney General
KENDRA S. RIVAS
Deputy Attorney General
State Bar No. 340217
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0112
Facsimile: (415) 703-5480
Attorneys for Complainant

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Petition to Revoke Probation Against: **ANTHONY JAMES MUSIELEWICZ, M.D.** **525 Lafayette Street, Apt. 611** **Baton Rouge, LA 70802-5435** **Physician's and Surgeon's Certificate No. G 74503,** Respondent.	Case No. 800-2022-085337 OAH No. 2022050749 **FIRST AMENDED PETITION TO REVOKE PROBATION**

Complainant Alleges:

PARTIES

1. William Prasifka (Complainant) brings this First Amended Petition to Revoke Probation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On June 30, 1992, the Board issued Physician's and Surgeon's Certificate Number G 74503 to Anthony James Musielewicz, M.D. (Respondent). The Physician's and Surgeon's Certificate was in effect at all times relevant to the charges brought herein and will expire on May 31, 2024, unless renewed. Respondent is currently prohibited from practicing medicine by virtue of a Cease Practice Order issued by the Board on December 6, 2021.

3. On November 24, 2020, Complainant filed an Accusation against Respondent, alleging cause for discipline based on Respondent's impaired ability to practice medicine safely. On August 12, 2021, the Board's Decision in Case No. 800-2018-048262 became effective (2021 Decision). The 2021 Decision adopted a Stipulated Settlement, whereby Respondent's Physician's and Surgeon's Certificate was revoked. However, the revocation was stayed and Respondent's certificate was placed on probation for a period of seven years with certain terms and conditions.

JURISDICTION

4. This Petition to Revoke Probation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

5. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Board deems proper.

6. Section 2228 of the Code states:

> The authority of the board or the California Board of Podiatric Medicine to discipline a licensee by placing him or her on probation includes, but is not limited to, the following:
>
> (a) Requiring the licensee to obtain additional professional training and to pass an examination upon the completion of the training. The examination may be written or oral, or both, and may be a practical or clinical examination, or both, at the option of the board or the administrative law judge.
>
> (b) Requiring the licensee to submit to a complete diagnostic examination by one or more physicians and surgeons appointed by the board. If an examination is ordered, the board shall receive and consider any other report of a complete diagnostic examination given by one or more physicians and surgeons of the licensee's choice.
>
> (c) Restricting or limiting the extent, scope, or type of practice of the licensee, including requiring notice to applicable patients that the licensee is unable to perform the indicated treatment, where appropriate.
>
> (d) Providing the option of alternative community service in cases other than violations relating to quality of care.

FIRST CAUSE TO REVOKE PROBATION

(Failing to Abstain from Using Controlled Substances)

7. Condition 1 of the 2021 Decision required Respondent to abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs defined by Business and Professions Code section 4022, and any drugs requiring a prescription.

8. Respondent violated Condition 1 when he tested positive for methamphetamine on October 26, 2021.

9. Respondent violated Condition 1 when he tested positive for methamphetamine on June 8, 2022.

SECOND CAUSE TO REVOKE PROBATION

(Failing to Abstain from Alcohol Use)

10. Condition 2 of the 2021 Decision required Respondent to abstain completely from the use of products or beverages containing alcohol.

11. Respondent violated condition 2 when he tested positive for alcohol on October 26, 2021.

12. Respondent violated condition 2 when he tested positive for alcohol on December 17, 2021.

THIRD CAUSE TO REVOKE PROBATION

(Failing to Comply with Biological Fluid Testing)

13. Condition 6 of the 2021 Decision required Respondent to submit to biological fluid testing, at Respondent's expense, upon request of the Board or its designee. Respondent was required to make daily contact with the Board or its designee to determine whether biological fluid testing is required and to be tested on the dates of the notification as directed by the Board or its designee. Specifically, Respondent was required to submit to 54 to 104 random tests during the first year of probation.

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14. On October 2, October 11, October 12, October 14, and November 6, 2021, Respondent failed to check-in with FSSolutions, his Board approved laboratory. Respondent also failed to submit a biological fluid sample when selected to do so on October 12, November 1, and December 3, 2021. On December 28, 2021, Respondent was selected to provide a PEth (blood) test. However, Respondent failed to provide the blood sample and instead provided a urine sample on that date. Respondent has therefore violated Condition 6 of the 2021 Decision.

15. Respondent failed to check-in with FSSolutions on February 1, February 7, February 8, and from May 9 through May 13, 2022. Further, Respondent failed to provide a biological fluid sample when selected to do so on January 31, February 4, February 8, May 12, and June 21, 2022. Respondent has violated Condition 6 of the 2021 Decision.

DISCIPLINARY CONSIDERATIONS

16. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about November 9, 2021, the Board issued a Citation Order against Respondent because he violated multiple conditions of his probation by failing to check-in with FSSolutions during program hours on October 12 and October 14, 2021, and failing to provide a biological fluid sample when selected to do so on October 12, 2021. The Citation Order included a $350 fine and the following order of abatement:

> The Board is ordering you to maintain compliance with all terms and conditions of the Decision placing you on probation. You are given notice that any future violation of your probationary terms and conditions may result in the filing of formal disciplinary action to revoke your probation

17. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about December 6, 2021, the Board issued a Cease Practice Order (CPO) against Respondent finding that Respondent failed to obey conditions of his probation by testing positive for metabolites for methamphetamine on October 26, 2021, and failing to submit to biological fluid testing on November 1, 2021, per the Uniform Standards for Substance Abusing Licensees. The CPO provided that "Respondent shall not resume the practice of medicine until notified in writing by the Board or its designee that he has completed thirty (30) calendar days of continuous negative biological fluid tests

indicating he has not used, consumed, ingested, or administered to himself a prohibited substance." To date, the CPO is still in effect.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate Number G 74503, issued to Anthony James Musielewicz, M.D.;

2. Revoking, suspending or denying approval of Anthony James Musielewicz, M.D.'s authority to supervise physician assistants and advanced practice nurses;

3. Ordering Anthony James Musielewicz, M.D., to pay the Board the costs of the investigation and enforcement of this case, and if placed on probation, the costs of probation monitoring;

4. Ordering Respondent Anthony James Musielewicz, M.D., if placed on probation, to provide patient notification in accordance with Business and Professions Code section 2228.1; and

5. Taking such other and further action as deemed necessary and proper.

DATED: JUL 12 2022

WILLIAM PRASIFKA
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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