

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: Feel Like Oh Yeah, LLC Request) GMCB-016-22con
for Healing Arts Practitioners' Office)
Exclusion from CON Review)
_____)

DECISION AND ORDER

Introduction

On June 16, 2021, Feel Like Oh Yeah, LLC (FLOY) submitted a request for a Jurisdictional Determination by the Green Mountain Care Board (Board) for the purchase and opening of two QC Kinetix franchise outlets to provide non-surgical and non-pharmaceutical pain management services within Vermont. In that request, FLOY asked for its project to be excluded from Certificate of Need (CON) jurisdiction under the statutory exclusion for offices of practitioners of the healing arts set forth in 18 V.S.A. § 9435(a).

On June 23, 2021, in Docket GMCB-011-21con, a Jurisdictional Determination was issued determining that the proposed QC Kinetix franchise outlets did not qualify for the healing arts practitioners' office exclusion and asserting jurisdiction. Following the Jurisdictional Determination, the Health Care Advocate (HCA), a special project within Vermont Legal Aid representing the interests of Vermont health care consumers, entered an appearance as a party to that filing. FLOY subsequently informed the Board that it was withdrawing its Letter of Intent.¹

On July 7, 2022, FLOY sent a letter requesting the reasoning behind the June 23, 2021 denial of the healing arts practitioners' office exclusion. A response was sent on July 26, 2022, listing the factors that need to be addressed for the Board to determine whether a project qualifies for the exclusion.

On November 1, 2022, FLOY submitted a new request that the Board consider its QC Kinetix "outpatient regenerative medicine pain clinic to be exempt from Certificate of Need as an office of practitioners of the healing arts." Request for Jurisdictional Determination (JD Request) at 1, 3 (November 1, 2022). FLOY informed the Board that it has operated a single franchise outlet in Colchester and has held annual operating costs under \$500,000. *Id.* at 1. FLOY used its experience running the single clinic to support its request. *Id.*

Request for Exclusion

FLOY's November 1, 2022 JD Request addresses the considerations weighed by the Board in determining whether a health care project qualifies for the 18 V.S.A. § 9435 healing arts practitioners' office exclusion. The JD Request addresses factors set forth in GMCB Rule 4.000,

¹ Documents related to GMCB-011-21con can be found on the Board's website at <https://gmcboard.vermont.gov/con/jurisdiction-letters-intent/jurisdiction-asserted>.

§ 4.205(1) by including details about FLOY’s billing practices, ownership structure, services, and staffing as follows:

- a. FLOY bills patients directly; its services are not covered by commercial insurance, Medicare, or Medicaid.
- b. Feel Like Oh Yeah, LLC is a Vermont single-member LLC; Tom Lee, who has not represented himself as a healing arts practitioner, is the single member.
- c. Medical Staffing is comprised of:
 - a. A Supervising Physician, DO, who is a contract employee with no specified FTE.
 - b. A Procedure Specialist, PA-C or APRN per diem substitute, who performs patient exams, procedures, and injections. (0.25 FTE)
 - c. A Medical Assistant/Phlebotomist who performs blood draws, processes blood to concentrate, and readies the resulting biologics for injections. (0.25 FTE)
- d. Procedures performed are:
 - a. Class IV Deep Tissue Laser Therapy
 - b. Platelet Rich Plasma (PRP) Therapy
 - c. Bone Marrow Aspirate Concentrate
- e. FLOY represents that patients are referred from chiropractors, massage therapists, physical therapists, orthopedic physicians, and word of mouth. The practice refers patients out to other providers as appropriate.
- f. Equipment consists of a hand-held ultrasound, centrifuges, and a class IV deep tissue laser.
- g. FLOY makes public representations about its services as therapeutic treatments costing \$4,000 to \$8,500 per joint. FLOY reports that it informs patients up front about the typical cost and that its services are not covered by insurance.
- h. Tables included with the JD request address the frequency with which other Vermont practitioners offer the same services. The laser therapy is offered by at least 25 Vermont practitioners. Eight other Vermont locations were listed as offering PRP therapy. One other Vermont location offers bone marrow aspirations.

JD Request at 2-5 (November 1, 2022).

Standard of Review

The CON statute excludes from review the offices of “practitioners of the healing arts, meaning the physical places that are occupied by such providers on a regular basis in which such providers perform the range of diagnostic and treatment services usually performed by such providers on an outpatient basis...[.]” 18 V.S.A. § 9435(a). However, the exclusion does not apply to specialty projects such as diagnostic or therapy programs, independent diagnostic labs, and diagnostic imaging facilities owned by healing arts practitioners. 18 V.S.A. § 9435(c). “Simple ownership of a facility by a practitioner or group of practitioners of the healing arts does not, in and of itself, exempt such facility from the definition of new health care project.” GMCB Rule 4.000, § 4.205(2).

Rule 4.000, § 4.205(1) provides considerations to assist the Board in determining whether a project qualifies for the healing arts practitioners’ office exclusion from CON review.

- a. Billing procedures
- b. Ownership structure

- c. Staff training and specialties
- d. Procedures performed
- e. Patient referral patterns and relation to other health care institutions
- f. Type of equipment to be purchased
- g. Representations to the public regarding the facility
- h. Frequency with which other VT practitioners offer the same services

GMCB Rule 4.000, § 4.205(1).

Together these factors help the Board discern whether the proposed project is the type of practice intended to be excluded from CON review by the statute.

Conclusion

Under the Rule 4.000, § 4.205(1) factors, FLOY's QC Kinetix practice does not qualify for the healing arts practitioners' office exclusion based on the representations made in the November 1, 2022 JD Request. We make this determination because a practitioner of the healing arts does not own the business; a healing arts practitioner does not occupy the office on a regular basis; and the practice involves specialty procedures not typically offered in general practice settings.²

FLOY's ownership structure does not support its request for the exclusion. Tom Lee, the single member of the LLC, is not a healing arts practitioner. *See* JD Request at 2 (November 1, 2022). Projects that are not owned by healing arts practitioners are not likely to meet the standard for the exclusion.

The staffing pattern at the QC Kinetix clinic also does not support the exclusion. A healing arts practitioner is expected to spend close to full time (1.0 FTE) at the office, reflecting the statute's description of occupying the office "on a regular basis." 18 V.S.A. § 9435(a). However, no medical practitioner spends a substantial amount of time at the Colchester clinic. The medical staffing is comprised of a consulting DO with no FTE allocation; the on-site PA-C is only 0.25 FTE, and the medical assistant is also on site only 0.25 FTE. JD Request at 2 (November 1, 2022).

Finally, QC Kinetix's services are not appropriate for the exclusion, FLOY's submission indicates that many other Vermont practitioners use deep tissue laser therapy. JD Request at Table 1. However, the submission lists only eight other VT locations that perform PRP therapy. JD Request at Table 2. Only one other Vermont location is listed as offering bone marrow aspiration. JD Request at Table 3. As such, the latter two procedures are not necessarily of the type usually performed by such providers in an outpatient setting.³

² The other considerations in Rule 4.000, § 4.205(1) of billing, referral patterns, equipment, and representations to the public do not appear to have direct bearing on whether QC Kinetix should qualify for the exclusion. *See* GMCB Rule 4.000, § 4.205(1)(a), (e), (f), (g).

³ While FLOY's Tables 2 and 3 include entries from throughout the Northeast, the relevant standard is the frequency with which other Vermont practitioners offer the same services. *See* GMCB Rule 4.000, § 4.205(1)(h).

Order

We deny FLOY’s request for the healing arts practitioners’ office exclusion because a practitioner does not own the project; no practitioner occupies the office on a regular basis; and the project offers services that are not the type usually performed by such providers in an outpatient setting.

SO ORDERED.

Dated: January 5, 2023 at Montpelier, Vermont

s/ Owen Foster, Chair)	
)	
s/ Jessica Holmes)	GREEN MOUNTAIN
)	CARE BOARD
s/ Robin Lunge)	OF VERMONT
)	
s/ Thom Walsh)	
)	
s/ David Murman)	

Filed: January 5, 2023

Attest: s/ Jean Stetter, Administrative Services Director
Green Mountain Care Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Board (by e-mail, telephone, or in writing) of any apparent errors, so that any necessary corrections may be made. (Email address: Kristen.Lajeunesse@vermont.gov). Appeal of this decision to the Supreme Court of Vermont must be filed with the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration, if any, must be filed with the Board within ten days of the date of this decision and order.