October 13, 2017

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Barry A. Dublin, M.D.

Christine Radman, Esq.
NYS Department of Health
90 Church Street - Fourth Floor
New York, New York 10007

RE: In the Matter of Barry A. Dublin, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 17- 296) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct
New York State Department of Health
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.
This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

[Redacted]
James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:nm
Enclosure
STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Barry A. Dublin, M.D. (Respondent) Administrative Review Board (ARB)

A proceeding to review a Determination by a Committee Determination and Order No. 17-298
(Committee) from the Board for Professional Medical
Conduct (BPMC)

Before ARB Members D'Anna, Koenig, Grablec, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Christine Radman, Esq.
For the Respondent: Pro Se

After a hearing below, a BPMC Committee found the Respondent committed professional misconduct related to the electrodiagnostic tests on six persons. The Committee voted to fine the Respondent $10,000.00 and to place him on probation for three years under conditions that include practicing with a monitor and completing a course on medical record keeping. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2017), the Petitioner asks the ARB to modify the penalty the Committee imposed. After considering the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination on the charges, the fine and the probation. The ARB modifies the Determination to censure and reprimand the Respondent and to place a permanent limitation on the Respondent's license to practice medicine in New York (License) to prohibit the Respondent from ordering, performing or interpreting electrodiagnostic tests.
Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2-3), 6530(5), 6530(21), 6530(32) & 6530(35) (McKinney Supp. 2017) by committing professional misconduct under the following specifications:

- practicing the profession fraudulently,
- practicing the profession with negligence on more than one occasion,
- practicing the profession with incompetence on more than one occasion,
- willfully filing a false report, and
- failing to maintain accurate patient records.

The charges related to electrodiagnostic tests on eleven people, Patients A to K. The record refers to the Patients by initials to protect patient privacy. Following the hearing, the Committee rendered the Determination now on review.

As relevant on this Review, the Committee sustained the charges that the Respondent practiced with incompetence on more one occasion and failed to maintain accurate records for Patients A-F. The Committee dismissed all other charges. The Respondent worked in his own medical office and as an employee for a number of medical clinics performing nerve conduction studies. The Committee found that the Respondent included in the medical records for Patient A-C identical nerve conduction study results, in both the wave results and the numerical data. In addition, the Committee found that the Respondent included in the medical records for Patient D-F identical nerve conduction study results, in both the wave results and the numerical data. Further, the Committee found it physiologically impossible for two patients to have identical wave and/or numerical nerve conduction study results.

At hearing, the Respondent testified that he recorded additional notations on sheets of paper. The Committee stated that they did not believe that testimony [Committee Determination page 5, footnote 1]. The Respondent also testified about his theory that a rogue technician was responsible for the inaccurate information in the records. The Committee did not find that theory persuasive.
The Committee wrote that they were very concerned that identical nerve conduction study results appeared in multiple patient records, because even an employee physician must maintain a record for each patient which accurately reflects the evaluation and treatment of each patient. The identical information appearing on multiple records made the records false on its face, but also made it impossible to know to which patient the information actually referred, one of the three patients, A to C, or even to a fourth person unidentified in this matter. The Committee found that the Respondent’s failure to insure the accuracy of the information on the records demonstrated not only failure to maintain accurate records, but also the lack of knowledge to practice medicine safely, which constitutes incompetence in practice on more than one occasion.

The Committee voted to fine the Respondent $10,000.00 and to place the Respondent on probation for three years, under the terms that appear at Appendix 3 to the Committee’s Determination. The probation terms require that, within the first year of the probation, the Respondent complete a course in medical record keeping, subject to the course’s approval by the Director of the Office for Professional Medical Conduct. The probation terms also require that the Respondent practice with a monitor for the entire probation period.

Review History and Issues

The Committee rendered their Determination on April 26, 2017. This proceeding commenced on May 9, 2017, when the ARB received the Petitioner’s Notice requesting a Review. The record for review contained the Committee’s Determination, the hearing record, the Petitioner’s brief and the Respondent’s reply brief. The record closed when the ARB received the reply brief on July 7, 2017.

The Petitioner argues that the penalty the Committee imposed fails to address the Respondent’s incompetence and his testimony at hearing, which the Committee found to be false. The Petitioner contends that the denial of culpability and lack of integrity provide
sufficient basis to conclude that attempts at rehabilitation are unlikely to succeed. The Petitioner argues further that the penalty (simple practice monitoring with chart review following CME) fails to satisfy the Board’s responsibility to protect the public. The Petitioner requested that the ARB revoke the Respondent’s License. In the alternative, the Respondent requested that the ARB modify the penalty to include a prohibition against the Respondent ordering, performing and/or interpreting Electrodiagnostic tests. The Petitioner requested further that the ARB modify the penalty to impose a $10,000.00 fine for each of the seven sustained specifications of misconduct.

The Respondent contended that the Committee failed to understand the Respondent’s testimony due to the nature and complexity of the testing. The Respondent noted that one of the Committee members was absent on the second hearing day, when the Respondent testified. The Respondent complained that the records in evidence came from an insurance company, which the Respondent characterized as a biased source. In reply to the Petitioner’s brief, the Respondent indicated that, in 22 years of practice, there had been no complaints from a patient or agency about the Respondent’s competence. In response to the findings on the Respondent’s records, he contended that he utilizes a handwritten worksheet as a means of analyzing and recording vast amounts of information necessary for performing the testing. The Respondent asked for the ARB to overturn the fine and monitor and to deny any limitation. The Respondent agreed to complete the CME course on record keeping.

ARB Authority
Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minijelly v. Comm. of Health. 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124

**Determination**

The ARB has considered the record and the parties' briefs. We affirm the Committee's findings on the charges. We further affirm the Committee's Determination to fine the Respondent $10,000.00 and to place the Respondent on probation for three years, with probation terms that include practice with a monitor and completion of a CME course on record keeping. We modify the penalty the Committee imposed to place a limitation on the Respondent’s License to prohibit the Respondent from ordering, performing and/or interpreting Electrodiagnostic tests. On our own motion, we vote to censure and reprimand the Respondent.

The Respondent argued that the Committee misunderstood his testimony. The Committee found the Respondent’s testimony lacked credibility and the Committee credited the testimony by the Petitioner’s expert, Todd Jorgensen, M.D. The ARB defers to the Committee, as the fact finder, in their judgement on credibility. The evidence the Committee found credible (Dr. Jorgensen’s testimony and the records) demonstrated that the Respondent practiced with incompetence on more than one occasion and failed to maintain accurate records. If the Respondent had more complete records than the Department presented, the ARB wonders why the Respondent would not have submitted those records for the Committee’s consideration.

The Committee found it impossible to have identical studies for two patients. In this case, there were two sets of identical studies for three patients. The Committee found that there was no way to tell which of the three Patients to which the studies related or if the studies actually related to a fourth person. The ARB finds it troubling that the Respondent would have sent such
inadequate records to other physicians who were treating the Patients. The ARB concludes that the Respondent has demonstrated his unfitness to perform Electrodiagnostic tests any longer. To protect patients, the ARB bans the Respondent ordering, performing and/or interpreting Electrodiagnostic tests.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.

2. The ARB affirms the Committee's Determination to fine the Respondent $10,000.00 and to place the Respondent on probation for three years under terms that include practicing with a monitor and completing a course on medical record keeping.

3. The ARB modifies the Determination to limit the Respondent's License permanently to prohibit him from ordering, performing or interpreting electrodiagnostic tests and to censure and reprimand the Respondent.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.
In the Matter of Barry A. Dublin, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the Matter of Dr. Dublin.
Dated: October 2017

[Signature]

Linda Prescott Wilson
In the Matter of Barry A. Dublin, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the Matter of Dr. Dublin.

Dated: October 10, 2017

Peter S. Koenig, Sr.
In the Matter of Barry A. Dublin, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Dublin.

Dated: 10/10/17, 2017

Steven Grabiec, M.D.
In the Matter of Barry A. Dublin, M.D.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Dublin.

Dated: October 6, 2017

[Signature]

Richard D. Milone, M.D.
In the Matter of Barry A. Dublin, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Dublin.

Dated: Oct 6, 2017

John A. D'Anna, M.D.