

January 13, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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RE: In the Matter of Matthew Miller, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-217) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

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 SIGNATURE

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Matthew Miller, M.D. (Respondent)

Administrative Review Board (ARB)

A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)

Determination and Order No. 11-217

COPY

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

For the Department of Health (Petitioner): Dianne Abeloff, Esq.
For the Respondent: Paul H. Levinson, Esq

Following a hearing below, a BPMC Committee determined the Respondent engaged in professional misconduct in treating two patients. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License) and to fine the Respondent \$100,000.00. In this proceeding pursuant to New York Public Health Law (PHL) §230-c (4)(a)(McKinney 2011), the parties limited the issue on appeal to the fine. The Respondent asked that the ARB eliminate the fine and the Petitioner recommended that the ARB reduce the amount of the fine. After considering the hearing record and the parties' review submissions, the ARB votes to reduce the amount of the fine from \$100,000.00 to \$30,000.00. We affirm the Committee's Determination to revoke the Respondent's License.

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(20) & 6530(31-32)(McKinney 2011) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- engaging in conduct that evidences moral unfitness,
- willfully harassing, abusing or intimidating a patient, and,
- failing to maintain accurate patient records.

The charges related to the care that the Respondent provided to two persons (Patients A and B).

The record refers to the Patients by initials to protect privacy. Following a hearing on the charges the Committee rendered the Determination now on review.

The Committee determined that the Respondent practiced with fraud by performing trigger point injections on Patients A and B, without medical indication, to mislead the Patients' insurance companies. The Committee found further that the Respondent practiced with fraud for referring Patient B for an electromyography (EMG) test, without justification, with intent to mislead the Patient's insurance carrier. The Committee found further that the Respondent engaged in sexually suggestive comments, gestures and conduct toward both Patients A and B, which amounted to willful harassment of the Patients and which amounted to engaging in conduct that evidenced moral unfitness. The Committee also concluded that the Respondent's conduct amounted to practicing medicine with negligence and incompetence on more than one occasion and failing to maintain accurate patient records.

In reaching their findings, the Committee found credible the testimony by the Petitioner's expert witness, Joseph H. Feinberg, M.D., and by Patients A and B. The Committee found the Respondent's testimony evasive and found that the Respondent testified falsely about orders for tests on Patient A. The Committee also found a portion of the Respondent's testimony flippant and the Committee found another portion of the Respondent's testimony attempted to deflect

responsibility for the Respondent's own willful conduct. The Committee found that four of the Respondent's other patients testified credibly in support of the Respondent. The Committee found that testimony, however, had little bearing on the Respondent's care for Patients A and B.

The Committee voted to revoke the Respondent's License. In addition to the charges the Committee sustained concerning Patients A and B, the Committee also reviewed two other disciplinary actions against the Respondent: a 1998 action for engaging in a sexual relationship with a patient and a 2001 action for inappropriate touching, sexual comments and invitations to a nurse. The disciplinary penalties from those actions included probation both times, as well as a stayed suspension and continuing education. The Committee found that the prior penalties had little impact on the Respondent understanding the significance of his conduct. The Committee found that revocation alone would provide the sanction to protect the public, as he Respondent failed to utilize prior opportunities to rehabilitate himself. The Committee also voted to impose a \$100,000.00 fine for the Respondent's fraudulent conduct and his abusive conduct. The Committee sustained ten misconduct specifications against the Respondent and assessed a \$10,000.00 fine for each specification.

Review History and Issues

The Committee rendered their Determination on September 13, 2011. Both parties requested administrative review. The ARB received review notices from the Petitioner on September 27, 2011 and from the Respondent on September 30, 2011. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's brief and reply brief. The record closed when the ARB received the reply brief on November 2, 2011.

The Respondent limited the issue on review to the inclusion of the fine in the sanction. The Respondent indicated that he had already surrendered his License and would make no appeal against the revocation order. The Respondent argued that the imposition of the fine was excessive and duplicative, in addition to the revocation. In addition, the Respondent argued that courts have upheld fines in previous BPMC cases only when the fine was more modest than \$100,000.00 or in cases in which the licensee retained his or her license. Further, the Respondent contended that the Committee failed to consider testimony from four of the Respondent other patients as mitigating evidence in this case.

In reply, the Petitioner argued that nothing prohibited the Committee from voting for revocation and imposing a fine. The Petitioner did urge that the ARB reduce the fine from \$100,000.00 to \$60,000.00. The Petitioner provided no reason, however, for that recommendation.

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 Minielly 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 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' review submissions. The ARB affirms the Committee's Determination that the Respondent engaged in professional misconduct and the Committee's Determination to revoke the Respondent's License. Neither party challenged the Committee's Determination on the charges or on the revocation. The ARB finds it appropriate and consistent with the Committee's findings and conclusions to fine the Respondent

in addition to revocation, because the Respondent's conduct included fraud in practice. The ARB modifies the penalty by reducing the fine from \$100,000.00 to \$30,000.00, for the reasons we state below.

Under PHL § 230-a(7), the penalties for professional misconduct may include a fine up to \$10,000.00 on each sustained specification of misconduct, although a Committee may not impose multiple fines on the same set of facts, Colvin v. Chassin, 214 A.D.2d 854, 625 N.Y.S.2d 351 (3rd Dept. 1995). The New York Courts have upheld the imposition of a fine in addition to revocation of a medical license, in cases in which a physician engaged in fraud in medical practice, Galin v. DeBuono, 259 A.D.2d 788, 686 N.Y.S.2d 190 (3rd Dept. 1999); Conteh v. Daines, 52 A.D.3d 994, 860 N.Y.S.2d 649 (3rd Dept. 2008); Steckmeyer v. State Board for Professional Medical Conduct, 295 A.D.2d 815, 744 N.Y.S.2d 82 (3rd Dept. 2002). In Galin, the New York Supreme Court Appellate Division for the Third Department upheld a \$55,000.00 fine in addition to a license revocation. In Conteh, the Third Department upheld a \$110,000.00 fine in addition to a license revocation. In Steckmeyer, the Third Department upheld a \$150,000.00 fine in addition to a license revocation.

In this case, the Committee found that the Respondent harassed and/or abused two patients sexually. The record indicated that BPMC disciplined the Respondent previously for a sexual relationship with a patient and for improper touching, comments and invitations to a nurse. License revocation constitutes an appropriate penalty for a physician who engages in sexual misconduct in the course of medical practice, D'Angelo v. State Bd. For Professional Medical Conduct, 66 A.D.2d 1154, 887 N.Y.S.2d 290 (3rd Dept. 2009); Coderre V. DeBuono, 247 A.D.2d 793, 669 N.Y.S.2d 440 (3rd Dept. 1998); Lombardo v. DeBuono, 233 A.D.2d 789, 650 N.Y.S.2d 423 (3rd Dept. 1996). In addition to the sexual misconduct findings against the

Respondent, the Committee also sustained three factual allegations that the Respondent engaged in fraud in practice (A.3, B.1, B.2). The Committee found that the Respondent provided trigger point injections to Patients A and B without medical indication, to mislead the Patients' insurers and that the Respondent ordered an EMG for Patient B without indication, to mislead the Patient's insurer. The ARB finds it appropriate and consistent with the Committee's findings to impose a \$10,000.00 for each of the three sustained factual allegations involving fraud, for a total fine of \$30,000.00.

We reject the Respondent's contention that the Committee ignored mitigating factors in this case. As we noted above, the ARB may consider both aggravating and mitigating circumstances in assessing a penalty, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono (supra). In addition to supportive testimony from four of the Respondent's patients, the record in this case also showed two prior disciplinary actions against the Respondent and it proved that the Respondent engaged in both sexual misconduct with patients and fraud in practice. The ARB finds that aggravating factors outweighed mitigating factors by a substantial margin in this case. The record also showed that less severe prior disciplinary sanctions against the Respondent failed to deter his current misconduct or impress upon the Respondent the need to change. The Respondent not only engaged in further acts of sexual misconduct, but he also engaged in acts of fraud. The ARB agrees with the Committee that the revocation of the Respondent's License is necessary to protect society and that the Respondent's fraudulent conduct warrants a financial penalty in addition to the revocation.

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 revoke the Respondent's License and to impose a monetary fine.
3. The ARB modifies the penalty the Committee imposed by reducing the amount of the fine from \$100,000.00 to \$30,000.00.

Peter S. Koenig, Sr.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Matthew Miller, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Miller.

Dated: 28 Dec 2011

REDACTED SIGNATURE

Linda Prescott Wilson

In the Matter of Matthew Miller, M.D.

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

Dated: December 29, 2011

REDACTED SIGNATURE


Peter S. Koenig, Sr.

In the Matter of Matthew Miller, M.D.

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

Dated: January 3, 2012

REDACTED SIGNATURE

Richard D. Milone, M.D.

In the Matter of Matthew Miller, M.D.

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

Dated: JAN 11, 2011

REDACTED SIGNATURE

John A. D'Anna, M.D.