



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

March 12, 2003



CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Robert Maher, Esq.
NYS Department of Health
433 River Street
Troy, New York 12180

Alvin Gordon, Esq.
Meiselman & Gordon, LLP
150 Broadway, Suite 1200
New York, New York 10038

Magda Lee Binion, M.D.

Redacted Address

RE: In the Matter of Magda Lee Binion, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-332) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

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

COPY

In the Matter of

Magda Lee Binion, 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. 02-232

Before ARB Members Grossman, Lynch, Pellman, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner):
For the Respondent:

Paul Robert Maher, Esq.
Alvin Gordon, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct and the Committee voted to suspend the Respondent's New York Medical License for one year and to stay all but three months of the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2003), the Petitioner asks the ARB to overturn that Determination and to revoke the Respondent's License. After considering the hearing record and the review submissions from the parties, we affirm the Committee's Determination to suspend the Respondent's License, but we modify the Determination and vote to limit the Respondent's License, as we provide in this Determination.

Committee Determination on the Charges

The Petitioner charged that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(ii) by engaging in conduct that resulted in the Respondent's conviction for a crime under Federal Law. The proceeding commenced by a Summary Order from the Commissioner of Health, pursuant to N.Y. Pub. Health Law § 230(12)(b). The Order suspended the Respondent's License summarily, upon the Commissioner's Determination that the Respondent was convicted for acts constituting

felonies. An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2003), before a BPMC Committee, which rendered the Determination now on review. In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). The ARB review addresses the Committee's Determination on the charges and penalty only, as the ARB lacks the authority to review Summary Orders [see Pub. Health Law § 230-c (1)].

The evidence before the Committee revealed the Respondent's conviction, on December 12, 2001, in the United States District Court for the Southern District of New York, on seven counts involving Conspiracy, Health Care Fraud and Mail Fraud. The Court sentenced the Respondent to serve three months imprisonment and nine months home confinement, to pay \$57,325.00 in restitution and to pay a \$700.00 assessment.

The Committee found that the conviction for the Federal felonies made the Respondent liable for disciplinary action pursuant to N. Y. Educ. Law § 6530(9)(a)(ii). The Committee found further that the convictions resulted from an insurance billing scheme involving the Respondent, an anesthesiologist, and a co-conspirator, who performed obstetrical, gynecological and fertility services. The Respondent and her co-conspirator caused bills to be submitted to insurance companies for emergency or urgent gynecological surgeries, when in fact, the patient care involved Assisted Reproductive Technology (ART) procedures. The Committee found that many insurance companies refuse to cover or cover fully ART procedures.

The Committee voted to suspend the Respondent for one year, retroactive to the date of the Summary Order (August 8, 2002) and to stay all but three months of the suspension. The Committee's Determination stated that the Respondent had served a heavy penalty already due to

her incarceration, separation from her children and the heavy restitution. The Committee also found that the Respondent turned over her billing to an attorney who goes over all bills with the Respondent to assure accuracy. The Committee also commented on testimony by several physicians who testified to the Respondent's skills as an anesthesiologist and her caring relationship with patients. The Committee concluded that the criminal penalty and the License suspension would impress upon the Respondent the need for strict compliance with applicable legal and medical standards in the future. The Committee also found probation unnecessary.

Review History and Issues

The Committee rendered their Determination on October 25, 2002. This proceeding commenced on November 6, 2002, 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 response brief. The record closed when the ARB received the response brief on December 13, 2002.

The Petitioner asks the ARB to revoke the Respondent's License. The Petitioner contends that the Respondent's felonious conduct impacts on health, welfare and patient safety and that the one-year suspension the Committee ordered fails to protect the public. The Petitioner urges the ARB to combat fraud and its impact on the public by revoking the Respondent's License.

The Respondent argues that the ARB has dealt with fraud many times in the past by imposing penalties less severe than revocation, such as suspensions, fines and practice restrictions. The Respondent also contends that the Committee found substantial mitigating circumstances in the case, which demonstrate that the Committee acted appropriately in imposing a penalty other than revocation.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct. Neither party challenged that ruling by the Committee. The ARB rejects the Petitioner's request that we revoke the Respondent's License. We modify the Committee's Determination, on our own motion, and limit the Respondent's License to practice in a medical facility operating under a government license or government ownership.

We agree with the Committee that mitigating factors in this case make revocation too severe a penalty. We disagree with the Petitioner that revocation provides the only penalty that will demonstrate a commitment to combating fraud. The Respondent has already undergone incarceration, home confinement and License suspension and she faces paying a substantial amount in restitution. The Petitioner's brief contended that fraud effects health and patient safety, but no charges or findings in this case challenged the care that the Respondent provided to her patients. The Committee found that hearing testimony showed the Respondent as a skillful physician, who maintained a caring relationship with her patients. The ARB concludes that the actual suspension the Committee imposed, along with a License limitation will provide the appropriate sanction in this case.

The Committee noted favorably that the Respondent now relies upon an attorney to assure that the Respondent submits accurate billings. Although this arrangement may work effectively, the arrangement remains voluntary and the Respondent could terminate the arrangement at any time. The ARB concludes that a penalty in this matter should include some legally binding mechanism to relieve the Respondent from any responsibility for billing.

The ARB may substitute our judgement 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) and we may substitute our judgement on our own motion, Matter of Kabnick v. Chassin. 89 N.Y.2d 828 (1996). We elect to substitute our judgement in this case.

We vote to limit the Respondent's License, pursuant to N.Y. Pub. Health Law § 230-a(6), to restrict the Respondent to practice in a health facility that holds a license under N.Y. Pub. Health Law Article 28 or that the government operates, such as a Veteran's Administration facility. We agree with the Committee that no need exists to include probation in the penalty.

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 suspend the Respondent's License for one year, and to stay the suspension for all but three months.
3. The ARB modifies the Committee's Determination to limit the Respondent's License as we provide in our Determination.

Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Magda Lee Binion, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Binion.

Dated: 2/24/2003

Redacted Signature

Robert M. Briber

FROM :

In the Matter of Magda Lee Binion, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Binion.

Dated: Feb 20, 2003

Redacted Signature

Thea Graves Pellman

In the Matter of Magda Lee Binion, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Binion.

Dated: February 21, 2003

Redacted Signature

Therese G. Lynch, M.D.

In the Matter of Magda Lee Binion, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of

Dr. Binion.

Dated: 03/01, 2003

Redacted Signature

~~_____~~

Winston S. Price, M.D.

In the Matter of Magda Lee Binion, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Binion.

Dated: February 20, 2003

Redacted Signature

Stanley L. Grossman, M.D.