



Department of Health

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SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

March 17, 2020

BY EMAIL

David W. Quist
NYS Department of Health
Corning Tower, Room 2512
Empire State Plaza
Albany, New York 12237

Dennis Gruttadaro, Esq.
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Brown, Gruttadaro & Prato, PLLC
19 Prince Street, Hale House
Rochester, New York 14607

RE: In the Matter of Sudipt Sureshchandra Deshmukh, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 20-069) 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.

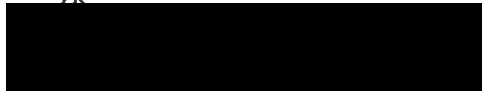
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified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

A large black rectangular redaction box covering the signature of James F. Horan.

James F. Horan |
Chief Administrative Law Judge
Bureau of Adjudication

JFH:nm
Enclosure

STATE OF NEW YORK : DEPARTMENT OF Lawrence Womack, MHEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

COPY

In the Matter of

Sudipt Sureshchandra Deshmukh, 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. 20- 069

Before ARB Members Grabiec, Wilson and Rabin
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): David W. Quist, Esq.
For the Respondent: Dennis Gruttardo, Esq. & William Kalish, Esq.

After a hearing below, a BPMC Committee found that the Respondent committed professional misconduct in treating four patients for chronic pain. The Committee voted to limit the Respondent's license to practice medicine in New York (License) to prevent the prescribing of controlled substances, to suspend the Respondent's license and to place the Respondent on probation following the suspension. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2020), the Petitioner asks the ARB to overturn the Committee and revoke the Respondent's License, or in the alternative, to modify the conditions on the License limitation and the probation. The Respondent opposes the request to increase the penalty, but offers no objections to some proposed modifications. After considering the hearing record and the parties' briefs, the ARB sustains the Committee's Determination to suspend the Respondent's License, to limit the Respondent's License and to place the Respondent on probation following the suspension. We vote 3-0 to modify the provisions in the limitation and the probation.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(3-6) and 6530(32)(McKinney Supp. 2020) by committing professional misconduct under the following specifications:

- practicing with negligence on more than one occasion,
- practicing with gross negligence,
- practicing with incompetence on more than one occasion,
- practicing with gross incompetence, and
- failing to maintain accurate records.

The charges related to the Respondent's long-term treatment, using opioids, to four persons (Patients A – D) with chronic pain. The Committee conducted a four-day hearing and heard from two witnesses: the Petitioner's expert witness, Roger E. Scott, D.O., and Jane Salamone, M.D., the Executive Medical Director at the Respondent's practice, Long Pond Internal Medicine. Following the hearing the Committee rendered the Determination now under review.

The Committee sustained the Specifications that charged the Respondent with practicing with negligence and incompetence on more than one occasion in treating Patients A to D and with gross incompetence and gross negligence in treating Patients B and D. The Committee also found that the Respondent failed to maintain accurate records for each Patient A to D. The Committee found that the Respondent's record keeping rose to the level of negligence in treating Patients B and D, because the Committee found a relationship between the inadequacies in the records and the patient treatment. The Committee found that the Respondent failed to perform adequate examinations, prescribed medications without adequate indication, failed to respond adequately to concerns raised by other providers regarding such prescribing, prescribed medications without informing patients adequately about the associated risks or without documenting that he informed the patients of the risks, failed to address evidence of possible substance abuse or diversion and failed to maintain accurate records. The Committee found that the Respondent's failures in the cases of Patients B and D created the risk of potentially grave consequences by failing to modify Patient B's medication despite concerns raised by other

providers and prescribing medications without adequate indication for Patient D despite that Patient's history of drug abuse.

In reaching their findings, the Committee relied on the testimony by the Department's expert, Dr. Scott, who the Committee found experienced and qualified and whose testimony the Committee found thoughtful, clear and comprehensive. The Committee also found Dr. Scott's testimony on the Respondent's deviations from care reflected the appropriate care standards at the time the Respondent provided the care. The Respondent presented no expert witness and did not testify himself. The Committee found that the Respondent's witness, Dr. Salamone, was a fact rather than an expert witness. She testified concerning the medical staff composition, patient population, general operating structure at Long Pond, management of patients on long-term opioid therapy and statistics pertaining to the Respondent's patients. The Committee found Dr. Salamone's testimony relevant to understanding the Respondent's difficult patient population and the Respondent's significant improvement with record keeping. The Committee found that Dr. Salamone's testimony did little or nothing of benefit, however, concerning the care and medical decision making the Respondent rendered to Patients A to D.

The Committee rejected the Petitioner's request to revoke the Respondent's License. The Committee voted to suspend the Respondent's License for thirty-six months, with thirty-three months stayed [Committee Order Paragraph 3]. The Committee placed the Respondent on probation for thirty-three months following the actual suspension [Committee Order Paragraph 4]. The probation terms appear following the Committee's Order and require a practice monitor [Probation Term 3] and restrict the Respondent to practice in a group setting during the probation [Probation Term 4]. The Committee also limited the Respondent's License permanently to ban the Respondent from prescribing controlled substances. The Committee also limited the Respondent's License permanently to ban the Respondent from prescribing controlled substances [Committee Order Paragraph 5]. Finally, the Committee mandated that the Respondent complete 50 hours continuing medical education (CME) in the area of pharmacology in each of the three years following the Committee's Determination, with at least ten hours per year on the topics of controlled substances or medicine interactions [Committee Order Paragraph 6].

The Committee noted that Patients A to D were difficult persons to treat given their histories, coexisting medical conditions and chronic pain. The Committee also wrote that they appreciated the population and volume of patients to whom the Respondent provided care and the steps taken within Long Pond to lower the number of the Respondent's patients on chronic opiates. The Committee concluded, however, that these factors failed to excuse the acts and omissions that resulted in so many sustained charges. The Committee found, from Dr. Salamone's testimony, that the Respondent had made great strides in switching from paper to electronic record keeping and that many physicians experienced difficulties in making that transition. Although the Committee found the improvements commendable, they found the improvement insufficient to excuse the potentially dangerous lack of information in the Respondent's medical records at issue in this proceeding

Review History and Issues

The Committee rendered their Determination on October 23, 2019. This proceeding commenced on October 29, 2019, 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 December 12, 2019.

The Petitioner requests that the ARB Overturn the Committee and revoke the Respondent's License. The Petitioner contends that the penalty the Committee imposed is not commensurate with the nature of the misconduct and that the penalty fails to protect patients adequately or provide appropriate deterrence. In the alternative, if the ARB declines to revoke, the Petitioner requests that the ARB modify three provisions in the limitation and probation. The Petitioner contends that the limitation should also prohibit the Respondent from administering, dispensing and ordering controlled substances, in addition to prescribing. Further, the Petitioner

proposes modifying the probation terms to remove a sentence from Probation Term 3 that reads: "The purpose of the monitor shall be to review the records of the Respondent". The Petitioner contends that provisions in Probation Term 3.a indicated that the Committee intended that the monitor perform not only record review, but also on-site observation. Finally, the Petitioner proposed to expand the CME topics beyond pharmacology and controlled substances. The Petitioner contended that there was an ongoing need for CME addressing record-keeping, patient examination and diagnosis.

The Respondent makes no challenge to the Committee's findings. The Respondent opposes the Petitioner's request for the ARB to impose a greater penalty and argues that the penalty the Committee imposed is consistent with other BPMC penalties imposed in similar cases over the last few years. The Respondent stated no objection to the to expanding the License limitation to include ordering, dispensing and administering controlled substances or to expanding the practice monitor's duties to performing on-site observation of the Respondent's practice. In reply to the Petitioner's proposal on the CME, the Respondent cited to Dr. Salamone's testimony as indicating that the Respondent is now astute in the medical records process, so that CME to better understand pharmacology might be time better spent.

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' briefs. We affirm the Committee's findings on the charges. Neither party challenged those findings. We reject the Petitioner's

request that we overturn the Committee and revoke the Respondent's License. We hold that the penalty the Committee imposed provides protection for the public. The monitoring and CME will assure that Respondent has corrected the deficiencies in his practice Committee. The Committee's decision to reject revocation as the sanction also considered the mitigating factors the Committee discussed, such as the patient population and the patient volume the Respondent handled at Long Pond. We affirm the Committee's Determination to limit the Respondent's License, to suspend the Respondent's License and to place the Respondent on probation following the suspension under terms that appear following the Order in the Committee's Determination. We modify the limitation and the probation terms.

Paragraph 5 in the Committee's Order limited the Respondent's License to prohibit the Respondent from prescribing controlled substances. The Petitioner's brief noted that the statutory and regulatory provisions on controlled substances also permit a practitioner to administer, dispense and order controlled substances. The Petitioner asked that the ARB expand the limitation to those above listed activities in addition to prescribing. The Respondent indicated he had no objection to the expansion, as he understood the prescribing limitation to include ordering, dispensing and administering. The ARB modifies Order Paragraph 5 to limit the Respondent's License permanently such that the Respondent shall not have the authority to prescribe, order, dispense or administer controlled substances.

Paragraph 4 in the Committee's Order placed the Respondent on probation for thirty-three months under the terms that appear following the Order. The final sentence in Probation Term 3 provides that the purpose of the monitor shall be to review the Respondent's records, but Term 3.a. provides for on-site observation to determine if the Respondent's practice is conducted in accordance with generally accepted standards of practice. The Petitioner's Brief 1) argued that

Probation Term 3.a makes clear that the record review is not the monitor's sole focus and 2) requested that the ARB remove the last sentence from Probation Term 3 to avoid limiting the monitor's role artificially. The Respondent's Reply stated no objection to on-site observation of the Respondent's practice. The ARB modifies Probation Term 3 to remove the sentence reading: "The purpose of the practice monitor shall be to review the records of the Respondent".

The Petitioner also requested that the ARB modify Probation Term 3 to add a sentence stating that practice without a monitor during probation would be unauthorized practice. The ARB declines to make that modification. The determination that a licensee has violated a probation term lies initially with a BPMC Committee following a violation of probation hearing.

Paragraph 6 in the Committee's Determination required the Respondent to complete fifty CME hours in the area of pharmacology in each of the three years following the Committee's Determination, with at least 10 hours per year on the topics of controlled substances or medicine interactions. The Petitioner's Brief argued that the CME requirement in Paragraph 6 should address other topics beyond pharmacology and controlled substances and that if the ARB expanded the controlled substances limitation, as the Brief requested, there would be less of an ongoing need for CME regarding controlled substances. The Respondent replied that Dr. Salamone's testimony showed that the Respondent has become so astute in the medical record process that he is now a training specialist. The Respondent suggested that a better understanding of pharmacology could be CME time better spent. The ARB finds it appropriate that the main focus in the CME should remain on pharmacology due to the changing landscape, but we feel that the Respondent should also remain current in medical record keeping. We modify Paragraph 6 in the Committee's Order to provide that the Respondent shall be required to complete fifty

hours CME per year primarily in the area of pharmacology, including medicine interactions, but that at least ten hours CME should address medical record keeping.

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 limit the Respondent's License permanently, to suspend the Respondent's License for thirty-six months, with thirty-three months stayed, and to place the Respondent on probation for thirty-three months following the suspension, under probation terms that appear in the Committee's Determination.
3. The ARB modifies the terms in the limitation and the probation as we specified in the above Determination.

Steven Grabiec, M.D.
Linda Prescott Wilson
Jill Rabin, M.D.

In the Matter of Sudipt Sureshchandra Deshmukh, M.D.

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

Dated: 6 March, 2020




Linda Prescott Wilson

In the Matter of Sudipt Sureshchandra Deshmukh, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Deshmukh.

Dated: 3/4/, 2020

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Steven Grabiec, M.D.

In the Matter of Sudipt Sureshchandra Deshmukh, M.D.

Jill Rabin, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Deshmukh.

Dated: March 4th, 2020



Jill Rabin, M.D.