



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

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

March 17, 2020

BY EMAIL

John Thomas Viti
Associate Counsel
New York State Department of Health
Bureau of Professional Medical Conduct
90 Church Street, 4th Floor
New York, New York 10007

John G. Martin, Esq.
Garfunkel Wild, P.C.
111 Great Neck Road
Great Neck, New York 11021

RE: In the Matter of Lawrence Womack, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 20-070) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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 solid 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 HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Lawrence Womack, 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. 20-070

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

For the Department of Health (Petitioner): John Thomas Viti, Esq.
For the Respondent: John G. Martin, Esq.

After a hearing below, a BPMC Committee found that the Respondent committed professional misconduct in prescribing controlled substances and in failing to reply to a request for treatment records. The Committee voted to censure and reprimand the Respondent, to limit his license to practice medicine in New York (License) and to order the Respondent to complete continuing medical education (CME). 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 sustain additional charges. The Respondent asks that the ARB dismiss the controlled substances findings. After reviewing the record below and the parties' review submissions, the ARB affirms the Committee's Determination on the charges and we modify the Committee's Determination on the penalty to remove the License limitation.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(9)(c), 6530(28), 6530(23), 6530(16) and 6530(21)(McKinney Supp. 2020) by committing professional misconduct under the following specifications:

- engaging in conduct that results in a finding that a licensee violated a Federal or state statute or regulation, when the violation would constitute professional misconduct in New York, a violation under EL§ 6530(9)(c) [First Specification];
- failing to respond within thirty days to communications from the Department of Health and to make available any relevant records with respect to an inquiry or complaint about the licensee's professional misconduct, a violation under EL§ 6530(28) [Second Specification];
- revealing personally identifiable facts, data or information obtained in a professional capacity without prior patient consent, a violation under EL§ 6530(23) [Third Specification];
- willful or grossly negligent failure to comply with substantial provisions of Federal, state or local laws, rules or regulations governing the practice of medicine, a violation under EL§ 6530(16) [Fourth Specification] and
- willfully making or filing a false report or failing to file a report required by laws or by the Department of Health or the Education Department, a violation under EL§ 6530(21) [Fifth Specification].

The Petitioner withdrew the Fifth Specification following the hearing. The Committee rendered their Determination on the other Specifications on August 5, 2019.

The First Specification charged that the Respondent engaged in conduct that resulted in a finding the Respondent violated a Federal or state statute or regulation when the violation would amount to professional misconduct in New York. The Committee found that the United States commenced a civil action against the Respondent in November 2014 seeking penalties and

injunctive relief under the Controlled Substances Act (Civil Action). The complaint in the Civil Action alleged that, between January 2011 and July 2013, the Respondent wrote 241 prescriptions for the Schedule II controlled substances oxycodone, methadone and fentanyl, without a legitimate medical purpose in the usual course of professional practice. The complaint alleged that such conduct violated Title 21 U.S.C. § 829(a) and Title 21 C.F.R. § 1306.04(a).

The Respondent and the United States entered into a consent judgment to end the civil action (Consent Judgment) on October 14, 2015. The Respondent agreed to be permanently enjoined from prescribing, dispensing, administering or distributing a Schedule II controlled substance. The Consent Agreement allows the Respondent to so prescribe for a patient who is an in-patient at a hospital while he is working on the premises at that hospital, but specifically prohibits the Respondent from prescribing a Schedule II controlled substance to a patient in a nursing home. The Respondent agreed further that he was enjoined, for a five-year period commencing on October 14, 2015, from prescribing, dispensing, administering or distributing a Schedule III controlled substance, except that the Respondent could prescribe testosterone and Tylenol with codeine to treat patients.

The Second Specification charged the Respondent with failure to respond and failure to provide records. The Respondent admitted that he received written communications from the Department requesting patient files which related to the Consent Agreement. He admitted further that he failed to respond and failed to produce the requested records [Committee Findings of Fact 8 and 9].

The Third and Fourth Specifications both concerned charges that in May 2017 over 500 medical records and medical waste from the Respondent's office were found in a vacant lot and an abandoned building in the Town of Islip, New York. The Department alleged that the Respondent revealed personally identifiable facts, data or information and that the Respondent failed to dispose properly of regulated medical waste. The Department did not charge that the Respondent dumped the medical records and the waste but argued that the Respondent was responsible to or at least could/should have done more to secure the medical waste and protect

the records. The Respondent testified at hearing that he installed locks with unreproducible keys and periodically visited the premises where the records and waste were stored.

The Committee found the Respondent's testimony credible and persuasive proof that the Respondent took reasonable efforts to secure the premises and, therefore, could not be held accountable for the dumping and any consequences that arose therefrom. The Committee's Determination noted that there was no police investigation and it was never determined who dumped the records and waste, which occurred around the time of the foreclosure on the Respondent's medical office building. The Committee noted that they credited the Respondent's testimony that he first learned of the foreclosure at the medical building where the records and medical waste were stored when the Respondent heard about the foreclosure from the Department.

The Committee dismissed the Third and Fourth Specifications and sustained the First and Second Specifications. On the First Specification, the Committee found that the Federal Civil Suit was an adjudication that was resolved by a stipulation or agreement and that the violation resolved would constitute professional misconduct. The Committee found further that the lifetime enjoinder on Schedule II Controlled Substances and the five-year enjoinder on Schedule III Controlled Substances constituted disciplinary action. On the Second Specification, the Respondent admitted the violation at hearing. The Committee rejected the Petitioner's request for license revocation as a sanction. The Committee voted to censure and reprimand the Respondent, to limit the Respondent's License consistent with the Consent Judgment's enjoinders and to require the Respondent to take an additional ten hours continuing medical education (CME) above and beyond the three hour newly required CME on controlled substances.

Review History and Issues

This proceeding commenced on August 16 and 19, 2019, when the ARB received both parties' Notices requesting Review. The record for review contained the Committee's

Determination, the hearing record, both parties' briefs and both parties' reply briefs. The record closed when the ARB received the reply briefs on November 4, 2019.

The Petitioner asked the ARB to modify the Determination by the Committee. The Petitioner argued that the Committee's Administrative Officer erred in allowing the Respondent to file an answer to the Statement of Charges on January 4, 2019. The Petitioner wrote that PIIL § 230(10)(c)(2) required the Respondent to file an answer no less than ten days prior to the original November 20, 2018 hearing date. Under the statute, the failure to file an answer means that the charges are deemed admitted, so the Committee should have deemed the Third and Fourth Specifications admitted rather than dismiss the Specifications. Further, the Petitioner argued that the facts and testimony in the case established that the Respondent knew for two years that his office building was in foreclosure yet did nothing. The Petitioner claimed that the Respondent had a full year to secure the records and medical waste but failed to do so. The Petitioner also alleged error by the Committee for crediting the Respondent's testimony on securing the records and waste. Finally, the Petitioner argued that the Committee imposed an inappropriate penalty that failed to protect the public. The Petitioner argued that the Respondent's failure to respond to the request for records and provide requested records amounted to serious misconduct. The Petitioner contended that the penalties imposed for the controlled substances merely reiterated the enjoinders under the Consent Judgment. The Petitioner asked the ARB to revoke the Respondent's License.

The Respondent replied that PIIL § 230(10)(f) allows a Committee to adjourn a first hearing day. The Committee did grant such an adjournment in this case to dates in January 2019, so the Respondent argues that he filed a timely answer on January 4, 2019. The Respondent argued that the Committee erred in finding that the Consent Judgment was a disciplinary action

that resulted from an adjudicatory proceeding. The Respondent argued that the Consent Judgment from a civil case provides no basis for a finding of misconduct under EL § 6530(9). The Respondent asked that the ARB overturn the Committee's finding on the First Specification. The Respondent challenged the Petitioner's request for an increase in the sanction and argued that the sanctions the Committee imposed were more than adequate.

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. The ARB affirms the Committee's Determination on the charges and affirms the Committee's Determination to censure and reprimand the Respondent and to require the Respondent to complete 10 hours CME. The ARB overturns the controlled substance limitations that mirror the enjoinders under the Consent Judgment.

The ARB denies the Petitioner's request that we deem the charges admitted. Although PHL § 230(10)(c)(2) does require the Respondent to file an answer by 10 days before the first hearing day, PHL § 230(10)(f) authorizes the Committee to adjourn the first hearing date. The Committee adjourned the first hearing day in this case, so the Respondent filed a timely answer. The Petitioner's Brief argued that an adjournment should not be the basis to cure a default. Neither PHL § 230(10)(c)(2) nor PHL § 230(10)(f), however, contain any such limitation on the Committee's authority to grant adjournments in the first hearing day.

The Department also challenged the Committee's Determination to dismiss the Third and Fourth Specifications which related to dumping medical waste and patient records. The Petitioner alleged error by the Committee for crediting the Respondent's testimony and finding that the Respondent took reasonable efforts to secure the building that housed the medical records and the waste. The ARB defers to the Committee as the fact finder in the Committee's findings on credibility. The Petitioner also argued the testimony and evidence were irrefutable that the Respondent acts and omissions resulted in the exposure of the medical records and the improper dumping of the medical waste. The ARB sees no findings of facts in the Committee's Determination, however, that provide a basis for sustaining the Third and Fourth Specifications and the ARB lacks any authority to make new findings. Under PHL §§ 230(10)(g)(1) and 230-c(4)(b), a committee makes findings of fact and the ARB determines whether the committee's determination on charges and penalty are consistent with findings of fact and conclusions of law. The ARB concludes that the Committee's findings on the Respondent's credibility are consistent with their Determination to dismiss the Third and Fourth Specifications.

The Respondent challenged the Committee's Determination to sustain the First Specification. Under EL §6530(9)(c) professional misconduct includes a guilty finding in an adjudicatory proceeding of violating a state or Federal statute or regulation pursuant to a final decision or determination or after a resolution by stipulation or agreement, when the violation would constitute misconduct in New York. The Respondent ended the Civil Action by stipulation in the Consent Judgment. The Respondent argues, however, that a civil lawsuit is not an adjudicatory proceeding and the Consent Judgment provides no basis for sustaining a misconduct finding pursuant to EL §6530(9)(c). In support of that argument, the Respondent's

brief cited to Matter of Kee Yee Shum v. Daines, 68 A.D.3d 1503; 891 N.Y.S.2d 549 (3rd Dept. 2009), a decision by the New York Supreme Court Appellate Division.

In Kee, a physician challenged the determination by a BPMC Committee that a physician was subject to discipline under EL §6530(9)(c) due to a settlement agreement in a civil action under the Federal False Claims Act. The Appellant Division overturned that determination and ruled that a stipulation would only provide grounds for a disciplinary action under EL §6530(9)(c) if the stipulation in question resolved an adjudicatory proceeding. The Court found the settlement agreement in that case was not grounds for a disciplinary action pursuant to EL §6530(9)(c). In Footnote #2 to the decision, the Appellate Division wrote that State Administrative Procedure Act § 102(3) defines an adjudicatory proceeding as an activity which is neither a rule making proceeding nor an employee disciplinary matter, “which would seemingly exclude a lawsuit from its scope”. The Court later contradicted that point in the same Footnote when it wrote:

“Given the lack of discussion on that point by the parties, however, we will assume without deciding that a lawsuit could constitute an adjudicatory hearing”

The ARB finds the Kee decision fails to clarify whether the Consent Judgment in this case constitutes grounds for a disciplinary action under EL §6530(9)(c).

The Committee read EL §6530(9)(c) to contain two separate grounds for discipline: either following an adjudicatory proceeding or after resolution of a proceeding by stipulation or agreement. The Committee sustained the First Specification upon finding that the Consent Judgment constituted a stipulation or agreement and that the enjoinders regarding controlled substances constituted a disciplinary action. The ARB affirms the Committee’s Determination on the First Specification.

As a penalty, the Committee voted to limit the Respondent's License with the same controlled substances enjoinders that bind the Respondent already under the Consent Judgment. The Petitioner challenged the limitation as merely reiterating the prohibitions from the Consent Judgment and requested that the ARB revoke the Respondent's License. The ARB agrees that the limitation duplicates the enjoinders under the Consent Agreement. We see no need, however, for any additional sanction and we see no need to duplicate the enjoinders that already bind the Respondent. We modify the Committee's Determination to remove the License limitation.

The Committee also sustained the Second Specification that charged the Respondent failed to respond to written communications from the Department of Health and failed to provide demanded records. The Respondent admitted to the misconduct. The Committee voted to censure and reprimand the Respondent and ordered that the Respondent take an additional 10 hours CME above and beyond the newly required three-hour controlled substance CME. The ARB finds the Censure and CME provide an appropriate sanction for the Respondent's misconduct under the Second Specification.

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 modifies the Committee's Determination to remove the License limitation.
3. The ARB affirms the Censure and Reprimand and the CME requirement.

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

In the Matter of Lawrence Womack, M.D.

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

Dated: 6 March, 2020

A black rectangular redaction box covers the signature of Linda Prescott Wilson. There are some faint handwritten marks above the box.

Linda Prescott Wilson

In the Matter of Lawrence Womack, M.D.

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

Matter of Dr. Womack.


Dated: 3/4/ 2020


Steven Grabiec, M.D.

In the Matter of Lawrence Womack, M.D.

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

Dated: March 4th, 2020



Jill Rabin, M.D.