

IN THE MATTER
OF
MAGDA LEE BINION, M.D.

ORDER

BPMC No. #02-332

Upon the proposed agreement of **MAGDA LEE BINION, M.D.**, (Respondent), for Modification and Supplement amending Administrative Review Board (ARB) Determination and Order 02-332, which is made a part, hereof, it is agreed and

ORDERED, that the application and the provisions thereof are adopted, hereby, and so ORDERED, and it is further

ORDERED, that this Order shall be effective upon issuance by the Board, either by mailing of a copy of this Consent Order, either by first class mail to Respondent at the address in the attached Consent Agreement or by certified mail to Respondent's attorney, or upon facsimile transmission to Respondent or Respondent's attorney, whichever is first.

SO ORDERED.

DATED: 12-12-2008

Redacted Signature

KENDRICK A. SEARS, M.D.
Chair
State Board for Professional
Medical Conduct

IN THE MATTER
OF
MAGDA LEE BINION, M.D.

MODIFICATION OF AND
SUPPLEMENT TO
ADMINISTRATIVE REVIEW
BOARD (ARB)
DETERMINATION AND
ORDER BPMC NO. 02-332

The following Modification and Supplement is submitted to the Office of Professional Medical Conduct for its acceptance and adoption as an agreed modification of and supplement to Administrative Review Board (ARB) and Order BPMC No. 02-332 (hereinafter "Original Order"). This Modification and Supplement has been signed by Respondent, attorney for Respondent, and counsel for the Department of Health.

Administrative Review Board (ARB) Determination and Order BPMC No. 02-332, is, modified and supplemented, hereby, to delete the paragraph on page 5 in the Original Order that states:

We vote to limit the Respondent's license, pursuant to N.Y. Pub. Health Law §230-a(6), to restrict 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.

And to substitute, therefore, the following paragraphs in the Original Order:

Prior to returning to the active practice of medicine, Respondent shall obtain a clinical competency assessment performed by a program for such assessment as directed by the Director of OPMC. Respondent shall cause a written report of such assessment to be provided directly to the Director of OPMC within sixty (60) days of the effective date of this Order.

At the direction of the Director and within 60 days following the completion of the clinical competency assessment (CCA) Respondent shall identify a Preceptor, preferably a physician who is board certified in the same specialty, to be approved in writing, by the Director of OPMC. Respondent shall cause the Preceptor to:

- a. Develop and submit to the Director, of OPMC for written approval, a remediation plan, that addresses the deficiencies/retraining recommendations, if any identified in the CCA. Additionally, this proposal shall establish a timeframe for completion of the remediation program. No plan or program shall be required if no deficiencies/retraining recommendations are identified.
- b. Submit progress reports at periods identified by OPMC certifying whether Respondent is fully participating in the personalized continuing medical Education program and is making satisfactory progress towards the completion of the approved remediation plan.
- c. Report immediately to the Director of OPMC if Respondent withdraws from the program and report promptly to OPMC any significant matter of non-compliance by Respondent.
- d. At the conclusion of the program, submit to the Director of OPMC a detailed assessment of the progress made by Respondent toward remediation of all identified deficiencies.

Respondent shall be solely responsible for all expenses associated with these terms including fees, if any, for the clinical competency assessment, the personalized continuing medical education program, or to the monitoring physician.

Respondent's practice of medicine is permanently restricted from directly billing for any services provided by Respondent.

Respondent shall attest to compliance with the prescribed practice restriction(s) by signing and submitting, to the Director of OPMC, a Practice Restriction Declaration, as directed by the Director.

Respondent shall cause the administrator(s) of all hospitals and other health care facilities or practices with which Respondent is affiliated to submit a letter to the Director of OPMC attesting to Respondent's compliance with the specified restriction(s) at each location.

Respondent's practice of medicine is permanently restricted from providing anesthesia to patients undergoing reproductive or fertility services.

Respondent shall be placed on three (3) years probation in accordance with the Terms and Conditions in Exhibit B, attached, hereto.

The above changes are agreed to by and between the undersigned and are submitted to the Office of Professional Medical Conduct for acceptance and incorporation into Administrative Review Board (ARB) Determination and Order BPMC No. 02-232.

DATE: 11/20/08

Redacted Signature

MAGDALEE BINION, M.D.
Respondent

DATE: 11/21/08

Redacted Signature

PETER J. MILLOCK
Attorney for Respondent

DATE: 30 November 2008

Redacted Signature

ROBERT BOGAN
Associate Counsel

DATE: 12/11/08

Redacted Signature

KEITH W. SERVIS
Director
Office of Professional Medical Conduct

EXHIBIT "B"

Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by N.Y. Educ. Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to N.Y. Pub. Health Law § 230(19).
2. Respondent shall maintain active registration of Respondent's license (except during periods of actual suspension) with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
3. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299 with the following information, in writing, and ensure that this information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; all current and past affiliations and/or privileges, with hospitals, institutions, facilities, medical practices, managed care organizations, and/or applications for such affiliations and/or privileges; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.
4. Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
5. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of 30 consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive 30 day period. Respondent shall then notify the Director again at least 14 days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in Exhibit "A" or as are necessary to protect the public health.

6. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records, hospital charts, and/or electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
7. Respondent shall adhere to federal and state guidelines and professional standards of care with respect to infection control practices. Respondent shall ensure education, training and oversight of all office personnel involved in medical care, with respect to these practices.
8. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.
9. Respondent shall make available for review by a third party billing monitor any and all office and accounts records, as directed by OPMC. Such billing monitor shall be proposed by Respondent and approved, in writing, by the Director, OPMC. Respondent shall fully cooperate in the review process. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care.
 - a. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the billing monitor.
 - b. Respondent shall cause the billing monitor to report quarterly, in writing, to the Director of OPMC.

Any perceived deviation of accepted standards of medical care or refusal to cooperate with the billing monitor shall be reported within 24 hours to OPMC.

10. Respondent shall comply with this Consent Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or a violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.



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

~~Ty~~ Tyone I. 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):

Paul Robert Maher, Esq.

For the Respondent:

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

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.

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.

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.