

IN THE MATTER
OF
HILARY B. KERN, M.D.

ORDER
BPMC No. #08-02

Upon the proposed agreement of **HILARY B. KERN, M.D.**, (Respondent), for Modification and Supplement amending Administrative Review Board (ARB) Determination and Order No. 08-02, that 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, by mailing of a copy of this Order, either by first class mail to Respondent at the address in the attached Agreement or by certified mail to Respondent's attorney, or upon facsimile transmission to Respondent or Respondent's attorney, whichever is first.

SO ORDERED.

DATE: 2-7-2009

Redacted Signature

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

IN THE MATTER
OF
HILARY B. KERN, M.D.

MODIFICATION OF AND
AND SUPPLEMENT
TO ADMINISTRATIVE
REVIEW BOARD (ARB)
DETERMINATION AND
ORDER BPMC NO. 08-02

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) Determination and Order BPMC No. 08-02 (hereinafter "Original Order"). The Modification and Supplement has been signed by Respondent, attorney for Respondent, and counsel for the Department of Health.

ARB Determination and Order BPMC No. 08-02, is modified and supplemented, hereby, as follows:

To delete the following paragraphs on page 10:

2. The ARB affirms the Committee's Determination to place the Respondent on probation under the terms that appear in the Committee's Order, but we modify the Committee's Determination by increasing the probation period from two years to five years.
3. The ARB modifies the Committee's Determination further by limiting the Respondent's License to practice in a government licensed or operated health care facility.

Substituting, therefor:

2. The Hearing Committee's Determination to place Respondent on probation is amended, in that Respondent shall be placed on three (3) years probation. The Terms of Probation are attached, hereto, and are incorporated into this Order.

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 the Original Order.

DATE: 1/17/2009

Redacted Signature

HILARY B. KERN, M.D.
Respondent

DATE: 1/27/2009

Redacted Signature

ROBERT B. HILLE
Attorney for Respondent

DATE: 03 February 2009

Redacted Signature

ROBERT BOGAN
Associate Counsel

DATE: 2/6/09

Redacted Signature

KEITH W. SERVIS
Director
Office of Professional Medical Conduct

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 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 privileges, with hospitals, institutions, facilities, medical practices, managed care organizations, and applications for such affiliations and privileges; and all investigations, arrests, charges, convictions and disciplinary actions by any local, state and federal agency, institution and facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.

3. 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 Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.

4. 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 the Statement of Charges, set forth in Appendix I, or as are necessary to protect the public health.

5. 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.

6. 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.

7. 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.

8. Respondent shall make available for review by a third party billing monitor any and all office and accounts records for review by a billing monitor. Such billing monitor shall be proposed, in writing, by Respondent and approved, in writing, by the Director, OPMC. The billing monitor shall examine a random selection of 20% of patients treated in New York State during the previous quarter. Respondent shall fully cooperate in the review process. The review will determine whether Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care and whether the Respondent's billings are supported by the medical records.

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.

9. Within thirty days of the effective date of the order, Respondent shall practice medicine only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor") proposed by Respondent and subject to the written approval of the Director of OPMC.

- a. Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection (no fewer than 20) of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.
- b. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.
- c. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
- d. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.

10. Respondent shall comply with terms 8 and 9 above when practicing medicine outside of a licensed health care facility.

11. Respondent shall notify the Director in writing, within sixty (60) days prior to any volunteer medical services. The volunteer medical services are subject to the prior written approval of the Director of OPMC. The services may be exempt from the monitoring in paragraph 9 at the discretion of the Director of OPMC.

12. Respondent shall comply with this 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.

Public



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

June 16, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robert Bogan, Esq.
Division of Legal Affairs
Office of Professional Medical Conduct
433 River Street - 4th Floor
Troy, New York 12180-2299

Robert B. Hille, Esq.
Kalison, McBride, Jackson & Murphy
The Helmsley Building
230 Park Avenue, 10th Floor
New York, New York 10169

Hilary B. Kern, M.D.
30 East 40th Street - #1200
New York, New York 10016

RE: In the Matter of Hilary B. Kern, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 08-02) 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, Acting Director
Bureau of Adjudication

JFH:nm

Enclosure

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

COPY

In the Matter of

Hilary B. Kern, 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. 08-02

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

For the Department of Health (Petitioner): Robert Bogan, Esq.
For the Respondent: Robert B. Hille, Esq.

The Respondent holds a license to practice medicine in New York State (License), as well as a medical license in New Jersey. Following a hearing below, a BPMC determined that the Respondent engaged in professional misconduct in New Jersey that made the Respondent liable for disciplinary action against the Respondent's License. The Committee voted to place the Respondent on probation for two years, under conditions that include monitoring of the Respondent's medical and billing records. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), both the Petitioner and the Respondent ask the ARB to overturn or modify the Committee's Determination. After reviewing the hearing record and the review submissions by the parties, the ARB votes to modify the Committee's Determination. The ARB affirms the Committee's Determination to place the Respondent on probation under the terms that appear in the Committee's Order, but the ARB increases the time on probation from two years to five years. In addition to the probation, the ARB limits the Respondent to practice only in a government licensed or government operated health care facility.

Committee Determination on the Charges

The Committee conducted a hearing in this matter under the expedited hearing procedures (Direct Referral Hearing) in PHL § 230(10)(p). In the hearing, the Petitioner alleged that the Respondent violated New York Education Law (EL) § 6530(9)(d)(McKinney 2008) by engaging in conduct in another state that resulted in a professional disciplinary action and that would constitute professional misconduct if the conduct occurred in New York State. The charges alleged that the Respondent's conduct, if committed in New York, would have constituted professional misconduct as:

- practicing medicine fraudulently, a violation under EL § 6530(2);
- practicing medicine with negligence on more than one occasion, a violation under EL § 6530(3);
- practicing medicine with gross negligence, a violation under EL § 6530(4);
- practicing medicine with incompetence on more than one occasion, a violation under EL § 6530(5);
- practicing medicine with gross incompetence, a violation under EL § 6530(6);
- failing to maintain accurate patient records, a violation under EL § 6530(32); and,
- ordering excessive tests, treatments or use of facilities, a violation under EL § 6530(35).

In a Direct Referral Proceeding, the statute limits the Committee to considering the nature and the extent of the penalty to impose against the licensee, Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee demonstrated that the New Jersey Department of Law and Public Safety, Division of Consumer Affairs, Board of Medical Examiners (New Jersey Board) suspended the Respondent's New Jersey medical license for two years, one year actual and one year stayed, and placed the Respondent on probation for the year of the stayed suspension. The New Jersey Board also required the Respondent to pay costs, fees, a civil penalty and restitution to an insurance company. The New Jersey Board's Order also required the Respondent to complete courses in medical record keeping and professional ethics and to

complete a preceptorship in the basic as well as practical skills and application of electrodiagnostic testing (EMG) and physiatry. The Order indicated that the Respondent:

- failed to provide information mandated by the New Jersey Health Consumer Information Act;
- sought and accepted patient referrals for EMG without acquiring the information necessary to determine the necessity for the referral;
- failed to maintain records that disclosed medical history, physical examinations and testing that justified ordering the EMG;
- billed for consultation services based on a standard battery of testing, with no consultation report prepared for the referring physician, with the Respondent's notes omitting all required elements of a consultation, and with necessary muscles left untested and other muscles tested which should not have been;
- billed third parties for consultations that failed to comply with the billing codes the Respondent used;
- failed to tailor the EMG to the patient's specific circumstances;
- allowed unlicensed technicians to conduct tests and failed to identify those technicians in the patient chart;
- based interpretations on incompletely performed and unreliable tests;
- failed to address the possibility of a conduction block, a potentially serious condition;
- failed to test the number and assortment of muscles essential to a reliable diagnosis and required by the billing code the Respondent used;
- prepared interpretations claiming abnormalities, without support from data and which placed the patients at risk of unnecessary medical or surgical care;
- failed to recommend treatment despite claiming to have identified pathology; and,
- billed in a manner that constituted unbundling or that was excessive given the tests performed.

The Committee determined that the Respondent's conduct, if committed in New York, would have amounted to:

- practicing with negligence on more than one occasion;
- practicing with incompetence on more than one occasion;
- failing to maintain accurate patient records; and,
- ordering excessive tests or treatments unwarranted by patient condition.

The Committee dismissed allegations that the Respondent's conduct would also have amounted to practicing fraudulently, practicing with gross negligence or practicing with gross incompetence.

The Committee voted to place the Respondent on probation for two years under the terms that appear in the Committee's Order. The Committee rejected the Petitioner's request that the Committee revoke the Respondent's License. The Petitioner argued for revocation at hearing on the allegation that the Respondent practiced fraudulently in New Jersey. The Committee determined that the record failed to support the fraud allegation. The Committee noted that the New Jersey Order faulted the Respondent's billing for consultation and EMG services, but the Committee rejected the conclusion that the Respondent's errors resulted from fraud rather than carelessness, ignorance or honest mistakes. The Committee also considered that the Respondent had no disciplinary problems prior to the New Jersey Order. The Respondent's New Jersey preceptor, Joseph Feinberg, M.D., testified that the Respondent's efforts to improve her knowledge have succeeded. Dr. Feinberg stated that the Respondent could be trusted to practice competently and safely. The New Jersey Board also terminated the suspension on the Respondent's New Jersey medical license in December 2007. The Committee concluded that the Respondent has become a more skillful physician with a greater awareness of her responsibilities. The Committee stated that the Respondent's improvement should not be rewarded with revocation now that New Jersey has expressed confidence in the Respondent by restoring her New Jersey medical license.

Review History and Issues

The Committee rendered their Determination on January 2, 2008. This proceeding commenced on January 16, 2008, 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 brief and reply brief. The record closed when the ARB received the reply brief on February 19, 2008.

The Petitioner argues that the New Jersey Order indicated that the Respondent's conduct in that state violated provisions of the New Jersey Code that involve the employment of dishonesty, fraud, deception, misrepresentation, false promise or false premise. The Petitioner argues further that the Order lists numerous acts by the Respondent that amount to practicing medicine with gross negligence or gross incompetence. The Petitioner argued further that the Respondent attempted to deny guilt in her hearing testimony and that the Respondent showed remorse only for being caught. The Petitioner asked the ARB to revoke the Respondent's License, or in the alternative, to amend the provisions of the probation the Committee imposed.

The Respondent asks that the ARB dismiss the charges against the Respondent on the grounds that neither the ARB nor a Committee may rely on an out-of-state consent order as the basis for licensure action in New York. In the alternative, the Respondent requests that the ARB consider all the evidence she submitted and affirm the Determination by the Committee.

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 Determination that the New Jersey Board's findings made the Respondent liable for disciplinary action against the Respondent's License. We affirm the Committee's Determination to place the Respondent on probation under the terms that appear in the Committee's Order, but we increase the time period for the probation from two years to five years. We modify the Committee's Determination to limit the Respondent's License to practice in a health care facility licensed by or operated by the government.

The ARB agrees with the Committee that the New Jersey Order makes the Respondent liable for action against her License under EL § 6530(9)(d). Another state's consent order can form the basis for disciplinary action under § 6530(9)(d), if under the consent order, the physician has accepted a substantial enough penalty, such as a suspension or surrender, Hatfield v. Dept. of Health, 245 A.D.2d 703, 665 N.Y.S.2d 755 (3rd Dept. 1997); Sternberg v. DeBuono, 235 A.D.2d 945, N.Y.S.2d (3rd Dept. 1997). The Courts in Sternberg and Hatfield held that a Committee or the ARB could infer from the acceptance of the substantial penalty that the allegations held some validity. In the New Jersey Order, the Respondent acknowledged that the New Jersey Attorney General possessed substantial evidence to prove allegations against the Respondent and the Respondent accepted as a penalty an actual suspension of her New Jersey medical license and her State Controlled Drug Registration. The Respondent also agreed to pay

\$14,096.00 in costs and fees, \$12,576.75 in restitution and a \$5,000.00 civil penalty. The Respondent agreed further to complete continuing medical education in record keeping and ethics and to complete a rigorous preceptorship in basic and clinical sciences as well as practical skills and EMG and physiatry application. The Respondent also conceded in her testimony at the Direct Referral Hearing that she agreed with certain charges under the New Jersey Order [Hearing transcript page 21]. The ARB infers from the penalty the Respondent accepted and the Respondent's testimony that the New Jersey charges held validity. The ARB holds that the Respondent's conduct in New Jersey would constitute misconduct in New York as practicing with negligence on more than one occasion, practicing with incompetence on more than one occasion, failing to maintain accurate records and ordering excessive tests or treatments unwarranted by a patient's condition. The ARB also affirms the Committee's Determination to dismiss the fraud, gross negligence and gross incompetence charges. The New Jersey Order contained no findings that the Respondent made a knowing representation, so no basis exists for a finding that the Respondent practiced fraudulently. The Order also made no reference to egregious conduct necessary for a finding of gross negligence and gross incompetence.

The New Jersey Order demonstrates that the Respondent engaged in misconduct in billing, in record keeping, in conducting EMG studies, in obtaining information, in making interpretations and in failing to recommend treatment. The sanction for that misconduct must address each aspect of the misconduct. First, the ARB modifies the Committee's Determination to limit the Respondent's License to practice only in a government licensed facility, such as a hospital holding licensure under PHL Article 28, or in a government operated facility, such as a hospital or infirmary operated by the United States Veteran's Administration, the United States Defense Department, or the United States Public Health Service. The ARB places that limitation

on the Respondent's License to remove her from responsibility for billing. A great deal of the Respondent's New Jersey misconduct involved billing issues. In a government licensed or operated facility, there are clear lines of authority and supervision and a separation of functions. A physician can concentrate on patient care and leave billing responsibilities to others at the facility. Next, the ARB must assure that the measures that the New Jersey Board took in their Order have corrected the Respondent's deficiencies in record keeping, in conducting EMG studies, in obtaining information, in making interpretations and in failing to recommend treatment. The ARB agrees that we should place the Respondent on probation, under the terms in the Committee's Order, to assure that the continuing education, the preceptorship and the other New Jersey sanctions have corrected the practice related deficiencies. The ARB finds two years too short a time period in which to assure that the Respondent can now practice safely and according to accepted medical standards. The ARB modifies the Committee's Determination to increase the period on probation from two years to five years.

The ARB rejects the Petitioner's request that we revoke the Respondent's License. The record contains no proof that the Respondent engaged in either fraudulent or egregious misconduct. The ARB concludes that probation and the License limitation will provide protection to the public and allow the Respondent to continue in practice.

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 place the Respondent on probation under the terms that appear in the Committee's Order, but we modify the Committee's Determination by increasing the probation period from two years to five years.
3. The ARB modifies the Committee's Determination further by limiting the Respondent's License to practice in a government licensed or operated health care facility.

Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Linda Prescott Wilson
Therese G. Lynch, M.D.

In the Matter of Hilary B. Kern, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kern.

Dated: 13 June, 2008

Redacted Signature

Linda Prescott Wilson


In the Matter of Hilary B. Kern, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kern.

Dated: May 27, 2008

Redacted Signature


Thea Graves Pellman

In the Matter of Hilary B. Kern, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kern.

Dated: 5/22, 2008

Redacted Signature

A horizontal line representing a redacted signature, with some faint, illegible markings above it.

Datta G. Wagle, M.D.

In the Matter of Hilary B. Kern, M.D.

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

Dated: May 23, 2008

Redacted Signature


Stanley L. Grossman, M.D.

In the Matter of Hilary B. Kern, M.D.

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

Dated: May 21, 2008

Redacted Signature


Therese G. Lynch, M.D.