



Department of Health

ANDREW M. CUOMO
Governor

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

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

January 28, 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Lee Davis, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

Edgar A. Guess, Jr., M.D.


RE: In the Matter of Edgar A. Guess, Jr., M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 16-026) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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 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
Office of Professional Medical Conduct
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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah
Enclosure

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

COPY

IN THE MATTER
OF
EDGAR A. GUESS, Jr., M.D.

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DETERMINATION
AND
ORDER

BPMC #16-026

A hearing was held on December 16, 2015, at the offices of the New York State Department of Health ("Department").¹ Pursuant to Section 230(10)(e) of the Public Health Law ("PHL"), **WILLIAM TEDESCO, M.D.**, Chairperson, **DENNIS P. ZIMMERMAN, M.S., CRC**, and **ROBERT CATALANO, M.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **DAWN MacKILLOP-SOLLER, ESQ., ADMINISTRATIVE LAW JUDGE ("ALJ")**, served as the Administrative Officer.

The Department appeared by Lee Davis, Esq. A Notice of Referral Proceeding and Statement of Charges dated September 16, 2015, and September 12, 2015, respectively, were served upon Edgar A. Guess, Jr., M.D. ("Respondent"), who did not appear at the hearing. There were no witnesses at the hearing. The Hearing Committee received and examined documents from the Department and a stenographic reporter prepared a transcript of the proceeding. After consideration of the entire record, the Hearing Committee sustains the charge that Respondent committed professional misconduct by having disciplinary action taken against him by the professional disciplinary agency of another state and the conduct resulting in the disciplinary action would have

¹ The location of the hearing was 150 Broadway, Suite 510, Albany, New York.

constituted misconduct if he had committed that conduct in New York. The Hearing Committee unanimously votes 3-0 to revoke Respondent's license to practice medicine in the State of New York.

BACKGROUND

The Department brought the case pursuant to PHL § 230(10)(p), which provides for an expedited hearing when a licensee is charged solely with a violation of Education ("Educ.") Law § 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The Respondent is charged with professional misconduct pursuant to Educ. Law § 6530(9)(d), "having his or her license to practice medicine revoked, suspended or having other disciplinary action taken..." where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state.

By signing a Stipulated Surrender of License and Order ("Surrender Agreement") with the Medical Board of California ("California Board"), the Respondent was subjected to disciplinary action resulting from allegations of professional misconduct against him. [Ex. 4]. Whether the California Board's disciplinary action constitutes misconduct here hinges on whether the underlying conduct would constitute professional misconduct if committed in New York. The Department charges that the underlying conduct would have constituted negligence on more than one occasion, in violation of Educ. Law § 6530(3), gross negligence, in violation of Educ. Law § 6530(4), and a failure to maintain a record for each patient which accurately reflects their evaluation and treatment, in violation of Educ. Law § 6530(32). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix I. [Ex. 1].

FINDINGS OF FACT

The Findings of Fact were made by the Hearing Committee after a review of the record in this matter. Under PHL § 230(10), the Department had the burden of proving its case by a preponderance of the evidence. The references in brackets refer to exhibits ["Ex."] or transcript pages ["T."]. The following findings and conclusions are the unanimous determinations of the Hearing Committee:

1. Edgar A. Guess, Jr., M.D., the Respondent, was authorized to practice medicine in New York on July 7, 1967, by the issuance of license number 099137, by the Education Department. [Ex. 1, 3].
2. By a Decision and Order effective on April 14, 2015, the California Board adopted a Surrender Agreement signed by Respondent on March 6, 2014, which imposed disciplinary action upon him resulting from allegations of professional misconduct. [Ex. 4].
3. The California Board charged Respondent with prescribing controlled substances to nine patients without adequately performing physical examinations or properly documenting their medical records. Respondent was also charged with failing to provide for treatment plans or drug testing and issuing prescriptions for the same controlled substance, in identical dosage amounts. [Ex. 4].

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

The Hearing Committee concluded that the evidence supports sustaining the charge of having committed misconduct as defined in Educ. Law § 6530(9)(d).

VOTE: Sustained (3-0)

CONCLUSIONS OF LAW

The Respondent did not appear at the hearing in person or by counsel. The Department submitted the Affidavit of Service, which states that on October 1, 2015, the Respondent was personally served with the Notice of Referral Proceeding and Statement of Charges at his last known address in Los Angeles, CA, establishing service pursuant to PHL § 230(10)(d)(i). After considering the documentary evidence concerning service of the Notice of Referral Proceeding and the Statement of Charges, the ALJ ruled that all requirements for proper notice were satisfied and the Board obtained jurisdiction over Respondent. [Ex. 2].

The Department made a motion to have the charges and allegations in the Statement of Charges deemed admitted pursuant to PHL § 230(10)(p), due to Respondent's failure to file a written answer. The Notice of Hearing, Department's Exhibit 1, states at page two the following:

Pursuant to the provisions of N.Y. Pub. Health Law § 230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not later than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted.

After determining that the Notice of Hearing complied with the requirement that a licensee be provided notice pursuant to PHL § 230(10)(p), and concluding that the Respondent failed to file a written answer to the specifications of misconduct and factual allegations in the Statement of Charges dated September 12, 2015, the ALJ ruled at the hearing that the charges were "deemed admitted" under PHL § 230(10)(p). [T. 10; Ex.1].

In addition to the allegations and specifications of misconduct being deemed admitted because Respondent failed to file a written answer, the Department provided the Hearing Committee with evidence to show that in the care and treatment rendered to the nine patients that are the subject of the California Board's Decision and Order, Respondent failed to provide medical rationales for

prescribing controlled substances and failed to perform physical examinations, which placed his patients at risk for harm. The Department's evidence also demonstrated that Respondent's medical record-keeping was deficient.

A. Negligence on More Than One Occasion

Negligence constituting professional misconduct is the "failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances." (Bogdan v. State Bd. for Prof'l Med. Conduct, 195 A.D.2d 86, 88 (3rd Dept. 1993)). Negligence pursuant to New York State Educ. Law § 6530(3) has been found when a physician "repeatedly prescribes habit-forming controlled substances without performing appropriate physical examinations or evaluations necessary for proper diagnosis and treatment of the patients at issue..." and where the patients' medical records are inadequate. (Conteh v. Daines, 52 A.D.3d 994, 996 (3rd Dept. 2008); *See also* (Roumi v. State Bd. for Prof'l Med. Conduct, 89 A.D.3d 1170, 1172 (3rd Dept. 2011))).

The Hearing Committee noted Respondent's breach of the standard of care in his failure to perform appropriate physical examinations on patients prescribed controlled substances, which included Oxycodone. This type of medical practice was considered by the Hearing Committee to prevent Respondent from properly evaluating his patients' complaints, vital signs, and substance abuse histories. It also prevented an assessment of the treatment plan, the effectiveness of prescribed drugs, the existence of any side-effects, and whether prescriptions for highly-addictive controlled substances should be continued. Like California, in cases where physicians prescribe opioid-based drugs, New York requires physicians to perform physical examinations or evaluations at office visits. (Conteh, 52 A.D.3d at 996). Respondent's prescription practices also occurred contemporaneous with his failure to document medical rationales for prescribing such drugs. Similar to California, New York also requires physicians prescribing habit-forming controlled substance prescriptions to take

the time to assess whether prescriptions for controlled substance medications are medically necessary. (Roumi, 89 A.D.3rd at 1172).

The Hearing Committee considered that the purpose behind these requirements is to keep patients who are prescribed controlled substances safe. Had Respondent's conduct occurred in New York, it would have been considered professional misconduct. As such, the Hearing Committee concluded that Respondent's failures would have constituted negligence on more than one occasion, in violation of Educ. Law § 6530(3).

B. Gross Negligence

Gross negligence is established if it can be shown that the physician's errors represent a significant or serious deviation from acceptable medical standards, placing the patient at risk for potentially grave consequences. (Post v. New York State Department of Health, 245 A.D.2d 985, 986 (3rd Dept. 1997); Minielly v. Commissioner of Health, 222 A.D.2d 750, 751-752 (3rd Dept. 1995)). In such cases, it is not required to show that the physician's conduct "posed a foreseeable risk of injury to a particular patient." (Binenfeld, 226 A.D.2d at 937).

Despite Respondent's nine patients presenting with different medical histories and physical complaints, Respondent's prescription practices included issuing the same controlled substance, in identical dosage amounts, to each patient. Such prescription practices in New York are considered gross negligence when it is "common knowledge in the medical community ... that the prescribed drug is widely abused and addictive." (Moyo v. Ambach, 136 A.D.2d 811, 813 (3rd Dept. 1988)). The Hearing Committee considered the addictive nature of the controlled substances Respondent prescribed to his patients, which included Oxycodone in an "inordinately large amount." In addition to this drug being one of the most common and habit-forming short acting opioids, the Hearing Committee noted that conspicuously absent from Respondent's patients' medical records

are physical examination findings and medical rationales for prescribing the drug. The Hearing Committee concluded that Respondent's handling of his patients' prescriptions for controlled substances in this manner placed them at a high risk of harm. Had Respondent's conduct occurred in New York, it would have been considered professional misconduct. As such, the Hearing Committee found that Respondent's conduct would have evidenced gross negligence, in violation of New York Education Law § 6530(4).

C. Failure to Adequately Maintain Patient Records

Deficient medical record keeping forms the basis of a violation of Educ. Law § 6530(32) when a patient's medical record fails to accurately reflect their care and treatment. An example of this type of failure is when a physician fails to document in patient medical records physical examination findings. (Matter of Sidoti v. State Bd. For Prof'l Med. Conduct, 55 A.D.3d 1162, 1166 (3rd Dept. 2008)). The purpose behind that section is to ensure that "meaningful information is recorded in case the patient should transfer to another professional or the treating practitioner should become unavailable." (Mucciolo v. Fernandez, 195 A.D.2d 623, 624 (3rd Dept. 1993)).

The California Board charged Respondent with failing to record in his patients' medical records necessary and important medical information, resulting in inadequate medical record-keeping. In New York, as in California, in cases where patients are prescribed controlled substances, a physician is required to document in his patients' medical files physical examination findings. (Matter of Sidoti, 55 A.D.3d at 1166). The Hearing Committee noted Respondent's failure to fulfill this obligation to each of the nine patients that are the subject of the California Board's Decision and Order. In not documenting physical examination findings, the Hearing Committee considered that important and critical information related to vital signs, adverse reactions, physical signs of addiction or dependence, and reasons for prescriptions, were not recorded. The Hearing

Committee concluded that Respondent's unsafe medical practice was also to the detriment of his patients' other providers, including primary care physicians. Had Respondent's inadequate record keeping occurred in New York, the Hearing Committee determined that it would have constituted professional misconduct pursuant to Educ. Law § 6530(32). As such, the Hearing Committee concluded that Respondent's failure to accurately document his patients' medical records with physical examination findings would have evidenced a violation of New York Educ. Law § 6530(32).

PENALTY DISCUSSION

The Hearing Committee considered the full spectrum of penalties available by statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties, and found that the sustained specifications indicate Respondent's lack of integrity in the use of his medical license to render irresponsible and unsound medical care to patients prescribed controlled substances. Troubling to the Hearing Committee was Respondent's inability to take even the most basic care of his patients by performing physical examinations or recording their medical histories. The Hearing Committee was not convinced that the same prescription practices Respondent exhibited in California would not occur should he decide to practice medicine in New York. As such, the Hearing Committee unanimously concluded that the evidence supports the penalty of revocation of Respondent's New York medical license.

ORDER

IT IS HEREBY ORDERED THAT:

1. The specification of professional misconduct, as set forth in the Statement of Charges, is


SUSTAINED;

2. Respondent's license to practice medicine in the State of New York is hereby **REVOKED**;

3. This Determination and Order shall be effective upon service on the Respondent. Service shall be either by certified mail or upon the Respondent at his last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.


DATED: Albany, New York

11/27/16, 2016


William Tedesco, M.D.
Chairperson

Dennis P. Zimmerman, M.S., CRC
Robert Catalano, M.D.

TO: Edgar A. Guess, Jr., M.D.


Lee Davis, Esq.
Associate Counsel
New York State Department of Health
Bureau of Professional Medical Conduct
Corning Tower Building – Room 2512
Empire State Plaza
Albany, New York 12237

APPENDIX I

IN THE MATTER
OF
EDGAR A. GUESS, JR., M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO: Edgar A. Guess, Jr., M.D.
[REDACTED]

PLEASE TAKE NOTICE THAT:

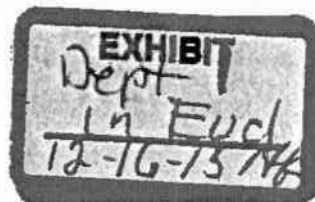
An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §230(10)(p) and N.Y. State Admin. Proc. Act §§301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on December 16, 2015, at 10:30 a.m., at the offices of the New York State Department of Health, Riverview Center, 150 Broadway, Suite 510, Menands (Albany), NY 12204-2719.¹

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel who shall be an attorney admitted to practice in New York state. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State

¹ For GPS purposes, enter "Menands", not "Albany".



Department of Health, Division of Legal Affairs, Bureau of Adjudication, Riverview Center, 150 Broadway - Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES HORAN, DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not later than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a written brief and affidavits with the Committee. Six copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below.

Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

YOU ARE HEREBY ADVISED THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here [REDACTED]

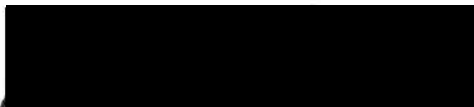
The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an

attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW §§230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
September 16, 2015


MICHAEL A. HISER
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Lee A. Davis
Associate Counsel
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
Empire State Plaza
Albany, NY 12237
(518) 473-4282

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
EDGAR A. GUESS, JR., M.D.

STATEMENT
OF
CHARGES

EDGAR A. GUESS, JR., the Respondent, was authorized to practice medicine in New York State on or about July 7, 1967, by the issuance of license number 099137 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about April 7, 2014, the Medical Board of California ("California Board") issued a Final Order that became effective on April 14, 2014 ("California Final Order") based upon a Stipulated Surrender of Respondent's medical license between Respondent and the California Board (signed by Respondent on March 6, 2014), wherein Respondent did not contest disciplinary charges that he: prescribed controlled substances or other dangerous drugs to patients without appropriate prior examination or medical indication; excessively prescribed controlled substances and other dangerous drugs to patients; and that he engaged in gross negligence, repeated acts of negligence, unprofessional conduct, and/or failure to maintain adequate and accurate medical records.

B. Respondent's conduct upon which findings of misconduct were based would, if committed in New York State, constitute professional misconduct under the laws of New York State, pursuant to the following sections of New York law:

1. New York Education Law §6530(3) [negligence on more than one occasion]; and/or
2. New York Education Law §6530(4) [gross negligence]; and/or
3. New York Education Law §6530(32) [failure to maintain accurate medical records].

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

HAVING HAD DISCIPLINARY ACTION TAKEN

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(9)(d) by having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York State as alleged in the facts of the following:

1. The facts in Paragraphs A and B.1; and/or Paragraphs A and B.2; and/or Paragraphs A and B.3.

DATE: September 12, 2015
Albany, New York



MICHAEL A. HISER
Deputy Counsel
Bureau of Professional Medical Conduct