



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

June 9, 1998

Dennis P. Whalen
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Claudia Morales Bloch, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Robert Asher, Esq.
295 Madison Avenue
Suite 700
New York, New York 10017

Robert Delbeau, M.D.
34-16 84th Street
Jackson Heights, New York 11372

RE: In the Matter of Robert Delbeau, M.D.

Dear Ms. Bloch, Mr. Asher and Dr. Delbeau:

Enclosed please find the Determination and Order (No.98-54) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T" and "B".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

**In The Matter Of
Robert Delbeau, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 54**

**Proceeding to review a Determination by a Hearing Committee (Committee)
from Board for Professional Medical Conduct (BPMC)**

COPY

**Before Board Members : Briber, Stewart, Sinnott, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Robert S. Asher, Esq.
For the Petitioner: Claudia Morales Bloch, Esq.**

After a hearing into charges that the Respondent committed professional misconduct, a BPMC Committee sustained charges that the Respondent practiced medicine fraudulently and with gross and repeated negligence and incompetence, ordered excessive treatment, failed to maintain accurate records, failed to register and committed conduct that resulted in a New York criminal conviction. The Committee voted to revoke the Respondent's New York Medical License (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Petitioner asks the ARB to modify the Committee's penalty and add a One Hundred Thirty Thousand Dollar (\$130,000.00) fine, as an additional sanction for the Respondent's fraudulent conduct and orders for excessive treatment. The Respondent asks that the ARB reduce the sanction against the Respondent, because his misconduct involved only poor record keeping, and the Respondent asks the ARB to impose no fine, because he received no enrichment and he would be unable to pay the fine the Petitioner requests. After considering the hearing record and the parties' briefs, the ARB sustains the Committee's Determination that the Respondent committed misconduct, except that we overturn the Committee's conclusion that the Respondent practiced with incompetence on more than one occasion. We sustain the Committee Determination revoking the Respondent's License and we vote 5-0 to fine the Respondent Eighty Thousand Dollars (\$80,000.00).

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-6), 6530(9)(a)(i), 6530(12), 6530(32) & 6530(35) (McKinney Supp. 1998), by:

- practicing medicine fraudulently;

- practicing medicine with negligence on more than one occasion;
- practicing medicine with gross negligence;
- practicing medicine with incompetence on more than one occasion;
- practicing medicine with gross incompetence,
- committing an act that results in a criminal conviction under New York Law;
- failing wilfully to register as a physician with the New York State Education Department (SED);
- failing to maintain accurate patient records; and,
- ordering excessive tests, treatment or treatment facility use, unwarranted by a patient's condition.

The negligence, incompetence, fraud, records and excessive treatments charges arose from the Respondent's care for thirteen persons, Patients A through M. The treatment for Patients B through M involved soft tissue injuries, resulting from automobile accidents or incidents involving insurance. The record refers to the Patients by letter to protect the Patients' privacy. A hearing on the charges ensued, pursuant to N.Y. Pub. Health Law §§ 230(7) & 230(10) (McKinney Supp. 1998), before a BPMC Committee, who then rendered the Determination which the ARB now reviews. The Committee sustained all the charges against the Respondent.

The Committee found that the Respondent committed gross negligence, gross incompetence and incompetence on more than occasion in treating Patient A, due to the Respondent's conduct after receiving profoundly abnormal laboratory results concerning the Patient, on July 7, 1992. The Committee found that the Respondent failed to hospitalize the Patient, failed to place the Patient on antibiotics, failed to require an immediate transfusion and failed to arrange for any evaluation or treatment, despite test results that showed the Patient at serious risk for developing fatal sepsis and/or life threatening complications. The Committee found that the Respondent committed fraud and failed to maintain accurate records for Patient A, because the Respondent rewrote his office records for Patient A and destroyed the originals. The Committee determined that the rewriting and destruction demonstrated that the Respondent intended to misrepresent his care for the Patient. The Committee also found that the Respondent committed simple negligence in caring for Patient A.

As to the Respondent's conduct towards Patients B through M, the Committee found that the Respondent practiced with negligence on more than one occasion and with fraud, ordered excessive treatments and maintained inaccurate records. The Committee concluded that the Respondent provided excessive treatments or caused extensive follow-up visits in a deliberate attempt to enhance or exaggerate the nature of the Respondent's injuries, in order to submit additional billings for his own enrichment. The Committee concluded further that the Respondent, knowingly and with intent to mislead, submitted false bills for services that he never rendered.

As to the other charges, the Committee found that the evidence [Petitioner's Exhibit 3] proved the Respondent's conviction for violating N. Y. Tax Law § 1801(a)(McKinney Supp. 1997-1998), a misdemeanor, for failing to file an income tax return, on or before the required date, with intent to avoid payment for any tax imposed. The Committee found no mitigating circumstances in the excuses the Respondent offered for failing to file. The Committee also determined that the Respondent continued in active medical practice in New York, from December 31, 1994 to April 17, 1996, without registering for medical practice with SED. The Committee rejected the Respondent's excuses for failing to file. The Committee noted that, at the time the Respondent entered a guilty plea in the income tax criminal case in September, 1992, the Respondent's attorney advised the Respondent to report the conviction when he re-registered. The Respondent had the obligation to re-register before December 31, 1994, but failed to re-register until April 17, 1996.

The Committee voted to revoke the Respondent's License. They provided no discussion as to how they reached their penalty. The Committee rendered their Determination on March 23, 1998.

REVIEW HISTORY AND ISSUES

The Petitioner commenced this proceeding on April 2, 1998, when the ARB received the Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and reply brief. The record closed when the ARB received the Petitioner's reply brief on May 26, 1998.

The Petitioner asserts that the Respondent's fraudulent practice, orders for excessive

treatments, failure to maintain accurate records, failure to register and his criminal conviction demonstrate that the Respondent lacked integrity, violated the public trust and deserved a fine in addition to revocation. The Petitioner argues that any fraudulent act that the Respondent committed would, standing alone, provide sufficient basis for a fine, but that the Respondent's pattern of fraudulent practice and willful misrepresentation for personal gain evidence a lack of integrity and disregard for the public trust. The Petitioner asks that the ARB impose a fine amounting to Ten Thousand Dollars (\$10,000.00) for each patient case at issue in this proceeding. The Petitioner's brief notes that this case presents similar facts to two recent ARB Determinations (Matter of Larkin, ARB # 97-189 and Matter of Neuman, ARB # 97-34). In both those cases the ARB imposed fines, in addition to License revocation, as penalties against Respondents who committed fraudulent conduct and exposed patients to unnecessary tests or treatments.

The Respondent requests that the ARB reduce the penalty against the Respondent and refuse to impose a fine. The Respondent challenges the proof underlying the Committee's findings and argues that the record proves only inadequate record keeping rather than any intent to defraud the system. The Respondent argues that he lacks the financial resources to pay any fine and he cites to several cases in which the ARB imposed no fine against a Respondent who had a clear economic gain from misconduct (Matter of Faiwyszewski, ARB # 97-189; Matter of Koenig, ARB # 93-19; Matter of Chudi-Chime, ARB# 97-247; Matter of Taubes, ARB # 97-204 and Matter of Sharma, ARB # 96-295).

In reply to the Respondent's brief, the Petitioner disputes the Respondent's claim that the record lacks certain billing records or testimony necessary to prove the Respondent's misconduct and the Petitioner argues that the Respondent's financial position merits no consideration by the ARB in our review in this case.

REVIEW BOARD DETERMINATION

The ARB has considered the record and the parties' briefs. All ARB members participated in this case. We sustain the Committee's Determination on the misconduct charges, except for their

Determination that the Respondent practiced with incompetence on more than one occasion in treating Patient A, which we overturn. We sustain the Committee's Determination to revoke the Respondent's License and reject the Respondent's request that we reduce the penalty. We modify the Committee's Determination, to impose a fine amounting to Eighty Thousand Dollars (\$80, 000.00).

Incompetence On More Than One Occasion: In considering the Respondent's challenge to the Committee's Determination on the charges, the ARB concluded that the record contains insufficient evidence to support the Determination that the Respondent practiced with incompetence on more than one occasion. To prove misconduct under N. Y. Educ. Law § 6530(5)(McKinney Supp. 1998), the Petitioner must prove that the Respondent committed simple incompetence "on more than one occasion". The Petitioner, however, proved only that the Respondent committed several incompetent acts in treating a single patient, Patient A, during a single treatment instance, on July 7, 1992 [Findings of Fact 8-13]. The Committee made no incompetence findings concerning treatment for Patient A for any other dates and no incompetence findings concerning any other patients. The ARB concludes that committing several incompetent acts during a single treatment instance involving a single patient constitutes only incompetence on one occasion and, therefore, fails to meet the statutory threshold for professional misconduct [see discussion concerning negligence on more than one occasion in Rho v. Ambach, 74 N.Y.2d 318 (1989)] . We therefore exercise our authority to substitute our judgement for the Committee's judgement in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 N.Y.S.2d 759 (Third Dept. 1994), we overturn the Committee's Determination that the Respondent practiced with incompetence on more than one occasion and we dismiss that charge.

Other Misconduct Charges: The ARB finds the Committee's Determinations on the remaining charges consistent with the Committee's findings and conclusions and we find the record supports those findings and conclusions.

We sustain the Committee's Determination that the Respondent's conduct in providing care to Patient A on July 7, 1992 constituted both practicing with gross negligence and practicing with gross incompetence [Committee Conclusions, page 40; Committee Appendix, factual allegations A(2)(a) - A(2)(h)]. The Committee found that, on that occasion, the Respondent:

- failed to hospitalize the Patient,
- failed to place the Patient on antibiotics,
- failed to require an immediate transfusion, and,
- failed to arrange for any evaluation or treatment,

despite profoundly abnormal test results that showed the Patient at serious risk for developing fatal sepsis and/or life threatening complications. The Respondent later acknowledged that he failed to appreciate the significance of the abnormal laboratory test results and clinical findings, so as to act appropriately [Committee Finding of Fact 14, page 6].

A single negligent act or treatment instance can constitute gross negligence, a single incompetent act or treatment instance can constitute gross incompetence and the same underlying act or treatment instance can constitute both gross negligence and gross incompetence, if the act or instance rises to a sufficiently egregious or flagrant level, Matter of Minielly v. Comm. of Health of the State of New York, 222 A.D.2d 750, 634 N.Y.S.2d 856 (Third Dept. 1995). Also, multiple negligent or incompetent acts occurring during one event can amount to gross negligence or gross incompetence, even if the acts fail to constitute negligence and/or incompetence on more than one occasion, Matter of Rho v. Ambach, (supra). The ARB concludes that the Committee's findings concerning the Respondent's conduct toward Patient A demonstrated an egregious failure to practice according to acceptable standards (gross negligence) and a flagrant lack of the necessary knowledge or ability to practice medicine (gross incompetence).

We sustain the Committee's Determination that the Respondent practiced fraudulently and failed to maintain accurate records for Patients A. The Committee's findings, that the Respondent rewrote his office records for Patient A and destroyed the originals, provided sufficient evidence for the Committee to infer that the rewriting and destruction demonstrated that the Respondent intended to misrepresent his care for the Patient. The Respondent's explanations for the rewriting and destruction created merely a factual question for the Committee to resolve as fact finder. We also sustain the Committee's Determination that the Respondent committed simple negligence in caring for Patient A.

The ARB holds that the evidence in the record demonstrates that the Respondent committed

negligence on more than one occasion and fraud, failed to maintain accurate records and ordered excessive or unwarranted treatment for Patients B through M. We find the Committee's Determination on those charges consistent with their findings and conclusions that the Respondent:

- provided excessive treatments or caused extensive follow-up visits,
- in a deliberate attempt to enhance or exaggerate the nature of the Respondent's injuries,
- in order to submit additional billings for his own enrichment, and,
- knowingly and with intent to mislead,
- submitted false bills for services that he never rendered.

The ARB also sustains the Committee's Determination that the Respondent's care for Patients B through M constituted practicing with negligence on more than one occasion. We reject the Respondent's arguments that the record contains insufficient information about the Respondent's billings in these cases. The record contains billing and/or office records for all the Patients and the Committee's Determination indicates that the Committee relied upon those records in making their findings. We also reject, as irrelevant, the Respondent's arguments concerning whether the Respondent became affluent from his billing practices. The credible evidence proves that the Respondent subjected patients to excessive treatment for his own enrichment and submitted false billings with intent to mislead. Such evidence proves the charges involving Patients B through M.

The evidence in the record also proved the Respondent's failure to register with SED, from December 1994 to April 1996, and the Respondent's conviction for committing a crime under New York Law, for failing to file income tax returns. The Respondent made no challenge to those findings. The explanations he offered at the hearing for both filing failures merely amounted to evidence in mitigation, that the Committee rejected on both charges.

License Revocation: As our holdings on the charges make clear, the evidence against the Respondent proved far more than the poor record keeping that the Respondent has conceded. The Respondent's fraudulent conduct in every patient case at issue here provides more than sufficient grounds on which to revoke his License. The Respondent used his License to commit fraud and bill for services he never performed. The Respondent violated the trust that the public places in the

medical profession and demonstrated that he lacks integrity. In addition, the Respondent placed Patient A in danger by failing to order appropriate tests or treatments upon receiving profoundly abnormal test results, and subjected Patients B through M to unnecessary medical procedures, solely for the Respondent's enrichment. Although retraining or continuing training might address and correct the deficiencies the Respondent exhibited in his failure to provide proper care for Patient A, neither retraining nor continuing education can teach the Respondent integrity, Matter of Bezar v. DeBuono, 240 A.D.2d 978, 659 N.Y.S.2d 547 (1997). We conclude that no less severe penalty will protect the public in this case or address the deficiencies the Respondent displayed in the cases at issue here.

Fines: The ARB agrees with the Petitioner that the Respondent's extensive, repeated and diverse misconduct warrants a monetary penalty in addition to License revocation. In opposing the Petitioner's request, the Respondent argues that fines should only apply when the Respondent obtains an economic gain. We disagree. The ARB has never restricted fines to only those cases in which the Respondent obtained an economic gain. The ARB and/or some Committees have approved fines in the following circumstances, involving issues other than economic gain by a Respondent:

- fraud in filing applications for staff reappointment, Matter of Bezar v. DeBuono, (supra);
- negligence and incompetence on more than one occasion, Matter of Colvin v. Chassin, 214 A.D.2d 854, 625 N.Y.S.2d 351(Third Dept. 1995);
- failing to comply with an obligation that the Education Law imposes upon a physician (refusing to turn over records following a request by the Office for Professional Medical Conduct), Matter of Park v. N.Y.S. Dept. of Health, 222 A.D.2d 959, 653 N.Y.S.2d 353 (Third Dept. 1995);
- molesting patients sexually, Matter of Coderre V. DeBuono, __ A.D.2d __, 669 N.Y.S.2d 440 (Third Dept. 1998); and,
- conducting sexual relationships and prescribing medication inappropriately for two patients, Matter of Sunnen v. Adm. Rev. Bd. for Prof. Med. Conduct, __ A.D.2d __, 666 N.Y.S.2d 239 (Third Dept. 1997).

The ARB also rejects the Respondent's assertion, that the Respondent made no attempt to commit

fraud and should, therefore, receive no fine. The Committee determined that the Respondent committed fraud in ninety-six specific instances, in the cases at issue in this proceeding [Committee Determination page 41].

Under N.Y. Pub. Health Law § 230-a (7)(McKinney Supp. 1998), the ARB may impose a fine for up to Ten Thousand Dollars (\$10,000.00) on each misconduct specification, except when the specifications arise from the same underlying factual findings, Matter of Colvin v. Chassin, (supra). The ARB concludes that the Respondent's misconduct warrants a fine totalling Eighty Thousand Dollars (\$80,000.00). We fine the Respondent Ten Thousand Dollars (\$10,000.00) for failing to register with SED from December, 1994 to April, 1996. On that charge, the Committee rejected the explanations or excuses that the Respondent offered in mitigation and the Committee found that at the time he failed to register, he knew that he would have to mention on the registration his New York conviction for failing to file income tax returns. We also impose a Ten Thousand Dollar (\$10,000.00) fine for the Respondent's conduct in the case involving Patient A. The Respondent's most serious misconduct in the cases at issue occurred in that case, in which the Respondent's failure to respond to the profoundly abnormal test results placed Patient A at grave risk and in which the Respondent destroyed the Patient's original records, with the intent to misrepresent the care he provided to the Patient. The ARB also concludes that we should impose fines in each of the twelve cases involving the Respondent's orders for excessive treatment and his false billings for services to Patients B through M. The ARB members differed initially over the amount for each fine, but agreed eventually to fine the Respondent Five Thousand Dollars (\$5000.00) in each case.

ORDER

NOW, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent practiced medicine fraudulently, with gross negligence, with gross incompetence, with negligence on more than one occasion, that he failed to maintain accurate patient records, that he ordered excessive treatments, that he failed to register for medical practice with the State Education Department and that he committed an act that resulted in a criminal conviction under New York Law.
2. The ARB **OVERTURNS** the Committee's Determination that the Respondent practiced medicine with incompetence on more than one occasion and we **DISMISS** that charge.
3. The ARB **SUSTAINS** the Committee's Determination revoking the Respondent's License to practice medicine in New York State.
4. The ARB **MODIFIES** the Committee's Determination and fines the Respondent Eighty Thousand Dollars (\$80,000.00).
5. The Respondent shall pay that sum to the Bureau of Accounts Management, New York State Department of Health, Erastus Corning Tower Building, Room 1245, Empire State Plaza, Albany, New York 12237 within thirty (30) days of the effective date of this Order.
6. Any civil penalty not paid by the prescribed date shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees, referral to the New York State Department of Taxation and Finance for collection, and non-renewal of permits or licenses (Tax Law §171(27); State Finance Law §18; CPLR §5001; Executive Law §32).

7. This Order shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

Edward C. Sinnott, M.D.

William A. Stewart, M.D.

In The Matter Of Robert Delbeau, M.D.

William A. Stewart, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Delbeau.

Dated : 4 June , 1998



William A. Stewart, M.D.

In The Matter Of Robert Delbeau, M.D.

Edward C. Sinnott, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Delbeau.

Dated: June 4, 1998



Edward C. Sinnott, M.D.

In The Matter Of Robert Delbeau, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Delbeau.

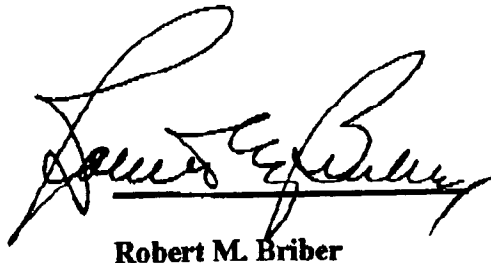
DATED: June 4, 1998


Sumner Shapiro

In The Matter Of Robert Delbeau, M.D.

Robert M. Briber, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Delbeau.

Dated : June 8, 1998



Robert M. Briber