



**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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

Richard F. Daines, M.D.
Commissioner

January 2, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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

Robert Bogan, Esq.
NYS Department of Health
Office of Professional Medical Conduct
433 River Street - Suite 303
Troy, New York 12180-2299

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

Dear Parties:

Enclosed please find the Determination and Order (No. 08-02) 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

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., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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,

Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

COPY

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

DETERMINATION

AND

ORDER

BPMC #08-02

A hearing was held on December 19, 2007, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated September 14, 2007, were served upon the Respondent, Hilary B. Kern, M.D. Pursuant to Section 230(10)(e) of the Public Health Law, Irving S. Caplan, Chairperson, Sheldon Gaylin, M.D., and Lyon M. Greenberg, M.D., duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. John Wiley, Esq., Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by Thomas Conway, Esq., General Counsel, by Robert Bogan, Esq., of counsel. The Respondent appeared in person and was represented by Kalison, McBride, Jackson & Murphy, Robert B. Hille, Esq., of counsel.

Evidence was received and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

BACKGROUND

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a

violation of Education Law Section 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 scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

None

For the Respondent:

Hilary B. Kern, M.D.
Joseph H. Feinberg, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. Hilary B. Kern, M.D., the Respondent, was authorized to practice medicine in New York State on July 29, 1993, by the issuance of license number 193111 by the New York State Education Department (Petitioner's Ex. 4).

2. On October 12, 2006, the New Jersey Department of Law & Public Safety, Division of Consumer Affairs, Board of Medical Examiners ("New Jersey Board"), by a

Final Order ("New Jersey Order"), suspended the Respondent's license to practice medicine for two years, the first year to be served as an active suspension, the second year to be served as probation; required her to pay costs, fees, a civil penalty and restitution to insurance carriers; and required her to complete courses in medical record keeping and professional ethics, and a preceptorship in the basic and clinical sciences as well as practical skills and application of electrodiagnostic testing ("EMG") and physiatry.

The New Jersey order was based on:

- failing to provide information mandated by the New Jersey Health Consumer Information Act;
- seeking and accepting the referral of patients for EMG without acquiring the information necessary to determine the necessity of the referral;
- failing to maintain records that disclosed medical history, physical examinations and testing that justified the ordering of EMG;
- billing for consultation services based on a standard battery of testing, with no consultation report prepared for the referring physician, with the Respondent's notes not containing all the required elements of a consultation, and with necessary muscles not tested and other muscles tested that should not have been;
- billing third parties for consultations that did not comply with the billing codes used by the Respondent;
- failing to tailor EMG to the specific circumstances of the patient;
- allowing unlicensed technicians to conduct tests and not identifying those technicians in the patient chart;
- basing interpretations on incompletely performed and unreliable tests;
- failing to address the possibility of a conduction block, a potentially serious condition;

- failing to test the number and assortment of muscles essential to a reliable diagnosis and required by the billing codes used;
 - preparing interpretations claiming abnormalities which were unsupported by the data, which placed the patients at risk of unnecessary medical or surgical care;
 - failing to recommend treatment despite claiming to have identified pathology;
- and
- billing in a manner that constituted unbundling or that was excessive given the tests performed. (Petitioner's Ex. 5).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State, had the conduct occurred in New York State, pursuant to:

- New York Education Law Section 6530(3) - "Practicing the profession with negligence on more than one occasion;"
- New York Education Law Section 6530(5) - "Practicing the profession with incompetence on more than one occasion;"
- New York Education Law Section 6530(32) - "Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. Unless otherwise provided by law, all patient records must be retained for at least six years. Obstetrical records and records of minor patients must be retained for at least six years, and until one year after the minor patient reaches the age of eighteen years;"
- New York Education Law Section 6530(35) - "Ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient..."

The Statement of Charges alleged that the conduct of the Respondent, had it occurred in New York State, would have constituted professional misconduct in three

other ways - practicing the profession fraudulently (Education Law Section 6530[2]), gross negligence (Education Law Section 6530[4]), and gross incompetence (Education Law Section 6530[6]). The Hearing Committee concludes that the hearing record does not support the fraud charge because the unjustified billings and inaccurate submissions of information described in the New Jersey Order could have been the result of carelessness or ignorance and because if the New Jersey Board was of the opinion that fraud had been present, it would have used that word or words to that effect in the New Jersey Order. Nothing that the Respondent did wrong, however, was described as fraudulent in the New Jersey Order. The Hearing Committee also does not find sufficient information in the New Jersey Order to conclude that any act of negligence or incompetence was egregious enough to constitute gross negligence or gross incompetence.

VOTE OF THE HEARING COMMITTEE

SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having her license to practice medicine suspended and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the suspension and/or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The New Jersey Order cites the Respondent for several types of professional misconduct, most of it related to consultation services, EMG and billing for these services, as set forth in some detail in Finding of Fact 2. The Petitioner argued that the Respondent did not testify honestly and forthrightly about these problems and that her

license to practice medicine should be revoked. The Hearing Committee does not believe that a revocation of her license is necessary to protect the public.

The Petitioner's position is based in part on the charge that the Respondent practiced medicine fraudulently. As mentioned above, the Hearing Committee does not believe that the hearing record supports this charge. The New Jersey Order faults the Respondent's billing for consultation and EMG services, but does not conclude that the billing errors were the result of fraud rather than carelessness, ignorance or honest mistakes. The Hearing Committee is unable and unwilling to make a fraud finding from the information in the New Jersey Order when the New Jersey Board was unable to make such a finding. Without the fraud charge, the rationale for revocation becomes much less persuasive.

Another reason for the Hearing Committee's unwillingness to revoke the Respondent's license is that she has not had any disciplinary problems other than the New Jersey proceeding. She also has complied with all the requirements of the New Jersey Order. The Hearing Committee also believes that the Respondent is unlikely to revert to the practices that led to the New Jersey Order. We observed her during her testimony and believe that she has been thoroughly traumatized by the New Jersey and New York disciplinary proceedings and would not risk the possibility of repeating the experience.

The Respondent's preceptor during the New Jersey probation, Joseph H. Feinberg, M.D., testified that the Respondent's efforts to improve her medical knowledge and skills have been both impressive and successful. He testified that he provided intensive instruction to the Respondent and that she learned quickly. He testified that the Respondent could be trusted to practice medicine competently and safely. The New Jersey Board apparently is of the same opinion, given the fact that it has terminated the

suspension of her New Jersey license effective December 12, 2007 (Respondent's Ex. D). In the Order restoring the Respondent's active license, the New Jersey Board stated that the Respondent:

...fully complied with the [New Jersey Order], went beyond the required course work to further her educational experience, and worked closely and successfully with an approved preceptor for one year. Additionally, respondent expressed remorse for the activities leading to the Board's action in this matter, altered her practice and learned from the experience.

The Respondent's medical reeducation was not limited to training provided by Dr. Feinberg. Respondent's Ex. B-3 contains evidence of an impressive number of continuing medical education courses attended by the Respondent since the New Jersey disciplinary proceeding.

The Hearing Committee concludes that the Respondent has become a more skillful physician who has a greater awareness of her responsibilities than was the case prior to the date of the New Jersey Order. Her efforts to improve since the issuance of the New Jersey Order should not be rewarded with a revocation of her New York license a few days after the New Jersey Board expressed confidence in her and restored her New Jersey license to active status. The Hearing Committee concludes that the public will be adequately protected by a two-year period of probation with monitoring of her medical and billing records.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent is placed on probation for two years. The terms of probation are stated in paragraphs 2 through 10 of this Order.
2. The Respondent shall conduct herself in all ways in a manner befitting her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by her profession.

3. The Respondent shall submit to the Office of Professional Medical Conduct ("OPMC") (New York State Department of Health, Office of Professional Medical Conduct, Hedley Park Place, 433 River Street, Suite 303, Troy, New York 12180-2299), written notification of any change in employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

4. The Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of this Order and shall personally meet with a person designated by OPMC when so requested.

5. The period of probation shall be tolled during periods in which the Respondent is not engaged in the active practice of medicine in New York State. After the period of active probation begins, the Respondent shall notify OPMC, in writing, if the Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of 30 consecutive days or more. The Respondent shall notify OPMC again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon the Respondent's return to practice in New York State.

6. The Respondent's professional performance may be reviewed by OPMC. This review may include, but shall not be limited to, a review of office records, patient records and hospital charts, interviews with or periodic visits with the Respondent and her staff at practice locations or OPMC offices.

7. The Respondent shall maintain legible and complete medical records that accurately reflect the evaluation and treatment of patients. The medical records shall

contain all information required by State regulations regarding controlled substances.

8. During the period of probation, the Respondent will, on a quarterly basis, make available to OPMC medical and billing records for ten percent of patients treated in New York State during the previous quarter. The patients will be chosen by OPMC. The purpose of this review is to determine whether the 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. The costs of monitoring will be the responsibility of the Respondent.

9. The Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2,000,000.00 per occurrence and \$6,000,000.00 per policy year, in accordance with Public Health Law Section 230(18)(b). Proof of coverage shall be submitted to OPMC within 30 days of the effective date of this Order.

10. Upon receipt of evidence of noncompliance with the terms of probation, OPMC or the State Board for Professional Medical Conduct may initiate a violation of probation proceeding and/or any other proceeding against the Respondent as may be authorized by law.

11. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Malone, New York
12-27, 2007

1 A

Redacted Signature

Irving S. Caplan
Chairperson

Sheldon Gaylin, M.D.
Lyon M. Greenberg, M.D.

Appendix I

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



IN THE MATTER

OF

HILARY B. KERN, M.D.
CO-06-10-5816-A

NOTICE OF
REFERRAL
PROCEEDING

TO: HILARY B. KERN, M.D.
30 East 40th Street - #1200
New York, NY 10016

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law §§230(10)(p) and New York State Administrative Procedures 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 the 18th day of October, 2007, at 10:00 a.m., at the offices of the New York State Department of Health, Hedley Park Place, 433 River Street, 5th Floor, Troy, NY 12180.

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. 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 Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. SEAN D. O'BRIEN, 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 ten days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of New York Public Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less 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 New York State Administrative Procedure 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.

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.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
Sept. 14, 2007

Redacted Signature

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street - Suite 303
Troy, New York 12180
(518) 402-0828

STATE OF NEW YORK

DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

HILARY B. KERN, M.D.
CO-06-10-5816-A

STATEMENT

OF

CHARGES

HILARY B. KERN, M.D., Respondent, was authorized to practice medicine in New York state on July 29, 1993, by the issuance of license number 193111 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about October 12, 2006, *nun pro tunc* October 1, 2006, the State of New Jersey, Department of Law & Public Safety, Division of Consumer Affairs, Board of Medical Examiners (hereinafter "New Jersey Board"), by a Final Order (hereinafter "New Jersey Order"), *inter alia*, suspended Respondent's license to practice medicine for two (2) years, the first year to be served as an active suspension, commencing October 1, 2006, the remaining year to be served as a period of probation; required her to pay \$14,096.00 investigative costs and fees, a \$5,000.00 civil penalty; and to reimburse insurance carriers \$12,576.75; and required her to complete courses in medical record keeping and professional ethics and a preceptorship in the basic and clinical sciences as well as practical skills and application of electrodiagnostic testing and physiatry, based on failing to provide information mandated by the New Jersey Health Consumer Information Act; seeking and accepting patients for electrodiagnostic testing without requiring of the referring doctors the kind of advance information, required to assure that the referral was appropriate; regularly documenting inadequate clinical examinations; maintaining patient records that do not include documentation of patient reports of specific redicular complaints or findings of neurological deficit to justify or of any physical examination or interim testing prior to electrodiagnostic testing; billing for "consultation" services based on administering a "standard battery" of testing, when no formal consultation report was prepared for issuance to the referring practitioner, her notes do not contain to all of the elements required for a consultation, her reports are not addressed to the referring physician, and muscles not pertaining to the patients complaint were tested and/or others which should have been tested

were not; submitting bills to third party payors containing CPT codes for consultations which did not comply with the requirements applicable to those codes, and recommending electrodiagnostic testing not justified by the chart documentation; failing to tailor EDX studies to an initial and evolving differential diagnosis of each patient, and instead allowing her unlicensed technicians to perform a standard battery of NCS's, and/or sometimes to test nerves having no pertinent relationship to the problem under study; not identifying technicians who performed tests; having studies in records that were incompletely performed based on unreliable waveforms and misplaced cursors and demonstrating artifact and other poor technique, resulting in unreliable data, thereby generating irrelevant numbers that Respondent purported to interpret; failure to address the possibility of a conduction block (a potentially serious condition); performing a standard battery of virtually the same EMGs irrespective of the patient's individual circumstance and the results of the NCS studies; failing to test the number and assortment of limb muscles essential to reliable diagnosis and required for the CPT codes under which Respondent billed; claiming diagnoses of bilateral radiculopathy of particular nerve roots despite having failed to test the muscles that would have conformed or refuted those diagnoses; preparing interpretations claiming abnormalities, which were not supported by the data and which placed the patients at risk for unnecessary medical or surgical interventions; failing to make recommendations for treatment or follow-up by a plenary licensed physician or providing follow-up despite claiming to have identified pathology; billing a manner which constituted unbundling and/or which was significantly inflated in the light of tests performed, thereby charging excessive fees.

B. The conduct resulting in the New Jersey Board disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state Law:

1. New York Education Law §6530(2) (practicing the profession fraudulently);
2. New York Education Law §6530(3) (negligence on more than one occasion);
3. New York Education Law §6530(4) (gross negligence);
4. New York Education Law §6530(5) (incompetence on more than one occasion);
5. New York Education Law §6530(6) (gross incompetence);
6. New York Education Law §6530(32) (failure to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient); and/or
7. New York Education Law §6530(35) (ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient).

SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having her license to practice medicine suspended and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the suspension and/or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws New York state, in that Petitioner charges:

1. The facts in Paragraphs A and/or B.

DATED: *Sept. 14*, 2007
Albany, New York

Redacted Signature

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct