



Department of Health

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Commissioner

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

November 18, 2019

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Christine M. Radman, Esq.
Bureau of Professional Medical Conduct
NYS Department of Health
90 Church Street
New York, New York 10007

Jeffrey Randolph, Esq.
139 Harristown Road, Suite 205
Glen Rock, New Jersey 07452

Ossama Elbahloul, M.D.
[REDACTED]

RE: In the Matter of Ossama Elbahloul, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 19-284) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
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.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
Enclosure

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

In the Matter of

Ossama Elbahloul, 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. 19- 284

Before ARB Members D'Anna, Grabiec, Wilson and Rabin
Administrative Law Judge James P. Horan drafted the Determination

For the Department of Health (Petitioner): Christine M. Radman, Esq.
For the Respondent: Jeffrey Randolph, Esq.

After a hearing, a BPMC Committee sustained charges that the Respondent committed professional misconduct in treating five patients. The Committee voted to revoke the Respondent's license to practice medicine in New York State (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2019), the Respondent asks the ARB to nullify the Committee's Determination and reinstate his License. After reviewing the hearing record and the parties' review submissions, the ARB votes 3-0 to affirm the Committee's Determination in full.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2-6), 6530(19), 6530(21), 6530(32) & 6530(35) (McKinney Supp. 2019) by committing professional misconduct under the following specifications:

- practicing the profession fraudulently;
- practicing the profession with negligence on more than one occasion;
- practicing the profession with gross negligence;

- practicing the profession with incompetence on more than one occasion;
- sharing fees for professional medical services with non-practitioners by permitting a person or persons not authorized by the EL to share in fees for professional medical services in exchange for rent, equipment and medical services;
- willfully making or filing a false report, or failing to file a report required by law or by the Department of Health or the Education Department;
- failure to maintain accurate records; and
- ordering excessive tests, treatment or use of facilities unwarranted by the patient's condition.

The charges related to the care that the Respondent provided to five persons (Patients A-E) for pain. The Respondent testified on his own behalf. The Petitioner presented testimony by Samuel Thampi, M.D.

The Respondent was the sole owner of the medical corporation Elbahloul Medical Services, PC (PC). In his testimony, the Respondent admitted that he shared 80% of his fees for professional medical services rendered under the PC with a management company (Management Company) in exchange for rent, equipment and management services [Committee Finding of Fact (FF) 5]. Based upon the Respondent's admission, the Committee found that the Respondent violated EL §6530(19) by sharing professional fees with non-practitioners.

The Committee then addressed the charges relating to patient care. The Committee found that Physical Medicine and Rehabilitation (PM&R) is a specialty related to the diagnosis and treatment of patients who suffer from injuries and/or medical conditions resulting in pain and/or some loss of function. Pain management is a sub-specialty within PM&R and interventional pain management is a non-opioid approach to pain management which involves the injection of diagnostic/therapeutic agents. Injections within the spine require imaging guidance and appropriate patient monitoring. The Committee found that the Respondent has had no formal education and training in PM&R, pain management or interventional pain management. The allegations in this case related to the performance of facet point injections and trigger point injections (TPI).

The Committee found that a TPI is a procedure in which a local anesthesia is injected into painful areas of muscle in spasm to ease pain. The "knot" area in the muscle is palpated by the physician to determine the site before insertion of needle. That same site may be injected no more than once every eight weeks. It is important to discern whether a trigger point is a superficial manifestation of a deeper problem. Fluoroscopy is a type of medical imaging that displays a continuous x-ray image on a monitor. It is used to guide certain procedures but carries the risk of radiation exposure which can be harmful to the skin and is carcinogenic. There is no reason to use fluoroscopy when administering TPI, as this exposes patients to the risk of radiation without any benefit. The expertise of the medical professional performing the external technique of palpation is all that is necessary.

In addition, the Committee found that facet joints are small bilateral joints on the back of the spine between the vertebrae which help support the spine. A facet block injection is generally entirely diagnostic. The procedure involves injecting a longer acting local anesthetic by fine needle into the areas of nerve supplying those joints to determine whether a patient's pain is coming from a particular facet joint. If the patient experiences relief from the pain, those nerves can be ablated with a heating current to provide pain relief lasting from six months to two years. Facet point injection must be performed in a sterile environment, with the patient carefully monitored by a trained medical professional throughout the procedure. An anesthesiologist may be required to administer some sedation. Intravenous access should be obtained as a precaution to address any adverse reaction. Fluoroscopic guidance for needle insertion is necessary to insure accuracy within this small and intricate spinal anatomy. The Committee found that notwithstanding the significant differences in risk associated with injecting into muscle trigger points versus the joint in the spine, the Respondent consistently documented that he used fluoroscopy guidance for muscle injections but not for spinal injections.

For each Patient A-F, the Committee found that the Respondent certified that he provided complete, true and exact copies of the records for each Patient, but in each case the Respondent billed for procedures for which no medical record exists. The Committee found further that the Respondent failed to perform adequate evaluations or testing and performed invasive facet block

testing with no indication that the Respondent monitored Patients' conditions or used imaging when he placed needles into the Patients' spines. The Committee found that these facet blocks exposed the Patients to severe unnecessary risk. The Committee found the Patients vulnerable to an adverse reaction during the procedures due to no IV access or vital sign monitoring. The Committee also found that without the use of imaging guidance, the Respondent risked inserting needles improperly into Patients' disks, nerves, arteries and/or spinal cords, to possibly great adverse effect. In addition, the Committee found that the Respondent performed TPI on each Patient under fluoroscopic guidance, unnecessarily exposing each Patient to radiation.

The Committee sustained the charges that the Respondent practiced medicine with gross negligence. Gross negligence involves a serious or significant deviation from acceptable medical standards that creates the risk for potentially grave consequences, but there is no need to prove that the physician was conscious of the impending dangerous consequences of his conduct, Post v. NYS Dept. of Health, 245 AD2d 985, 667 NYS2d 94 (3rd Dept. 1997); Minnielly v. Comm. of Health, 222 AD2d 750, 643 NYS2d 886 (3rd Dept. 1995). The Committee found that the Respondent's unsafe manner of performing facet block procedures on Patients A-E posed unnecessary risk and his use of fluoroscopy with TPI exposed Patients A-E to unnecessary risk. The Committee concluded that the treatment constituted a serious deviation from acceptable medical standards, which presented a risk of potentially grave consequences to the Patients. The Committee sustained the allegations charging practice with negligence on more than one occasion for the reasons noted above and also found that the Respondent deviated from accepted standards of practice by showing no effort to diagnose the etiology of the Patients' pain and trying to treat it.

The Committee sustained the charges that the Respondent practiced with incompetence on more than one occasion and with gross incompetence. Incompetence is the lack of the requisite skill or knowledge to practice medicine safely and gross incompetence is incompetence that can be characterized as serious and carrying potentially grave consequences, Dhabuwala v. State Board for Prof. Med. Cond., 225 AD2d 669 (3rd Dept. 1996). The Committee found that the Respondent's testimony revealed that he was unable to recognize the ways in which his medical

care was deficient and exposed his patients to unnecessary, grave risks. The Committee also sustained charges that the Respondent ordered excessive tests for Patients A-E because the Respondent repeatedly administered unwarranted TPI and facet blocks to the Patients.

The Committee sustained charges that the Respondent practiced fraudulently. Fraud in practice requires proof of either an intentional misrepresentation or the concealment of a known fact and the intent or knowledge may be inferred from surrounding circumstances, Steckmeyer v. State Board for Prof. Med. Cond., 295 AD2d 815, 744 NYS2d 82 (3rd Dept. 2002). The Committee repeated that the Respondent made no effort to find the etiology of the pain that the Patients experienced or to alleviate the pain. The Committee concluded that the Respondent performed unwarranted tests and treatments for the sole purpose of generating income by billing insurance companies. The Hearing Committee rejected the Respondent's testimony denying responsibility for the billings. The Committee inferred that the Respondent knew about the false billings and intended to deceive based on the Respondent's pattern of administering treatments with no regard for the results and on the Respondent's evasive testimony, which attempted to justify the unwarranted treatments that provided no therapeutic benefits for the Patients. The Committee dismissed charges that the Respondent filed false reports upon the Committee's determination that those charges duplicated the fraud charges.

The Committee sustained the charges that the Respondent failed to maintain accurate patient records upon finding the histories and physicals for Patients A-E gravely inadequate and without support for the Respondent's diagnosis and treatment. The Committee noted that a medical record must convey to other physicians objectively meaningful medical information concerning patient treatment, Maglione v. NYS Dept. of Health, 9 AD2d 522 (3rd Dept. 2004). The Committee found that the Respondent's own testimony illustrated the poor quality of the records when the Respondent was unable to determine from his own record which cervical facet level he injected.

In making their findings, the Committee relied on the testimony by the Petitioner's expert, Samuel Thampi, M.D. Dr. Thampi completed a residency in PM&R at St. Vincent's Medical Center and a fellowship in pain management at Emory University. He also worked as a

pain management specialist in the Northwell Hospital System for five years before entering private practice. Dr. Thampi holds certification by the American Board of Physical Medicine and Rehabilitation in both PM&R and pain management. He is an attending physician at four hospitals, possessing 20 years clinical experience in the field, and focuses his practice in non-opioid management of pain, employing therapeutic injections and prescribing physical therapy. The Committee found Dr. Thampi possesses excellent credentials for providing an opinion on the standard of care in his field and found Dr. Thampi's testimony credible. The Respondent testified as his own expert. The Committee found the Respondent non-credible due to virtually no expertise in pain management and evasive answers to questions. The Committee wrote that the Respondent provided no reasonable explanation for the inadequacy of his medical records, the basis for medical treatments he purportedly provided, the severe risks he created unnecessarily or his pattern of providing treatments which yielded no therapeutic benefit for the Patients.

The Committee voted to revoke the Respondent's License. The Committee wrote that the Respondent lacked credibility, showed no remorse for his misconduct and failed to take any responsibility for his actions. The Committee found that the Respondent formed the PC which billed for medical services, with no regard for the Patients. The Committee also referred to overwhelming evidence that the Respondent engaged in the fraudulent practice of medicine while providing grossly substandard care to the Patients.

Review History and Issues

The Committee rendered their Determination on April 3, 2019. This proceeding commenced on April 12, 2019, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply on June 27, 2019.

The Respondent requests that the ARB overturn the Committee and reinstate the Respondent's License. The Respondent contends that the Petitioner's only evidence against the Respondent came from the testimony from Dr. Thampi. The Respondent alleges this testimony was insufficient to prove negligence, gross negligence or incompetence because Dr. Thampi provided no objective guidelines, protocols or literature to support his opinion. The Respondent's Brief argues that the New York Civil Practice Law and Rules (CPLR) § 4515 (McKinney 2007) requires that an expert state on cross-examination the data and other criteria supporting the expert's opinion. The Respondent argues further that the Committee failed to apply the proper standards to prove negligence, gross negligence and incompetence. The Respondent claims that gross negligence constitutes conduct showing a reckless disregard for the rights of others and smacks of intentional wrongdoing, Colnaghi, USA, Inc. v. Jeweler's Protection Services, 81 NY2d 821 (1993). The Respondent also argues that incompetence is not the same standard as simple negligence but requires more than just a breach of the normal standards of care. The Respondent contends that the Management Company bore responsibility for all administrative, record retention and billing misconduct at issue in the non-clinical charges. The Respondent also indicates that he no longer practices pain management.

In its reply, the Petitioner argues that the Respondent's Brief reveals a lack of understanding of the BPMC process. The Petitioner contends that the Respondent had the opportunity to produce an expert to challenge the testimony by Dr. Thampi but failed to do so. The Petitioner also argues that the Respondent erred in relying on the Colnaghi case to define gross negligence because Colnaghi dealt with an art gallery suing an alarm company for breach of contract. The Petitioner contends that, in the context of the EL misconduct categories, gross negligence means a single act of negligence of egregious proportions or multiple acts of

negligence that amount that cumulatively amount to egregious conduct, Rho v. Ambach, 74 NY2d 318 (1989).

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 Respondent violated EL §6530(19) by sharing professional fees with non-practitioners. The Respondent's own testimony established that he shared 80% of his fees for professional medical services rendered under the PC with the Management Company in exchange for rent, equipment and management services. The ARB sustains the Committee's Determination on the other charges, and we affirm the Committee's Determination revoking the Respondent's License.

The Committee made their findings largely on Dr. Thampi's testimony. The Respondent argued that Dr. Thampi failed to qualify as an expert witness under the standard at CPLR § 4515. We reject that argument. The procedural standards that apply to BPMC hearings appear in the New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2019), PHL §230 and Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State Of New York (NYCRR) rather than in the CPLR.

Under SAPA §306(1), unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by the courts. The provisions on BPMC hearings at PHL § 230 provide no requirement that BPMC follow any of the standards observed by the courts, but PHL § 230-c(5) does provide that any action to challenge a determination by a BPMC Committee shall be returnable before the Appellant Division of the State Supreme Court, Third Department. In reviewing challenges to BPMC Determinations, the Third Department has ruled that:

- a BPMC hearing Committee is not bound by the rules of evidence, Sookhu v. Comm. of Health, 31 AD3d 1012, 820 NYS2d 146 (3rd Dept. 2006);
- a physician is generally qualified to render an expert opinion in a physician disciplinary hearing so long as he or she possesses the requisite skills, training, knowledge and experience upon which to base a reliable opinion with regard to patients at issue, Sundarum v. Novello, 53 AD3d, 861 NYS2d 822 (3rd Dept. 2008) leave to appeal denied 11 NY3d 708; and
- a board-certified physician in internal medicine and rheumatology was qualified to render an opinion in regard to a physician charged with misconduct in light of the board-certified physician's skills, training, education, knowledge and experience, Conteh v. Daines, 52 AD3d 994, 860 NYS2d 649 (3rd Dept. 2008).

The Committee's Determination at pages 15-16 listed Dr. Thampi's extensive qualifications to testify in this case and the ARB finds no error in the Committee's reliance on Dr. Thampi's testimony. The Committee also acted within their authority in finding the Respondent non-credible due to his lack of expertise in pain management and his evasive answers.

The testimony the Committee found credible proved that the Respondent practiced medicine with gross negligence, negligence on more than one occasion, gross incompetence and incompetence on more than one occasion. We find that the Committee applied the correct definitions for negligence and gross negligence from the New York Court of Appeals ruling in Rho v Ambach (supra) and the Third Department rulings in Post v. NYS Dept. of Health, (supra) and Minnielly v. Comm. of Health (supra) and for incompetence and gross incompetence from the Third Department ruling in Dhabuwala v. State Board for Prof. Med. Cond. (supra). The evidence which the Committee found credible also established that the Respondent ordered excessive tests unwarranted by the Patients' conditions, failed to maintain accurate medical records and practiced medicine fraudulently. The Respondent testified that the Management Company bore sole responsibility for the fraudulent conduct, but the Committee found that testimony non-credible and inferred the Respondent's intent from other factors, which the Committee enumerated. Where a Respondent's explanation for fraudulent misrepresentation is found non-credible, a BPMC Committee may properly draw an inference of intent to deceive, Catsoulis v. NYS Dept. of Health, 2 AD3d 920, 767 NYS2d 526 (3rd Dept. 2003).

The ARB affirms the Committee's Determination to revoke the Respondent's License. The Committee wrote that the Respondent lacked credibility, showed no remorse for his misconduct and failed to take any responsibility for his actions. They also noted that the Respondent formed the PC to bill for medical services, with no regard for the Patients. The Committee also cited to overwhelming evidence that the Respondent engaged in the fraudulent practice of medicine while providing grossly substandard care to the Patients. Revocation provides the appropriate sanction for the Respondent's misconduct.

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 revoke the Respondent's License.

Steven Grabiec, M.D.
Linda Prescott Wilson
Jill Rabin, M.D.

In the Matter of Ossama Elbahloul, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the Matter of Dr. Elbahloul.

Dated: 12 November 2019

A black rectangular redaction box covers the signature of Linda Prescott Wilson. A small handwritten mark is visible to the left of the box.

Linda Prescott Wilson

In the Matter of Ossama Elbahloul, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Elbahloul.

Dated, 10/28, 2019


Steven Grabiec, M.D.

In the Matter of Ossama Elbahloul, M.D.

Jill Rabin, M.D., an ARB Member concurs in the Determination and Order in the Matter
of Dr. Elbahloul.

Dated: 10/29, 2019



Jill Rabin, M.D.