



Department of Health

ANDREW M. CUOMO
Governor

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

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

August 9, 2018

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Marc S. Nash, Esq.
New York State Department of Health
Bureau of Adjudication
150 Broadway-Suite 510
Albany, New York 12204

Michael Keating, Esq.
Dughi, Hewit & Domalewski, P.C.
340 North Avenue E
Cranford, New Jersey 07016

Malini Rao, M.D.



RE: In the Matter of Malini Rao, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 18-177) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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 P. Moran
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cac
Enclosure

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

In the Matter of

Malini B. Rao, 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. 18- 177

Before ARB Members D'Anna, Koenig, Grabiec, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Marc Nash, Esq.
For the Respondent: Michael J. Keating, Esq.

The Respondent holds a medical license in New Jersey, in addition to her license to practice medicine in New York (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2018), the ARB considers whether to take disciplinary action against the Respondent's License following disciplinary action against the Respondent in New Jersey. After a hearing below, a BPMC Committee found that the Respondent engaged in conduct in New Jersey, which would amount to professional misconduct in New York, and the Committee voted to suspend the Respondent's License for fifteen months and to place her on probation for one year following the suspension. The Petitioner then requested administrative review and asked the ARB to modify the Committee's Determination by adding nine months stayed suspension and two additional years on probation. After reviewing the hearing record and the parties review submissions, the ARB votes 5-0 to modify the Committee's Determination by increasing the post-suspension probation from one year to three years.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). In the Direct Referral Hearing, the Petitioner charged that the Respondent violated New York Education Law (EL) §§ 6530(9)(b) & 6530(9)(d)(McKinney Supp. 2018) by committing professional misconduct, because the duly authorized professional disciplinary agency from another state:

- found the Respondent guilty for improper professional conduct [6530(9)(b)], and/or,
- took disciplinary action against the Respondent's medical license in that state [6530(9)(d)],

for conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Direct Referral Hearing Exhibit 1] alleged that the Respondent's misconduct in New Jersey would constitute misconduct if committed in New York, under the following specifications:

- practicing the profession with negligence on more than one occasion, a violation under EL § 6530(3); and/or
- failing to maintain accurate patient records, a violation under EL § 6530(32).

In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee demonstrated that the New Jersey State Board of Medical Examiners (New Jersey Board) issued a June 17, 2016 Order finding the Respondent guilty for misconduct for failing to record two failed efforts to place an epidural anesthetic in the lower lumbar spinal region of a labor and delivery patient. The catheter sheared in the epidural space both times, leaving fragments inside the patient's back resulting in complications for the patient, including back pain, an emergency laminectomy procedure to evacuate and debride an abscess and treatment for a methicillin-resistant staphylococcus aureus infection (MRSA). The New Jersey Board also found the Respondent failed to record truthfully the immediate outcome following the incident in a medical note she authored in the patient's chart weeks later. The New Jersey Board suspended the Respondent from practice for three years, with one year stayed and placed the Respondent on probation for that year. The New Jersey Board also ordered the Respondent to pay penalties totaling \$50,000.00, complete courses in record keeping and medical ethics and demonstrate before the New Jersey Board that she is fit and competent to resume the practice of medicine and surgery.

The Committee noted that the Respondent failed to take steps to document the problems with the catheter or to remove the catheter. The Committee also noted the Respondent's penchant for dishonesty during her testimony at the Direct Referral Proceeding, in which she attempted to justify the false chart entry (two weeks after the epidural complications) by stating her note was not false, but merely omitted facts. The Committee found further that the Respondent demonstrated a willingness to conceal wrongdoing at the expense of patient safety and health, rather than to take any steps to remedy the matter by documenting and discussing with the care team, referring the patient for evaluation and imaging or following up with the patient. The infected catheters invaded the Patient's epidural space and compressed a nerve root,

endangering the patient's health by exposing her to the risk of life threatening infections, including meningitis.

The Committee found that New York, like New Jersey, requires physicians to document anesthesia procedures to address adverse outcomes in a timely manner and to place other providers on notice of care. The Committee concluded that the Respondent's disregard for these obligations, if committed in New York, would have constituted practicing with negligence on more than one occasion and failing to maintain accurate records. The Committee voted to suspend the Respondent from practice for fifteen months and to place the Respondent on probation for one year following the suspension under the terms that appear as Appendix 1 to the Committee's Determination. The Committee rejected the Petitioner's request to include a fine with the sanction. The Committee determined that the New Jersey Board's sanction provided sufficient monetary penalties.

Review History and Issues

The Committee rendered their Determination on March 26, 2018. This proceeding commenced on April 10, 2018, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's reply brief. The record closed when the ARB received the reply brief on June 14, 2018.

The Petitioner requested that the ARB increase the sanction the Committee imposed by suspending the Respondent for twenty-four months, with nine months stayed and fifteen months actual, and by placing the Respondent on probation for three years. The Petitioner characterized the penalty the Committee imposed as light. Despite the Respondent's claim in her hearing

testimony that she learned her lesson, the Petitioner argued that a more lengthy period of probation was necessary to assure that the Respondent's misconduct never occurred again.

The Respondent replied that the penalty the Committee imposed was fair and appropriate, given the mitigating circumstances in the case and the remedial measures the Respondent undertook. The Respondent argued that the ARB should not disturb or alter the Committee's Determination in any way.

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 engaged in conduct in New Jersey that would constitute professional misconduct in New York and which makes her liable for action against her License. Neither party offered any challenge to the Committee's Determination on the charges. The ARB rejects the Petitioner's request that we impose an additional stayed suspension against the Respondent's License. We modify the Committee's Determination and we increase the probation in this case from one year to three years.

The Petitioner asked the ARB to change the penalty from a fifteen-month actual suspension to a twenty-four-month suspension with nine months stayed and fifteen actual. The Petitioner provided no explanation for why it was requesting to add a nine-month stayed

suspension to the penalty or what the additional stayed suspension would accomplish. The ARB sees no reason to modify the suspension terms. We find a fifteen-month actual suspension appropriate in this case.

The Petitioner also requested that the ARB increase the period of probation in this case from one to three years. The Respondent's Reply argued that the Respondent gave compelling testimony at hearing, which was honest and forthright, concerning mitigating factors and remedial measures and which made any alteration in the penalty unnecessary. The Committee, however, found the Respondent's hearing testimony anything but honest and forthright. The Committee noted the Respondent's penchant for dishonesty in her hearing testimony in the Respondent's attempt to justify her false chart entry as "not false" but merely "omitted" facts. The ARB agrees with the Petitioner that three years on probation, with a practice monitor, will provide greater assurance that the Respondent has corrected the error in her practice that resulted in the New Jersey Board's action. The Respondent's testimony alone fails to provide such assurance.

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 suspend the Respondent's License for fifteen months.

3. The ARB modifies the Committee's Determination to increase the time that the Respondent shall practice on probation from one year to three years.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Malini B. Rao, M.D.

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

Dated: 8 August, 2018



Linda Prescott Wilson

In the Matter of Malini B. Rao, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Rao.

Dated: August 2, 2018

A solid black rectangular redaction box covering the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Malini B. Rao, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Rao.

Dated: 8/2, 201



Steven Grabiec, M.D.

In the Matter of Malini B. Rao, M.D.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Rao.

Dated August 2, 2018

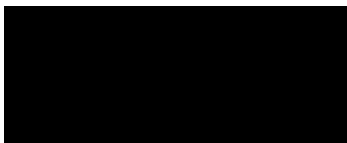


Richard D. Milone, M.D.

In the Matter of Malini B. Rao, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Rao.

Dated: August 7, 2018



John A. D'Anna, M.D.