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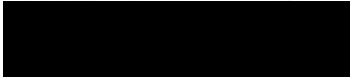
September 15, 2021

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Quist, Esq.
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower Building, Room 2512
Empire State Plaza
Albany, New York 12237

Andrew Knoll, Esq.
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507 Plum Street, Suite 310
Syracuse, New York 13204

Jacob William Smith, M.D.



RE: In the Matter of Jacob William Smith, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 21-192) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Jacob William Smith, M.D. (Respondent)

A proceeding to review a Determination by a Committee
(Committee) from the Board for Professional Medical
Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 21-192

COPY

Before ARB Members Torrelli, Rabin, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): David W. Quist, Esq.

For the Respondent: Andrew Knoll, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by diverting drugs for his own use and falsifying patient records to cover the diversion. The Respondent conceded the use and diversion. 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 asked the ARB to overrule the Committee, allow the Respondent to retain his License and place restrictions on the Respondent's practice. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination to revoke the Respondent's License.

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 on charges that the Respondent violated New York Education Law (EL) §§ 6530(2-5), 6530(8) and 6530(32) by:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross incompetence,
- practicing medicine with incompetence on more than one occasion,
- being a habitual abuser of or being dependent upon narcotics, barbiturates, amphetamines, hallucinogens or other drugs having similar effects, and,
- failing to maintain accurate patient records.

The diversion and use occurred while the Respondent, an anesthesiologist, provided care to thirteen persons (Patients A-M). The record identifies the Patients by letters to protect patient privacy.

The Committee determined that the Respondent committed professional misconduct by practicing fraudulently and with negligence on more than one occasion, failing to maintain accurate patient records and being a habitual abuser of or being dependent upon narcotics, barbiturates, amphetamines, hallucinogens or other drugs having similar effects. The Committee dismissed the other charges. The Committee found that, while providing anesthesia treatment to Patients A-M between February and May 2017 at Cayuga Medical Center (CMC), the Respondent diverted Dilaudid and fentanyl for his own use. Further, the Respondent documented incorrect drug amounts in the Patients' medical records intentionally to hide the diversion. A CMC hospital audit caught the diversion due to opioid discrepancies in pharmacy and medical records. The Committee found the diversion and incorrect documentation constituted serious deviations from the standard of care.

The Respondent's prior history revealed inpatient drug treatment in 2007 for substance abuse and monitoring after a University of Rochester Hospital audit revealed that, while working as a resident, the Respondent diverted fentanyl by drinking it from a syringe the Respondent used to "take off the excess" from 20 cc vials. The Respondent entered into a Temporary Surrender of his license in August 2007 prohibiting the Respondent from seeking to practice medicine due to substance abuse. In September 2009, the Respondent admitted that he violated PHL Article 33 by diverting fentanyl and failing to record accurately administrations of the drug to hospital patients between April and May 2007. The Respondent agreed to pay a fine. A BPMEC Committee restored the Respondent's privilege to seek licensure to practice medicine and to engage in the practice of medicine on July 31, 2010, subject to practicing and monitoring conditions and continuing enrollment in the Committee for Physician Health (CPH) for five years. The Respondent requested to end the monitoring and practicing conditions in October 2013. The Director for the Office for Professional Medical Conduct (OPMC) granted that request in March 2014.

The record showed further that, following the discovery of the diversion in May 2017, the Respondent received inpatient treatment for opioid abuse disorder at the Farley Center in Williamsburg, VA and thereafter outpatient individual and group counseling sessions at the Alcohol and Drug Council of Tompkins County in Ithaca, NY. The Respondent currently receives monthly injections [REDACTED], participates in regular self-help meetings and undergoes four monthly random urine drug screens.

The record also contained testimony from several witnesses, whom the Committee evaluated for credibility. The Department presented Stephen C. Gladysz, M.D., a board-certified

anesthesiologist, and David Evlyn, M.D., Vice-President of Medical Affairs at CMC and the Respondent's drug monitor pursuant to the prior BPMC monitoring condition. Dr. Gladysz testified that the administration of the Dilaudid and fentanyl to Patients A-M would have been inappropriate in the large amounts documented and that the amounts documented suggested diversion. Dr. Evlyn testified concerning the CMC audit findings and the Respondent's admission to the diversion. The Committee found the testimony from both these witnesses credible and consistent with the evidence.

The Respondent presented his A.A. sponsor, Kirk Tolhurst, M.D., psychotherapist Helen Kaplan, addiction therapist John Bezirgianian, M.D. and forensic psychiatrist R.P. Singh M.D. The Committee found these witnesses knowledgeable about addiction and recovery, but the Committee were unpersuaded by the opinions these witnesses expressed about the Respondent's ability to return safely to anesthesia practice. The Committee found this testimony inconsistent with treatment records and testimony suggesting otherwise. The Committee found the Respondent's testimony forthcoming about his history of opioid use disorder but less candid about the drugs the Respondent admitted to diverting. The Committee gave weight to the inconsistencies because they raised questions about whether any amounts were administered to patients. The Committee attributed the Respondent's evasiveness to his underlying disease and evaluated his testimony accordingly.

The Committee voted to revoke the Respondent's License. The Committee considered the serious nature of the Respondent's opioid use disorder and history of relapse and found that, based on the treatment recommendations and his prognosis for recovery and relapse, the Respondent is incapable currently to practice medicine safely. The Committee disagreed with the Respondent's testimony that CPH and other treatment providers deemed the Respondent safe and

appropriate to return to practice. The Committee noted that CPH never approved the Respondent's return to practice and instead recommended that the Respondent consider alternatives in lower risk working environments. A progress note from Dr. Bezirgianian stated that the Respondent remained risky to resume full anesthesia practice. Although Dr. Bezirgianian expressed a different opinion in his hearing testimony, he conditioned the Respondent's safe return to practice on continuous monitoring and treatment. [REDACTED]

Dr. Singh, the psychiatrist who evaluated the Respondent's fitness to practice, testified that such monitoring and treatment conditions must remain in place for the remainder of the Respondent's professional life. Dr. Singh acknowledged the possibility of another relapse involving patients and concluded that even with controls in place, the risk for relapse remains. Dr. Singh testified that the major risk factors for relapse include personal and career stress and mood disorders, which are stressors that remain for the Respondent. Dr. Evlyn testified to his opinion that one half of providers under active monitoring relapse. The Committee expressed concern that the Respondent has already relapsed despite hospital audits and the vigilance of staff familiar with the Respondent's history.

The Committee noted, that although the Respondent discussed the toll that he Respondent's disease had taken on his career and family, the Respondent never mentioned his patients as victims of his diversion or the hospital from which the Respondent stole supplies or drugs or the harm on self-injecting opioids and then driving home. The Committee rejected the Respondent's argument that precedent supported imposing a penalty short of revocation and rejected the request to limit the Respondent to practicing addiction medicine as an alternative.

The Committee concluded that the Respondent must eliminate any opportunity for relapse by choosing a different career path, such as teaching, to reach his goals.

Review History and Issues

The Committee rendered their Determination on April 15, 2020. This proceeding commenced on April 28, 2020, 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 Department's reply brief. The record closed when the ARB received the reply brief on June 4, 2020.

The Respondent asked that the ARB overturn the Committee's Determination to revoke the Respondent's License. The Respondent argued that:

- the Respondent is safe to return to medical practice, including anesthesia,
- medical science and the public policies of the Federation of State Medical Boards (FSMB) and the America Society of Addiction Medicine (ASAM) support that the Respondent is safe to return to the practice of medicine,
- treatment records and testimony were consistent with the testimony by the Respondent's witnesses that the Respondent is safe to return to practice,
- the Committee failed to appreciate addiction as a disease,
- practicing addiction medicine provides an alternative if the ARB has concerns about the Respondent handling and administering controlled substances.

The Respondent asked that the ARB return the Respondent to the practice of anesthesia with a stayed suspension, strict monitoring and treatment controls in place as seen In the Matter of Ryan Peterson, M.D., BPMC Determination and Order 13-405 [Respondent's Brief Attachment 12].

The Petitioner replied that the Committee evaluated the evidence appropriately, that fraudulent practice alone provides the basis for revocation, that the Respondent's arguments rely on material from outside the hearing record, that the Respondent misplaced the reliance on a prior OPMC Determination and that the Respondent proposed an insufficient penalty.

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 committed professional misconduct. Neither party challenged the Committee's Determination on the charges. We affirm the Committee's Determination to revoke the Respondent's License.

The Respondent committed fraud in the practice of medicine, which standing alone provides sufficient grounds to support revocation, Matter of Glassman v. Dept. of Health, 208 A.D.2d 1060; 617 N.Y.S.2d 413 (3rd Dept. 1994), lv. denied 85 N.Y.2d 801 (1995). This Respondent made false entries in 13 patient records to cover the diversion of narcotics for the Respondent's use. The false documentation deviated seriously from the standard of care and created serious risks to patients because it can mislead subsequent providers in care for the patients. Dr. Gladysz classified the false documentation as wrong ethically because it could mislead subsequent providers into believing mistakenly that patients' drug tolerances are

unusually high or misdiagnosing surgical complications as drug related. The Committee found that the Respondent's deliberate use of his License to falsify drug amounts to hide diversion showed a willingness to place the Respondent's diversion needs above the safe and effective management of patient pain, especially during the recovery period. The Committee noted that although the Respondent testified about the toll the disease has taken on his family and career, the Respondent never mentioned his patients as victims of the diversion. The Respondent testified that the record falsification was a "minor triviality" [Hearing Transcript page 248, lines 10 and 13]. The ARB found striking the Respondent's lack of focus on his patients.

The ARB finds that the Committee evaluated the evidence accurately and fairly and that the Committee made findings consistent with the record. The Committee found from the testimony and the treatment records that the Respondent remains at risk for a relapse. The Respondent has relapsed already. The Respondent stated at his 2010 Restoration Hearing that he realized that his condition would require a lifetime of vigilance, but by 2013 the Respondent was seeking to end his practicing and monitoring conditions. The Respondent also stopped participating in recovery meetings after he lost his initial sponsor. The Respondent's psychotherapist, Ms. Kaplan, testified that the Respondent was not being honest with himself in 2017 about how engaged you must be in a relapse recovery process and that there was still some self-delusion and lack of humility. Ms. Kaplan testified further that addiction is a disease of shame and secrecy and there will be some lack of honesty that one must push past [Hearing Transcript pages 281-282]. The Committee found the Respondent evasive in his hearing testimony and attributed the evasiveness to the underlying disease. The ARB questions whether the Respondent is being fully honest with himself yet and whether he has learned anything from the ordeal. The Respondent certainly showed no awareness about the potential harm he could

have caused his patients. We note that both the 2007 and 2017 diversions ended because an audit discovered the diversions, rather than because the Respondent self-reported the diversions.

The Respondent asked for another chance to return to medicine. We note that the Respondent has already had another chance. After weighing the Respondent's possible return against the risk of possible harm, the Committee found the risk unacceptable after concluding that the Respondent placed his needs above the safe and effective management of his patients' pain. We reject the suggestion that we limit the Respondent to practicing addiction medicine because we question whether the Respondent has full insight into his own addiction. We see no precedent in the 2013 BPMC Determination In the Matter of Ryan Peterson. Nothing in that Committee's Determination found Dr. Peterson evasive in his testimony or lacking in focus on his patients. The Committee's Determination also noted that Dr. Peterson had placed himself into treatment before the discovery that he was diverting drugs.

The ARB agrees with the Committee that it is critical that the Respondent eliminate any opportunity for diversion by choosing a different career path.

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.

Carmela Torrelli
Linda Prescott Wilson
Richard D. Milone, M.D.
Jill Rabin, M.D.

In the Matter of Jacob William Smith, M.D.

Carmela Torrelli, an ARB Member, concurs in the Determination and Order in the Matter
of Dr. Smith.

Dated: August 29, 2021



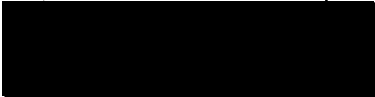
Carmela Torrelli

In the Matter of Jacob William Smith, M.D.

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

of Dr. Smith.

Dated: 8/25, 2021


Jill Rabin, M.D.



In the Matter of Jacob William Smith, M.D.

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

Dated: *August 25*, 2021



Richard D. Milone, M.D.

In the Matter of Jacob William Smith, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Smith.

Dated: 8 September, 2021



Linda Prescott Wilson