



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

Dennis P. Whalen
Executive Deputy Commissioner

November 18, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dianne Abeloff, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Harold Solomon, Esq.
430 Sunrise Highway
Rockville Centre, New York 11570

Robert Larkins, D.O.
94-38 59th Avenue
Rego Park, New York 11373

RE: In the Matter of Robert Larkins, D.O.

Dear Ms. Abeloff, Mr. Solomon and Dr. Larkins:

Enclosed please find the Determination and Order (No.97-189) 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.

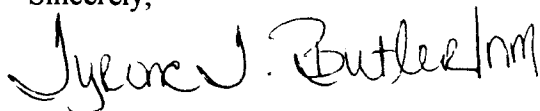
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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" followed by a vertical line and the initials "nm".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

IN THE MATTER

OF

ROBERT LARKINS, D.O. (Respondent)

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

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB NO. 97-189

**BEFORE: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,
EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**

After a hearing into charges that the Respondent committed professional misconduct, a BPMC Committee sustained charges that the Respondent practiced medicine fraudulently, ordered excessive tests and treatment and failed to maintain accurate patient records. The Committee voted to revoke the Respondent's New York Medical License for the misconduct. In this proceeding pursuant to N. Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the Respondent asks the Board to overturn the Committee's Determination on the charges or to reduce the penalty. The New York State Department of Health (Petitioner) asks that the Board sustain the additional charge that the Respondent practiced with negligence on more than one occasion. After considering the hearing record and the parties' briefs, the Board sustains the Committee's Determination on the charges, except that we modify the Determination to find that the Respondent also practiced with negligence on more than one occasion. We also sustain the Committee's Determination revoking the Respondent's license. On our own motion, we modify the penalty to impose a Ten Thousand Dollar (\$10,000.00) Fine, for the Respondent's fraudulent conduct and his willingness to expose his patients to excessive and unnecessary tests for his own enrichment.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination.

HAROLD SOLOMON, ESQ., represented the Respondent.

DIANNE ABELOFF, ESQ. represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530 (2), (3), (5), (32) & (35), by committing professional misconduct under the following categories:

- practicing medicine fraudulently,
- practicing with negligence on more than one occasion,
- practicing with incompetence on more than one occasion,
- failing to maintain accurate patient records, and,
- ordering excessive tests and treatments.

The charges related to the Respondent's treatment for four patients, A through D, following the Patients' injuries in automobile accidents. The record refers to the Patients by initials to protect their privacy.

Three BPMC Members, **JERRY WAISMAN, M.D., Chair, RALPH LEVY, D.O., and REV. EDWARD HAYES** comprised the Committee who conducted the hearing in this matter, pursuant to N.Y. Pub. Health Law § 230(7)(McKinney's Supp. 1997), and who rendered the Determination which the Board now reviews. Administrative Law Judge **MICHAEL P. McDERMOTT** served as the Board's Administrative Officer and drafted the Determination. The Committee sustained the charges that the Respondent:

- ordered excessive tests or treatments for Patients A to C;
- committed fraud in treating Patients A to C, by ordering excessive tests, knowingly, for his own financial benefit; and,
- maintained records that failed to reflect patient treatment accurately.

The Committee dismissed the negligence and incompetence charges and dismissed all the charges relating to Patient D. The Committee voted to revoke the Respondent's New York License for his fraudulent conduct, upon concluding that no courses in morality or ethical conduct could rehabilitate him.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on August 1, 1997. The Respondent then commenced this proceeding on August 18, 1997, when the Board received the Notice requesting a Review pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The Board received the Respondent's brief on September 8, 1997, the Petitioner's brief on September 15, 1997, the Respondent's reply on September 22, 1997 and the Petitioner's reply on September 15, 1997.

The Respondent contends that a disgruntled insurance carrier commenced the proceeding against him to avoid paying medical bills and contends that he failed to receive due process at the hearing, because the Petitioner's expert formed his opinion prior to reviewing legible medical records. The Respondent alleges that proof before the Committee failed to show:

- patient harm,
- practice below accepted standards, or,
- reliance on alleged misrepresentations leading to injury.

The Respondent also contends that the Committee imposed their penalty due to bias over the Respondent's age. In response to the Petitioner's submissions, the Respondent argues the Petitioner can point to no factual showing to justify the Committee's Determination.

The Petitioner requests that the Board find the Committee's Determination dismissing the negligence charges to be inconsistent with the Committee's findings and the Petitioner requests that the Board rule that the Committee's findings support a Determination that the Respondent practiced with negligence on more than one occasion in treating Patients A to C. In response to the Respondent's brief, the Petitioner contends that record legibility caused no problem at the hearing, that no insurance company participated in prosecuting the Petitioner's case and that the Respondent's age formed no consideration in the Committee's penalty Determination.

REVIEW BOARD AUTHORITY

In reviewing a Committee's Determination, the Board determines: 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 the law permits [N.Y. Pub. Health Law § 230(10)(i), § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law § 230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995).

REVIEW BOARD DETERMINATION

The Board has considered the record and the parties' briefs. We conducted deliberations in this case on September 26, 1997. We reject the Respondent's due process challenge to the hearing. We sustain the Committee's Determination that the Respondent failed to maintain accurate records, that he ordered excessive tests or treatments and that he practiced medicine fraudulently. We modify the Committee's Determination to find that the Respondent practiced medicine negligently on more than one occasion in treating Patients A to C. We sustain the Committee's Determination revoking the Respondent's License. We modify the penalty, to include a Ten Thousand Dollar (\$10,000.00) Fine.

We find nothing in the record to support the Respondent's contention that the Petitioner's expert formed his opinion in the case based on illegible records. As the Petitioner's Reply brief notes, the expert denied, at page 69 in the transcript, finding the Respondent's records illegible. Further, we

find no relevance as to who may have filed the complaint that began the proceeding against the Respondent. The questions on this review concern whether the proof in the records supports the findings and what would constitute an appropriate penalty, if the proof does support the findings.

We conclude that the Respondent failed to maintain accurate records. A medical record that fails to convey objectively meaningful medical information concerning the patient treated to other physicians is inadequate, Matter of Bogdan v. State Bd. for Prof. Med. Conduct, 195 AD2d 86, 606 NYS2d 381 (Third Dept. 1993). The Committee found that the Respondent's records:

- noted he prescribed relaxant and analgesic drugs, but failed to identify the drug or dosage;
- failed to document the rationale for ordering various tests;
- noted test results infrequently;
- failed to note how tests influenced patient management or treatment; and,
- sometimes failed to contain any notes on tests, other than billing records.

Such records failed to reflect accurately patient care and treatment and they formed a sufficient basis for the Committee's conclusion that the Respondent maintained inaccurate records.

The proof before the Committee also demonstrates that the Respondent ordered over thirty tests or treatments for each Patient, A to C, without medical indication. Such proof demonstrates that the Respondent ordered excessive tests or treatments. The proof established a pattern showing excessive and inappropriate testing and the proof justified the Committee's inference that the Respondent knew that no indication existed for these tests when he ordered them. The evidence, therefore, established that the Respondent knowingly misrepresented the need for the testing for his own financial gain and supported the Committee's Determination that the Respondent practiced medicine fraudulently. No need existed to show reliance, to prove fraud under the Education Law, Matter of Tompkins v. Board of Regents, 299 N.Y. 469, 476, 87 N.E.2d 517 (1949), reversing 274 A.D. 354, 85 N.Y.S.2d 140 (3d Dept. 1948).

The Board concludes that the evidence also established that the Respondent practiced medicine with negligence on more than one occasion in treating Patients A to C. The proof that the Respondent ordered unnecessary, excessive or inappropriate tests or treatment establishes that the

Respondent practiced medicine below accepted medical standards. Such proof demonstrates that the Respondent practiced medicine with negligence on more than one occasion. The Committee offered no explanations as to why they dismissed the negligence charge, after making the findings about excessive testing. The Board modifies the Determination to sustain the charge that the Respondent practiced with negligence on more than one occasion.

The Board sustains the Committee's Determination revoking the Respondent's License to practice Medicine in New York State. The Respondent's repeated fraudulent conduct violated the trust that the public places in the medical profession and violated specifically the trust that the Respondent received from the Patients whom the Respondent subjected to unnecessary or inappropriate testing. The Respondent's conduct demonstrates that he lacks the necessary integrity to practice medicine. The Board finds the Respondent's age irrelevant to determining a penalty in this case, because no retraining or continuing medical education can aid a Respondent who lacks integrity, Matter of Bezar v. DeBuono, __ AD2d __, 659 NYS2d 547 (Third Dept. 1997). We agree with the Committee that the Respondent's fraudulent conduct justifies revoking the Respondent's License. The Board believes that the Respondent's conduct in subjecting his patients to excessive tests for no reason, other than the Respondent's own financial gain, justifies a Ten Thousand Fine (\$10,000.00), in addition to the revocation. We modify the Committee's penalty to impose a fine in that amount.

ORDER

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

1. The Board sustains the Committee's Determination that the Respondent committed professional misconduct, but we modify the Determination, to find that the Respondent practiced medicine with negligence on more than one occasion, in addition to practicing fraudulently, ordering excessive testing and maintaining inaccurate records.
2. The Board sustains the Committee's Determination revoking the Respondent's New York Medical License.
3. The Board modifies the Committee's Determination, to add a Ten Thousand Dollar (\$10,000.00) Fine to the Respondent's penalty.
4. 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.
5. 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).

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF ROBERT LARKINS, D.O.

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. Larkins.

DATED: Roslyn, New York

November 8, 1997

A handwritten signature in cursive script, appearing to read "Edward C. Sinnott, M.D.", written over a horizontal line.

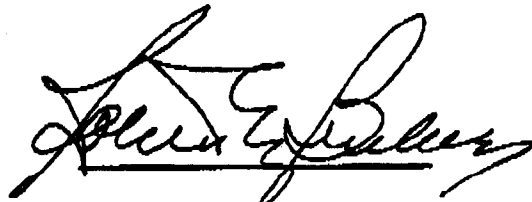
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF ROBERT LARKINS, D.O.

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. Larkins.

DATED: Schenectady, New York

11/10 /1997

A handwritten signature in black ink, appearing to read "Robert M. Briber", written in a cursive style. The signature is positioned above a horizontal line.

ROBERT M. BRIBER

IN THE MATTER OF ROBERT LARKINS, D.O.

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. Larkins.

DATED: Syracuse, New York

10 Nov. , 1997



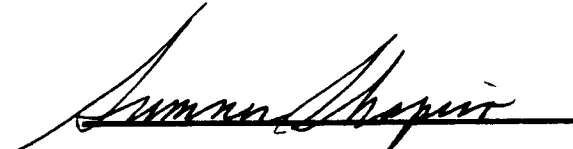
WILLIAM A. STEWART, M.D.

IN THE MATTER OF ROBERT LARKINS, D.O.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Larkins.

DATED: Delmar, New York

Nov 12, 1997


SUMNER SHAPIRO