



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

October 5, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ruben L. Otero, M.D.
224 Brookside Avenue
Mt. Vernon, NY 10553

Roy Nemerson, Esq.
NYS Department of Health
5 Penn Plaza - Sixth
New York, NY 10001

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, NY 10583

RE: In the Matter of Ruben L. Otero, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 98-104) 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.

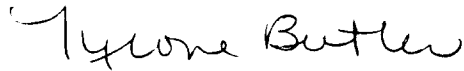
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

**In The Matter Of
Ruben L. Otero, M.D. (Respondent)**

**Administrative Review
Board (ARB)
Determination and
Order 98 - 104**

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

**Before Board Members : Briber, Grossman, Lynch, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Anthony Z. Scher, Esq.
For the Petitioner: Roy Nemerson, Esq.**

In this proceeding we consider the penalty to impose against the Respondent following his Federal criminal conviction for devising a scheme to defraud insurance companies. After a hearing on charges that the Respondent's conviction constituted professional misconduct for a physician, a BPMC Committee sustained that charge, voted to suspend the Respondent's New York Medical License for two years, stayed the suspension and placed the Respondent on probation for six years. The Petitioner now asks, pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1998), that the ARB overturn that Determination and revoke the Respondent's License, due to the Respondent's fraudulent conduct, the Respondent's inappropriate attempt to minimize his fraudulent conduct and insufficient mitigating evidence in the record. After considering the record and the submissions by both parties, we vote unanimously to revoke the Respondent's License to practice medicine in New York State.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges [Committee Determination, Appendix I] with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(ii) (McKinney Supp. 1998) by committing an act that resulted in a criminal conviction under Federal Law. An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p) (McKinney Supp. 1998), before a BPMC Committee, who rendered the Determination which the ARB now reviews. In such a Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). The case began through a Summary Order suspending

the Respondent's License to practice, following his criminal conviction. The Respondent has been away from medical practice since the Summary Order.

The Committee found that the Respondent committed a crime under Federal Law, due to his April 29, 1997 guilty plea in the United States District for the Southern District of New York, to devising a scheme to defraud insurance companies, a class D felony under Title 18 USC § 1341. The Respondent admitted in entering his plea that he submitted insurance claims seeking payment for unindicated services or services the Respondent never performed (Petitioner Exhibit 4, page 17). The District Court sentenced the Respondent to three years on probation with eight months home confinement and ordered that the Respondent pay a criminal penalty assessment and Eighteen Thousand One Hundred Twelve Dollars (\$18,112.00) in restitution.

The Committee concluded that the Respondent posed no threat to repeat his misconduct and that the Respondent was an asset to his community. The Committee also noted that the Respondent has paid a considerable monetary sanction due to his summary suspension from practice. The Committee placed the Respondent on probation for six years, with requirements that the Respondent obtain a practice monitor, a sobriety monitor and a therapist with training in addiction therapy.

Review History and Issues

The Committee rendered their Determination on May 27, 1998. This proceeding commenced on June 12, 1998 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 Respondent submitted his reply brief on July 20, 1998.

The Petitioner argues that License revocation constitutes the appropriate sanction for fraud in medical practice. The Petitioner contends that Respondent submitted insufficient mitigating evidence to justify a sanction less severe than revocation, that no expert testimony, medical records or other reliable evidence proves the Respondent's work an asset to his community and that the Respondent has paid an insufficient price for his misconduct to this point. The Petitioner alleges that

the Committee failed to give proper effect to aggravating factors such as the Respondent's attempt to trivialize his fraudulent conduct and his lack of honesty beyond the crime itself.

In reply, the Respondent contends that the Petitioner's brief ignores important facts, mischaracterizes arguments from the hearing below and seeks to remove all discretion from BPMC for imposing misconduct penalties. The Respondent notes that he has been out of practice since Autumn, 1997 and that the Committee imposed a heavy penalty, in addition to his actual suspension. The Respondent claims that he submitted the fraudulent insurance billings to help patients meet insurance deductibles, due to pressures and demands from the patients. The Respondent's brief asserts, at page 3, that the Committee credited the Respondent's testimony on that issue. The Respondent notes, that other than the admission at his guilty plea, there has never been a determination as to whether the procedures for which he billed were unindicated. The Respondent's brief calls our attention to several BPMC Committee Determinations that imposed a sanction less severe than revocation for fraudulent conduct and to the character evidence that the Respondent submitted.

Determination

All ARB Members participated in this case, considered the record and considered the parties' briefs. We hold that the Committee imposed an inappropriate penalty for the conduct at issue in this case, that the record shows nothing on which to conclude that the Respondent no longer presents a danger to repeat his misconduct and that no mitigating evidence in this case overcomes the Respondent's admission to participating in a scheme to use his medical license to enrich himself through fraud. We vote to overturn the Committee and revoke the Respondent's License.

We conclude that the Committee's imposed an inappropriate penalty, because the Statement of Charges contained no allegations that the Respondent ever practiced while impaired by drugs, alcohol or mental disease, yet the Committee imposed probation requiring a therapist and sobriety monitor. The Statement of Charges also contained no allegations that the Respondent ordered unnecessary tests due to negligence or incompetence, but the Committee imposed a probation term requiring a practice monitor. The Respondent admitted in his guilty plea that he had submitted the

billings for unnecessary procedures or procedures he never performed to defraud insurance companies. He never raised impairment or incompetence as an excuse before the Committee, instead, he tried to blame his patients for his conduct. No basis existed in the charges or in the proof for imposing monitoring and therapy conditions in the penalty and the ARB sees no way that those conditions will provide protection to any patients or deter the Respondent from future misconduct.

The ARB concludes from the record that the Respondent submitted false billings for his own enrichment. At the hearing, the Respondent attempted to blame his misconduct on his patients, arguing that the patients pressured him into submitting billings to help the patients avoid out-of-pocket payments for insurance deductibles. The Respondent's brief, at page 3, claimed that the Committee credited that testimony by the Respondent. The ARB sees no finding, conclusion or discussion in the Committee's Determination indicating that the Committee believed that the Respondent acted from patient pressure. The Committee did find the patients who testified credible [Committee Determination page 4], but no patient who testified stated that they pressured the Respondent or that the Respondent had ever helped them with insurance deductibles. The Respondent did admit at the hearing he received payments from the fraudulent billings [Transcript page 93] and apparently the Respondent retained those payments, because the District Court ordered that the Respondent pay over Eighteen Thousand Dollars (\$18,000.00) in restitution to insurance companies as part of his criminal sentence [Petitioner Exhibit 5, fourth page]. We also see nothing in the record to indicate that the Respondent discontinued his illegal conduct for any reason other than that the government caught up to him.

At page 3 in his brief, the Respondent infers that he may have actually provided necessary treatment in the cases at issue, but entered a guilty plea to billing for unnecessary treatment, only because he had no choice in order to obtain the plea agreement ending the criminal case. The ARB refuses to accept the Respondent's attempt to repudiate his guilty plea and admissions. The ARB provides no forum for the Respondent to relitigate his criminal conviction.

The record demonstrates that the Respondent used his medical license to commit fraud. The Respondent engaged in a scheme over three years, to defraud insurance companies for his own gain, by submitting billings to those companies knowingly for unnecessary services or services he never

performed. The Respondent engaged in that scheme until the government caught up to him and he retained his financial gain until the criminal court ordered him to return the money as part of his sentence. Before the Committee and the ARB the Respondent has attempted to save his License, by blaming his patients for his misconduct and by inferring that he actually provided necessary services. The ARB sees the Respondent's attempts to blame his patients and his attempt to repudiate his admissions in his guilty plea as aggravating rather than mitigating circumstances. We conclude that his criminal conduct outweighs the good work he has done for his patients, that the Respondent's repeated and intentional misconduct violates the public trust in the medical profession and proves the Respondent lacks the integrity to remain in this profession. The ARB votes unanimously to revoke the Respondent's License.

ORDER

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

1. The ARB **SUSTAINS** the Committee's Determination, finding that the Respondent committed professional misconduct.
2. The ARB **OVERTURNS** the Committee's Determination suspending the Respondent's License to practice medicine in New York State, staying the suspension and placing the Respondent on probation for six years.
3. The ARB **REVOKES** the Respondent's license to practice medicine in New York State.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

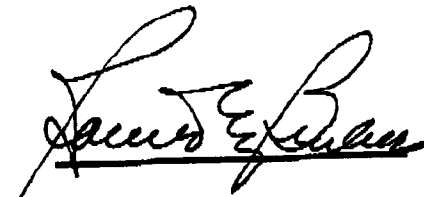
Stanley L. Grossman, M.D.

Therese G. Lynch, M.D.

In The Matter Of Ruben L. Otero, M.D.

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. Otero.

Dated : Sept 7 , 1998


Robert M. Briber

In The Matter Of Ruben L. Otero, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Otero.

DATED: September 7, 1998



Sumner Shapiro

In The Matter Of Ruben L. Otero, M.D.

Therese G. Lynch, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Otero.

Dated : Sept 10 , 1998

A handwritten signature in cursive script that reads "Therese G. Lynch, M.D." with a horizontal line drawn underneath the signature.

Therese G. Lynch, M.D.

In The Matter Of Ruben L. Otero, M.D.

Winston S. Price, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Otero.

Dated: 9/12, 1998

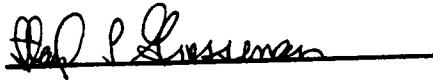


Winston S. Price, M.D.

In The Matter Of Ruben L. Otero, M.D.

Stanley L. Grossman, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Otero.

Dated September 25 1998

A handwritten signature in cursive script, appearing to read "Stanley L. Grossman", is written over a solid horizontal line.

Stanley L. Grossman, M.D.