



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Public

Dennis P. Whalen
Executive Deputy Commissioner

August 22, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Amy B. Merklen, Esq.
NYS Department of Health
Corning Tower Room 2512
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Albany, New York 12237

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Bond, Schoeneck & King, PLLC
111 Washington Avenue
Albany, New York 12210

Jerry Katzman, M.D.
P.O. Box 16
Sacket Harbor, New York 13685

RE: In the Matter of Jerry Katzman, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-78) 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.

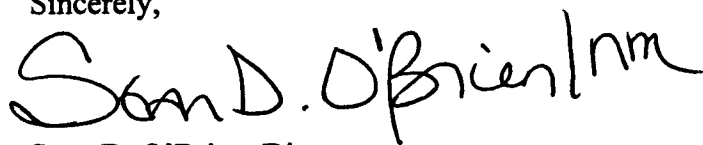
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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 "Sean D. O'Brien/nm". The signature is written in a cursive style with a large initial "S" and a long horizontal stroke at the end.

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:nm

Enclosure

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

In the Matter of

Jerry Katzman, M.D. (Respondent)

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

COPY

Administrative Review Board (ARB)

Determination and Order No. 05-78

Before ARB Members Grossman, Lynch, Pellman, Wagle and Briber

Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Amy B. Merklen, Esq.

**For the Respondent: Bond, Schoeneck & King
By Carolyn Shearer, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by practicing medicine fraudulently and willfully submitting false reports. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney Supp. 2005), the Respondent asks the ARB to nullify that Determination and argues that the evidence failed to support the Committee's findings, their conclusions on the charges and their judgment on the penalty. After considering the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination in full.

Committee Determination on the Charges

The Committee conducted a hearing on charges that the Respondent violated N. Y. Educ. Law (EL) §§ 6530(2) & 6530(21)(McKinney Supp. 2005) by committing professional misconduct under the following specifications:

- practicing the profession of medicine fraudulently, and,
- willfully filing a false report required by law or by the Health or Education Departments.

The charges related to the answers the Respondent provided on four documents:

- an application for appointment for Samaritan Medical Center (Samaritan Application),
- a participating physician application for the Specialty Surgery Center of Central New York (Center Application),
- the form used to update the Respondent's New York State Physician Profile (Profile), and,
- the Subject Statement for filing with the National Practitioner Data Bank (Subject Statement).

The answers on the documents related to:

- the Respondent's privileges with Humana Health Plans of Florida (Humana Privileges),
- a malpractice settlement,
- the Respondent sitting for an examination for board certification, and,
- a fellowship.

The Respondent admitted that the Samaritan Application concerned false information concerning a malpractice settlement, a fellowship and the Respondent sitting for a certification examination.

The Respondent denied any intention to deceive in providing that information. The Respondent denied that any other false information appeared in the documents at issue in the hearing.

Following the hearing on the charges, the Committee rendered the written Determination now on review.

The Committee made general findings that the Respondent, an ophthalmologist, practiced formerly in Florida and entered into several contracts with Humana. In 1994, following an investigation and hearings, Humana limited the Respondent's privileges due to quality of care problems. Further, the Committee found that the Respondent entered into and paid a medical malpractice settlement in 1987. In addition, the Committee found that the Respondent never participated in nor completed a fellowship with the Oculoplastic Fellowship Society of New York. Also, the Committee found that the Respondent never received board certification in any specialty and that the Respondent was never scheduled to sit for the board examination in ophthalmology in April 2002.

On the charges, the Committee found that the Respondent gave deliberately false answers, with the intent to deceive, on the Samaritan and the Center Applications and on the Subject Statement. The Committee dismissed all charges involving the Profile. In the Samaritan Application, the Committee found that the Respondent gave intentionally false answers by:

- denying that there were any settlements against him in professional liability cases [Committee Finding of Fact (FF) 10],
- denying he ever agreed to a limitation of privileges to avoid a disciplinary action [FF 11],
- claiming that he completed an Oculoplastic Fellowship in 1984 [FF 14], and,
- claiming he was scheduled to sit for the ophthalmology board examination in April 2002 [FF 15].

The Committee found that the Respondent submitted a Subject Statement to the National Practitioner Data Bank in 1997, after Humana notified the Bank about the adverse action against the Respondent's Humana Privileges. In the Subject Statement, the Committee found that the Respondent made an intentionally false statement by claiming that Humana action involved no quality of care issues, when in fact the Humana action did involve quality of care issues. In the Center Application, the Committee found that the Respondent gave an intentionally false answer

in denying that his privileges had ever been restricted or reduced due to quality of care issues, when in fact the Humana action involved quality of care issues.

In making their findings, the Committee relied in part on testimony by Dr. Ewing-Chow, the Chief of Ophthalmology at Samaritan, who contacted Humana to verify information on the Samaritan Application. Dr. Ewing-Chow found that the Humana action involved patient care deficiencies from unnecessary cataract surgery and inappropriate laser surgery on post-operative cataract patients. The Committee found corroboration for that testimony in several documents in the Department's Hearing Exhibit C. The Committee rejected contrary testimony by the Respondent, who claimed that the Humana proceeding involved record keeping only. As to the answers on the Samaritan Application dealing with the malpractice settlement, the fellowship and the certification examination, the Respondent admitted that the Samaritan Application contained false information. The Respondent claimed that the false information appeared on the Samaritan Application due to an honest mistake, rather than any intent to mislead. To support that position, the Respondent testified and presented testimony by his former office manager, Peggy Husted. The Committee found the testimony by the Respondent and Ms. Husted unconvincing.

The Committee concluded that the Respondent's false answers on Applications and the Subject Statement amounted to practicing fraudulently and willfully filing false reports. The Committee voted to revoke the Respondent's License. The Committee found that the Respondent engaged in a pattern of fraudulent conduct and that the Respondent continued his dishonesty through his testimony at the hearing.

Review History and Issues

The Committee rendered their Determination on April 25, 2005. This proceeding commenced on May 11, 2005, 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 brief on June 21, 2005.

The Respondent argues that the Committee erred in crediting the testimony by Dr. Ewing-Chow, because that testimony constituted less than reliable hearsay and because Dr. Ewing-Chow would have been in competition for patients with the Respondent if the Respondent received privileges at Samaritan. The Respondent also faults the Committee for rejecting testimony by Ms. Husted, which the Respondent described as disinterested, and the Respondent's own testimony, which the Respondent described as forthcoming and consistent. The Respondent also argues that the evidence fails to establish the intent or willful misconduct necessary to prove fraud in medical practice or willfully filing a false report. The Respondent argues further that the facts in the case fail to warrant a penalty so severe as revocation. The Respondent asserts that he admitted to honest mistakes on the Samaritan Application concerning the malpractice settlement, the fellowship and the board examination and the Respondent asserts that he will make no such mistakes in the future.

The Petitioner raised no issues on review and asked that the ARB affirm the Committee.

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 Determination on the evidence the Committee found credible and we affirm the Committee's

Determination to sustain the fraud and false reporting charges and we affirm the penalty the Committee imposed.

Credible Evidence: Most charges that the Committee sustained involved the limitation in the Humana Privileges. The Committee used testimony by Dr. Ewing-Chow and documents in evidence as Exhibit C as the basis for finding that the limitation on the Humana Privileges involved patient care issues rather than records. The Committee recognized that Dr. Ewing-Chow's testimony amounted to hearsay, because Dr. Ewing-Chow's testimony relied on conversations that the witness had with a Humana physician, Dr. Quigley, who did not testify at the hearing in this case. The Committee found corroborating evidence in Exhibit C. The evidence in Exhibit C also contradicted the Respondent's testimony. The Committee addressed the Respondent's claim that Dr. Ewing-Chow gave false testimony because the Respondent represented a competitor. The Committee found that Dr. Ewing-Chow did many privileges investigations for Samaritan and that other Ophthalmologists who would be competitors of the witness received privileges at Samaritan.

The ARB defers to the Committee as the fact finder in their judgment on credibility between the Respondent and Dr. Ewing-Chow. The Committee received the opportunity to observe both witnesses and the Committee gave detailed analysis about why they credited the one witness and rejected the other. We hold that the Committee acted within their authority and we see no error in their judgment.

The other sustained charges involved the answers on the Samaritan Application that denied that the Respondent made the malpractice settlement and claimed that the Respondent held a fellowship and planned to sit for the Ophthalmology certification examination. The Respondent admitted that those answers amounted to false information, but the Respondent and

Ms. Husted testified that the false information resulted from honest errors. The Committee rejected that testimony and once again gave detailed reasons for the rejection. For example, Ms Husted testified that she was having a bad day when she prepared the Samaritan Application for the Respondent's signature. She also testified that she misunderstood the question because the question asked about professional liability cases rather than malpractice cases. The Committee found that testimony lacked credibility, because Ms. Husted had prepared other credentialing applications for the Respondent, and even on a bad day, the witness must have known that professional liability meant malpractice cases. The Respondent testified that he gave the Samaritan Application only a cursory review that failed to detect the false information. The ARB notes that such false information, however, included claims about a fellowship the Respondent never participated in and an April 2002 certification examination that the Respondent never planned to take. We find that the Committee had good reason to reject the Respondent's testimony, because even a cursory review should have identified such blatantly false information. Again, we defer to the Committee's judgment as the fact finders who received the opportunity to observe the witnesses. The Committee acted within their authority in rejecting the testimony by the Respondent and Ms. Husted and we find no error in that rejection.

Fraud and False Reporting Charges: In order to sustain a charge that a licensee practiced medicine fraudulently, a hearing committee must find that (1) a licensee made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (Third Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer the licensee's knowledge and intent properly from facts that such committee finds, but

the committee must state specifically the inferences it draws regarding knowledge and intent, Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (Third Dept. 1991). To prove willfully filing a false report, a committee must establish that a licensee made or filed a false statement willfully, which requires a knowing or deliberate act, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Merely making or filing a false report, without intent or knowledge about the falsity fails to constitute professional misconduct, Matter of Brestin v. Comm. of Educ., (supra). A committee may reject a licensee's explanation for erroneous reports (such as resulting from inadvertence or carelessness) and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., (supra).

Under PHL § 230(10)(f), a Committee must base their conclusions on a preponderance of the evidence¹. Preponderant evidence means the burden to persuade the fact-finder that a fact's existence is more probable than its non-existence [1 New York Patterned Jury Instructions 2d, PJI 1:60]. Under the preponderance standard, if evidence is equally balanced or if evidence leaves a fact-finder in such doubt as to be unable to decide a controversy either way, then the judgment must go against the party upon whom the burden rests [Prince-Richardson, Evidence §3-206 (11th Edition, Farrell)].

The ARB holds that the evidence the Committee found credible provided preponderant evidence that the Respondent's answers on the Samaritan and Center Applications and the Subject Statement constituted fraud in practice and willfully filing a false report. The Respondent knowingly gave false information. The Committee stated that they inferred that the Respondent gave the false information to mislead Samaritan, the Center and the National Practitioner Data

¹ The Respondent's brief, at Section B on Page 4, stated incorrectly that the burden required proof by substantial evidence.

Bank. The Committee acted within their authority in rejecting the Respondent's explanations for the false answers.

Penalty: Under PHL § 2805-k, before a hospital may grant privileges, the hospital must obtain information from physicians as part of the quality assurance process to protect the safety of the hospital's patients. The quality assurance system must rely on truthful reporting by the physicians seeking privileges. Under the Health Care Quality Improvement Act of 1986 [Title IV of Public Law 99-660], the United States Congress created the National Practitioner Data Bank to improve health care quality by encouraging health care entities to identify and discipline those who engage in unprofessional behavior and to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery about a medical malpractice payment or an adverse action history. When the Data Bank receives a report about a subject physician, the physician may file a subject statement with the Bank to challenge the accuracy of the report.

The Respondent's repeated, fraudulent conduct impedes the quality assurance and Data Bank systems that seek to protect patient safety and improve health care. Such repeated, fraudulent conduct also demonstrated that the Respondent lacks the integrity necessary to practice medicine in New York State. The Respondent's lack of remorse for his misconduct leads the ARB to conclude that the Respondent remains at risk to repeat such misconduct if we allow the Respondent to retain his License. We vote 5-0 to sustain the Committee's Determination to revoke the Respondent's License.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

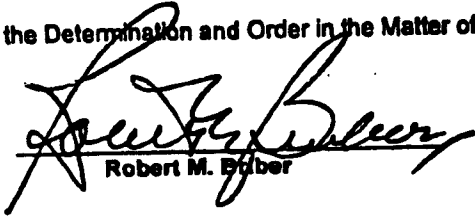
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License.

Robert M. Briber
Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Jerry Katzman, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Katzman.

Dated: August 20, 2005


Robert M. Briber

In the Matter of Jerry Katzman, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Katzman.

Dated: 8/19, 2005

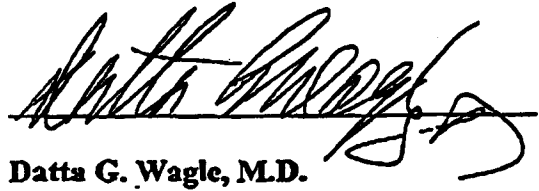


Thea Graves Pellman

In the Matter of Jerry Katzman, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Katzman.

Dated: 8/21, 2005


Datta G. Wagle, M.D.

In the Matter of Jerry Katzman, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Katzman.

Dated: August 20, 2005

Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

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In the Matter of Jerry Katzman, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Katzman.

Dated: August 22 2005

Therese G. Lynch

Therese G. Lynch, M.D.