



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

Public

February 21, 2006

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Heron Rattray, M.D.
137-04 Guy R. Brewer Boulevard
Jamaica, New York 11434

Heron Rattray, M.D.
229 Lower Rocky Point Road
Sound Beach, New York 11789

Daniel Guenzburger, Esq.
NYS Department of Health
90 Church Street - 4th Floor
New York, New York 10007

Ralph A. Erbaio, Esq.
Hoffman, Einiger & Polland PLLC
220 East 42nd Street, Suite 435
New York, New York 10017

**RE: In the Matter of Heron Rattray, M.D. &
Rochdale Medical, P.C.**

Dear Parties:

Enclosed please find the Determination and Order (No. 05-265) 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.

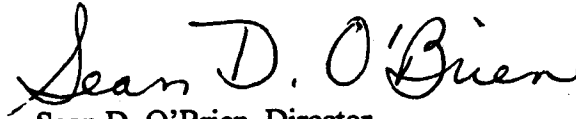
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah

Enclosure

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

In the Matter of

Heron Rattray, M.D. &
Rochdale Medical, P.C. (Respondents)

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. 05-265

COPY

Before ARB Members Grossman, Lynch, Pellman, Wagle and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Daniel Guenzburger, Esq.
For the Respondent: Ralph A. Erbaio, Jr., Esq.

After a hearing below, a BPMC Committee determined that the Respondents engaged in repeated, fraudulent and willfully false conduct and the Committee voted to revoke the Respondent Rattray's License to practice medicine in New York State (License) and the Respondent Rochdale's certificate of incorporation (Certificate). In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2006), the Respondents ask the ARB to nullify that Determination. Upon reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondents engaged in repeated and serious misconduct and we affirm the License and the Certificate revocations. On our own motion, the ARB also fines the Respondent Rattray \$10,000.00.

Committee Determination on the Charges

The Committee conducted a hearing in this matter on charges that the Respondents violated N. Y. Educ. Law (EL) §§ 6530(2-3), 6530(5), 6530(14), 6530(16), 6530(21) &

6530(32)(McKinney Supp. 2006) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- failing to provide a hospital with information required under PHL § 2805-k,
- willful or grossly negligent failure to comply with substantial provisions of federal law governing the practice of medicine,
- willfully filing a false report, and,
- failing to maintain accurate records.

The charges related to:

- billings for tests, procedures and x-rays, for nine persons (Patients A-I);
- statements on hospital and managed care applications, the New York Physician Profile and the New York State Education Department Application for Re-Licensure; and,
- records that the Respondent submitted to the Office for Professional Medical Conduct (OPMC).

The charges also alleged that the Respondent Rattray used the Respondent Rochdale Medical, P.C. as a vehicle for illegal transactions. The Respondent Rattray is the sole shareholder in that professional corporation and Rochdale was the legal entity that submitted Medicare and insurance claims at issue in this proceeding. The Committee conducted a three-day hearing on the charges and thereafter rendered the Determination now under review.

The Committee determined that the Respondent Rattray practiced medicine fraudulently and willfully submitted false reports by:

- submitting false reports, with the intent to mislead, for procedures such as x-rays, spirometries and or stress tests, which the Respondent never performed;
- intentionally misrepresenting facts on health care credentialing applications and on an Education Department licensure application; and,

- altering medical records and making misrepresentations on the dates for x-rays.

The Committee also found that the Respondent Rattray practiced with negligence on more than one occasion by failing to follow up on abnormal laboratory results for Patients B and C. Further, the Committee found that the Respondent Rattray violated EL § 6530(14) and PHL § 2805-k by concealing information about his suspension from Franklin Hospital on an application to St. Vincent's Catholic Medical Center. Finally, the Committee determined that the Respondents violated substantial provisions of federal law pertaining to the practice of medicine by billing Medicare for services never performed on Patients C through G.

In making their determinations on the charges, the Committee credited testimony by the Petitioner's expert witnesses, Ellen Czajka, M.D. and Henry Spector, M.D., and the Petitioner's Investigator Joseph Cain, R.N. The Committee found the Respondent lacked credibility as a witness due to his bias in the outcome of the proceeding, his disregard for the hearing process and his refusal to take responsibility for his actions.

The Committee voted to revoke the Respondent Rattray's License. The Committee concluded that the Respondent Rattray's conduct demonstrated a lack of honesty, which no additional training or probation could remediate. The Committee also noted that the Respondent Rattray showed no genuine remorse for his conduct. The Committee also revoked the Certificate for the Respondent Rochdale.

Review History and Issues

The Committee rendered their Determination on November 16, 2005. This proceeding commenced on November 30, 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 February 3, 2006.

The Respondents argued that the hearing record failed to support the Committee's Determination and the Respondents asked that the ARB overturn the revocations. The Respondents argued that Dr. Rattray testified at the hearing that he performed all x-rays and EKGs for which the Respondents billed. The Respondents argued that record-keeping problems resulted from administrative difficulties in the Respondents' office. As to the Respondent Rattray's conduct in altering medical records and in failing to disclose information on credentialing and licensure applications, the Respondents argued that Dr. Rattray acted with no intent to deceive. The Respondents contended that Dr. Rattray made alterations to the medical records due to poor judgment and the Respondents argued that Dr. Rattray's wife prepared all the applications and that Dr. Rattray failed to review the applications carefully. The Respondents also argued that their hearing counsel failed to provide adequate legal representation and the Respondents contended that the failure to receive effective assistance of counsel provides grounds on which to overturn the Committee's Determination. The Respondents also argued that the Committee imposed a penalty grossly disproportionate to the conduct at issue in the hearing.

The Petitioner asks the ARB to affirm the Committee's Determination. The Petitioner argues that the Respondents' effective assistance of counsel argument falls outside the ARB's limited review jurisdiction. The Petitioner argues further that the hearing evidence supported all the findings by 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's Determination on the charges and we affirm the Determination to revoke the Respondent Rattray's License and the Respondent Rochdale's Certificate. On our own motion, we modify the Committee's Determination and fine the Respondent Rattray \$10,000.00.

The Respondents argued that there should be a new hearing due to ineffective assistance of counsel at the hearing before the Committee. The Respondents based that argument on the decision in Axelrod v. Ambach, 126 A.D.2d 288, 513 N.Y.S.2d 858 (3rd Dept. 1987). In that case, the Appellate Division for the Third Department ordered additional hearing days in a case in which a physician's hearing attorney had poor orientation and difficulty in both speech and memory during a hearing, due to a brain tumor. In this case, the Respondents argued that their hearing counsel failed to raise a proper defense, but the Respondents point to nothing in the record that would indicate that their hearing counsel suffered poor orientation, difficulties in speech or memory loss. The Respondents also failed to make any showing that the former counsel's conduct at the hearing resulted in any way from illness. In addition, the Respondents failed to provide this panel of non-attorneys with any legal guidelines by which we could judge whether the hearing counsel's conduct failed to provide effective assistance of counsel to the extent that due process would mandate a new hearing. The ARB declines to remand this case for further proceedings and we leave the Respondents to raise the issue with the courts.

As to the charges that the Committee sustained, the Respondents argue that the hearing record fails to support the charges, if you accept all the Respondent Rattray's explanations, excuses and attempts to blame others. The Respondents argue, in effect, that the Committee erred because they rejected the Respondent Rattray's testimony. The ARB finds no error here.

The Committee had the opportunity to observe Dr. Rattray and the Petitioner's witnesses testify and the ARB defers to the Committee, as the fact finder, in the Committee's judgment on witness credibility. The testimony that the Committee found credible provided proof by preponderance of the evidence that the Respondents engaged in fraudulent conduct by billing for services that Dr. Rattray never performed, altering medical records and withholding information on credentialing and licensure applications. The Petitioner's expert, Dr. Czajka, testified that x-rays in the record appeared duplicated because the patients appeared situated in the exact same way and with the same artifacts in the x-rays, which Dr. Rattray claimed to have taken months apart. The Respondent Rattray conceded that he withheld information on the credentialing and licensure applications and that he altered records and he conceded that he billed for performing EKGs which are absent from Patient charts. The Committee acted within their authority in accepting the testimony and conclusions by Dr. Czajka, in rejecting Dr. Rattray's explanations and by inferring that the Respondents acted with the intent to mislead. On the negligence charge, the Respondents made no challenge to the Committee's findings that the Respondents failed to follow-up on abnormal laboratory results for two patients.

We also reject the Respondent's arguments that the Committee imposed an overly harsh penalty by revoking Dr. Rattray's License and the Rochdale Certificate. The Respondents engaged in repeated and varied fraudulent conduct. The Respondent Rattray used his License fraudulently to enrich himself by claiming to perform services that he never performed. The Respondent Rattray also withheld information on credentialing and licensing applications and altered records that he submitted to OPMC in response to the investigation in this case. The Respondent Rattray thus attempted to impede the efforts by health care providers and regulators to assure that the Respondent Rattray is providing safe and effective care to patients. Both the

systems for health care quality assurance and health care reimbursement require honesty and integrity from physicians in order for those systems to function. The Respondent has demonstrated that he lacks honesty and integrity and the ARB agrees with the Committee that no continuing education program, period on probation or license restriction will change that.

After considering the penalty that the Committee imposed, the ARB concludes that the Respondent Rattray's conduct actually warrants a penalty more severe than that which the Committee imposed. The Respondent Rattray intentionally made false representations by billing for medical services that he never performed. The ARB infers that Dr. Rattray made those false representations for his own financial gain. The ARB concludes that such conduct warrants a civil fine in addition to the revocations. We fine the Respondent Rattray \$10,000.00.

ORDER

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

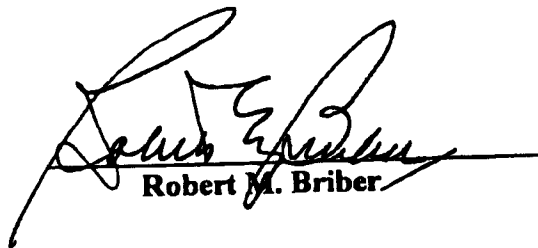
1. The ARB affirms the Committee's Determination that the Respondents committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent Rattray's License and the Respondent Rochdale's Certificate.
3. On our own motion, the ARB fines the Respondent Rattray \$10,000.00.

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 Heron Rattray, M.D. & Rochdale Medical, P.C.

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

Dated: February 18, 2006



Robert M. Briber

In the Matter of Heron Rattray, M.D. & Rochdale Medical, P.C.

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

Dated: Feb 20, 2006



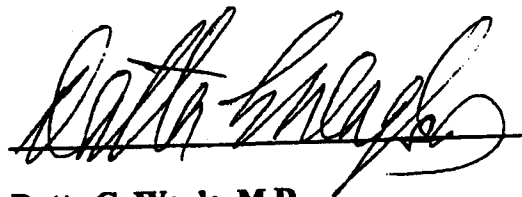
Thea Graves Pellman

In the Matter of Heron Rattray, M.D. & Rochdale Medical, P.C.

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

Matter of Dr. Rattray and Rochdale.

Dated: 2/18/, 2006

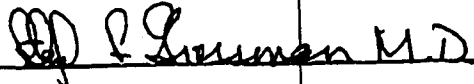


Datta G. Wagle, M.D.

In the Matter of Heron Rattray, M.D. & Rochdale Medical P.C.

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

Dated: February 18, 2006



Stanley L Grossman, M.D.

In the Matter of Heron Rattray, M.D. & Rochdale Medical, P.C.

Therese G. Lynch, M.D., an ABB Member concurs in the Determination and Order in the Matter of Dr. Rattray and Rochdale Medical.

Dated: Feb 17, 2006

Therese G Lynch M.D.

Therese G. Lynch, M.D.