



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

Public

Dennis P. Whalen
Executive Deputy Commissioner

October 17, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Andre Benony Celestin, M.D.
2348 Dutch Broadway
Elmont, New York 11003

Andre Benony Celestin, M.D.
Katmar Medical Center
205 Clankron Avenue
Brooklyn, New York 11226

Nathan L. Dembin, Esq.
Nathan L. Dembin & Associates
225 Broadway – Suite 1400
New York, New York 10007

Robert Bogan, Esq.
NYS Department of Health
Office of Professional Medical Conduct
433 River Street – 4th Floor
Troy, New York 12180

RE: In the Matter of Andre Benony Celestin, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-119) 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.

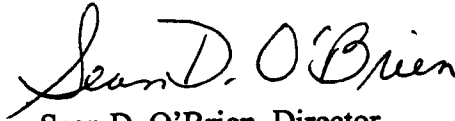
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

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

Andre Benony Celestin, M.D. (Respondent)

Administrative Review Board (ARB)

Determination and Order No. 05-119

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

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):
For the Respondent:**

**Paul Robert Maher, Esq.
Nathan L. Dembin, Esq.**

In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2005), the ARB considers the action to take against the Respondent's license to practice medicine in New York State (License) following the Respondent's Federal criminal conviction for soliciting and accepting Medicare kickbacks. After a hearing below, a BPMC Committee voted to censure and reprimand the Respondent and to suspend his License for three months. The Petitioner now asks the ARB to overturn that Determination and to revoke the Respondent's License. After considering the hearing record and the parties' review submissions, the ARB votes 5-0 to overturn the Committee and to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing in this matter under the expedited hearing procedures (Direct Referral Hearing) in PHL § 230(10)(p). In the hearing, the Petitioner charged that the Respondent violated N. Y. Educ. Law (EL) §§ 6530(9)(a)(ii) (McKinney Supp. 2005) and committed professional misconduct by engaging in conduct that resulted in a criminal

conviction under Federal Law. In a Direct Referral Proceeding, the statute limits the Committee to considering whether a criminal conviction occurred, and if the Committee determines a conviction occurred, the Committee then determines the nature and the extent of the penalty to impose against the licensee, Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). The Direct Referral Proceeding began under a March 5, 2004 order from the Commissioner of Health, pursuant to PHL §230(12)(b), which suspended the Respondent's License summarily, due to a felony conviction.

Following the hearing, the Committee rendered a written Determination that the Respondent entered a guilty plea in United States District Court for the Southern District of New York in June 2004. The Respondent admitted to Solicitation and Receipt of Medicare Kickbacks, a crime under Title 42 USC § 1320a-7b(b)(1)(A). The Court sentenced the Respondent to three years on probation, including six months house arrest, a \$6000.00 fine and a \$100.00 assessment. The Committee found that the crime involved accepting payments from a gastroenterologist in return for referring Medicare patients to the gastroenterologist, over a period of approximately six years. The Committee determined that the Respondent's conduct constituted misconduct under EL § 6530(9)(a)(ii).

The Committee voted to censure and reprimand the Respondent and to suspend the Respondent's License for three months, retroactive to the date of the Commissioner's Summary Order. The Committee rejected a request by the Petitioner to revoke the Respondent's License or to fine the Respondent. The Committee concluded that although the Respondent engaged in serious criminal activity on several occasions and provided less than frank testimony at hearing, the Respondent experienced no previous problems with law enforcement, disciplinary proceedings or malpractice claims. The Committee also cited the Respondent's history for

providing medical care to poor and under-served populations. The Committee also found the Respondent an unlikely candidate to repeat his criminal behavior.

Review History and Issues

The Committee rendered their Determination on June 14, 2005. This proceeding commenced on June 21, 2005, 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 ARB received the reply brief on August 22, 2005.

The Petitioner asks that the ARB overturn the Committee and revoke the Respondent's License, due to the criminal activity. In the alternative, the Petitioner requests that the ARB place the Respondent on probation and/or impose a fine.

The Respondent's reply repeated some mitigating factors that the Committee's Determination cited, such as the Respondent's work for poor and under-served populations. The Respondent noted that he has already paid a penalty both through the criminal sentence and the Commissioner's Summary Suspension Order that disrupted the Respondent's practice. The Respondent indicated that he complies currently with the Court Order to make payments on his criminal fine. The Respondent argued that he has learned his lesson, that his criminal conduct amounts to an aberration and that he poses no risk of imminent harm or danger to his patients.

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. The ARB affirms the Committee's Determination that the Respondent's criminal conviction made the Respondent's License subject to disciplinary action under EL § 6530(9)(a)(ii). Neither party challenged the Determination on the charge. The ARB overturns the Committee's Determination on penalty and votes to revoke the Respondent's License.

The Respondent violated the public's trust in the medical profession by accepting fees for referrals. Such conduct threatens medical service quality and professionalism and creates the possibility that a licensee would make a referral due to personal profit rather than a patient's medical need or the quality of the medical care that the referral physician may provide. The Respondent argued that all patients that received referrals in the cases at issue needed the referrals, but the Committee found the Respondent less than frank in his testimony. The Respondent engaged in this pattern of deliberate misconduct over an extended period of time. The Respondent argued that the misconduct violated no New York laws. The ARB finds no mitigation in that argument. Violating Federal laws constitutes professional misconduct under EL § 6530(9)(a)(ii) and every physician should know that it's wrong to accept fees for referrals. The Respondent's less than frank testimony demonstrates a lack of remorse for this misconduct

and leads the ARB to conclude that the Respondent remains at risk to repeat the misconduct if the Respondent retains his license.

The Respondent's misconduct demonstrates his unfitness to practice medicine in New York State and the ARB votes to revoke the Respondent's License.

ORDER

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

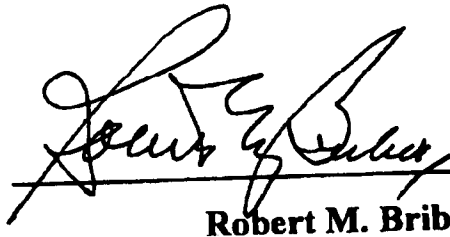
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to censure and reprimand the Respondent and to suspend the Respondent's License.
3. The ARB revokes the Respondent's License.

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 Andre Benony Celestin, M.D.

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

Dated: October 14, 2005



Robert M. Briber

In the Matter of Andre Benony Celestin, M.D.

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

Dated: Sept. 12, 2005



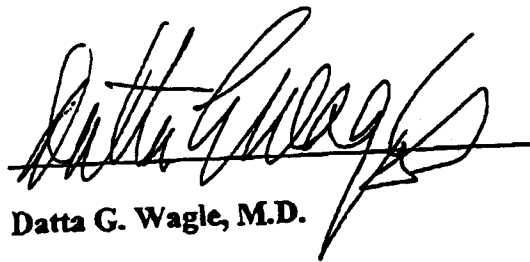
Thea Graves Pellman

In the Matter of Andre Benony Celcstin, M.D.

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

Matter of Dr. Celestin.

Dated: 9/11/, 2005



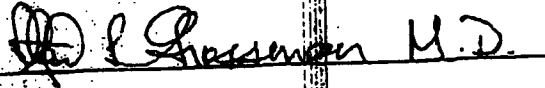
Datta G. Wagle, M.D.

In the Matter of Andre Benony Celestin, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Celestin.

Dated: September 9 2005

Handwritten signature of Stanley L. Grossman, M.D. in cursive script, underlined.

Stanley L. Grossman, M.D.

In the Matter of Andre Benony Celestin, M.D.

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

Dated: Sept 8, 2008

Therese G Lynch M.D.

Therese G. Lynch, M.D.