



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Public

Wendy E. Saunders
Chief of Staff

March 3, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Melchias Mukendi, M.D.
61 – 15 97th Street, Apt. 6F
Rego Park, New York 11374

Daniel Guenzburger, Esq.
NYS Department of Health
Division of Legal Affairs
90 Church Street – 4th Floor
New York, New York 10007

Denise L. Quarles, Esq.
Quarles & Associates, P.C.
36 West 44th Street – Ste. 1018
New York, New York 10036

RE: In the Matter of Melchias Mukendi, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.07-227) 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.

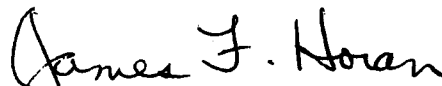
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Melchias Mukendi, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 07-227

COPY

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

For the Department of Health (Petitioner): Daniel Guenzburger, Esq.
For the Respondent: Denise Quarles, Esq.

After a hearing below, a BPMC Hearing Committee (Committee) found that the Respondent engaged in professional misconduct and the Committee voted to revoke the Respondent's License to practice medicine in New York State (License) and to fine the Respondent \$50,000.00. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), the Respondent asks the ARB to nullify the Committee's Determination or to reduce the penalty. The Petitioner asks the ARB to modify the Determination by increasing the amount of the fine. After reviewing 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 New York Education Law (EL) §§ 6530(2), 6530(11), 6530(19-20) & 6530(25) (McKinney 2008) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,

- permitting, aiding or abetting the unlicensed practice of medicine,
- permitting an unqualified individual to share in fees for professional services,
- engaging in conduct that evidences moral unfitness in the practice of medicine, and,
- delegating professional responsibilities to persons when the licensee knows or has reason to know that such persons lacks qualifications by licensure to perform the professional responsibility.

The charges involved the Respondent's care and treatment for five persons (Patients A-E). The record refers to the Patients by initials to protect patient privacy. The charges also contained allegations concerning the Respondent's relation with several medical professional corporations (Corporations).

The Committee found that the Respondent referred Patients A-E for unnecessary consultations and treatments. The Committee concluded that the Respondent:

- practiced fraudulently by referring the Patients for unnecessary tests, treatment and consultations for the Respondent's benefit only;
- engaged in further fraudulent conduct by participating in the formation of the Corporations by allowing the Corporations' actual, non-physician owners to use the Respondent's name on legal documents forming the Corporations;
- willfully filed false reports by ordering and then billing for unnecessary tests and by filing false statements with the New York State Education Department concerning the formation of the Corporations;
- delegated professional responsibilities to unlicensed persons by permitting non-physician owners of the Corporations to determine the course for testing and treatment for the Respondent's Patients; and,
- engaged in conduct that evidenced moral unfitness in the practice of medicine by working almost his entire career in New York State in collusion with non-physician clinic owners, to defraud the State's no-fault system.

The Committee also concluded that the Respondent engaged in conduct that evidenced moral unfitness in violating the public trust in the medical profession, by using the Respondent's position as a physician to enrich himself unjustly by ordering unnecessary tests and treatments.

In reaching their conclusions, the Committee relied on testimony by the Petitioner's medical expert, Joseph Carfi, M.D. The Committee's Determination stated that the Committee gave great weight to Dr. Carfi's testimony upon finding that Dr. Carfi gave balanced, direct and forthright testimony. The Committee also found that Dr. Carfi had no interest in the outcome of the proceeding. The Committee also found credible the testimony by Douglas Lentivich, Esq., an Assistant Counsel at the Office of Professions at the New York State Education Department, concerning statutory requirements for medical professional corporations. The Committee noted that the Respondent testified on his own behalf and held a clear interest in the hearing's outcome. The Committee found that the Respondent's testimony demonstrated a lack of basic medical knowledge. The Committee also found the Respondent's testimony in conflict with an affidavit that the Respondent gave in which he admitted to ordering unnecessary diagnostic procedures, being listed falsely as the owner of the Corporations and splitting fees with the Corporations' non-physician owners.

The Committee voted to revoke the Respondent's License and to fine the Respondent \$50,000.00. The Committee determined that the Respondent engaged in a long-standing pattern of fraud to the detriment of his Patients and the citizens of the State of New York. The Committee stated that they found nothing in the testimony demonstrating remorse and nothing to lead the Committee to believe that any possibility existed for rehabilitation. The Committee imposed the maximum \$10,000.00 fine possible for each specification concerning treatment to the Patients, for a total fine of \$50,000.00.

Review History and Issues

The Committee rendered their Determination on October 17, 2007. This proceeding commenced on November 5, 2007, 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 brief. The record closed when the ARB received the Respondent's brief on December 18, 2007.

The Respondent argued that the Committee imposed an overly harsh penalty. The Respondent argued that courts should not second-guess the medical necessity for tests and procedures. The Respondent also argued that no proof existed that the Respondent acted with the intent to commit fraud. The Respondent argued that he was remorseful and that he was capable of the legitimate practice of medicine.

The Petitioner argued that the Committee concluded incorrectly that the maximum possible fine in the case was limited to \$50,000.00. The Petitioner argued that the Committee could also have imposed a \$10,000.00 fine in each of the five instances in which the Respondent facilitated lay ownership of the Corporations. The Petitioner requested that the ARB correct the Committee's error and increase the fine against the Respondent to \$100,000.00.

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 and we reject the parties' challenges to the Committee's conclusions on the charges and the penalty.

The Respondent argued against second-guessing a physician as to the necessity for tests and procedures. The ARB notes that the Respondent's Affidavit admitted to ordering unnecessary tests and procedures. The Committee found the Respondent's Affidavit more credible than the Respondent's testimony to the contrary and the ARB defers to the Committee in the Committee's judgment on credibility. The ARB affirms the Committee's conclusion that the Respondent ordered unnecessary tests and treatments.

The Respondent also argued that no proof existed to show that the Respondent acted with the intent to commit fraud. The ARB holds that the evidence before the Committee did prove fraud. 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). 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 Education, 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986).

Once again, the Respondent's Affidavit admitted that the Respondent ordered unnecessary tests and treatments and the Respondent's Affidavit admitted to allowing the Corporation's non-physician owners to share in professional fees and to determine treatments

and tests for the Patients. The testimony by Dr. Carfi and the medical records in evidence demonstrated further that the Respondent ordered unnecessary tests and treatments. The evidence also showed that the Respondent made misrepresentations concerning the Corporations' true ownership. The Committee found that the evidence established that the primary benefit of the treatments that the Respondent ordered for Patients A to E was to generate revenue for the Respondent. The evidence provided the Committee with the basis to infer that the Respondent made knowing and deliberate misrepresentations, with the intent to mislead, about the need for treatments and tests and about the Corporations' ownership.

The ARB affirms the Committee's Determination to revoke the Respondent's License. The ARB finds revocation the appropriate penalty for the Respondent's continued fraudulent activity. The Respondent exposed Patients to unnecessary tests and treatments for no reason other than the Respondent's financial benefit. We agree with the Committee that the Respondent demonstrated no remorse for his conduct and that nothing in the record suggested the potential for rehabilitation. Further, the ARB sees no support in the record for the Respondent's assertion that he could practice medicine legitimately. The Committee found that the Respondent spent almost his entire career in New York State colluding with the non-physician Corporation owners to defraud the State's no-fault insurance system. The ARB also affirms the Committee's Determination to fine the Respondent \$10,000.00 for the misconduct in the treatment of each of the Patients A to E, whom the Respondent sent for unnecessary tests and treatments. The ARB sustains the total fine of \$50,000.00. The Respondent exposed the Patients to the tests and treatments for the Respondent's financial gain only. The ARB rejects the Petitioner's request to fine the Respondent an additional \$50,000.00. The Petitioner based the request for the additional fine on the argument that the Committee erred in limiting the fine to \$50,000.00, because the Committee could also have imposed a fine for the Respondent's conduct with the Corporations' non-physician owners. The ARB sees no error because the Committee chose to limit the fine to the conduct involving the Patients.

ORDER

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

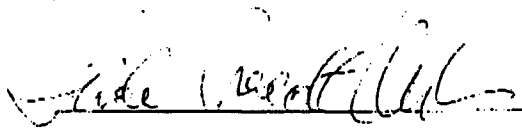
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License and to fine the Respondent \$50,000.00.

Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Linda Prescott Wilson
Therese G. Lynch, M.D.

In the Matter of Melchias Mukendi, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Mukendi.

Dated Feb 21, 2008, 2008

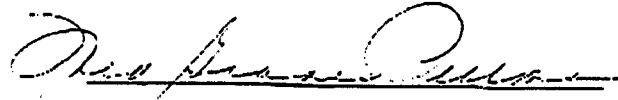


Linda Prescott Wilson

In the Matter of Melchias Mukendi, M.D.

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

Dated: Feb 29, 2008



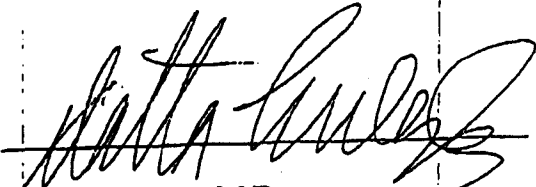
Thea Graves Pellman

In the Matter of Melchias Mukendi, M.D.

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

Matter of Dr. Mukendi.

Dated: 2/19/ 2008

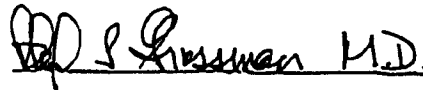


Datta G. Wagle, M.D.

In the Matter of Melchias Mukendi, M.D.

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

Dated: 02/16, 2008

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Stanley L Grossman, M.D.

In the Matter of Melchias Mukendi, M.D.

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

Matter of Dr. Mukendi.

Dated: February 16, 2008

Therese G. Lynch M.D.

Therese G. Lynch, M.D.