



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.  
*Commissioner*

Wendy E. Saunders  
*Chief of Staff*

September 24, 2008

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mikhail Makhlin, M.D.

Redacted Address

Gregory J. Gallo, Esq.  
The Pellegrino Law Firm  
475 Whitney Avenue  
New Haven, Connecticut 06511

Daniel Guenzburger, Esq.  
NYS Department of Health  
Bureau of Professional Medical Conduct  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007

**RE: In the Matter of Mikhail Makhlin, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 08-51) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

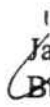
Office of Professional Medical Conduct  
New York State Department of Health  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

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,

Redacted Signature

 James R. Horan, Acting Director  
Bureau of Adjudication

JFH:djh

Enclosure

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

In the Matter of

Mikhail Makhlin, 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. 08-51

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: Gregory J. Gallo, Esq.

Following a hearing below, a BPMC Committee determined that the Respondent committed serious and repeated acts of professional misconduct in treating patients and in making misrepresentations in records and on an application. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License) and to fine the Respondent \$100,000.00. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), the Respondent asks the ARB to nullify findings by the Committee and to reduce the penalty and the fine against the Respondent. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination on the charges, we affirm the Determination to revoke the Respondent's License and we affirm the Determination that the Respondent pay a \$ 100,000.00 fine.

### Committee Determination on the Charges

The Committee conducted a hearing into charges alleging that the Respondent violated New York Education Law (EL) §§ 6530(2-3), 6530(16), 6530(20-21) & 6530(35) (McKinney 2008) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- engaging in a willful or grossly negligent failure to comply with substantial provisions of state law, rules or regulations governing the practice of medicine,
- engaging in conduct that evidences moral unfitness in the practice of medicine,
- willfully filing a false report, and,
- ordering excessive tests or treatments unwarranted by a patient's condition.

The charges related to the medical care that the Respondent provided to six persons (Patients A-F) from 2001 to 2005. The record refers to the Patients by initials to protect privacy. The Respondent prescribed the Patients the medication Serostim and/or other antiretroviral medications to treat HIV and AIDS wasting syndrome. The wasting syndrome involves unintentional weight loss in an HIV infected individual. The allegations also charged that the Respondent provided false information deliberately in an application to New York Methodist Hospital (Application). The Respondent denied all factual allegations and all specifications of misconduct and the matter proceeded to a hearing. Following the hearing, the Committee rendered the Determination now on review.

The Committee determined that the Respondent prescribed Serostim and other medications for the Patients without legitimate medical need, that the Respondent made misrepresentations to the Medical Assistance Program (Medicaid) and that the Respondent provided false information on the Application deliberately and with the intent to mislead.

The Committee determined that the Respondent practiced fraudulently by making false representations with the intent to mislead in prescribing HIV medications for Patients B, D, and E without legitimate medical need for the medications, by listing a false weight and diagnosis for Patient A and by making a false denial on the Application. The Committee found further that the Respondent willfully made or filed false reports in making false entries in the medical records and in submissions to Medicaid for Patients A-E and on the Application. The Committee also found that the Respondent engaged in a willful and/or grossly negligent failure to comply with a state rule or regulation. The Committee determined that the Respondent violated Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York § 515.2(b)2 by making false statements to Medicaid in connection with information that the Respondent provided to obtain prior authorization for the Serostim prescriptions to Patients D and E. The Committee found that the Respondent engaged in conduct that evidenced moral unfitness in the practice of medicine by submitting false information to Medicaid, by placing false information in the medical records for Patients A-F and thus creating the potential for grave or serious injury to the Patients, by prescribing medications without legitimate medical need and by providing false information in the Application. The Committee determined that the Respondent practiced with negligence on more than one occasion by diagnosing the Patients inappropriately, prescribing medications without adequate medical indication and failing to confirm or rule out patient HIV status. The Committee determined that the Respondent ordered excessive treatments unwarranted by patient condition by prescribing medication for Patients A-F without adequate medical indication.

In making the findings, the Committee relied on the Respondent's medical records in evidence, the Application, other documentation and testimony by the Petitioner's medical expert,

Edward Telzak, M.D. The Committee found that the Respondent's medical expert, Vincent N. Jarvis, M.D., had difficulty in providing direct answers to questions, went out of his way to defend the Respondent regardless of the evidence in the Respondent's own patient records and relied on information the Respondent provided from outside patients medical records. The Committee found that the Respondent fabricated testimony and evaded questions. The Respondent claimed to rely on information that patients provided, but the Respondent never recorded in patient records. The Committee rejected such claims because the Respondent could not recall the patients themselves or physical characteristics and attributes. The Respondent also attempted to blame savvy patients for deceiving the Respondent to obtain Serostim and to blame other practitioners or his staff for failing to return calls or secure prior medical information. The Committee rejected that defense by the Respondent because patient records failed to document any of the Respondent's claims.

The Committee voted to revoke the Respondent's License and to fine the Respondent \$100,000.00. The Committee concluded that no penalty less severe than revocation would correct or change the Respondent's conduct. The Committee noted further that the Respondent committed fraud and demonstrated that he lacks the integrity to practice medicine. The Committee found the fine appropriate for six acts of prescribing inappropriately, making a false entry in the medical record for Patient A, failing to comply with the Medical prior authorization protocol by making a false representation to Medicaid for Patients D and E and making a deliberate misrepresentation on the Application.

### Review History and Issues

The Committee rendered their Determination on April 8, 2008. This proceeding commenced on or about April 22, 2008, when the Respondent filed a 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 30, 2008.

The Respondent alleges error by the Committee for relying on the testimony by Dr. Telzak and for inferring inappropriately that the Respondent played a role in a scheme to procure Serostim. The Respondent argues that no evidence demonstrated that he received a secondary gain from the Serostim prescriptions. The Respondent argued that he committed no fraud and that he was not adept at detecting fraud by patients who provided false information. The Respondent argues that patients involved in this case were arrested rather than the Respondent. The Respondent also suggests that the Department of Health targeted the Respondent following a New York Times article concerning the number of Serostim prescriptions the Respondent issued. The Respondent requests a reduction in the penalty and the fines.

In reply, the Petitioner argues that the Respondent's appeal amounts to an inappropriate attempt to re-litigate the hearing before the ARB. The Petitioner contends that the Respondent has raised no appropriate issue for appeal and asks that the ARB affirm the Committee's Determination in full.

### 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health. 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 committed professional misconduct under all specifications in the Statement of Charges. The ARB affirms the Committee's Determination to revoke the Respondent's License and the Determination to fine the Respondent \$100,000.00.

The Respondent alleged that the Petitioner failed to present preponderant evidence to prove the charges because other evidence in the record may have conflicted with evidence the Committee found credible. The ARB defers to the Committee, as the fact finder in their judgment on credibility. The Committee discussed in detail their reasons for crediting the testimony by Dr. Telzak over Dr. Jarvis and for rejecting totally the testimony by the Respondent. The evidence, which the Committee found credible, proved all the charges against the Respondent. The ARB agrees with the Petitioner that the Respondent's brief attempts to re-litigate the Committee's findings.

The ARB finds that revocation and a large fine provide the proper sanction in this case. The Respondent engaged in numerous fraudulent acts concerning patient records, representations to Medicaid and the Application. This misconduct demonstrates that the Respondent lacks integrity. No retraining program or other sanction will teach the Respondent integrity. The

Respondent's lack of integrity demonstrates his unfitness to practice medicine. The Respondent demonstrated a disregard for his Patients' safety by placing incorrect information in patient medical records and by prescribing medications without proper medical indication. That misconduct placed patients at risk. The Respondent has shown no remorse for his misconduct and has attempted to blame others for his errors. The Respondent's refusal to accept responsibility for misconduct and to accept the need to change his practice means that the Respondent remains at risk to repeat his misconduct in the future and to place future patients at risk. The refusal also makes the Respondent a poor candidate for retraining. The Respondent's serious and deliberate misconduct also warrants fines in each of the ten instances that the Committee discussed at page 35 in their Determination.

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.
3. The ARB affirms the Committee's Order that the Respondent pay a fine of \$100,000.00.

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 Mikhail Makhlin, M.D.

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

Dated: 9 September 2008

Redacted Signature

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Linda Prescott Wilson

In the Matter of Mikhail Makhlin, M.D.

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

Dated: Sept 12, 2008

Redacted Signature

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Thea Graves Pellman

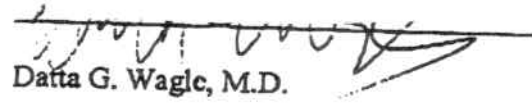
In the Matter of Mikhail Makhlin, M.D.

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

Matter of Dr. Mikhail Makhlin.

Dated: 9/16/, 2008

Redacted Signature



Datta G. Wagle, M.D.

In the Matter of Mikhail Makhlin, M.D.

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

Dated: September 16, 2008

Redacted Signature

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Stanley L Grossman, M.D.

In the Matter of Mikhail Makhlín, M.D.

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

Dated: Sept 6, 2008

Redacted Signature



Therese G. Lynch, M.D.