



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 23, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Raymond Joseph Nisi, M.D.
Redacted Address

Anthony Z. Scher, Esq.
Wood & Scher – Attorneys at Law
222 Bloomingdale Road – Suite 311
White Plains, New York 10605

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

RE: In the Matter of Raymond Joseph Nisi, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 08-58) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 F. 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

Raymond Joseph Nisi, 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. 08-58

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

For the Department of Health (Petitioner): Christine Radman, Esq.
For the Respondent: Anthony Z. Scher, Esq.

Following a hearing below, a BPMC Committee found that the Respondent practiced with negligence on more than one occasion and ordered unnecessary cataract surgery for a patient. The Committee also found that the Office for Professional Medical Conduct (OPMC) disciplined the Respondent previously for practicing with negligence on more than one occasion and ordering unnecessary cataract surgery. The Committee voted to fine the Respondent \$20,000.00 and to ban the Respondent from performing cataract surgery for one year. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), the Petitioner asks that the ARB affirm an additional charge against the Respondent and that the ARB overturn the Committee and revoke the Respondent's license to practice medicine in New York State (License). After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination on the charges, but we overturn the Committee's Determination on penalty and we vote to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing on charges that the Respondent violated New York Education Law § 6530(2-5), 6530(21), 6530(32) & 6530(35) (McKinney 2008) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- willfully making or filing a false report,
- failing to maintain accurate patient records, and,
- ordering excessive tests or treatments unwarranted by a patient's condition.

The charges related to the care that the Respondent, an Ophthalmologist, provided to a single person (Patient A) for nuclear sclerosis, a form of cataract. Following the hearing, the Committee rendered the Determination now on review.

The Committee dismissed the charges that the Respondent practiced with gross negligence, fraud or incompetence on more than one occasion and that the Respondent willfully filed a false report. The Committee also dismissed the charge that the Respondent failed to maintain an accurate record for Patient A. The Committee sustained the charges that the Respondent practiced with negligence on more than one occasion and that the Respondent ordered treatment unwarranted by the Patient's condition.

The Committee found that the Respondent failed to perform adequate ocular examinations on Patient A on July 22, 2003, April 6, 2004, October 5, 2004 and March 15, 2005. The Committee found further that the Respondent ordered cataract surgery inappropriately on

Patient A. The record demonstrated that, following the recommendation for surgery, two other physicians examined Patient A and found no need for surgery and found that Patient A had 20/20 vision with eyeglasses. The record also showed that the Respondent entered a Consent Decree with OPMC in 1998, in which the Respondent agreed not to contest charges that the Respondent practiced with negligence on more than one occasion and ordered unnecessary procedures in treating two patients. Those charges included allegations that the Respondent failed to perform adequate ocular examinations and that the Respondent ordered cataract surgery inappropriately for both the patients. The Consent Decree suspended the Respondent's License for two years, stayed suspension and placed the Respondent on probation for two years. The probation terms included a practice monitor.

As a sanction for the conduct involving Patient A, the Committee ordered the Respondent to pay a \$20,000 fine and prohibited the Respondent from performing cataract surgery for one year. The Committee chose against placing the Respondent on probation because the Respondent completed two years on probation, with extensive monitoring, under the Consent Order. The Committee concluded that ordering further probation would be futile. The Committee stated that they believed that the Respondent is capable of following the standards of care, but that he does not fully appreciate his responsibility to follow the standards of care.

Review History and Issues

The Committee rendered their Determination on April 22, 2008. This proceeding commenced on May 5, 2008, 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 brief and reply brief. The record closed when the ARB received the reply brief on June 16, 2008.

The Petitioner requests that the ARB affirm the additional charges that the Respondent practiced fraudulently and willfully made a false report. The Petitioner argues that the Committee could have drawn an inference, from evidence in the record, that the Respondent made misrepresentations about the Patient's medical condition to justify cataract surgery. The Petitioner asks further that the ARB overturn the Committee's Determination to fine the Respondent and ban cataract surgery for one year. The Petitioner asks that the ARB revoke the Respondent's License on grounds that the Committee imposed an insufficient sanction that fails to address the Respondent's repeated misconduct.

The Respondent argues that the Petitioner failed to present expert testimony that supports the negligence or unwarranted treatment charges. In the alternative, the Respondent argues that the Committee imposed an overly harsh penalty by voting to fine the Respondent \$ 20,000.00 in addition to banning the Respondent from performing cataract surgery for one year. In reply to the Petitioner's request that the ARB affirm additional charges, the Respondent argues that the request amounts to asking the ARB improperly to make new findings of fact, without support in the record.

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 practiced with negligence on more than one occasion and ordered excessive tests unwarranted by patient condition. The ARB overturns the penalty the Committee imposed and the ARB votes 5-0 to revoke the Respondent's License.

The ARB holds that the evidence before the Committee supported the Committee's Determination that the Respondent practiced with negligence on more than one occasion and that the Respondent ordered unnecessary surgery for Patient A. The testimony by the Petitioner's expert, Martin Mayers, M.D., established that the Respondent deviated on more than one occasion from the standard of care by failing to perform certain examinations and by making a recommendation for cataract surgery without exploring other options to correct the vision in Patient A. The Petitioner also presented two physicians who treated Patient A subsequent to the Respondent's recommendation, Paul Kim, M.D. and Steven J. Katz, M.D. Those physicians testified that they found no indication for surgery and found that Patient A had 20/20 vision with eyeglasses.

The ARB rejects the Petitioner's request that we affirm additional charges that the Respondent practiced fraudulently and willfully filed a false report. Under the provisions in PHL § 230(10)(g), only a Hearing Committee makes findings of fact. Under the provisions on administrative reviews in PHL § 230-c, the ARB reviews a Committee's findings and conclusions for consistency with the Committee's Determination. The Committee made no findings or conclusions consistent with a Determination that the Respondent practiced fraudulently or that the Respondent willfully filed a false report. The ARB agrees with the Respondent that the Petitioner is asking the ARB to act beyond our authority and search the

record to make additional findings that would then support a Determination to sustain fraud and false reporting charges. The ARB defers to the Committee in their role as the fact-finder.

The ARB overturns the Committee and revokes the Respondent's License. The ARB agrees with the Committee that additional probation would provide a futile sanction against the Respondent. The Respondent has completed probation with a practice monitor recently. The Respondent received the probation for engaging in the same misconduct as that at issue in this case. The probation with monitoring failed clearly to correct the deficiencies in the Respondent's practice. The ARB concludes further that retraining would also provide an inappropriate sanction. Retraining provides a remedy when a physician lacks knowledge necessary to practice medicine safely. The Committee found that the Respondent knows the established standards of care, but that the Respondent fails to fully accept his responsibility to follow those standards. The Committee voted to ban the Respondent from performing cataract surgery for one year and to fine the Respondent. The ARB finds the one-year ban and the fine inappropriate to protect the public. The ARB sees no reason why the one-year ban and the fine will make the Respondent appreciate any better his responsibility to follow accepted standards of care.

The Respondent received already the opportunity to correct his practice deficiencies and to demonstrate that he accepts his responsibility to follow accepted care standards. Soon after the probation and monitoring under the Consent Decree, the Respondent repeated the same misconduct in treating Patient A. The ARB sees no reason why the Respondent should receive a further opportunity. This case and the Consent Decree present a pattern in which the Respondent continues to place patients at risk by failing to practice by accepted standards and by ordering unwarranted procedures. The ARB concludes that we can guarantee protection for the public only by removing the Respondent from practice.

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 fine the Respondent and to bar the Respondent from performing cataract surgery for one year.
3. The ARB revokes the Respondent's License.

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 Raymond Joseph Nisi, M.D.

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

Dated: 19 September 2008

Redacted Signature

Linda Prescott Wilson

In the Matter of Raymond Joseph Nisi, M.D.

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

Dated: September 16 2008

Redacted Signature

~~Stanley L. Grossman, M.D.~~

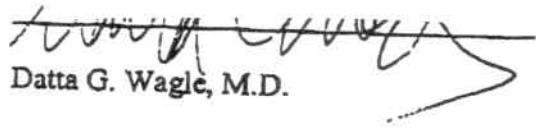
Stanley L Grossman, M.D.

In the Matter of Raymond Joseph Nisi, M.D.

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

Dated: 9/16/, 2008

Redacted Signature


Datta G. Wagle, M.D.

In the Matter of Raymond Joseph Nisi, M.D.

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

Dated: Sept 16, 2008

Redacted Signature

Therese G. Lynch, M.D.

In the Matter of Raymond Joseph Nisi, M.D.

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

Dated: Sept 12, 2008

Redacted Signature

Thea Graves Pellman