

NEW YORK
state department of
HEALTH

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

October 20, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Hoi Yat Kam, M.D.

REDACTED

Michael G. Bass, Esq.
NYS Department of Health
Corning Tower Room 2512
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Hoi Yat Kam, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-172) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

James F. Horan)
Chief Administrative Law Judge
Bureau of Adjudication

JFH:nm

Enclosure

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

COPY

In the Matter of

Hoi Yat Kam, 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. 11-172

Before ARB Members D'Anna, Koenig, Wagle, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Michael G. Bass, Esq.
For the Respondent: Pro Se

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c
(4)(a)(McKinney 2011), the ARB determines whether to impose a penalty against the
Respondent's license to practice medicine in New York State following the Respondent's five-
year exclusion from participation as a provider in the Medical Assistance Program (Medicaid).
After a hearing below, a BPMC Committee determined that the conduct that resulted in the
Medicaid exclusion amounted to professional misconduct by a physician and the Committee
voted to revoke the Respondent's license to practice medicine in New York State (License). The
Respondent then requested that the ARB review the case. After reviewing the hearing record and
the parties' review submissions, the ARB overturns the Committee's Determination. The ARB
votes 5-0 to suspend the Respondent's License for five years, to stay the suspension in full and to
place the Respondent on probation for five years under the terms that appear as the Appendix to
this Determination.

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). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in N. Y. Education Law (EL) §6530(9)(c) (McKinney 2011) by engaging in conduct that resulted in a violation under a State or Federal statute or regulation. In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee indicated that Medicaid excluded the Respondent from participation in Medicaid for five years, following a hearing in 2006 (Medicaid Exclusion). The hearing determined that the Respondent committed unacceptable practices under the Medicaid regulations at Title 18 NYCRR §§ 515.2(b)(1) & 515.2(b)(12). Those regulations define unacceptable practices to include submitting a false claim for unfurnished medical care services or supplies [515.2(b)(1)] and furnishing medical services that fail to meet professionally recognized standards [515.2(b)(12)]. Administrative Law Judge (ALJ) John Wiley found that Medicaid Investigators visited the Respondent's office posing as patients between 2001 and 2004. The ALJ found that the Respondent performed cursory or no medical examinations before writing prescriptions for the Investigators. The ALJ found further that the Respondent's medical charts contained documentation for histories, examinations and vital signs the Respondent never performed. At the Medicaid hearing, the Respondent denied the Investigators' allegations. The ALJ found the testimony by the Investigators more credible than the Respondent's denials.

Following the Direct Referral Hearing, the Committee determined that the Respondent violated State regulations and that the violations that resulted in the Medicaid Exclusion would constitute professional misconduct as practicing fraudulently, practicing with negligence on more than one occasion, failing to maintain accurate patient treatment records and failing to comply with a State regulation governing medical practice. The Committee concluded further that the Respondent's conduct warranted License revocation. The Committee found that the Respondent demonstrated a patent lack of respect for the truth and the Committee saw such a lack of respect as a serious defect in the Respondent's moral character.

Review History and Issues

The Committee rendered their Determination on July 5, 2011. This proceeding commenced on July 20, 2011, 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 Notice and the Respondent's reply. The record closed when the ARB received the reply brief on or about August 22, 2011.

The Respondent argued that nothing in the Medicaid Exclusion mentioned fraud or negligence and that the key element in the Medicaid Exclusion involved the components in an examination. The Respondent contended that the examinations at issue in the Medicaid Exclusion were sufficient and did not require a great deal of time. The Respondent requested that the ARB overturn the revocation and grant the Respondent a full and fair hearing.

The Petitioner noted that the Respondent submitted only a review notice containing the points summarized above. The Petitioner argued that the Respondent failed to submit a full review brief and the Petitioner argued such failure amounts to the failure to perfect the appeal and requested that the ARB find that the appeal was closed. In the event the ARB decided to

accept the Respondent's Notice as a valid appeal, the Petitioner argued that the facts of the case justified the Committee's Determination to revoke the Respondent's License.

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 accepts the Respondent's review notice as a brief as well. The ARB affirms the Committee's Determination that the conduct that resulted in the Medicaid Exclusion constituted misconduct and made the Respondent liable for disciplinary action against his License. The ARB overturns the Committee's Determination to revoke the Respondent's License. We vote to suspend the Respondent's License for five years, to stay the suspension in full and to place the Respondent on probation for five years under the terms that appear as the Appendix to this Determination.

The Medicaid Exclusion demonstrated that the Respondent violated regulations governing medical practice and that such conduct amounted to misconduct under EL§§ 6530(9)(c) & 6530(16). The Exclusion found that the Respondent's records failed to reflect accurately the examinations the Respondent performed on the Investigators. Such conduct amounted to misconduct under EL§ 6530(32) as failure to maintain accurate records. The Exclusion also concluded that the Respondent billed Medicaid for services the Respondent never provided. Such conduct amounted to fraud in practice under the misconduct definition at EL§

6530(2). The Exclusion also found that the Respondent violated Title 18 NYCRR § 515.2(b)(12) by failing to furnish medical care according to professional recognized standards. The failure, on repeated occasions, to practice according to accepted medical standards amounted to practicing medicine with negligence on more than one occasion, a violation under EL § 6530(3). The Respondent attempted to use the Direct Referral Hearing to re-litigate the findings under the Medicaid Exclusion. The ARB holds that the Respondent already received the opportunity for a full hearing on the Medicaid Exclusion in a prior hearing and the findings from that hearing can provide the basis for disciplinary action against the Respondent's License, Camperlengo v. Barrell, 78 N.Y.2d 674 (1991). The ARB denies the Respondent's request for a further hearing and the ARB affirms the Committee's Determination on the charges.

The ARB finds that the Respondent engaged in serious misconduct. The Respondent has, however, already suffered a sanction from a five year exclusion from Medicaid. We note further that the conduct at issue under the Medicaid Exclusion occurred between 2001 and 2004 [Petitioner's Exhibit 5, Finding of Fact 4]. The Petitioner has offered no evidence that the Respondent has engaged in additional misconduct since and the Respondent has remained in practice during that time. The Petitioner did not request revocation as a sole penalty against the Respondent at hearing and noted that the Committee might have rejected revocation as a penalty due to the "age of the case" [Direct Referral Hearing Transcript page 75]. The ARB questions why this case took five years to come to a Direct Referral Hearing following the Medicaid Exclusion. That passage of time suggests no great concern over the Respondent continuing to practice medicine.

The ARB concludes that the facts in this case warrant a penalty less severe than revocation. We overturn the Committee. The ARB votes to suspend the Respondent from

practice for five years and we stay that suspension in full. We vote further to place the Respondent on probation for five years under the terms that appear in the Appendix to this 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 overturns the Committee's Determination to revoke the Respondent's License.
3. The ARB suspends the Respondent's License for five years, stays the suspension and places the Respondent on probation for five years under the terms that appear as the Appendix to this Determination.

Peter S. Koenig, Sr.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Hoi Yat Kam, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Kam.

Dated: Oct. 14, 2011

REDACTED

Peter S. Koenig, Sr.

In the Matter of Hoi Yat Kam, M.D.

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

Dated: 4 October, 2011

REDACTED

Linda Prescott Wilson

In the Matter of Hoi Yat Kam, M.D.

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

Matter of Dr. Kam.

Dated: 18th Sept 2011

REDACTED

Datta G. Wagle, M.D. 

In the Matter of Hoi Yat Kam, M.D.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kam.

Dated: October 14, 2011

REDACTED

Richard D. Milone, M.D.

In the Matter of Hoi Yat Kam, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kam.

Dated: Oct 14, 2011

REDACTED

John A. D'Anna, M.D.

Appendix

Probation Terms

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.
6. Respondent shall maintain legible and complete medical records, which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.