



**Department
of Health**

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

May 4, 2017

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

John Viti, Esq.
NYS Department of Health
90 Church Street-4th Floor
New York, NY 10007

Ezekiel Akande, M.D.


Joseph Potashnik, Esq.
90 Broad Street, 9th Floor
New York, NY 10004

RE: In the Matter of Ezekiel Akande, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.17-133) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

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,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: mw
Enclosure

COPY

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

In the Matter of

Exekial Akande, 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. 177 133

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

For the Department of Health (Petitioner): John Viti, Esq.
For the Respondent: Joseph Potashnik, Esq.

The Respondent holds medical licenses in Kentucky, Pennsylvania and California, in addition to his license to practice medicine in the State of New York (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2017), the ARB considers whether to impose a sanction against the Respondent's License following disciplinary action against the Respondent's licenses in those other states. After a hearing, a BPMC Committee determined that the Respondent engaged in conduct in Kansas that would amount to professional misconduct in New York and the Committee voted to revoke the Respondent's License. On review, the Respondent asks the ARB to remand this matter to the Committee so the Respondent can provide evidence concerning mitigation and rehabilitation. After reviewing the hearing record and the review submissions, the ARB denies the request for remand and affirms the Committee's Determination in full.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq.*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). The Petitioner charged that the Respondent violated New York Education Law (EL) § 6530(9)(d)(McKinney Supp. 2016) by committing professional misconduct, because the duly authorized professional disciplinary agencies from other states took disciplinary action against the Respondent's medical licenses in those states for conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent's misconduct in Kentucky would constitute misconduct if committed in New York, under the following specifications:

- practicing the profession with negligence on one occasion, a violation under EL § 6530(3);
- practicing the profession with gross negligence, a violation under EL § 6530(4);
- practicing the profession while impaired by alcohol, drugs, physical ability or mental impairment, a violation under EL § 6530(7); and/or
- failing to maintain a record that reflects accurately the treatment of a patient, a violation under EL § 6530(32).

In the Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin,

89 N.Y.2d 250 (1996). Following the hearing, the Committee rendered the Determination now on review.

The evidence before the Committee demonstrated that the Kentucky Board of Medical Licensure (Kentucky Board) filed an April 7, 2015 Agreed Order that restricted/limited for an indefinite period of time the Respondent's License to practice medicine in Kentucky by limiting the Respondent's right to prescribe and dispense controlled substances. The Kentucky Board based the Agreed Order on allegations that the Respondent prescribed controlled substances inappropriately and failed to document his medical records adequately. The Kentucky Board filed an Amended Agreed order on March 7, 2016, which restricted/ limited the Respondent's Kentucky license further for an indefinite period of time to restrict the Respondent's ability to prescribe controlled substances or to perform independently, without direct supervision, epidural steroid injections or radiofrequency ablations. The Kentucky Board issued an Emergency Order of Suspension on April 22, 2016 suspending the Respondent's License to practice medicine in Kentucky. The Kentucky Board based the Emergency Order on the finding that probable cause existed to believe that the Respondent violated the terms of prior orders placing the Respondent on probation. The State Board of Medicine for Pennsylvania (Pennsylvania Board) issued an Order on October 27, 2015 which suspended the Respondent's Pennsylvania medical license indefinitely and issued a public reprimand. The Pennsylvania Board based its action on the April 2015 Kentucky Agreed Order. The Medical Board of California (California Board) issued a Default Decision and Order on March 1, 2016, which revoked the Respondent's Physician's and Surgeon's Certificate. The California Board based its action on the April 2015 Kentucky Agreed Order.

Counsel for the Respondent appeared at the Direct Referral Hearing, but the Respondent made no appearance. The Respondent's counsel requested that the Committee suspend, rather than revoke the Respondent's License, pending Kentucky's final determination concerning the Respondent's licensure in that state. The Committee rejected that request.

The Committee concluded that the underlying nature of the Kentucky misconduct warranted disciplinary action against the Respondent's License independently from the Kentucky license's status. The Committee cited the Respondent failure's to appear at the Direct Referral Hearing, leaving the Committee without the opportunity to hear any mitigating and rehabilitative evidence from the Respondent. The Committee also noted that the Respondent has been unregistered to practice in New York since 2013. The Committee found these factors and the public protection provided the grounds to revoke the Respondent's License.

Review History and Issues

The Committee rendered their Determination on December 28, 2016. This proceeding commenced on January 12, 2017, 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 reply brief. The record closed when the ARB received the reply brief on February 15, 2017.

The Respondent's Brief stated incorrectly that the Committed "suspended" the Respondent's License due to a decision by the Kentucky Board which was then under appeal. As noted above, the Committee revoked the Respondent's License. The Brief noted that the Committee stated that the Respondent's failure to appear left the Committee without the opportunity to hear any mitigating or rehabilitative evidence from the Respondent. The Brief

blamed the failure to appear on the Respondent never receiving information from his prior counsel about the hearing and the Respondent's opportunity to appear and speak on his own behalf. The Respondent requested an opportunity to appear before the Committee to present mitigating and rehabilitative evidence.

The Petitioner replied that the Respondent was personally served with the Notice of Referral [Hearing Exhibits 1 and 2] and that the Notice provided the date, time and place for the hearing, stated that the Respondent could appear in person and with counsel and stated that the hearing would proceed whether or not the Respondent appeared. The Reply noted that the Respondent's prior counsel stated at the hearing that the Respondent received the Notice. Further, the Reply argued that the Committee based their sanction on more than the Respondent's failure to appear at the hearing. The Committee concluded that the serious nature of the underlying Kentucky conduct warranted disciplining the Respondent's New York 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. We reject the request for remand, we affirm the determination that the Respondent committed misconduct that provided the grounds for disciplinary against his License and we affirm the determination to revoke that License.

The record demonstrated that the Respondent received Notice of the Referral and an opportunity to appear at the hearing. The Committee's Administrative Officer ruled at the hearing that the Respondent received personal service of the Notice on September 9, 2016 [Hearing Transcript page 11-12]. The Respondent's prior counsel also stated on the hearing record that the Respondent told the prior counsel that the Respondent received the papers [Hearing Transcript page 11]. The ARB finds no grounds to remand this matter.

The Record showed further that the Kentucky Board disciplined the Respondent's Kentucky license for conduct that would constitute professional misconduct in New York. Although the Kentucky Board's April 2016 Emergency Order of Suspension may be subject to a hearing or appeal [Hearing Exhibit 4], the Respondent consented to Stipulations of Fact and disciplinary actions under the April 2015 and March 2016 Agreed Orders which provided grounds for the Committee's Determination [Hearing Exhibits 5 and 6].

The April 2015 Agreed Order indicated that there had been ongoing investigations of the Respondent's practice since 2012 and that the practice consisted of 80-90% interventional pain practice and 10-20% pain medication management. That Agreed Order contained Stipulated

Facts that:

- a consultant found in February 2013 that 3 of 16 charts reviewed revealed departure from or failure to conform to acceptable and prevailing medical practices;
- a December 14, 2014 review found multiple concerns with the adequacy of the Respondent's documentation,
- a consultant in February 2015 found the Respondent's documentation poor and inadequate to justify prescribing controlled substances;

- the consultant found that the Respondent departed from or failed to conform to prevailing medical practices in diagnosing patients in ten medical charts reviewed and exhibited gross negligence in those ten charts;
- as a result, the consultant found the Respondent constituted an imminent danger to the citizens of Kentucky.

The Respondent thereafter accepted the restriction/limitation on prescribing, dispensing and otherwise utilizing controlled substances professionally. The March 7, 2016 Agreed Order included Stipulated Facts that:

- a May 2015 clinical assessment found that the Respondent demonstrated significant gaps in his knowledge of interventional pain management, including neurotomy;
- an October 2016 Educational Assessment Plan recommended 100% direct supervision in the performance radiofrequency ablation and epidural steroid injections;
- a September 2015 neurological evaluation raised concern about the Respondent's performance in the visual-spatial area specifically nonverbal perception and reasoning which was borderline;
- a February 2, 2016 letter from a neurologist related a finding that suggested a possible malignant disease process which could affect the Respondent's ability to practice.

The Respondent then consented to the provisions in the 2016 Agreed Order that continued the controlled substances limitations and banned the Respondent from performing independently epidural steroid injections or radiofrequency ablations.

In accepting the practice restrictions under both the 2015 and 2016 Agreed Orders, the Respondent denied any wrongdoing, but he acknowledged that the Stipulations of Fact could

provide a hearing panel grounds to conclude that the Respondent engaged in professional misconduct. Despite denying any wrongdoing, the Respondent's decision to accept the practice limitations in the Agreed Orders raised the inference that the Kentucky Board's allegations against the Respondent held some validity, Sternberg v. Department of Health, 235 A.D.2d 945, 652 N.Y.S.2d 855 (3rd Dept. 1997); Hatfield v. Department of Health, 245 A.D.2d 703, 665 N.Y.S.2d 755 (3rd Dept. 1997).

The Stipulated Findings from the Agreed Orders provided the Committee the grounds to find that the Kentucky Board disciplined the Respondent for conduct in Kentucky that would constitute misconduct in New York under EL §§ 6530(3-4), 6530(7) & 6530(32) as practicing with negligence on more than one occasion, practicing with gross negligence, practicing while impaired and failing to maintain accurate patient records. Those findings provided the basis for disciplinary action pursuant to EL §6530(9)(d). The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.

The Agreed Orders showed escalating problems with the Respondent's practice which placed the Respondent's patients in imminent danger. The Respondent had the opportunity to appear before the Committee to present evidence concerning mitigation or rehabilitation and the Respondent failed to take advantage of that opportunity. The ARB affirms the Committee's Determination 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 affirms the Committee's Determination to revoke the Respondent's License.**

**Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.**

In the Matter of Ezekial Akande, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Akande.

Dated: 23 April, 2017

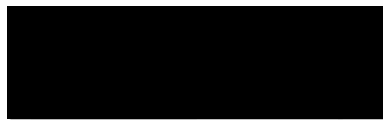


Linda Prescott Wilson

In the Matter of Ezekial Akande, M.D.

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

Dated: April 22, 2017



Peter S. Koenig, Sr.

In the Matter of Ezekial Akande, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Akande.

Dated: 4 / 17, 2017



Steven Grabiec, M.D.

In the Matter of Ezekial Akande, M.D.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Akande.

Dated April 17, 2017



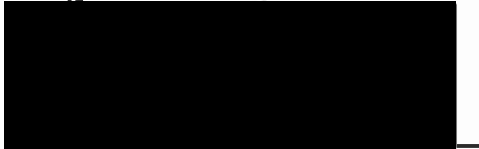
Richard D. Milone, M.D.

In the Matter of Ezekial Akande, M.D.

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

Matter of Dr. Akande.

Dated: May 2, 2017



John A. D'Anna, M.D.