



Department of Health

ANDREW M. CUOMO
Governor

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

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

September 20, 2017

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jaime Gabriel Gutierrez, M.D.
2309 Arthur Avenue
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Anthony Z. Scher, Esq.
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NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

RE: In the Matter of Jaime Gabriel Gutierrez

Dear Parties:

Enclosed please find the Determination and Order (No.17-266) 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.

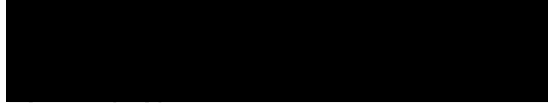
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified 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:ISM
Enclosure

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

In the Matter of

Jaime Gabriel Gutierrez, 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. 17- 266

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): Daniel Guenzburger, Esq.
For the Respondent: Anthony Z. Scher, Esq.

Following a hearing below, a BPMC Committee found the Respondent guilty of professional misconduct for failing to maintain accurate patient records. The Committee censured and reprimanded the Respondent and ordered the Respondent to complete a course in medical record keeping. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2017), both parties ask the ARB to modify the Committee's Determination. After reviewing the hearing record and the parties' review submissions, the ARB modifies the Committee's Determination to sustain a further charge that the Respondent exercised undue influence over three patients. The ARB further modifies the Committee's Determination by placing the Respondent on probation for five years, with a practice monitor.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2-3) 6530(5), 6530(17), 6530(20-21) and 6530(32)(McKinney Supp. 2017) by committing professional misconduct under the following specifications:

- practicing the profession fraudulently,
- practicing with negligence on more than one occasion,
- practicing with incompetence on more than one occasion,
- exercising undue influence on a patient,
- engaging in conduct that evidences moral unfitness,
- willfully filing a false report; and,
- failing to maintain accurate patient records.

The charges related to the Respondent's billing for physician house calls to four foreign tourists at New York City hotels (Patients A-D), trigger point injections to four persons following motor vehicle accidents (Patients E-H) and fabricated billings submitted under the Respondent's name.

The Respondent made four house calls at hotels in working for a hotel physician concierge practice. The Respondent began in that practice in 2008 for a Florida based referral service Global Medical Center, Inc. (Global). The Respondent and his fiancée, Manoelli Cenci, established a similar service, Doctors 24 HS, Inc. (Doctors) in 2012. The Respondent held no shares in Doctors, but his compensation was linked directly to the profits Doctors made. The Committee found that the Respondent's role in Doctors involved on-site medical care to patients, while Ms. Cenci handled the administrative side in the business. The Respondent continued to take referrals from Global and both services used the same procedure for referrals. A hotel employee would provide an 800 number for one of the services to hotel guests requesting medical assistance. The services would require the guests to provide credit card information, including the credit card security code, before dispatching a physician.

The Respondent treated Patient A, a person with a history of heart disease, who felt sore and sick, and charged \$3,700.00 for the visit. The Respondent treated Patient B for an upper respiratory infection and sinusitis, and the Respondent charged \$5000.00 for the visit. A physician assistant working under the Respondent's supervision, Andrea Trimmingham, treated Patient C for nausea, vomiting and diarrhea and charged the Patient \$3000.00 for the visit. The Respondent treated Patient D for severe flu and charged \$5000.00 for the visit. The Patients learned the charge for the visit only after they had received treatment.

The Committee dismissed all misconduct specifications relating to the house calls. As relevant to this Review, the Committee found no undue influence. The Committee found that undue influence involves a person in a position of power taking advantage of another person. The Committee found unpersuasive the Petitioner's argument that Patients A, C and D were susceptible to the Respondent's undue influence because of their compromised positions. The Committee found further that a high fee is not the basis for sustaining a charge of undue influence because no law regulates fees in a hotel concierge setting. The Committee also found that the Patients paid voluntarily and that the Respondent never attempted to collect fees prior to rendering care.

The Committee sustained factual allegations that the Respondent knowingly made false representations in submitting a health insurance claim concerning the care for Patient B. Patient B had travel insurance. The Respondent gave the Patient a health insurance claim to submit to the insurance company. The Committee found that the Respondent knowingly and falsely used Current Procedural Terminology (CPT) codes on the claim to reflect a physical examination of high complexity, a disruption in scheduled office visits and a telephone evaluation with management service. Testimony at hearing by the Respondent's travel insurance expert witness, Colin Ploktin, M.D., indicated that travel insurance companies do not rely on CPT coding in determining reimbursement. The Committee agreed with Dr. Plotkin's testimony that CPT codes are irrelevant to travel insurance reimbursement and dismissed misconduct specifications that charged practicing fraudulently, willfully filing a false report and engaging in conduct that evidences moral unfitness.

The Committee sustained the misconduct specification that charged the Respondent with failing to maintain accurate patient records for Patients E, F and G, who received trigger point injections. The Committee found that the records were "cookie cutter" in that they were repetitive in language and boxes checked. The Committee also found that the Respondent failed to maintain control of his records and that he was treating patients using summary sheets when he should have had access to the entire record. The Committee dismissed the other misconduct

specifications relating to the trigger point injections, finding that there was no evidence that the Respondent deviated from medically accepted standards in administering the injections.

The Committee also dismissed the misconduct specifications relating to the fabricated nerve conduction studies submitted to GEICO for seven persons (Patients I-O). The parties stipulated that the studies were fabricated. The Committee found that there was no evidence that the Respondent had any role in the fabricated studies, either in seeing the Patients, submitting the insurance claims or reading the studies.

The Committee voted to censure and reprimand the Respondent and to order that, within six months, the Respondent complete a course in medical record keeping. The Committee found the Respondent's record keeping skills sloppy and his coding skills subpar.

Review History and Issues

The Committee rendered their Determination on April 3, 2017. This proceeding commenced on April 24 and April 26, 2017, when the ARB received both parties' Notices requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received both parties' reply briefs on June 8, 2017. The ARB disregarded the Petitioner's June 16 letter concerning the Respondent's reply brief, because the statute permits no submissions after reply briefs.

The Respondent asked that the ARB overturn the Committee determination on failure to maintain adequate records. The Respondent argued that the Committee was unable to make a determination on the records charges because the Committee lacked the Respondent's complete medical records. The Respondent turned the complete records over to a law firm that was handling his billings and the law firm has refused to return the full records due to ongoing

litigation between the Respondent and that law firm. The copies of the records in evidence at the hearing were obtained by the Petitioner from GEICO, which had received the records from the Respondent or his billing service. The Respondent argued that the records from GEICO were only excerpts of the Respondent's complete record for the Patients at issue. The Respondent asks that the ARB remove any penalty against the Respondent. The Respondent requested in the alternative, that if the ARB sustained the record keeping charge, that the ARB limit the sanction to directing the Department to issuing an administrative warning.

The Department limited its brief to the request that the ARB overturn the Committee and sustain the misconduct specifications that charged exercising undue influence over a patient and willfully filing a false report. The Petitioner argued that the record demonstrated that the Respondent submitted false CPT codes in a billing for patient care. The Petitioner argued that the ARB established the elements necessary to prove filing false reports in the ARB decision in *Matter of Chime ARB 97-247*. The *Chime* case involved an obstetrician who billed Medicaid for performing vaginal deliveries, when in fact the obstetrician was not present for the deliveries and did not provide any services. The Petitioner argued that the facts in this case are similar to those in *Chime*. On the undue influence specification, the Petitioner argued that the Committee confused "undue influence" with "duress". The Petitioner asked that the ARB make findings sufficient to sustain the specification or that the ARB remand to the Committee to make additional findings.

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 affirm the Committee's Determination sustaining the specification that the Respondent failed to maintain accurate records and dismissing the specification that the Respondent willfully filed a false report. We overturn the Committee and sustain the specification that charged the Respondent with exercising undue influence over Patients A, C and D. We affirm the Committee's Determination to censure and reprimand the Respondent. We modify the Committee's Decision to place the Respondent on probation for five years, with a practice monitor. The full probation terms appear at the Appendix to this Determination.

We affirm the Committee Determination to sustain the charges that the Respondent failed to maintain accurate medical records for Patients E, F and G. The Respondent conceded that he transferred the full medical records for those Patients to his billing service, so that the Respondent would not have had those records for reference at follow-up visits. The Respondent would also have lacked the records if there had been a request to transfer copies of the records to a health care provider or facility. The failure to keep the original records or full copies, standing alone, constitutes a violation under EL § 6530(32). The Petitioner obtained copies of the Respondent's records from GEICO. The Committee found those records repetitive and lacking in detail. The Respondent argued that the record copies could not form the basis for a misconduct finding because the records were incomplete. The Respondent's hearing testimony, however,

indicated that records lacked only consent forms and documents prepared by other providers. The Committee rejected the incomplete records argument and found that the available records were sufficient to sustain the charge.

The ARB also affirms the Committee's Determination to dismiss the charge that the Respondent willfully filled a false report in billing for the care to Patient B. The Committee affirmed allegations that the Respondent knowingly and falsely misrepresented treatment for Patient B in using CPT codes. The Committee dismissed the willful false reporting charge upon concluding that the Respondent lacked the proper CPT coding education. The Petitioner argued that the facts in this case were similar to those in a prior ARB decision, *Chime*, in which the ARB found willful and knowing false reporting by an obstetrician who billed for services never performed, at a vaginal delivery from which the obstetrician was absent. The ARB finds no similarity between the facts in *Chime* and the facts in this case. In *Chime*, the ARB found no facts in evidence that indicated the Medicaid billings resulted from accident or clerical error. In this case, the Committee found that the false billing resulted from a lack of proper education on CPT coding.

The ARB overturns the Committee and sustains the Specification that charged the Respondent with exercising undue influence over Patients A, C and D. The Petitioner had argued that the Committee's Determination dismissing the undue influence charge resulted from confusing undue influence with duress. The ARB sees no such confusion by the Committee. The Committee did, however, find no exercise of undue influence because the Respondent or his physician assistant first focused on medical care at the hotel, without attempting to obtain a fee prior to providing services. The ARB finds an error in that conclusion. The record showed that neither Doctors nor Global would dispatch a physician to a hotel unless the patient provided

credit card information and the credit card's security code. The ARB concludes that in obtaining this information, the services had obtained the fee prior to the provision of care. The Respondent then proceeded to provide care prior to revealing the cost. The ARB concludes that this conduct constituted preying upon foreign tourists who didn't know the health care system. This conduct constituted exercising undue influence to exploit patients for financial gain.

The ARB affirms the Committee's Determination to Censure and Reprimand the Respondent and to require the Respondent to complete a course on record keeping and CPT coding. The ARB modifies the Committee's Determination to place the Respondent on probation for five years under the Terms that appear at the Appendix to this Determination. The terms will include a practice monitor to ensure that the Respondent corrects his record keeping problems. The practice monitor will have access to all treatment and billing records at whatever sites the Respondent practices.

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 failed to maintain accurate medical records.
2. The ARB overturns the Committee's Determination and sustains the charge that the Respondent exercised undue influence to exploit patients for financial gain.
3. The ARB affirms the Committee's Determination to Censure and Reprimand the Respondent and to order the Respondent to complete a course in medical record keeping and CPT Coding.
4. The ARB modifies the Committee's Determination by placing the Respondent on probation for five years under the terms that appear as the Appendix to this Determination.

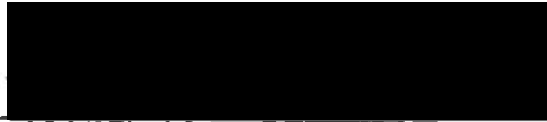
Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Jaime Gabriel Gutierrez, M.D.

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

Matter of Dr. Gutierrez.

Dated: 19 September, 2017



Linda Prescott Wilson

In the Matter of Jaime Gabriel Gutierrez, M.D.

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

Dated: August 24, 2017



Richard D. Milone, M.D.

In the Matter of Jaime Gabriel Gutierrez, M.D.

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

Dated: August 24, 2017

A black rectangular redaction box covers the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Jaime Gabriel Gutierrez, M.D.

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

Dated: AUGUST 24, 2017

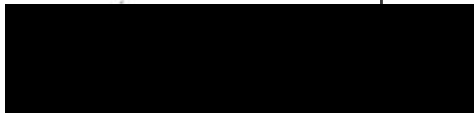


John A. D'Anna, M.D.

In the Matter of Jaime Gabriel Gutierrez, M.D.

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

Dated: 8/28, 2017



Steven Grabiec, M.D.

Appendix

TERMS OF PROBATION

1. The Respondent's conduct shall conform to the moral and professional standards of conduct in his profession and in governing law. Any act of professional misconduct by the Respondent as defined by New York Education Law § 6530 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York Public Health Law § 230 (10) or (19), or both.
2. The Respondent shall remain in continuous compliance with all requirements of New York Education Law § 6502, including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in New York Education Law § 6502(4) to avoid registration and payment of fees.
3. Respondent shall provide to the Director, Office of Professional Medical Conduct (OPMC), Riverview Center, Suite 355, 150 Broadway, Albany, New York, 12204 at least every six months and as otherwise requested, or within thirty days of any change in the information, the following information in writing:
 - a. a full description of the Respondent's employment and practice;
 - b. all professional and residential addresses and telephone numbers within and outside of New York State;
 - c. any and all information concerning investigations, arrests, charges, convictions or disciplinary actions by any local, state, or federal agency;
 - d. any and all information concerning investigations, terminations, or disciplinary matters by any institution or facility.
4. The Respondent shall provide to the OPMC Director copies of all applications relating to the practice of medicine, including but not limited to, privileges, insurance, and licensure, in any jurisdiction, concurrent with their submission.
5. The Respondent shall cooperate fully with, and will respond within two weeks to, OPMC requests to provide written periodic verification of Respondent's compliance with these

terms of probation. Upon the OPMC Director's request, the Respondent shall meet personally with a person designated by the Director.

6. The probation period shall toll when the Respondent is not engaged in active medical practice in New York State for a period of thirty consecutive days or more. The Respondent shall notify the OPMC Director, in writing, if the Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty-day period. The Respondent shall then notify the Director again at least fourteen days before returning to active practice. Upon the Respondent's return to active practice in New York State, the probation period shall resume, and the Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose.
7. The OPMC Director, or his/her designee, may review Respondent's professional performance. This review may include but shall not be limited to:
 - a. A review of office records, billing records, patient records, hospital charts, and/or electronic records; and
 - b. Interviews with or periodic visits with the Respondent and staff at practice locations or OPMC offices.
8. The Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients, and contain all information required by State rules and regulations concerning controlled substances.
9. Within thirty days of the effective date of this Determination and Order, the Respondent shall practice only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor") proposed by Respondent and subject to OPMC Director's written approval.
 - a. The Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice on a random unannounced basis at least monthly and shall examine a selection (no less than 20) of records maintained by Respondent. The review will determine whether Respondent's charting is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation from accepted

standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.

- b. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.
- c. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
- d. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC within 30 days after the date of this Determination and Order:

- 10. Within six months of the effective date of this Determination and Order, the Respondent shall enroll in and successfully complete a course of Continuing Medical Education in the area of medical recordkeeping. This course is subject to the OPMC Director's prior written approval and courses taken in the past may not be used to fulfill this requirement.
- 11. The Respondent shall comply with these Terms of Probation, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with or a violation of these terms, the OPMC Director and/or the Board for Professional Medical Conduct may initiate a violation of probation proceeding, and/or any other proceeding authorized by law, against the Respondent.