NEW YORK
STATE OF
OPPORTUNITY.
Department
of Health

ANDREW M. CUOMO
Governor

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

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

Public

February 27, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paul Tsui, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

Mikhail Presman, M.D.
[redacted]

Mikhail Presman, M.D.
FCI Fort Dix
P.O. Box 2000
Fort Dix, New Jersey 08640

Samuel M. Braverman, Esq.
Fasulo, Braverman & DeMaggio, LLP
226 Broadway – Suite 715
New York, New York 10007

RE: In the Matter of Mikhail Presman, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-046) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered,** together with the registration certificate.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,

[redacted]

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Mikhail Presman, M.D. (Respondent)

A proceeding to review a Determination by a Committee (Committee) from the Board for Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 15-046

COPY

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): Paul Tsui, Esq.
For the Respondent: Sam Braverman, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by engaging in conduct that resulted in a Federal criminal conviction for Health Care Fraud. As a sanction for the misconduct, the Committee voted to revoke the Respondent's license to practice medicine in New York State (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2015), the Respondent asks the ARB to modify that Determination by reducing the sanction to an actual suspension, with continuing medical education and community service. After reviewing the record below and the parties' review submissions, the ARB 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's Statement of Charges [Hearing Exhibit 1] alleged that the

Respondent committed professional misconduct under the definition in New York Education Law (EL) §6530(9)(a)(ii) (McKinney 2015) by engaging in conduct that resulted in a conviction under Federal Law. The action against the Respondent began with an order from the Acting Commissioner of Health suspending the Respondent's License summarily (Summary Order) pursuant to PHL § 230(12)(b). The Summary Order became effective July 14, 2014. 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 showed that the Respondent entered a guilty plea on October 30, 2013, in the United States District Court for the Eastern District of New York, to the charge of Health Care Fraud, a crime under Title 18 USC § 1347. The crime involved fraudulent billings to the Medicare Program. The Court sentenced the Respondent to 18 months imprisonment, with supervised release, and ordered the Respondent to pay $1,200,000.00 in restitution and a $100.00 fine.

The Committee determined that the Respondent violated EL § 6530(9)(a)(ii) by engaging in conduct that resulted in a criminal conviction under Federal Law. The Committee voted to revoke the Respondent's License. The Committee found that the Respondent engaged in fraudulent conduct over a period of seven years, during which the Respondent billed Medicare for home visits at times when the Respondent was in various locations around the world or in his own home, rather than in the patients' homes. The Committee found revocation to be the appropriate penalty for such conduct.

Review History and Issues

The Committee rendered their Determination on December 9, 2014. This proceeding commenced on December 10, 2014, 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 January 13, 2015.

The Respondent requested that the ARB overturn the revocation and impose a less severe sanction. The Respondent's brief conceded that he engaged in significant and protracted misconduct, but with no patient harm. The Respondent asked the ARB to consider the lack of patient harm as well as other mitigating factors. The Respondent claimed an exemplary work history and pointed to certificates demonstrating educational commitment and many letters of support concerning the Respondent's dedication and abilities. The Respondent also noted that he had suffered a severe injury to one hand while working on a machine in prison, which had exacted a serious psychological and physical impact on the Respondent. Further, the Respondent stated that the $1,200,000.00 restitution has required the Respondent and his wife to forfeit their retirement accounts, leaving the Respondent, now disabled, with few assets. The Respondent argued that his willingness to accept responsibility and forfeit almost all his assets must be considered as mitigating factor. The Respondent asked that the ARB modify the penalty to five years suspension, an additional year suspension to complete re-training courses and 100 hours community service. The Respondent asserted that he could not pay a fine.

The Petitioner asked that the ARB affirm the sanction that the Committee imposed. The Petitioner argued that the Respondent's injury, while unfortunate, fails to warrant modification in the sanction. The Petitioner contends further that the restitution payments should not be considered as mitigation, because the District Court ordered the Respondent to pay restitution from the proceeds of his intentional criminal fraud, over a seven year time span. The Petitioner also argued that the Respondent's Brief attempted to minimize his conduct and explain his failures as purely administrative.

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 that the Respondent committed professional misconduct. Neither party challenged the Committee's Determination on the charges. The ARB votes 5-0 to affirm the Committee's Determination to revoke the Respondent's License.

The Respondent engaged in fraudulent conduct over an extended period of time. The Respondent bore sole responsibility for his actions and billed for visits at patients' homes, when the Respondent was not even in the United States. The restitution the Respondent must pay under his criminal sentence merely represents the return of funds the Respondent obtained due to his criminal conduct. The horrific injury the Respondent suffered in prison also provides no mitigation for the Respondent's conduct. The Respondent caused no patient harm, but a Committee and/or the ARB may impose revocation as a sanction in cases that involve no patient harm, Matter of Zharov v. New York State Department of Health, 4 A.D.3d 580, 577 N.Y.S.2d 211 (3rd Dept. 2004). The ARB agrees with the Committee that revocation provides the appropriate sanction in this case.

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 Mikhail Presman. M.D.

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

Dated: 11 February, 2015

[redacted]

Linda Prescott Wilson

In the Matter of Mikhail Presman, M.D.

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

Dated: February 19, 2015

[redacted]

Peter S. Koenig, Sr.

In the Matter of Mikhail Presman, M.D.

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

Dated: 2/26/, 2015

[redacted]

Steven Grabiec, M.D.

In the Matter of Mikhail Presman, M.D.

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

Dated: February 19, 2015

[redacted]

Richard D. Milone, M.D.

In the Matter of Mikhail Presman, M.D.

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

Dated: Feb 20, 2015

[redacted]

John A. D'Anna, M.D.