

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

ORIGINAL

In the Matter of

Olga Benitez, MD. (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. 99-6

**Before ARB Members Grossman, Lynch, Shapiro, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination**

For the Department of Health (Petitioner):

Terrence J. Sheehan, Esq.

For the Respondent:

William L. Wood, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct 1.) by providing sub-standard care and ordering excessive tests for six patients and 2.) by submitting false and fraudulent billings. The Committee voted to suspend the Respondent from practice, to fine her and to order her to perform community service. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1999), the Petitioner asks the ARB to modify the Committee's Determination, by finding the Respondent committed misconduct under an additional specification, and by overturning the Committee Determination and revoking the Respondent's License to practice medicine in New York State (License). The Respondent's response brief asks that the ARB sustain the penalty that the Committee imposed. After considering the record, the ARB sustains the Committee's Determination on the charges, but we overturn the penalty the Committee imposed. We hold that the Respondent's fraudulent conduct and her substandard care for the patients in this case provide sufficient grounds to revoke the Respondent's License.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-3), 6530(5), 6530(19-21), 6530(32) & 6530(35) (McKinney Supp. 1999) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- permitting any person to share in fees for professional services (fee-splitting),
- engaging in conduct that evidences moral unfitness,
- willfully making or filing a false report,
- failing to maintain accurate patient records, and,
- ordering excessive tests or treatments.

The charges related to the Respondent's care for six patients, A through F, and her billings for the care she provided to those Patients. A BPMC Committee conducted a hearing into those charges, pursuant to N. Y. Pub. Health Law § 230(10)(McKinney Supp. 1999), and the Committee rendered the Determination now on review.

The Committee dismissed the charges that the Respondent practiced with incompetence. The Committee also dismissed charges that the Respondent engaged in an improper fee-splitting arrangement with another physician, Dr. Herzog. The Committee concluded that the Petitioner

failed to prove the crucial element in the charge, that the Dr. Herzog paid money or other benefits to the Respondent.

The Committee sustained charges under all other misconduct specifications. The Committee determined that the Respondent failed to maintain accurate records for all Patients, A-F. The Committee also found that the Respondent practiced with negligence on more than one occasion in treating all six Patients, because the Respondent failed to obtain and note adequate histories and to perform and note adequate physical examinations. The Committee found further negligence in the failure to provide follow-up treatment to Patient A for a heart murmur, to Patient B for a breast nodule, to Patient D for tenderness in the abdomen and to Patient F for cystitis. The Committee found that the Respondent practiced fraudulently and filed false reports by billing for test interpretations the Respondent never performed. The Committee found further fraud and false report filings because the Respondent engaged in "unbundling" in billing for tests for Patients B, D and F. Unbundling occurs when a physician conducts one test, but bills separately for separate parts of the test. The Committee also sustained charges that the Respondent ordered certain tests inappropriately for Patients B, E & F. The Committee concluded that the Respondent engaged in conduct evidencing moral unfitness, by engaging in excessive billing, falsifying insurance records and failing to provide follow-up treatments for Patients A, B, D and F.

The Committee made their findings by relying on testimony by the Petitioner's expert Edward Howard, M.D. The Committee found the Respondent's testimony at the hearing evasive and self-serving and the Committee indicated that they gave the Respondent's testimony little weight.

The Committee voted to suspend the Respondent's License for four years, to stay the suspension for the final three years and nine months and to place the Respondent on probation that includes monitoring for record keeping and billing practices. The Committee also ordered the Respondent to pay a Ten Thousand Dollar (\$10,000.00) fine and to perform One Hundred and Fifty hours community service. The Committee found revocation unwarranted, because the charges dated back to events in 1990-1992 and because no evidence at the hearing indicated that the misconduct continues today. The Committee accepted the Respondent's testimony that she had changed her billing practices and the Committee concluded that the Respondent had learned from her mistakes.

Review History and Issues

The Committee rendered their Determination on January 12, 1999. This proceeding commenced on February 2, 1999 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 response brief. The record closed when the ARB received the response brief on or about April 14, 1999.

The Petitioner requests that the ARB overturn the Committee's Determination dismissing the fee-splitting charge and that we overturn the penalty the Committee imposed. On fee splitting, the Petitioner argues that Committee's findings support the charge and argues that the necessary element of proof requires a showing that the Respondent shared fees with Dr. Herzog. On the penalty, the Petitioner argues that license revocation and a substantial fine constitute the only appropriate sanction for the Respondent's offenses. The Petitioner contended that in making their determination, the Committee relied heavily on the Respondent's statement that she had

ceased unbundling. The Petitioner characterizes the Committee's reliance as inconsistent with their statement that they gave the Respondent's testimony little weight due to its evasiveness and self-serving nature. The Petitioner also questioned from whence the Committee derived their conclusion that the Respondent had learned from her mistakes.

The Respondent argues that the Committee found the Respondent credible in her assurances about correcting her mistakes. The Respondent contends that the ARB owes deference to the Committee's judgement on credibility and should, therefore, affirm the penalty that the Committee imposed. The Respondent reminded the ARB that the misconduct took place in 1990-1992, during a period in which the Respondent endured great stress due to her marriage breaking-up and to harassment by her former husband.

Determination

All ARB members participated in this case and considered the record and the parties' briefs. We affirm the Committee's Determination sustaining the charges that the Respondent practiced fraudulently, practiced with negligence on more than one occasion, filed false reports, ordered excessive tests or treatments, maintained inaccurate records and engaged in conduct that evidenced moral unfitness. The Respondent made no challenge to the Committee's Determination on those charges. For the same reason, we affirm the Committee Determination to dismiss the charges that the Respondent practiced with incompetence on more than one occasion. The Petitioner made no challenge to that dismissal. As to the fee-splitting charge, we sustain the Committee for the reasons we discuss below. We vote unanimously to overturn the Committee's Determination on penalty and to revoke the Respondent's License. We reject, however, the Petitioner's request that we impose a fine in addition to the revocation.

Fee-Splitting: The Committee stated that some evidence suggested an illicit agreement between the Respondent and Dr. Herzog, but concluded that insufficient evidence appeared in

the record to support the charge that the Respondent shared fees inappropriately with Dr. Herzog. We agree and we see no findings by the Committee that provide us a basis to overturn the Committee's Determination on that charge.

Penalty: We find the Committee's Determination on penalty inconsistent with their findings and inappropriate to address the Respondent's conduct. In reaching their Determination, the Committee relied in large part on testimony by the Respondent that she stopped unbundling. We find such reliance by the Committee inconsistent with their statements that they found the Respondent's testimony evasive, self-serving and totally incredulous. We also agree with the Petitioner, that even if you accepted the Respondent's statement about unbundling, the Committee had no basis to conclude that the Respondent had ceased her other fraudulent billings or that she had improved her medical practice. We see no basis in the record and the Committee offered no basis for their conclusion that the Respondent had learned from her mistakes. The Committee also found mitigating factors in the stress the Respondent suffered due to the break-up in her marriage and the harassment she endured from her former husband. We find those factors provide no excuse for the misconduct the Respondent committed. No distractions justify fraudulent activity. The Respondent also attempted to shift the blame for her misconduct, by admitting that she engaged in fraud by unbundling, but blaming the conduct on a suggestion by Dr. Herzog. The Committee pointed out correctly that the Respondent alone bore the responsibility for the billings she submitted under her name.

We find the Respondent's sub-standard care for her patients equally as troubling as the Respondent's fraudulent conduct. The Committee expressed great concern over the Respondent's failure to follow up the heart murmur for Patient A and the nodule for Patient B. The Committee characterized the failure to follow-up as a flagrant lack of concern by the Respondent for her patients' well being. The Respondent also showed a disregard for her patients, by subjecting them to unnecessary treatments. We conclude that the Respondent

subjected those patients to the unnecessary procedures for the Respondent's enrichment rather than the patients' needs. We find it improbable that freedom from stress, the passage in time or learning from her mistakes has instilled in the Respondent a regard for her patients that she lacked previously. We find it equally improbable that those factors could instill in the Respondent the integrity she lacked, when she submitted the fraudulent billings.

Either the Respondent's deficient care for the patients at issue in this proceeding or her fraudulent conduct, standing alone, would provide sufficient grounds upon which to revoke the Respondent's License. The Respondent has betrayed the trust that the public places in the medical profession and, more alarming, she betrayed the trust that these patients placed in her individually. We vote to overturn Committee's penalty in full, and to revoke the Respondent's License. We decline the Petitioner's request that we impose a fine in addition to the revocation. We conclude that revocation provides a sufficiently severe penalty.

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 suspend the Respondent from practice, to fine her and to order her to provide community service.

3. The ARB votes 5-0 to **REVOKE** the Respondent's License to practice medicine in New York State.

**Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.**

In the Matter of Olga Benitez, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Benitez.

Dated: July 3 1999

REDACTED

Robert M. Briber

In the Matter of Olga Benitez, M.D.

Sumner Shapiro, an ARB Member concurs in the
Determination and Order in the Matter of Dr. Benitez.

Dated: July 3, 1999

REDACTED

Sumner Shapiro

In the Matter of Olga Benitez, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Benitez.

Dated: JULY 10, 1999

REDACTED

Winston S. Price, M.D.

In the Matter of Olga Benitez, M.D.

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

Dated: July 9, 1999

REDACTED

Stanley L. Grossman, M.D.

In the Matter of Olga Benitez, M.D.

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

Dated: July 2, 1999

REDACTED

Therese G. Lynch, M.D.