



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

May 2, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Timothy J. Mahar, Esq.
NYS Department of Health
Corning Tower-Room 2438
Empire State Plaza
Albany, New York 12237

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
14 Harwood Court
Scarsdale, New York 10583

Barry Alan Smolev, M.D.
2885 Nicada Drive
Los Angeles, California ~~45867~~
90077

RE: In the Matter of Barry Alan Smolev, M.D.

Effective Date: 05/09/96

Dear Mr. Mahar, Mr. Scher and Dr. Smolev:

Enclosed please find the Determination and Order (No. 96-105) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

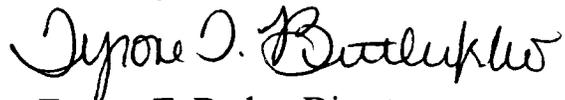
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A handwritten signature in cursive script that reads "Tyrone T. Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

COPY

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

IN THE MATTER
-OF-
BARRY ALAN SMOLEV, M.D.
Respondent

DETERMINATION
AND
ORDER

BPMC-96-105

A Notice of Referral Proceeding and Statement of Charges, both dated November 28, 1995, were served upon the Respondent, Barry Alan Smolev, M.D. **ARSENIO G. AGOPOVICH, M.D. (Chair), ARTHUR J. SEGAL, M.D. and JOHN T. VERNIEU** duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **JEFFREY W. KIMMER, ESQ., ADMINISTRATIVE LAW JUDGE**, served as the Administrative Officer. The Department of Health appeared by Timothy J. Mahar, Esq., Assistant Counsel. The Respondent was represented by Wood and Scher, Anthony Z. Scher, Esq. of counsel. Evidence was received, statements were heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). This statute provides for an expedited proceeding where a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon prior professional disciplinary action and/or a criminal conviction. The scope of this expedited proceeding is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law § 6530(9)(a)(ii) (conviction of a federal crime) and Education Law § 6530(9)(d) (disciplinary action taken against the license by another state). The charges herein arise from Respondent submitting false insurance claims for the purpose of illegally obtaining payments from the respective insurance companies. The Respondent also filed a false income tax return for the tax year of 1991, alleging he had no income for that year when in fact he had reportable income. The allegations in this proceeding are more particularly set forth in the Statement of Charges, a copy of which is attached to this Determination and Order as Appendix One.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. BARRY ALAN SMOLEV, M.D. (hereinafter, "Respondent"), was licensed to practice medicine in New York State on May 1, 1981, by the issuance of license number 145867 by the New York State Education Department. (Pet. Ex. #3).

2. On or about May 17, 1995, Respondent was convicted after a plea of guilty in the United States District Court, Central District of California, of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342(b), and aiding and assisting in the preparation and presentation of a false tax return in violation of 26 U.S.C. § 7206(2). (Pet. Exs. #5 and 6)

3. On or about March 6, 1995, the Medical Board of California, Department of Consumer Affairs, State of California adopted the Respondent's Stipulated Settlement wherein he admitted that he participated in an insurance fraud scheme designed to fraudulently obtain payments for medical services and he willfully aided in the preparation and filing of a false federal tax return. (Pet. Ex. #8)

4. The State of California revoked the Respondent's Physician's and Surgeon's Certificate, stayed the revocation and imposed a seven year probationary period. (Pet. Ex. # 8)

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee concluded that the Department has sustained its burden of proof in this matter. The preponderance of the evidence demonstrates that Respondent was convicted, upon a plea of guilty, of mail fraud and aiding and assisting in the filing of a false income tax return. Additionally, the preponderance of the evidence demonstrates that Respondent was had disciplinary action taken or had his application for a license refused by a professional disciplinary agency of another state. Subdivision (d) defines professional misconduct to include having a license to practice medicine revoked after a disciplinary action was instituted by another state, where the conduct resulting in the revocation, if committed in New York, would constitute professional misconduct in this state. The Respondent's license to practice medicine was revoked by the State of California based on the conduct noted above. The resulting conduct which was the basis of the action by California would constitute professional misconduct in New York. Specifically, the Hearing Committee found the Respondent's actions would fall within the definitions of misconduct set forth at N.Y. Education Law §6530(2) (Practicing the profession fraudulently) , N.Y. Education Law §6530(20) (Conduct which evidences moral unfitness) and N.Y. Education Law §6530(21) (Willfully making or filing a false report). Consequently, the Committee voted to sustain the First and Second Specifications.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be suspended for a maximum period of six (6)

months and a seven (7) year probationary period should be imposed, the terms of said suspension and probation are set out in Appendix II, attached hereto and made a part hereof. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Hearing Committee views the fraud committed by the Respondent to be of the utmost seriousness. However, the Committee was convinced that the Respondent has taken substantial steps, subsequent to the underlying conduct, towards rehabilitating himself. The Respondent produced numerous attestations to his professional value to his patients, his personal good character and his sincere remorse for his mistakes. The Hearing Committee was persuaded by these testimonials that the Respondent's license to practice medicine in New York should not be revoked but rather suspended for a period of time after which his practice would be closely monitored. This penalty would not take effect until the Respondent returned to New York state and indicated his intention to practice medicine here. The Hearing Committee felt the imposition of this penalty would adequately protect the citizens of this state.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The First and Second Specifications of professional misconduct, as set forth in the Statement of Charges (Appendix I) are **SUSTAINED**;

2. Respondent's license to practice medicine in New York State be and hereby is **SUSPENDED** for a period of **SIX (6)** months. The terms of the suspension are set forth in Appendix II, attached hereto and made apart hereof.

3. Respondent is placed on **PROBATION** for a period of **SEVEN (7)** years in accordance with the terms set forth in Appendix II, attached hereto and made apart hereof.

DATED: Albany, New York

April 29, 1996



ARSENIO G. AGOPOVICH, M.D. (CHAIR)

Arthur J. Segal, M.D.

John F. Vernieu

TO: TIMOTHY J. MAHAR, ESQ.
Assistant Counsel
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower Building
Empire State Plaza
Albany, N.Y. 12237

ANTHONY Z. SCHER, ESQ.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

Barry Alan Smolev, M.D.
2885 Nicada Drive
Los Angeles, California 45867
90077



APPENDIX ONE

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

-----X

IN THE MATTER : STATEMENT
OF : OF
BARRY ALAN SMOLEV M.D. : CHARGES

-----X

BARRY ALAN SMOLEV, M.D., the Respondent, was authorized to practice medicine in New York State on May 1, 1981, by the issuance of license number 145867 by the New York State Education Department.

FACTUAL ALLEGATIONS

1. On March 20, 1995, Respondent was convicted upon a plea of guilty of mail fraud in violation of 18 U.S.C. §§1341 and 1342(b) and of aiding and assisting in the preparation and presentation of a false income tax return in violation of 26 U.S.C. §7206(2) in the United States District Court, Central District of California (United States of America v. Barry Alan Smoley; Docket No. CR-93-429-TJH).

2. More specifically, on or about October 16, 1991, Respondent used the United States mail service to transmit false insurance claims forms to insurance carriers for the purposes of inducing the insurance carriers to remit payments to Respondent's patients for their participation in a weight control program with which Respondent was associated. Among other things, Respondent

falsely represented patient symptoms to insurance carriers so as to make it appear as if the patient was suffering an acute psychiatric disorder.

3. As to Respondent's conviction for tax evasion, Respondent knowingly and willfully aided in the preparation and presentation of his 1991 U.S. Individual Income Tax Return which falsely represented that Respondent had no taxable income for the calendar year 1991. Respondent did in fact have taxable income for the 1991 calendar year.

4. On March 20, 1995, Respondent was sentenced to five years probation, the terms of which required, among other things, Respondent's residence for a six month period in a community correction center, his participation in an outpatient substance abuse treatment program, his submission to psychiatric counseling, and payment of all tax Federal and State income tax owing.

5. In a decision dated March 6, 1995, the Medical Board of the State of California (California Board) accepted a stipulated settlement and disciplinary order entered into by Respondent on November 7, 1994.

6. The stipulated settlement and disciplinary order included the following admissions by Respondent, among others:

- a. Respondent was a treating psychiatrist for a weight loss program and in connection with the same, participated in a fraudulent scheme in which he misrepresented patient's symptoms and conditions to insurance carriers to make it appear as though the patients were suffering from acute psychiatric disorders in order to qualify them for insurance benefits to pay for their participation in the weight loss program. In addition, Respondent used improper billing codes in his submissions to insurance carriers in order to inflate the amount charged for his services. Further, Respondent billed the insurance carriers for services not actually rendered.
- b. Respondent knowingly and willfully aided in the preparation and presentation of his 1991 U.S. individual income tax return which falsely represented that Respondent had no taxable income for the calendar year 1991, whereas Respondent knew that he did have taxable income for that calendar year.

7. The California Board revoked Respondent's medical license, stayed the revocation and placed Respondent on probation for seven years with the following terms and conditions, among others:

- a. Required Respondent to serve an actual 21-day suspension of his medical license;
- b. Required Respondent to abstain from the personal use or possession of controlled substances and alcohol;
- c. Required Respondent to submit to biological fluid testing;
- d. Required Respondent to pass an oral clinical exam in psychiatry limited to issues of boundaries in clinical practice, dual relationships, and transference;
- e. Required Respondent to undergo psychiatric evaluation;
- f. Required Respondent's practice to be monitored;

- g. Prohibited Respondent from preparing, filing or submitting any bills to patients and/or claims to third parties for health care services rendered.

8. The conduct upon which the California Board took disciplinary action against Respondent's license, would if committed in New York State, constitute professional misconduct under N.Y. Educ. Law §6530(2) [practicing the profession fraudulently] and/or N.Y. Educ. Law §6530(20) [engaging in conduct evidencing moral unfitness] and/or N.Y. Educ. Law §6530(21) [willfully making or filing a false report required by law].

FIRST SPECIFICATION

CRIMINAL CONVICTION UNDER FEDERAL LAW

Respondent is charged with professional misconduct under N.Y. Educ. Law §6530(9)(a)(ii) (McKinney Supp. 1995) by reason of having been convicted of committing an act constituting a crime under Federal law in that Petitioner charges:

1. The facts in Paragraphs 1 through 4.

SECOND SPECIFICATION
DISCIPLINE BY OTHER STATE

Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(d) (McKinney Supp. 1995) by reason of having disciplinary action taken against his license to practice medicine by a duly authorized and professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State, in that the Petitioner charges:

2. The facts in Paragraphs 6 through 8.

DATED: *November 28,* 1995
Albany, New York


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

TERMS OF SUSPENSION

The Respondent's license to practice medicine in New York is suspended for six months. This suspension will not take effect until Respondent returns to New York to practice medicine. This suspension shall be reduced by one month for each whole year that Respondent satisfactorily fulfills the terms of his California probation but in no event will the suspension be less than one month. The suspension will not start to run until the Respondent informs the New York State Department of Health, Office of Professional Conduct (hereinafter OPMC) by certified mail that he intends to practice medicine in New York and is permanently residing in New York and he provides OPMC with certified documentation from the Medical Board of California regarding the status and length of time he has practiced in California under that state's probation.

TERMS AND CONDITIONS OF PROBATION

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 imposed by law and by his profession.
2. Respondent shall comply with all federal, state and local laws, rules and regulations governing the practice of medicine in New York State.
3. Respondent shall submit prompt (within 20 days) written notification to the Board, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Corning Tower Building, Room 438, Albany, New York 12237, regarding any change in employment, practice, residence or telephone number, within or without New York State.
4. In the event that Respondent leaves New York to reside or practice outside the State, Respondent shall notify the Director of the OPMC in writing at the address indicated above, by registered or certified mail, return receipt requested, of the dates of his departure and return. Periods of residency or practice outside New York State shall toll the probationary period, which shall be extended by the length of residency or practice outside New York State.
5. Respondent shall have quarterly meetings with an employee of the OPMC during the period of probation. During these quarterly meetings Respondent's professional performance may be reviewed by having a random selection of office records, patient records and hospital charts reviewed.

6. Respondent shall submit quarterly declarations, under penalty of perjury, stating whether or not there has been compliance with all terms and conditions of probation and, if not, the specifics of such non-compliance. These shall be sent to the Director of the OPMC at the address indicated above.
7. Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the N. Y. Public Health Law § 3302 (6) or any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent for a bona fide illness or condition by another physician.
8. Respondent shall abstain completely from the use of alcoholic beverages.
9. Respondent shall immediately submit to biological fluid testing at respondent's cost, upon request of the OPMC or its designee.
10. Respondent shall submit written proof to the Director of the OPMC at the address indicated above that he has paid all registration fees due and is currently registered to practice medicine as a physician with the New York State Education Department. If Respondent elects not to practice medicine as a physician in New York State, then he shall submit written proof that he has notified the New York State Education Department of that fact.
11. At least 10 days before the end of the period of suspension, respondent shall submit to the OPMC for its prior approval the name and address of a physician in the same field of practice as the respondent, who shall serve as a monitor and provide quarterly reports to the OPMC. The monitor shall not be the same person who has or is providing psychotherapy noted in condition #15. Respondent shall provide the OPMC proof that respondent has served a true copy of this decision on the monitor. If the monitor resigns or is no longer available, respondent shall, within 15 days, move to have a new monitor appointed, through nomination by respondent and approval by the OPMC. Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected) to verify compliance with the term(s) and condition(s) of probation and accepted standards of medical practice. The respondent shall be responsible for all costs associated with the monitoring of his practice. Respondent shall have quarterly meetings with the monitoring physician who shall review Respondent's practice. This monitoring physician shall review randomly selected medical records and evaluate whether Respondent's practice correspond with generally accepted standards of medical practice. Respondent shall not practice medicine as a physician until an acceptable monitoring physician is approved.
12. Monitoring of status conditions may include, but is not limited to, licensee cooperation in providing releases permitting unrestricted access to records and other information, to the extent permitted by law, from any treatment facility, treating practitioner, support group or other individual/facility involved in the education,

treatment, monitoring or oversight of Respondent, or maintained by a rehabilitation program for impaired licensees. If bodily substance monitoring has been ordered, the licensee shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

13. With the exception of providing information regarding services rendered and supplies and equipment used, respondent shall be prohibited from personally preparing, filing, or submitting any (a) bills to patients and/or (b) claims to third practice for professional and other health care services. However, respondent shall take personal responsibility for the truth and accuracy of the information provided by him for each bill and claim submitted under his name. Respondent shall bear the cost of any outside billing services that are utilized in compliance with this restriction.

14. At least 10 days before the end of the period of suspension, respondent shall submit to the OPMC an affidavit from a psychotherapist, subject to the approval of the OPMC, who has or is treating the respondent stating that the respondent is capable of practicing medicine safely. Respondent's suspension shall remain in effect if the respondent fails to provide this affidavit.

15. If there is full compliance with every term and condition set forth herein, Respondent may practice as a physician in New York State in accordance with these terms of probation the Determination and Order of the Board for professional Medical Conduct; provided, however, that on receipt of evidence of non-compliance or any other violation of the term(s) and condition(s) of probation, a violation of probation proceeding and/or such other proceeding as may be warranted, may be initiated against Respondent pursuant to New York Public Health Law §230 or §230(19) or any other applicable laws.