

IN THE MATTER OF

* BEFORE THE BOARD

GIDEON M. KIOKO, M.D.

* OF PHYSICIAN QUALITY

Petitioner

* ASSURANCE

License No. D08283

* Case No. 93-0288

* * * * *

FINAL ORDER

On October 17, 1991, Gideon M. Kioko, M.D. (the "Petitioner") was charged by the Board of Physician Quality Assurance (the "BPQA" or "Board") with violating Md. Code Ann., Health Occupations ("H.O.") §§ 14-404(a)(3), (18), and (22), which provide:

Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of its full authorized membership, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

(3) Is guilty of ... unprofessional conduct in the practice of medicine;

(18) Practices medicine with an unauthorized person or aids an unauthorized person in the practice of medicine; and

(22) Fails to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical and surgical care performed in an outpatient surgical facility, office, hospital, or any other location in this State.

The charges were based on incidents occurring at the Hillview Women's Medical Center, an ambulatory surgical center, where the Petitioner was employed to perform therapeutic abortions. The charges alleged that the Petitioner breached the standard of care by performing abortions on two patients without

insuring that anesthesia was administered by qualified medical personnel,¹ that the patients were appropriate candidates to receive the anesthesia used, or that the patients were adequately monitored during surgery. Two patients on whom the Petitioner performed abortions under IV Brevital suffered cardiac arrests as a result of complications caused by the anesthesia. Patient A died three days after surgery. Patient B suffered severe neurological damage, was transferred to a long-term nursing facility, and subsequently died of complications from pneumonia approximately three years after the surgery.

On December 31, 1991, as a result of BPQA's investigation and charges, the Petitioner surrendered his Maryland medical license by executing a public letter of surrender.

On May 19, 1992, the Petitioner petitioned BPQA for reinstatement of his Maryland medical license. On October 28, 1992, BPQA voted to initially deny reinstatement based on H.O. § 14-404(a)(3), (18), and (22).² Subsequently, on January 27, 1993, BPQA voted to additionally deny reinstatement based on the Petitioner's execution of a voluntary Letter of Surrender which provided that the decision to surrender his license was irrevocable. BPQA issued a Notice of Intent

¹ The individual in charge of the Hillview Women's Medical Center was an unlicensed individual, thus outside the jurisdiction of Maryland health occupations boards. To the best of BPQA's knowledge, no sanction was imposed on this individual by any regulatory or law enforcement agency.

² H.O. § 14-205(a)(iii) provides that BPQA may deny an application for reinstatement for reasons which would be grounds for disciplinary action set out in H.O. § 14-404.

to Deny Reinstatement on January 27, 1993. The Petitioner requested a hearing on the intended denial on January 29, 1993.

The Petitioner appeared before BPQA's Case Resolution Conference Committee (the "CRC") on April 7, 1993, to address the issue of the reinstatement of his medical license. The Petitioner informed the CRC that, since the time of the surrender of his Maryland license, he had been actively practicing medicine in Washington, D.C. On that date, the CRC advised the Petitioner that it would not recommend to BPQA that his license be reinstated unless and until the Petitioner's medical practice in Washington, D.C. was peer reviewed. Based on that recommendation, BPQA referred the case to the Medical and Chirurgical Faculty of Maryland ("Med-Chi") for peer review.³ On September 24, 1993, Med-Chi informed BPQA that it would not perform the peer review due to his preselection of cases which would affect the integrity of the peer review process. On October 22, 1993, the Petitioner informed BPQA that a peer review of records would be conducted by an ad hoc Committee of the District of Columbia Medical Society (the "Committee"). The Petitioner forwarded the records for which he had obtained patient releases to the Committee for peer review.

On October 26, 1993, the Committee forwarded a report to BPQA which

³ The Petitioner was requested to provide BPQA with a list of patients seen in 1992 and 1993, during the period of surrender of his Maryland license. On April 13, 1993, the Petitioner provided BPQA with a list of fifty patients. Since the medical care being scrutinized by peer review was performed outside the jurisdiction of BPQA, the Petitioner was requested to secure releases from patients to effectuate the release of records for the peer review.

indicated that it had conducted a peer review of fifteen of the 36 records randomly selected by the Petitioner. The committee unanimously concluded that the Petitioner met the standard of care of the Washington, D.C. medical community.

On January 5, 1994, the Petitioner appeared before a second CRC. On that date, the CRC recommended to BPQA that it reinstate the Petitioner's medical license subject to terms and conditions of probation, including periodic peer review of the Petitioner's medical practice and restrictions on surgical procedures. On February 23, 1994, BPQA voted to reject the recommendation of the CRC and require the parties to proceed to a hearing.

A hearing on the merits of the case was conducted at the Office of Administrative Hearings on August 29 and September 8, 1994. Jana Corn Burch, Administrative Law Judge (the "ALJ") presided over the hearing.⁴ On December 19, 1994, the ALJ issued a Recommended Decision wherein she concluded that the Applicant had failed to meet the burden of demonstrating by a preponderance of the evidence that he was entitled to reinstatement of his medical license.

On January 10, 1995, the Petitioner filed with BPQA exceptions to the Recommended Decision. On February 1, 1995, the Administrative Prosecutor filed a response to the Petitioner's exceptions. On February 22, 1995, the parties

⁴ Originally, Melanie Vaughn, ALJ, was assigned to this case and presided over certain prehearing matters. The case was reassigned upon her departure from OAH to a federal ALJ position.

appeared before BPQA for an oral hearing on exceptions. BPQA considered this case on that date. Subsequent to oral argument, Dr. Kioko submitted a post-argument pleading and the Administrative Prosecutor filed a response. BPQA reviewed the Petitioner's post-argument pleading and response by the Administrative Prosecutor and further considered this case on March 22, April 26, and May 24, 1995.

OPINION

Burden of Proof

Pursuant to the ALJ's Memorandum Opinion and Order dated July 18, 1994, Dr. Kioko had the burden to demonstrate to BPQA by a preponderance of the evidence that he met the qualifications for reinstatement. The preponderance of the evidence standard requires proof that:

something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.

Meyers v. Montgomery County Police, 96 Md. App. 668, 688 (1993).

Dr. Kioko repeatedly asserts that the State put on no evidence to contradict his showing that he met the criteria for reinstatement. However, the lack of contradictory evidence does not necessitate a finding that Dr. Kioko adequately met the preponderance burden of proof. See Joseph F. Murphy, Jr., Maryland Evidence Handbook § 407, citing Smith v. Miller, 71 Md. App. 273, 279, 525 A.2d 245, 248 (1987) (a fact-finder does not have to accept a party's evidence

as dispositive of an issue merely because no contradictory evidence is offered by the opposing party). Indeed, the ALJ has no obligation to accept the evidence presented by Dr. Kioko as proving the factors relevant to reinstatement of his medical license.

The ALJ has broad discretion to make factual findings based on the evidence presented. As the individual who sees and hears the witnesses, the ALJ is charged with determining the integrity of the evidence presented. As explained by the Court of Appeals,

the credibility findings of the person who sees and hears the witnesses--be he ALJ, juror or judge--is entitled to considerable deference. While the degree of deference due the ALJ's final decision is related to the importance of credibility in a particular case, the ALJ's decision to give or deny credit to a particular witness's testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the ALJ (emphasis added).

Anderson v. Dep't of Public Safety and Correctional Services, 330 Md. 187, 217 (1993), quoting Charles H. Koch, Jr., Administrative Law and Practice Vol. 1, § 6.73 at 522 (1985).

BPQA acknowledges that Dr. Kioko presented substantial evidence regarding his technical competence. However, as recognized by the ALJ, the evidence presented by Dr. Kioko was not dispositive of the fundamental issue in the case, namely, whether Dr. Kioko possesses sufficient independent medical judgment to justify reinstatement of his medical license.

As the sole physician employed by the Hillview clinic, Dr. Kioko served as de facto medical director. That position required that he be responsible for all

aspects of patient medical care, including anesthesia administration and insuring the credentials of employees to whom medical and surgical responsibilities were delegated. Little, if any, evidence exists in the record demonstrating that Dr. Kioko has addressed this problem in a manner that would insure that he has gained insight into the situation in such a way as to avoid a recurrence in a similar setting in the future.

Dr. Horwitz testified extensively regarding Dr. Kioko's professional competence as an obstetrician/gynecologist based on credentialing reviews at Columbia Hospital and his own observations of Dr. Kioko's surgical procedures and credentialing reviews at Columbia Hospital Center. T.425-428. However, Dr. Horwitz testified that on the occasions where he personally observed Dr. Kioko's surgeries, he was assisted by other trained medical personnel, including an anesthesiologist. T.475-76. Dr. Horwitz never observed Dr. Kioko in an outpatient surgical facility, a less structured surgical setting. T.449. While BPQA is satisfied that the quality of Dr. Kioko's technical performance of pregnancy terminations in an outpatient surgical facility was adequate, thus comparable to the surgeries observed by Dr. Horwitz, that testimony did not prove that Dr. Kioko was competent to function as a medical director responsible for overall quality of medical and surgical care.

Similarly, Dr. Booker's expert testimony focused only on Dr. Kioko's technical competence based on his referral of patients for colposcopy, his partnership with Dr. Kioko at Clark, Greenfield and his position on the hospital

resuscitated but suffered massive neurological damage. Patient B was subsequently transferred to a long-term care facility and died on December 1, 1992 of complications from pneumonia.

BPQA's investigation further revealed that Dr. Kioko was not trained in the administration of anesthesia, nor did he insure that those administering anesthesia at Hillview were qualified to do so. Furthermore, Dr. Kioko failed to insure that conditions at Hillview were safe for the administration of IV anesthesia in that he did not attempt to determine the type of anesthesia used, whether the anesthesia was appropriate for the patient, and whether appropriate emergency equipment or medication was available in the event that a patient required resuscitation. In addition, though Dr. Kioko was often the only physician present at the clinic, he was not trained, nor did he insure that other staff were trained, in advanced life support techniques.

Dr. Kioko argues that, while denying him an opportunity to rebut the underlying charges, the ALJ accepted the truth of the allegations set out in the charging document. The Recommended Decision clearly indicates that the allegations were merely investigative facts. This case is problematic in that no litigation of the facts occurred due to the surrender of Dr. Kioko's medical license.

The letter of surrender signed by Dr. Kioko indicated that he freely chose to surrender his medical license while an investigation was pending. In so doing, Dr. Kioko gained the benefit of not having any formal disciplinary action which

might have been imposed and reported to the National Practitioner's Data Bank. However, Dr. Kioko clearly waived his right to contest those investigative findings. The letter of surrender clearly provides that, "[t]his decision to surrender my license to practice medicine in the State of Maryland is IRREVOCABLE." By signing an irrevocable letter of surrender, Dr. Kioko agreed that he would not be permitted to rescind the decision to surrender and subsequently request a hearing on the charges. Dr. Kioko cannot now ignore that waiver by attempting to litigate those facts in a reinstatement proceeding. Instead, in seeking reinstatement of a license which he chose to surrender, Dr. Kioko must do so from a posture which he himself created.

BPQA's analysis of a physician's fitness for reinstatement requires a review of the original circumstances and inroads which have been made to rectify underlying deficiencies in the physician's practice. BPQA is cognizant of the fact that the investigative facts on which it relies in its assessment of the requirements for reinstatement are merely allegations. However, as indicated, Dr. Kioko knowingly waived any right to contest those investigative facts. Indeed, the letter of surrender provides that Dr. Kioko consulted an attorney prior to signing the letter and affirmed that he understood both the impact of the letter of surrender and the nature of BPQA's actions.

Furthermore, the letter of surrender itself sets out a factual basis for BPQA to consider, namely, that Dr. Kioko performed abortions on patients sedated by IV Brevital, which was administered by unqualified personnel leading

to the death and severe brain damage of two patients, respectively. This factual predicate is sufficient for BPQA to conclude that Dr. Kioko, as de facto medical director of Hillview, abdicated his responsibility to insure the well-being of patients on whom he performed surgery.

BPQA's review of the allegations underlying its charges, which led to the surrender of Dr. Kioko's license, indicates a serious lack of judgment regarding the administration of anesthesia and the obligations of a physician to insure the safety of patients undergoing surgical procedures. As the sole physician employed by Hillview, Dr. Kioko essentially functioned as the facility's medical director. As such, he was obligated to adequately insure that the anesthesia selected was appropriate for the patient, that the anesthesia was administered and monitored by trained medical personnel, that appropriate resuscitative equipment was available, and that personnel trained in advanced life support techniques were available on site. The absence of these measures, if not the direct cause of harm to Patients A and B, clearly contributed to conditions at Hillview that posed a grave risk of harm to patients. Because of the serious breach of Dr. Kioko's duty, he bears a heavy burden in proving that he is sufficiently rehabilitated to engage in the practice of medicine. See Matter of Murray, 316 Md. 303, 306, 558 A.2d 710, 711 (1989).

2. Dr. Kioko's Subsequent Conduct and Reformation

After the surrender of his Maryland medical license, Dr. Kioko continued to practice obstetrics and gynecology in Washington, D.C., and maintained

privileges at Columbia Hospital for Women. Additionally, since January, 1992, Dr. Kioko has been employed to perform abortions by the New Summit Medical Clinic in Washington, D.C.

In October, 1993, an ad hoc committee of the D.C. Medical Society performed a peer review of Dr. Kioko's medical practice. Initially, Dr. Kioko selected a list of 50 patients he had seen at New Summit during the period of January, 1992 to June, 1993. No names of patients whom Dr. Kioko had seen in his private practice during this period were included on the list. Dr. Kioko secured a release from 36 of the 50 patients on the list. The Committee performed a review using 20 records randomly selected from the 36 records provided. The peer review report submitted to BPQA concluded that Dr. Kioko's care of these 20 patients met the standard of care for the District of Columbia.

During the period in which his license has been surrendered, Dr. Kioko has completed continuing medical education credits in excess of those required by H.O. § 14-409(b). Dr. Kioko excepted to the ALJ's minimization of his CME credits, pointing out that the majority of those credits were obtained in his specialty area, namely, obstetrics and gynecology. However, as indicated by this opinion, BPQA has no basis to challenge that Dr. Kioko is a technically competent obstetrician/gynecologist. While it is certainly commendable that Dr. Kioko maintain this competence by taking CME's in that area, for the purposes of reinstatement, CME's focused in areas relevant to the deficiencies in his medical judgment would be more appropriate. Until recently, none of the credits involved

training in advanced life support techniques and only minimally focused on anesthesia administration.

Dr. Kioko points out that, since the Hillview incidents, he has practiced only in settings where such events are not likely to occur. While it is true that he no longer performs surgery on patients under general anesthesia in the absence of trained personnel, that assurance, standing alone, would not preclude Dr. Kioko from doing so in the future. Certainly, BPQA could place restrictions on Dr. Kioko's license if it granted reinstatement. However, it is not the role of BPQA to continuously police a physician's practice in order to insure the safety of Maryland citizens. Nothing in the record at this juncture suggests that BPQA may rely instead on Dr. Kioko's independent medical judgment.

In his submissions to BPQA, Dr. Kioko made clear his willingness to comply with any restrictions placed on his practice by BPQA. Furthermore, Dr. Kioko maintained that the New Summit Medical Clinic, of which he is currently the medical director, complies with safety regulations established by the D.C. government. However, the practice of medicine routinely presents situations in which a physician cannot always rely on written guidelines and practice parameters. BPQA is concerned that Dr. Kioko is not at this time capable of functioning in a way to insure the safety of his patients should such an unforeseen emergency occur.

In his application for reinstatement, Dr. Kioko expressed remorse for the events at Hillview. He stated that he has examined these situations and what he

should have done differently. Likewise, in the course of the exceptions hearing, Dr. Kioko indicated that he accepted full responsibility for the deaths of Patients A and B and recognizes that, as the operating physician, he bore ultimate responsibility for insuring the patients' welfare.

However, while it appears that Dr. Kioko recognizes his responsibility, it is unclear whether this recognition is adequately reflected in his activities since the surrender of his Maryland medical license. BPQA finds two areas of particular concern. First, Dr. Kioko is currently employed as the medical director of the New Summit Medical Clinic. When questioned by BPQA in the course of the exceptions hearing regarding safety precautions at that clinic, Dr. Kioko stated, in effect, that the clinic has only that equipment minimally required by the District of Columbia government regulations. E.T.61-62, 64. He also stated that staff at that clinic were trained only in basic resuscitation techniques and that no one was trained in advanced life support. E.T.61-62. For advanced life support, Dr. Kioko stated that he would rely on calling 911. E.T.63.

BPQA recognizes that intravenous anesthetic is not administered for abortions at the New Summit. However, it is difficult for BPQA to find that Dr. Kioko truly comprehends that his lapse of judgment contributed to the tragic outcome at Hillview when he has done little to correct similar circumstances at New Summit. Merely because that clinic minimally meets District of Columbia safety regulations does not insure that a physician's practice at that facility will meet appropriate standards of care. In addition, even though he is not performing

abortions under general anesthesia, Dr. Kioko should be thoroughly familiar with potential reactions to local anesthetic and able to deal with any resulting complications. BPQA's assessment of Dr. Kioko's application for reinstatement involves a determination of the extent of his reformation to assure that such a result is never repeated. BPQA is not convinced at this time that Dr. Kioko has adequately met that standard.

Certainly, BPQA recognizes that Dr. Kioko is more than willing to comply with any conditions BPQA requires for reinstatement. Similarly, Dr. Kioko indicates that New Summit, where he is the Medical Director, complies with District of Columbia regulations. However, the practice of medicine requires the exercise of independent medical judgment and not mere rote compliance with regulatory strictures. Unless and until Dr. Kioko demonstrates a more meaningful level of professional judgment, he has not adequately demonstrated entitlement to reinstatement of his medical license.

3. Dr. Kioko's Present Character

In a letter dated March 29, 1990, in response to BPQA's investigation of the incidents at Hillview, he described the incidents at Hillview in correspondence with BPQA. Bd. Exhibit J(1). In that letter Dr. Kioko indicated that he accepted responsibility for post-operative complications. However, he also stated that he considered himself "unlucky," and failed to recognize his ultimate responsibility for the patients' safety. Dr. Kioko perceived that his role as a surgeon permitted him to walk into the operating room only to perform surgery on

the sedated patient. Dr. Kioko denied any involvement in the choice of anesthesia yet failed to insure that the individuals who made that decision were sufficiently trained to do so. Furthermore, Dr. Kioko denied that he was the medical director at Hillview because he was neither remunerated nor formally contracted to fill that position.



In contrast, at the exceptions hearing, Dr. Kioko expressed his regret for the Hillview incidents and accepted full responsibility for those outcomes.

E.T.35. Dr. Kioko also recognized that he should have learned from Patient A's death such that the incident involving Patient B could have been prevented.

E.T.35. BPQA does not doubt that Dr. Kioko sincerely regrets the Hillview incidents. However, as indicated above, Dr. Kioko has not sufficiently translated this remorse into actions which would decrease the risk that similar situations would occur in the future.

4. Dr. Kioko's Present Qualifications and Competence to Practice Medicine

During the period of surrender of his Maryland medical license, Dr. Kioko continued to practice obstetrics and gynecology in Washington, D.C. The peer review of Dr. Kioko's practice in that jurisdiction concluded that the practice met the standard of care for the District of Columbia. While BPQA has some concerns about the supposedly random selection of records used for the peer review, BPQA rejects the conclusion of the ALJ that competence in one jurisdiction does not demonstrate competence in Maryland.

Based on the record before it, BPQA has no basis to deny that Dr. Kioko is

able to competently perform technical surgical procedures in the area of obstetrics and gynecology. However, BPQA concludes that Dr. Kioko has failed to demonstrate the ability to exercise sound medical judgment when an unforeseen emergency arises, or to prospectively identify potential situations which may evolve into emergencies. It is this aspect of Dr. Kioko's competency which precludes BPQA from reinstating his medical license at this time. In his post-hearing submission, Dr. Kioko indicated that he has registered for a course in Advanced Cardiac Life Support. This, as well as similar actions more relevant to correcting deficiencies in his practice related to the underlying incidents, should have occurred much earlier in the reinstatement process.

FINDINGS OF FACT

BPQA adopts and incorporates by reference the Findings of Fact made by the ALJ in the Recommended Decision issued on December 19, 1994. The entire Recommended Decision is attached and incorporated into this Final Order as Appendix A.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, and after consideration of the Applicant's exceptions and the Administrative Prosecutor's response to those exceptions, BPQA concludes as a matter of law that the Applicant has failed to prove by a preponderance of the evidence that he meets the requirements for

reinstatement of his Maryland medical license which he surrendered to BPQA on December 21, 1991.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is this 21 day of July, 1995, by a majority of the full authorized membership of BPQA considering this case⁶

ORDERED that the application for reinstatement of GIDEON M. KIOKO, M.D., is hereby DENIED; and it is further

ORDERED that this is a Final Order of the Maryland Board of Physician Quality Assurance and as such is a PUBLIC DOCUMENT pursuant to Md. Code Ann., State Gov't §§ 10-611 et seq.

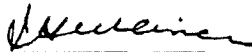
NOTICE OF RIGHT TO APPEAL

Pursuant to the Md. Code Ann., Health Occupations § 14-408, you have a right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days from your receipt of this Final Order and shall be made as provided for judicial review of a final decision in the Md. Code Ann., State Gov't §§ 10-201

⁶ The following BPQA members took part in the final decision of this case: Israel H. Weiner, M.D., BPQA Chair; Cheryl Winchell, M.D.; Ira N. Brecher, M.D.; William A. Crawley, M.D.; Brian M. Hepburn, M.D.; Lawrence A. Jones, M.D.; Christine J. Moore; Mary M. Newman, M.D.; Sheila Riggs; John F. Strahan, M.D.; and J. Andrew Sumner, M.D. Sidney B. Seidman, M.D. was recused from the vote. Frank A. Gunther, Vice Chair, Suresh C. Gupta, M.D., and Charles F. Hobelmann, M.D. were absent.

et seq., and Title 7, Chapter 200 of the Maryland Rules.

7/21/45
Date


Israel H. Weiner, M.D.
Chair