



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/med/

April 10, 2002

Xi P. Yin, M.D.
200 Carman Avenue, Apt. 23F
East Meadow, NY 11554

Dear Doctor Yin:

Please find enclosed a certified copy of the Findings, Order and Journal Entry approved and confirmed by the State Medical Board meeting in regular session on April 10, 2002.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

Very truly yours,

Anand G. Garg, M.D.
Secretary

AGG:jam
Enclosures

CERTIFIED MAIL NO. 7000 0600 0024 5146 4229
RETURN RECEIPT REQUESTED

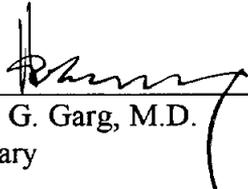
Cc: 67-87 Exter Street
Forest Hills, NY 11375
CERTIFIED MAIL NO. 7000 0600 0024 5146 4878
RETURN RECEIPT REQUESTED

Mailed 4-11-02

CERTIFICATION

I hereby certify that the attached copy of the Findings, Order and Journal Entry approved by the State Medical Board, meeting in regular session on April 10, 2002, constitutes a true and complete copy of the Findings, Order and Journal Entry in the Matter of Xi P. Yin, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This Certification is made by the authority of the State Medical Board of Ohio in its behalf.



Anand G. Garg, M.D.
Secretary

(SEAL)

April 10, 2002

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

XI P. YIN, M.D.

*

FINDINGS, ORDER AND JOURNAL ENTRY

By letter dated December 12, 2001, notice was given to Xi P. Yin, M.D., that the State Medical Board intended to consider disciplinary action regarding his license to practice medicine and surgery in Ohio, and that he was entitled to a hearing if such hearing was requested within thirty (30) days of the mailing of said notice. In accordance with Section 119.07, Ohio Revised Code, said notice was sent via certified mail, return receipt requested, to the address of record of Dr. Yin, that being 200 Carman Avenue, Apt. 23F, East Meadow, NY 11554. The Notice was returned to our offices by the United States Postal Service marked "Undeliverable as Addressed". On February 28, 2002, the notice was sent via certified mail, return receipt requested, to 67-87 Exter Street, Forest Hills, NY 11375 which was identified by the New York Board as his address of record.

A signed certified mail receipt was returned the Medical Board offices from the second mailing documenting proper service of the notice. However, no hearing request has been received from Dr. Yin and more than thirty (30) days have now elapsed since the mailing of that notice.

WHEREFORE, for the reasons outlined in the December 12, 2001 notice of opportunity for hearing, which is attached hereto and incorporated herein, it is hereby ORDERED that the license of Xi P. Yin, M.D., to practice medicine and surgery in the State of Ohio be REVOKED.

This Order shall become effective IMMEDIATELY.

This Order is hereby entered upon the Journal of the State Medical Board of Ohio for the 10TH day of APRIL 2002 and the original thereof shall be kept with said Journal.

(SEAL)


Anand G. Garg, M.D.
Secretary

April 10, 2002
Date



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/rmed/

December 12, 2001

Xi P. Yin, M.D.
200 Carman Avenue, Apt. 23F
East Meadow, New York 11554

Dear Doctor Yin:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand or place you on probation for one or more of the following reasons:

- (1) Your certificate to practice medicine and surgery in Ohio was suspended by operation law, on or about October 1, 2001, for non-payment of renewal fees, and has not been reinstated.
- (2) Effective on or about December 12, 2000, the New York Department of Health Administrative Review Board for Professional Medical Conduct (hereinafter the "New York Board") Determination and Order (No. 00-202) affirmed the Bureau of Professional Medical Conduct Committee Determination to suspend your license for three (3) years, to stay the suspension and place you on probation.

Further, the New York Board affirmed the Bureau of Professional Medical Conduct Committee Determination that you committed professional misconduct by practicing medicine with negligence on more than one occasion and by willfully or with gross negligence violating a statute governing medical practice, by dispensing the drug Viagra to an undercover investigator in large quantities and without an examination.

The conduct, which resulted in the above penalty, is more fully set forth in the New York Board Determination and Order which is attached hereto and incorporated herein.

The New York Board Determination and Order, as alleged in paragraph (1) above, constitutes "[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatry, or the limited branches of medicine in another state, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand," as that clause is used in Section 4731.22(B)(22), Ohio Revised Code, as in effect prior to April 10, 2001.

*Mailed 12-13-01
Second Mailing 1-4-02
Third Mailing 2-28-02*

Xi P. Yin, M.D.

Page 2

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, effective March 9, 1999, provides that "[w]hen the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Anand G. Garg, M.D.
Secretary

AGG/jag
Enclosures

CERTIFIED MAIL # 7000 0600 0024 5147 3221
RETURN RECEIPT REQUESTED

SECOND MAILING: 433 River Street, 4th Floor
Troy, NY 12180

CERTIFIED MAIL NO. 7000 0600 0024 5147 1449
RETURN RECEIPT REQUESTED

THIRD MAILING: 67-87 Exter Street
Forest Hills, NY 11375
CERTIFIED MAIL NO. 7000 0600 0024 5146 4205
RETURN RECEIPT REQUESTED

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

COPY

In the Matter of

Xi Peng Yin, 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. 00-202

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

**For the Department of Health (Petitioner):
For the Respondent:**

**Dianne Abeloff, Esq.
Nathan L. Dembin, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent practiced medicine in with negligence on more than one occasion and violated a statute governing medical practice, by dispensing the drug Viagra to an undercover investigator in large quantities and without an examination. The Committee voted to suspend the Respondent's New York Medical License (License) for three years, stayed the suspension and placed the Respondent on probation for three years, under terms that appear as Appendix II in the Committee's Determination. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to modify the Committee's Determination by sustaining additional misconduct specifications and by revoking the Respondent's License. After reviewing the hearing record and the parties' review submissions, the ARB votes 3-2 to sustain the Committee's Determination in full.

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(2-6) & 6530(16) (McKinney Supp. 2000) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- willful or grossly negligent failure to comply with substantial provisions of state law with regard to practicing medicine, and,
- engaging in conduct that evidences moral unfitness.

The charges arose from the Respondent's conduct in dispensing the drug Viagra to an undercover investigator and to patients the record identifies as Patients 2-101. The record identifies the Patients by number to protect patient privacy. A hearing on the charges ensued before a BPMC Committee who rendered the Determination now on review.

The Committee found that the Respondent dispensed Viagra to Food and Drug Administration Investigator Harold Moy on November 13, 1998 & January 27, 1999. On the first date, the Respondent asked the Investigator for \$440.00 for 40 Viagra tablets, without examining the Investigator, taking his blood pressure, listening to his heart and lungs or questioning the Investigator about medical history, sexual function or medications the Investigator may have been taking. On the second date, the Investigator indicated that he wanted to purchase Viagra for two friends. The Respondent provided two bottles of Viagra to the Investigator without asking questions about the friends' health. The Committee also found that the Respondent had no pre-existing relationships with Patients 2-101 and that many of the patients were visitors from Mainland China.

The Committee sustained the charge that the Respondent violated a statute, N.Y. Educ. Law § 6807(2)(a)(McKinney Supp. 2000), by dispensing drugs in more than a seventy-two hour

supply. The Committee found further that the Respondent practiced medicine with negligence on more than one occasion by failing to perform an adequate history and physical examination before dispensing Viagra to the Investigator. The Committee dismissed charges that the Respondent practiced with negligence on more than one occasion in dispensing to Patients 2-101. The Committee determined that the Respondent evaluated those Patients appropriately. The Committee also voted to dismiss the incompetence, gross negligence, moral unfitness and fraud charges. The Committee voted to suspend the respondent's License for three years, stay the suspension and place the Respondent on probation under the terms that appear at Appendix II to the Committee's Determination. The Committee noted that the Respondent cooperated with the investigation that resulted in the BPMC Hearing and that the Respondent frequently donated his services to the Chinese community.

Review History and Issues

The Committee rendered their Determination on July 31, 2000. This proceeding commenced on August 11, 2000, 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 September 25, 2000.

The Petitioner requests that the ARB modify the Committee's Determination on the charges and overrule the Committee's determination on penalty. The Petitioner argues that the Committee should sustain the fraud charge, because the Respondent sold the Investigator Viagra without examining the Investigator and because the Respondent sold the Investigator Viagra, knowing that the Investigator intended the Viagra for use by friends. The Petitioner also argues that the ARB should sustain the gross negligence charge because the Respondent never examined or established a physician-patient relationship with Investigator and the Investigator's friends. The Petitioner asks the ARB to revoke the Respondent's License for dispensing drugs in

violation of the Education Law, in other than good faith medical practice and for failing to maintain accurate patient records. The Petitioner argues that the Respondent abused his privilege to practice by exchanging drugs for money.

In reply, the Respondent argues that the ARB may impose no penalty for any act by the Respondent in dispensing for the Investigator's friends, because the Petitioner's Statement of Charges contained no allegations concerning dispensing to the Investigator's friends. The Respondent contends that no basis exists to modify or overturn the Committee.

Determination

The ARB has considered the record and the parties' briefs. We vote 3-2 to sustain the Committee's Determination on the Charges and the Penalty.

Dr. Price, Dr. Lynch and Mr. Briber agree with the Committee in full and see no need to modify or overrule the Committee's judgement. The majority holds that the stayed suspension and probation provide the appropriate remedy in this case, in which the Committee found no greed or fraudulent motivation for the Respondent's conduct. Dr. Grossman and Ms. Pellman would hold that the Respondent committed fraud and gross negligence. They would also hold that the Respondent demonstrated that he was practicing medicine in other than good faith by dispensing drugs in the quantities that violated Educ. Law § 6807(2)(a).

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER**:

1. The ARB votes 3-2 to **AFFIRM** the Committee's Determination that the Respondent committed professional misconduct by practicing medicine with negligence on more than one occasion and by willfully or with gross negligence violating a statute governing medical practice.
2. The ARB votes 3-2 to **AFFIRM** the Committee's Determination to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation under the terms in Appendix II to the Committee's Determination.

Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Xi Peng Yin, M.D.

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

Dated: Nov 24, 2000

Therese G. Lynch M.D.

Therese G. Lynch, M.D.

In the Matter of Xi Peng Yin, M.D.

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

Dated: November 24, 2000

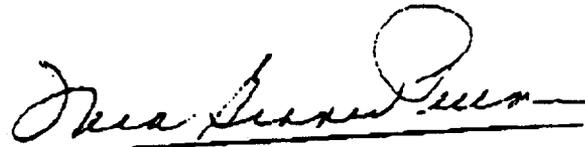


Robert M. Briber

In the Matter of Xi Peng Yin, M.D.

Thea Graves Pellman, an ARB Member, affirms that she participated in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Yin.

Dated: Nov. 29, 2000



Thea Graves Pellman

In the Matter of Xi Peng Yin, M.D.

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

Dated: 12/11, 2000

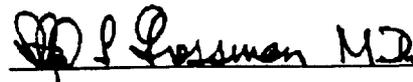
A handwritten signature in cursive script, appearing to read "Winston S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Xi Peng Yin, M.D.

Stanley L. Grossman, an ARB Member, affirms that he participated in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Yin.

Dated: November 22, 2000

 _____

Stanley L. Grossman, M.D.



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

July 31, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Xi Peng Yin, M.D.
200 Carman Avenue
East Meadow, New York

Nathan L. Dembin, Esq.
225 Broadway, Suite 1400
New York, New York 10007

Dianne Abeloff, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza
New York, New York 10001

RE: In the Matter of Xi Peng Yin, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-202) 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.

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.

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
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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,


Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

COPY

**IN THE MATTER
OF
XI PENG YIN, M.D.**

DETERMINATION

AND

ORDER

BPMC #00-202

GERALD M. BRODY, M.D., Chairperson, GERALD S. WEINBERGER, M.D. and REV. THOMAS KORNMEYER, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. CHRISTINE C. TRASKOS, ESQ., served as Administrative Officer for the Hearing Committee. The Department of Health appeared by HENRY M. GREENBERG, General Counsel, DIANNE ABELOFF, ESQ., Associate Counsel, of Counsel. The Respondent appeared by NATHAN L. DEMBIN & ASSOCIATES, P.C., NATHAN L. DEMBIN, ESQ. of counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

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

STATEMENT OF CHARGES

The accompanying Statement of Charges alleged three hundred and seven (307) specifications of professional misconduct, including allegations of gross negligence, negligence on more than one occasion, gross incompetence, incompetence on more than one occasion, fraudulent practice, willful or grossly negligent failure to comply with substantial provision of state law with regard to dispensing of prescription drugs and moral unfitness. The charges are more specifically set forth in the Statement of Charges dated January 26, 2000, a copy of which is attached hereto as Appendix I and made a part of this Determination and Order.

WITNESSES

For the Petitioner:

**Harold Moy
Lawrence M. Matlin
Maury Greenberg, M.D.**

For the Respondent:

**Loren Hockenberry
Ailing Zhang
Lin Killy
Xi Peng Yin**

FINDINGS OF FACT

1. Xi Peng Yin, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 13, 1996, by the issuance of license number 204134, by the New York State Education Department. (Ex. 1)
2. On or about November 13, 1998, Harold Moy, an agent for the Food and Drug Administration, went to an herbal store located at 1024 Sixth Avenue, N.Y., N.Y., to purchase Viagra. He was told that they were out of Viagra. Mr. Moy was then introduced to Respondent. Respondent offered to help Mr. Moy with Viagra. (T. 39, 40, 41, 42)
3. Respondent took Mr. Moy into his office/consultation room, at which point Moy told Respondent that he wanted to purchase Viagra for his friends. (T. 43,91)
4. The consultation room where Respondent and Agent Moy talked did not contain any medical equipment; there was only a desk, desk chair, one other chair and paperwork. (T. 43,44)
5. Respondent went to a closet, took down a locked box which contained money and pills. Respondent asked for \$440 for 40 pills. Agent Moy gave Respondent the money; Respondent gave Moy the Viagra.. (T. 44-45, 49)
6. Respondent never examined Moy prior to selling the Viagra; he never took Agent Moy's blood pressure, listened to his heart or lungs. (T. 48)

7. Respondent never asked Moy about his medical history, family history, sexual function, or whether he was taking any medications. Respondent did not ask any questions about Moy's friends' health. (T. 46-48)
8. On or about January 27, 1999, Agent Moy returned to Respondent's office to purchase more Viagra. Respondent met Moy in the reception area and took him back to the consultation office described in Findings of Fact 4. (T.50)
9. Moy informed Respondent that he wanted to purchase two more bottles of Viagra for his friends. (T. 50-51)
10. Respondent again did not examine Moy, nor did he ask any questions about his medical history or family history. Respondent did not ask any questions about the friends' health. (T. 50-52, 103-104)
11. Respondent sold Moy two bottles of Viagra pills for \$530. (T. 51-52)
12. The conversations on November 13th and January 27th were both conducted in Cantonese. (T. 374)
13. Each time after Respondent sold Moy the Viagra, he gave Moy a sheet of instructions in Chinese. He never asked Moy if he understood the information on the sheet, if he had any questions, or if he understood the risks of using it. When Respondent saw Agent Moy on both occasions, he did not ask for his name. (T. 93)

14. Respondent provided Petitioner's Ex. 1 to the Office of Professional Medical Conduct in response to a request for Harold Moy's record. This record does not accurately reflect what occurred when Agent Moy was in Respondent's office on two occasions.(Ex. 1; 39-52, 111-112). Respondent took no notes during either of Moy's two office visits. (T. 93-96)
15. Respondent kept no medical records for Agent Moy's two office visits. (T. 46,52,81, 93-94)
16. Although Harold Moy is listed as Patient 1 in the Petitioner's Statement of Charges, the record that Respondent submitted to OPMC for "Moy" is not the record for Agent Harold Moy's office visits.
17. Viagra is a drug that helps men to achieve erection if they are having difficulty maintaining or achieving erections. (T. 157)
18. Viagra may be used to enhance sexual performance in a patient with no contraindication. (T. 221-224)
19. There is nothing about Viagra that would cause a physician to act differently towards the care of a patient who requests Viagra then any other drug. A physician still needs to perform a sufficient evaluation to be assured that there are no contraindications to the use of the drug. (T. 157-159, 172,224,235-237)

20. A physician needs to be careful when prescribing Viagra to an older person who may have a family history of cardiac disease, but has not been evaluated for cardiac disease. If such a man suddenly engaged in a high-energy activity such as sex, he could develop angina or other cardiac symptoms. (T. 164-165,193)
21. If a patient with whom the physician has an established patient-physician relationship comes to the physician with a request for Viagra, and the physician is not aware of any contraindications, it would be acceptable to prescribe Viagra.(T. 222)
22. Respondent had no pre-existing relationships with Patients 1-101. (T. 375;Exs. 1-101)
Many of the patients were visitors from Mainland China. (T. 381-382)
23. Respondent provided medical charts for Patients 2-101. (Exs. 2-101)
24. From on or about April 30,1998, through on or about November 29, 1999, Respondent purchased 1155 bottles of Viagra, or 34,650 pills. (T. 236; Exs. 1-101, 104)

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 following Factual Allegations should be sustained. The citations in parenthesis refer to the Findings of Fact which support each Factual Allegation:

| | |
|--------------------|---------|
| Paragraph A: | (2,3) |
| Paragraph A.1: | (7,10) |
| Paragraph A.2: | (6,10) |
| Paragraph A.4: | (5,11) |
| Paragraph A..4(a): | (3,10) |
| Paragraph A.5: | (14-16) |
| Paragraph B | (22,23) |

Paragraph B.4 (24)

Paragraph B.5 (23)

The Hearing Committee further concluded that the following Specifications are sustained.

The citations in parenthesis refer to the Factual Allegations which support each Specification:

NEGLIGENCE ON MORE THAN ONE OCCASION

Paragraph: (A and A.1,2,4, 5)

Paragraph: (B and B.4, 5)

**WILLFUL OR GROSSLY NEGLIGENT FAILURE TO COMPLY WITH
SUBSTANTIAL PROVISIONS OF STATE LAW WITH REGARD TO
DISPENSING OF PRESCRIPTION DRUGS**

Paragraphs : A and A.4

Paragraphs : B and B.4

The Hearing Committee further concluded that the following specifications should not be sustained:

DISCUSSION

Respondent is charged with three hundred and seven (307) specifications alleging professional misconduct within the meaning of Education Law § 6530. This statute sets forth numerous forms of conduct which constitute professional misconduct, but do not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing Committee consulted a memorandum prepared by the General Counsel for the Department of Health. This document, entitled "Definitions of Professional Misconduct Under the New York Education Law", sets forth suggested definitions for gross negligence, negligence, gross incompetence, incompetence and the fraudulent practice of medicine.

The following definitions were utilized by the Hearing Committee during its deliberations:

Negligence is failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances.

Gross negligence is failure to exercise the care that would be exercised by a reasonably prudent physician under the circumstances, and which failure is manifested by conduct that is egregious or conspicuously bad.

Gross incompetence is an unmitigated lack of the skill or knowledge necessary to perform an act undertaken by the licensee in the practice of medicine.

Incompetence is a lack of the skill or knowledge necessary to practice the profession.

Fraudulent practice is the intentional misrepresentation or concealment of a known fact, made in some connection with the practice of medicine. The Hearing Committee must find that (1) a false representation was made by the licensee, whether by words, conduct or concealment of that which should have been disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation. The licensee's knowledge and intent may properly be inferred from facts found by the Hearing Committee, but the Committee must specifically state the inferences it is drawing regarding knowledge and intent.

Using the above-referenced definition as a framework for its deliberations, the Hearing Committee concluded, by a preponderance of the evidence, that one hundred and two (102) of the three hundred and seven (307) specifications of professional misconduct should be sustained. Two hundred and five (205) of the specifications were not sustained. The rationale for the Committee's conclusions regarding each specification of misconduct is set forth below.

At the outset of deliberations, the Hearing Committee made a determination as to the credibility of the witnesses presented by the parties. The Department called Harold Moy, Lawrence M. Matlin and Maury Greenberg, MD as witnesses. The Hearing Committee found Harold Moy, an agent with the U.S. Food and Drug Administration to be a credible and unbiased witness in testifying about his two visits to Respondents office. (T. 35-109) No motive for falsification or fabrication of his testimony was alleged or proven. The Hearing Committee further found that OPMC investigator Lawrence Matlin was ill prepared in his testimony. They found his notes to be accurate but his memory was questionable. The Hearing Committee therefore gave his testimony limited credibility. Maury J. Greenberg, M.D. is board certified in family medicine. He has a private practice in Stony Brook and he works part-time on the faculty at the School of Medicine, State University of New York. (T. 155-156, Ex. 105) The Hearing Committee finds him to be qualified as an expert witness. They further note that he was prudent and thoughtful in his testimony and did not overstate his case. Thus, they find his testimony to be very credible.

The Respondent testified and offered three character witnesses on his behalf. The three character witnesses were Loren Hockenberry, Ailing Zhang and Lin Killy. These witnesses all spoke of Respondent's service as a caring, dedicated physician in the Chinatown community. (T. 266-298) The Hearing Committee finds that Respondent is clearly acknowledged for his dedication to his community but they do not find this testimony to be relative to the charges. More importantly, the Hearing Committee finds Respondent to be a credible witness. They note that he was truthful in acknowledging that he did not keep any records of Agent Moy's two visits. (T. 335-337) The Hearing Committee finds Respondent's testimony to be very credible.

GROSS NEGLIGENCE

Respondent is charged with gross negligence for dispensing Viagra to Patients 1 – 101 as stated in the charges. The Hearing Committee finds there is no evidence in the record to establish that Respondent's conduct was egregious or conspicuously bad as per the definition of gross negligence with respect to Agent Moy or Patients 2 -101. Therefore, the Hearing Committee finds that the evidence in the record does not sustain the 1st through 101st Specifications.

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with negligence on more than one occasion for dispensing Viagra to Patients 1-101 as stated in the charges. Dr. Greenburg testified that prior to prescribing Viagra, a physician should obtain a medical history from the patient to determine what the problem is and then physically examine the patient "at least enough to be assured that there are no other co-morbid conditions that were affecting the patient." (T. 157-158) He further stated that if the history and the physical exam suggested there was a condition that required laboratory testing, then that testing would be done. (T. 162) These conditions could include suspected diabetes, neuratrophy or family history of cardiac disease. (T. 162-164)

With respect to the allegations in Paragraph A, relating to Agent Moy (Patient 1), the Hearing Committee finds that Respondent was negligent in failing to perform an adequate history and physical examination before prescribing Viagra. They do not sustain the requirement of laboratory testing because Dr. Greenburg testified that this is not automatic, but would be established from the history and physical. (T. 162, 186) They find no proof in the record that laboratory tests

were required. The Hearing Committee further finds that Respondent inappropriately sold 100 Viagra pills to Agent Moy. Furthermore, they find that the drug was dispensed to Agent Moy in other than the good faith practice of medicine, because Respondent was told that the drug was not for Agent Moy but for his friends. They further find that Respondent kept no medical records for these two visits. Finally, the Hearing Committee finds that the Department failed to prove that Respondent knowingly created a fictitious medical record for Agent Moy and submitted it to OPMC with intent to mislead.

With respect to Patients 2-101, the Hearing Committee notes that none of these patients testified against Respondent. Respondent testified that most of these patients came to his office with complaints that they were not satisfied with their sexual performance and they wanted to try Viagra (T. 357) He stated that he questioned them about their medical history, specifically asking if they had heart disease, any previous surgery, diabetes or any psychological problems. (T. 357) He further explained that he warned them not use Viagra if they are taking nitrate and he gave them a special instruction sheet. (Ex. B; T. 358-359,372) Respondent further stated that his medical records show that the patients wanted Viagra and that he cleared them to take it. (T. 370)

The Hearing Committee is satisfied that Respondent did evaluate Patients 2-101 for co-morbid conditions before dispensing Viagra to them and that he adequately warned them of the side effects. They find no persuasive proof in the record that Respondent failed to take adequate history, physical and order necessary lab tests. They further find no proof that Respondent acted in other than good faith with respect to these patients. They however, do find that Respondent inappropriately dispensed Viagra to these patients in violation of N.Y. Education Law §6807(2)(a) and that his

minimal record keeping failed to accurately reflect the care and treatment he rendered to these patients. Therefore, the Hearing Committee sustains the 102nd Specification in part.

GROSS INCOMPETENCE

The Hearing Committee finds no evidence in the record of Respondent's unmitigated lack of skill and knowledge to support this specification. The Hearing Committee believes that Respondent is a well-educated physician who received extensive training in Mainland China as well as in the United States.(T. 303-315) Therefore, the 103rd Specification is not sustained.

INCOMPETENCE ON MORE THAN ONE OCCASION

The Hearing Committee finds no proof in the record that Respondent lacked the necessary skill and knowledge to practice medicine and believes Respondent to be a well-trained physician as enumerated in the above paragraph . As a result, the Hearing Committee does not sustain the 104th Specification.

FRAUDULENT PRACTICE

The Hearing Committee finds no proof in the record of Respondent's intentional misrepresentation or concealment of a known fact made in some connection with the practice of medicine. The further find no facts in evidence to infer that fraud was committed. The Hearing

Committee believes that Respondent sold Viagra to his patients for cost plus an office visit charge. They find that the Department's attempt to paint these transactions as fraud is a tortured argument. The Hearing Committee also found no fraud for creation of a medical record for Agent Moy as none was created. Therefore, the 105th through 205th Specifications are not sustained as fraudulent practice.

**WILLFUL OR GROSSLY NEGLIGENT FAILURE TO COMPLY WITH
SUBSTANTIAL PROVISION OF STATE LAW WITH REGARD TO DISPENSING OF
PRESCRIPTION DRUGS**

It is alleged that Respondent violated §6807(2)(a) of the Education Law because he dispensed more than a 72 hour supply of a drug and that he did not meet any of the exceptions to this restriction. The Hearing Committee finds no proof that Respondent's actions were willful in this instance. They however, find that the acceptable standard of practice requires a New York State physician to know the law regarding the limitations on dispensing drugs. (T. 225-227) Thus, the Hearing Committee finds that Respondent should have known about the restrictions on dispensing drugs from his office. Therefore, the Hearing Committee sustains the 206th through 306th Specifications.

MORAL UNFITNESS

The Department argues that Respondent be found morally unfit in the practice of medicine for using his medical license to facilitate the sale of Viagra. The Hearing Committee finds that Respondent's actions involved no egregious behavior and no greed as patients were charged for an office visit plus the cost of the Viagra. They further note that Respondent ceased this practice once informed by the Department that it was inappropriate and he voluntarily brought his records to OPMC. (T.117) It further appears to the Hearing Committee that Respondent has demonstrated his professional dedication to serving the general medical needs of his Chinatown community often at no charge to the patient. (T. 297) Therefore, the Hearing Committee concludes that Respondent's misconduct does not rise to the level of moral unfitness and the 307th Specification is not sustained.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above determined by unanimous vote that Respondent's license to practice medicine in New York State should be suspended for a period of (3) years following the effective date of this Determination and Order. The suspension shall be stayed in its entirety and Respondent shall be placed on probation. The complete terms of probation are attached to this Determination and Order as Appendix II. 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 found that Respondent failed to perform a proper medical evaluation during Agent Moy's two visits, that it was inappropriate to dispense Viagra to other than the patient, that all dispensations exceeded the limitations of §6807(2)(a) of the Education Law and that the medical documentation was inadequate. The Hearing Committee also found that Patients 2-101 were adequately screened for co-morbid conditions before prescribing Viagra. Furthermore, the Hearing Committee does not believe that Respondent was motivated by greed or that he has engaged in defrauding his patients. They note that Respondent was cooperative once the OPMC investigation began. They further found him to be well-educated physician, who frequently donates his services to the Chinese community.

The Hearing Committee notes that the Department has argued for revocation in this instance, but they found no proof in the record to sustain the more serious specifications of gross negligence, gross incompetence, fraud or moral unfitness for which revocation is appropriate. The Hearing Committee believes that a three (3) year stayed suspension with probation that includes record monitoring sends sufficient message to Respondent to deter these practices. Under the totality of the circumstances, the Hearing Committee concludes that this penalty is commensurate with the level and nature of Respondent's professional misconduct.

ORDER

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

1. The 102nd Specification and the 206th through 306th Specifications of Professional Misconduct, as set forth in the Statement of Charges (Petitioner's Exhibit #1) are **SUSTAINED**; and

2. The 1-101st, 103rd through 205th and the 307th Specifications of Professional Medical Misconduct against Respondent, as set forth in the Statement of Charges (Petitioner's Exhibit #1) are **NOT SUSTAINED**;

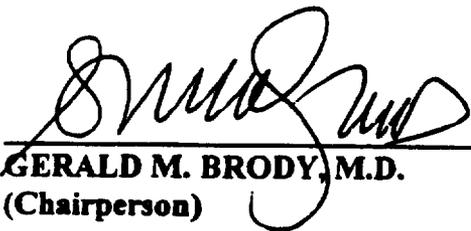
3. Respondent's license to practice medicine in New York State be and hereby is **SUSPENDED** for a period of **THREE (3) YEARS**, said suspension to be **STAYED**; and

4. Respondent's license shall be placed on **PROBATION** during the period of suspension, and he shall comply with all Terms of Probation as set forth in Appendix II, attached hereto and made a part of this Order; and

5. This Order shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

DATED: New York, New York

26 July 2000


GERALD M. BRODY, M.D.
(Chairperson)

GERALD S. WEINBERGER, M.D.
REV. THOMAS KORNMEYER

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APPENDIX I

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

IN THE MATTER
OF
XI PENG YIN, M.D.

STATEMENT
OF
CHARGES

XI PENG YIN, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 13, 1996, by the issuance of license number 204134 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about November 13, 1998 and or about January 27, 1999, an Agent from the United States Food and Drug Administration, known to Respondent as Patient 1 (all patients and/or purported patients are identified in Appendix "A" went to Respondent's office located at 1024 Sixth Avenue, N.Y., N.Y., and stated to Respondent that he sought to purchase Viagra.
1. Respondent failed to perform an adequate history.
 2. Respondent failed to perform an adequate physical examination.
 4. Respondent inappropriately sold 100 Viagra pills to Patient 1, charging \$970.
 - a. Respondent dispensed this drug to Patient 1 other than in the good faith practice of medicine.
 5. Respondent's records failed to accurately reflect the care and treatment he rendered to Patient 1.

6. Respondent knowingly created a fictitious medical record for Patient 1 and submitted it to the N.Y.S. Office of Professional Medical Conduct with the intent to mislead.

B. On various dates in 1999 Patients 2 - 101 went to Respondent's office and Respondent noted complaints of impotency. Respondent sold and/or provided Viagra directly to Patients 2 - 101. Respondent's practice deviated from accepted medical conduct for each of these 100 patients in that with regard to each patient:

4. Respondent inappropriately sold Viagra to the patient.
 - a. Respondent dispensed this drug to Patient 2 - 101 other than in the good faith practice of medicine.
5. Respondent's records failed to accurately reflect the care and treatment he rendered to the patient.

SPECIFICATION OF CHARGES

ONE HUNDRED and SECOND SPECIFICATION
NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3)(McKinney Supp. 2000) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two more of the following:

102. Paragraphs A and B and each subparagraph thereof.

**TWO HUNDRED and SIXTH THROUGH THREE HUNDRED and SIXTH
SPECIFICATION
WILLFUL OR GROSSLY NEGLIGENT FAILURE TO COMPLY WITH
SUBSTANTIAL PROVISION OF STATE LAW WITH REGARD TO DISPENSING
OF PRESCRIPTION DRUGS**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(16)(McKinney Supp. 2000) by his willful or grossly negligent failure to comply with substantial provision of state law governing the practice of medicine, specifically N.Y. Educ. Law §6807(2)(a), as alleged in the facts:

206. Paragraphs A and A4.

DATED: January 21, 2000
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX II

TERMS OF PROBATION

1. Respondent shall conduct himself at all times 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 written notification to the Board addressed to the Director, Office of Professional Medical Conduct ("OPMC"), Hedley Park Place, 4th Floor, 433 River Street, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

4. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of

Respondent's compliance with the terms of the Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.

5. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

6. Respondent shall maintain legible and complete hospital and office medical records which accurately reflect evaluation and treatment of patients. All hospital and office medical records shall contain a comprehensive history, physical examination findings, chief complaint, present illness, diagnosis and treatment. In cases of prescribing, dispensing, or administering of controlled substances, the medical record will contain all information required by state rules and regulations regarding controlled substances.

7. Respondent shall comply with all terms, conditions, restrictions, and penalties to which he is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of non-compliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.