

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the First Amended)	
Accusation Against:)	
)	
Augustus Kwadwo Atta Ohemeng, M.D.)	Case No. 11-2012-223147
)	
Physician's and Surgeon's)	
Certificate No. A 48589)	
)	
Respondent)	
_____)	

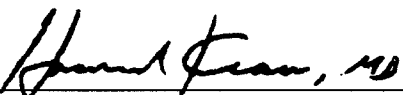
DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 8, 2016.

IT IS SO ORDERED June 10, 2016.

MEDICAL BOARD OF CALIFORNIA

By: 
Howard Krauss, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation Against:

AUGUSTUS K.A. OHEMENG, M.D.,

Physician's and Surgeon's Certificate
Number A 48589

Respondent.

Case No. 11-2012-223147

OAH No. 2015030959

PROPOSED DECISION

A hearing in this matter convened before Administrative Law Judge (ALJ) Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on February 1, 2016.

Deputy Attorney General John Gatschet represented complainant Kimberly Kirchmeyer, in her official capacity as Executive Director of the Medical Board of California (Board), Department of Consumer Affairs.

Respondent Augustus K.A. Ohemeng, M.D., represented himself by telephone from Federal Prison South Camp, in Lompoc, California.

Oral and documentary evidence was presented. At the hearing, respondent's request to present his direct testimony in writing was granted and a new hearing date was to be scheduled for cross-examination. As discussed in below, complainant waived her right to cross-examine respondent and the parties submitted written closing argument. Pursuant to the March 14, 2016 Case Status Order, the record closed and the matter was submitted for decision on April 11, 2016.

FACTUAL FINDINGS

1. *License History:* On August 21, 1990, the Board issued Physician's and Surgeon's Certificate Number A 48589 to Augustus K.A. Ohemeng, M.D. (respondent). On

February 25, 2014, an Automatic Suspension Order - No Practice was issued. Respondent's certificate expired on April 30, 2014, and is currently in delinquent status.¹

2. *Accusation:* On April 7, 2014, complainant filed an Accusation seeking to discipline respondent's license under Business and Professions Code sections 490, 2236 and 2236.1, based upon his felony conviction for health care fraud, and under section 2234 for unprofessional conduct, based upon the facts and circumstances resulting in this conviction.

3. On September 17, 2014, respondent filed his Notice of Defense and request for hearing. Respondent asked that any hearing not be conducted until "at least 9 months after Respondent is released from the Half Way House custody of the Bureau of Prisons ('BOP')." Based on his anticipated release date, respondent requested that the hearing be scheduled "no earlier than June 1, 2018."

4. The hearing on the Accusation was scheduled for February 1 through 3, 2016. On April 27, 2015, respondent filed a 'Motion for Continuance or in the Alternative Stipulation of Resolution,' requesting that the hearing be continued to December 5, 2016, six months after his anticipated release date, to allow him time to prepare and present his defense that his health care fraud conviction is not substantially related to the qualifications, functions and duties of a physician. As an alternative, respondent offered to stipulate to the suspension of his license until the matter could be heard following his release from the BOP. On April 29, 2015, respondent's request to continue was denied and respondent was authorized to appear at the hearing by telephone.

5. *First Amended Accusation:* On October 26, 2015, complainant filed a First Amended Accusation, re-alleging the original two causes for discipline and adding a third cause for discipline under Business and Professions Code section 2305, based on respondent's license discipline imposed by another state.

6. On January 14, 2016, respondent renewed his request for a continuance of the hearing. On January 27, 2016, this request was denied and respondent was authorized to appear at the hearing by telephone.

7. *February 1, 2016 Hearing:* At the hearing, respondent renewed his request to continue the hearing until after his release from incarceration. Respondent argued that he had not been timely served with the First Amended Accusation and had only received it on January 28, 2016, with complainant's exhibit packet. Complainant established that respondent had been properly served at his address of record with the Board and that the First Amended Accusation, deemed controverted pursuant to Government Code section 11507, was based on respondent's surrender of his New York medical license nearly two years

¹ Business and Professions Code section 2236, subdivision (a), provides that "a physician and surgeon's certificate shall be suspended automatically during any time that the holder of the certificate is incarcerated after conviction of a felony, regardless of whether the conviction has been appealed."

before. Respondent's request to submit his direct testimony in writing was granted, and a second hearing date was to be arranged by complainant for cross-examination.

8. *Post-Hearing Motions and Briefs:* On February 8, 2016, respondent filed a Motion to Continue, summarizing the continuance request that was made and denied at the February 1, 2016 hearing. On February 10, 2016, complainant filed an opposition to this Motion. On February 18, 2016, a Case Status Order established dates for respondent to provide his written testimony and for complainant to coordinate available dates for a continued hearing with BOP, Lompoc. On February 22, 2016, respondent filed his Reply to complainant's opposition to the motion to continue.²

On February 26, 2016, respondent filed his "Amended Response to Case Status Order" (Amended Response), requesting that his prior motion be disregarded and submitting his written testimony in response to the First Amended Accusation. Respondent admitted that each cause for discipline in the First Amended Accusation was "accurate and true." Respondent requested that, as discipline, the Board suspend his license and his authority to supervise physician assistants, "for a period terminating upon the completion of his three (3) year term of Supervised Release as imposed by the U.S. District Court for the Central District of California...." Respondent also submitted his sworn Declaration, discussed below. (Exhibit C.)

On March 2, 2016, complainant filed her response to respondent's Amended Response and waived her right to cross-examine respondent, based upon his admissions. Complainant offered written closing argument and requested that respondent's license be revoked. A briefing schedule was established in the March 14, 2016 Case Status Order. In response to this Order, the following written arguments were received: "Respondent's Response to Complainant's Response to Respondent's Amended Response to Case Status Order" (marked for identification as Exhibit D), and Complainant's Reply to Respondent's Closing Arguments (marked for identification as Exhibit 10).

Respondent's Conviction

9. On March 6, 2013, in the United States District Court, Central District of California, Case No. CR12-415-CAS, respondent was found guilty of six counts of Health Care Fraud in violation of 18 U.S.C. section 1347, a felony, after a six-day jury trial. On July 22, 2013, respondent was sentenced to 42 months of incarceration on each count, to be served concurrently, followed by three years of supervised release on each count, to run concurrently. Respondent was ordered to pay restitution in the total amount of \$2,964,934 and a special assessment of \$600. All fines were waived.

10. As set forth in the Indictment, respondent treated patients at the Pacific Clinic (clinic) in Long Beach. Co-defendants included the clinic's manager, another treating physician, and the owners and operators of two durable medical equipment (DME) supply

² Respondent's pre-hearing continuance requests is contained in ALJ Exhibit 1.

companies. The DME suppliers purported to provide the following to Medicare beneficiaries: enteral nutrition, a liquid nutritional supplement sold under brand names (e.g., Ensure and Glucerna) and enteral nutrition feeding supply kits, including syringes to administer such nutrition to patients who received nutrition through a feeding tube rather than by mouth. The clinic had patient recruiters (“cappers”) who brought Medicare beneficiaries to the clinic.

Between February 2005 and September 2008, respondent and the other treating physician examined and prescribed enteral nutrition and feeding kits to over 700 patients at the clinic, and signed Certificates of Medical Necessity (CMN), falsely certifying that the patients had medical conditions which justified the DME (i.e., that they could not ingest food orally and required a daily value of 1,600 calories in liquid nutrition). The clinic’s operator then referred the patients to the two DME suppliers. Using the CMNs, the suppliers billed Medicare for the nutrition and kits and were paid, collectively, \$2,969,668. The physicians and clinic were reimbursed by Medicare for services to patients and the clinic received a \$300 kickback payment from the DME suppliers for each prescription. The DME suppliers only supplied to the Medicare beneficiaries a fraction of the enteral nutrition and supply kits for which it billed Medicare.

Respondent’s Out-of-State License Discipline

11. On November 14, 1989, the New York State Education Department issued License Number 180715 to respondent, which authorized him to practice medicine in New York State.

12. On February 12, 2014, the New York State Board for Professional Medical Conduct issued a Statement of Charges against respondent in Case Number CO-13-03-1168-A), charging him with a violation of New York State Education Law section 6530 (9)(a)(ii), “by having been convicted of committing an act constituting a crime under federal law” The specific factual basis was respondent’s felony Health Care Fraud conviction, described above. On this same date, the New York State Commissioner of Health issued an order suspending respondent’s right to practice medicine immediately. The matter was referred for a hearing before a committee on professional conduct.

13. On June 20, 2014, the New York State Board for Professional Medical Conduct issued its Surrender Order (BPMC Case Number 14-156), striking respondent’s name from the roster of physicians in the State. The Surrender Order adopted respondent’s signed license surrender, dated May 23, 2014, by which he sought permission to surrender his license on the grounds that he “did not contest the First Specification” in the Statement of Charges; i.e., his violation of New York State Education Law section 6530 (9)(a)(ii), based on his federal conviction outlined above.

Respondent's Evidence

14. In his Declaration filed with the Amended Response, respondent apologized to the courts and accepted “full responsibility for [his] actions” that resulted in his conviction. Respondent explained that he was brought up in a Christian home in Ghana, West Africa, where his father was a respected ordained Presbyterian Minister. Respondent was taught to “help those in need, especially underprivileged ones, and not to cheat or take advantage of these people. This kind of training in my childhood motivated me to go into medicine where I am able to help heal the sick and save lives which has been demonstrated throughout my years of practicing medicine since 1986 when I finished my training in Internal Medicine and Geriatric Medicine.”

Respondent explained that in approximately 2000, he was asked by a friend (and later co-defendant) to treat elderly patients who had multiple medical problems. Respondent's role was to supervise a physician assistant who saw the patients. At the time, respondent had a busy full-time job with Talbert Medical Group in Downey. He volunteered to help the Pacific Clinic. “Some mistakes were made on my part but I had no intention of defrauding Medicare or the Federal Government, and I deeply apologize for all that I was found guilty and sentence thereof [*sic*].”

Respondent noted that, prior to his incarceration, he was “actively involved” in his church in Anaheim, California, “feeding the homeless and ministering to them.” While in prison, respondent has become “deeply involved in Bible Study groups, Prayer groups, and helping fellow inmates who need emotional support for lost [*sic*] of loved ones, as well as prayers for healing. My experience here has, through the strength and love of God, made me a far better person.”

15. In his closing argument, respondent offered additional information about the circumstances surrounding his crime, in order to fix the degree of discipline. First, respondent indicated that he practiced medicine from 1986 through 2012, without any legal issues or lawsuits. Second, respondent noted that, since arriving in the United States on January 22, 1971, he has “committed no crime or been arrested for anything” until the present medical fraud case. Third, respondent asserted that he has paid his state and federal taxes every year since arriving in the United States. Fourth, respondent asserted that he has been “a good neighbor and active member of his community” before his incarceration on January 22, 2014. Fifth, respondent argued that his involvement with Pacific Clinic “was not due to making money but primarily was to take care of those elderly patients who needed medical assistance.” He wrote:

The actual amount of money gained over a 4 year period (2005 – 2009) was only \$150,000, which as proven by the government was but for his services provided to the clinic, with significant portions of the other for clinic expenses. The other 3 million dollars involved in the conspiracy proven, according to the records of the trials, to have gone to the other co-defendants.

Based on these circumstances, respondent requested an order of suspension or penalty less than revocation.

LEGAL CONCLUSIONS

1. *Purpose of Physician Discipline:* The purpose of the Medical Practice Act is to assure the high quality of medical practice. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574.) In exercising its disciplinary authority, the Board's highest priority is protection of the public. (Bus. & Prof. Code, § 2229.) Disciplinary proceedings protect the public from incompetent practitioners by eliminating those individuals from the roster of state-licensed professionals. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. *Burden and Standard of Proof:* To revoke or suspend respondent's medical license, complainant must establish the allegations and violations alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The requirement to produce clear and convincing evidence is a heavy burden, far in excess of the preponderance of evidence standard that is sufficient in most civil litigation. Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Applicable Statutes

3. Under Business and Professions Code section 490, subdivision (a), the Board may revoke or suspend a license "on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued."

4. Business and Professions Code section 2236, subdivision (a), provides that the "conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred."

5. Business and Professions Code section 2234 provides, *inter alia*, that the Board "shall take action against any licensee who is charged with unprofessional conduct."

6. Business and Professions Code section 2305 provides:

The revocation, suspension, or other discipline, restriction, or limitation imposed by another state upon a license or certificate to practice medicine issued by that state, or the revocation,

suspension, or restriction of the authority to practice medicine by any agency of the federal government, that would have been grounds for discipline in California of a licensee under this chapter, shall constitute grounds for disciplinary action for unprofessional conduct against the licensee in this state.³

Legal Cause to Revoke License

7. Respondent has admitted that the First and Second Causes for Discipline in the First Amended Accusation are accurate and true. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Findings 9 and 10, respondent's conviction is substantially related to the qualifications, functions and duties of a licensed physician and surgeon, and constitutes unprofessional conduct. In finding respondent guilty of all six counts of health care fraud, the jury necessarily determined, beyond a reasonable doubt, that respondent "knowingly and willfully" participated in a scheme to defraud the United States government by falsely certifying that his patients had medical conditions which required treatment by enteral nutrition and that this nutrition had to be administered by use of enteral nutrition feeding supply kits.⁴ A conviction for health care fraud is a proper basis for revocation. (Cf. *Matanky v. Board of Medical Examiners* (1978) 79 Cal.App. 3d 293, 301-303.) Legal cause is established to revoke respondent's license under Business and Professions Code sections 490, subdivision (a), 2236, subdivision (a), and 2234.

8. Respondent has admitted that the Third Cause for Discipline in the First Amended Accusation is accurate and true. Respondent's surrender of his New York medical license was the direct result of charges brought against him arising from his conviction. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Findings 11 through 13, respondent's license is subject to discipline under Business and Professions Code section 2305 based on his out-of-state discipline.

9. *Appropriate Discipline:* Respondent has consistently requested that his license be disciplined by suspension rather than by revocation and, in closing argument,

³ This action is also authorized by Business and Professions Code section 141, subdivision (a).

⁴ 18 U.S.C. section 1347, subdivision (a), provides: "Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--(1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both."

requested that his license suspension terminate upon completion of his post-incarceration, three-year supervised release (parole). Business and Professions Code section 2227, subdivision (a), provides various forms of discipline, including by having “his or her right to practice suspended for a period *not to exceed one year* upon order of the board.” (Italics supplied.)

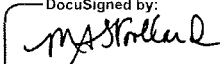
Based on a review of the record as a whole and a review of the Manual of Model Disciplinary Orders and Disciplinary Guidelines, 11th Edition (2011) (Guidelines), revocation is the appropriate remedy. In pertinent part, the Guidelines recommend: (1) a minimum penalty of stayed revocation with five years of probation with conditions, and a maximum of revocation for general unprofessional conduct (Bus. & Prof. Code, § 2234); and (2) for conviction of a crime “substantially related to the qualifications, functions or duties of a physician and surgeon and arising from or occurring during patient care, treatment, management or billing,” a minimum penalty of stayed revocation, one year suspension, and at least seven years of probation and a maximum penalty of revocation. (Bus. & Prof. Code, § 2236.) For disciplinary action taken by other states, the penalty range is the same as for a similar offense in California. (Bus. & Prof. Code, §§141, subd. (a), 2305.) In this case, three separate causes for discipline have been established by clear and convincing evidence.

A stayed revocation with probation is not appropriate. Respondent minimized the seriousness of his conduct which extended over multiple years. Respondent remains incarcerated for serious offenses which demonstrate a lack of honesty and integrity, and which arose directly from his conduct as a physician performing professional duties. Upon release from prison, respondent will be on parole for three years. Respondent will be able to apply for reinstatement of his license in the future, upon a showing that he is rehabilitated from the conduct that resulted in his felony conviction.⁵

ORDER

Physician’s and Surgeon’s Certificate Number 48589 issued to respondent AUGUSTUS K.A. OHEMENG, M.D., is hereby REVOKED, pursuant to Legal Conclusions 1 through 9.

DATED: May 10, 2016

DocuSigned by:

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MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

⁵ Pursuant to Business and Professions Code section 2307, a person whose license has been revoked may file a petition for reinstatement after at least three years from the date of revocation. (Bus. & Prof. Code, § 2307, subd. (b)(1).)