

<b>IN THE MATTER OF</b>	*	<b>BEFORE THE</b>
<b>BERNHARD BIRNBAUM, M.D.</b>	*	<b>MARYLAND STATE</b>
<b>Respondent</b>	*	<b>BOARD OF PHYSICIANS</b>
<b>License Number: D33088</b>	*	<b>Case Number: 2218-0211B</b>

\* \* \* \* \*

**CONSENT ORDER**

On September 3, 2019, Disciplinary Panel B (“Panel B”) of the Maryland State Board of Physicians (the “Board”) charged **BERNHARD BIRNBAUM, M.D.**, (“the Respondent”), License Number D33088, under the Maryland Medical Practice Act (the “Act”), Md. Code Ann., Health Occ. (“Health Occ.”) §§ 14-101 *et seq.* (2014 Repl. Vol. & 2018 Supp.). The Respondent was charged under the following provisions of Health Occ. § 14-404:

(a) *In general.* – Subject to the hearing provisions of § 14-405 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum of the disciplinary panel, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

...

(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; [and]

...

(40) Fails to keep adequate medical records as determined by appropriate peer review[.]

On October 30, 2019 Panel B was convened as a Disciplinary Committee for Case Resolution (“DCCR”) in this matter. Based on negotiations occurring as a result of this

DCCR, the Respondent agreed to enter into this Consent Order, consisting of Findings of Fact, Conclusions of Law, and Order.

**I. Findings of Fact**

Panel B finds:

1. At all times relevant, the Respondent was and is licensed to practice medicine in the State of Maryland. The Respondent was initially licensed to practice on December 3, 1985, under license number D33088. The Respondent's license is presently active and expires on September 30, 2020.
2. The Respondent is board-certified in internal medicine.
3. The Respondent is currently employed by a community health organization (the "Organization").
4. On or about January 26, 2018, the Board received a complaint from the sister (the "complainant")<sup>1</sup>, of one of the Respondent's former patients ("Patient 1"), now deceased. The complainant alleged that the Respondent prescribed "excessive" amounts of opioids to Patient 1 for several years prior to his death on July 24, 2017.
5. Based on the complaint, the Board initiated an investigation of the Respondent.

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<sup>1</sup> For confidentiality purposes, the names of individuals, patients, and institutions involved in this case have not been identified in this document. The Respondent is aware of the identity of all individuals, patients, and institutions referenced herein.

## **II. Board Investigation**

6. In furtherance of its investigation, the Board conducted a drug survey, subpoenaed ten patient medical records from the Respondent, obtained the Respondent's quality assurance file from the Organization, and obtained a written response to the complaint from the Respondent.
7. On or about July 16, 2018, the Board received a written response from the Respondent via counsel acknowledging that Patient 1 was under the Respondent's care beginning in 1998. The Respondent stated that "the opioids prescribed to [Patient 1] were both medically appropriate and effective pain management." The Respondent further stated that Patient 1 "was dependent on the medication, but was not addicted, and was not a candidate for substance abuse referral."
8. In addition, on or about August 21, 2018, Board investigators conducted a sworn interview with the Respondent. The Respondent stated that he utilizes urine drug screens approximately once per year with relevant patients. In regards to Patient 1, the Respondent stated that he did not believe Patient 1 was addicted to the pain medications, but that he was certainly dependent. He further stated that he believed it was a "very legitimate use of the opioids to control his pain to make him more functional."
9. On or about November 29, 2018, the Board sent the ten patient medical records and related investigative materials to a peer review entity for independent

review by two board-certified physicians with a sub-specialty in pain medicine.

10. Upon review of the records, the peer reviewers concurred that the Respondent failed to meet appropriate standards for the delivery of quality medical care with respect to ten of the ten patients. Additionally, the peer reviewers concurred that the Respondent failed to maintain adequate medical records in eight of the ten patients.
11. On or about January 30, 2019, the Board sent copies of the peer reviewers' reports to the Respondent and requested a supplemental response.

### **III. Summary of Standard of Care and Documentation Violations**

12. The peer review reports revealed that the Respondent:
  - a. failed to utilize frequent and/or random urine toxicology screens to assess prescription compliance (Patients 1 – 10);
  - b. gave patients instructions to tamper with opioid medications by cutting them in half (Patients 4,7);
  - c. failed to review and/or document review of PDMP data periodically for compliance (Patients 2, 3, 4, 6, 8, 9, 10);
  - d. prescribed two long-acting opioid agents concurrently (Patient 3);
  - e. prescribed three short-acting opioids concurrently (Patient 1);
  - f. prescribed 2 benzodiazepines concurrently (Patient 2, 9);
  - g. failed to address aberrant behavior with regards to urine drug screens or frequent/early refill requests (Patients 4, 5, 7, 8, 9, 10);
  - h. failed to adequately document supporting rationale justifying continued course of medications (Patient 1, 2, 3, 4, 6, 8, 9, 10);

#### IV. PATIENT 1

13. The Respondent's medical records indicate that the Respondent treated Patient 1 regularly beginning in approximately July, 2000, until approximately late June 2017.
14. Pharmacy records from Pharmacy A show that between approximately November 12, 2013, and July 5, 2017, Patient 1 filled CDS prescriptions written by the Respondent including approximately nineteen prescriptions for Oxycodone HCl<sup>2</sup> 20mg., four times per day, thirty prescriptions for Tramadol HCl<sup>3</sup> 50mg., four times per day, and seventy-nine prescriptions for Oxycodone HCl 10mg., maximum five per day.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, Panel B concludes that the Respondent failed to meet appropriate standards for the delivery of quality medical care, in violation of Health Occ. § 14-404(a)(22) and failed to keep adequate medical records, in violation of Health Occ. § 14-404(a)(40).

#### ORDER

It is thus by Disciplinary Panel B of the Board, hereby:

**ORDERED** that the Respondent is **REPRIMANDED**; and it is further

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<sup>2</sup> Oxycodone HCl is a Schedule II opioid analgesic used in the relief of moderate to moderately severe pain according to the U.S. Drug Enforcement Agency.

<sup>3</sup> Tramadol is Schedule IV opioid analgesic used in the relief of moderate to moderately severe pain in adults according to the U.S. Drug Enforcement Agency.

**ORDERED** that the Respondent is **permanently prohibited** from prescribing and dispensing all Schedule II and III Controlled Dangerous Substances (CDS) and from certifying patients for the medical use of cannabis; and it is further

**ORDERED** that on every January 31st thereafter if the Respondent holds an active Maryland medical license, the Respondent shall provide the Board with an affidavit verifying that the Respondent has not prescribed Schedule II and III CDS in the past year and has not certified patients for the medical use of cannabis in the past year; and it is further

**ORDERED** that if the Respondent fails to provide the required annual verification of compliance with this condition:

- (1) there is a presumption that the Respondent has violated the permanent condition; and
- (2) the alleged violation will be adjudicated pursuant to the procedures of a Show Cause Hearing; and it is further

**ORDERED** that the Respondent is placed on **PROBATION** for a minimum of **THREE (3) YEARS.**<sup>4</sup> During probation, the Respondent shall comply with the following terms and conditions of probation:

1. For the first **6 MONTHS** of **PROBATION** Respondent shall be **prohibited** from prescribing and dispensing all CDS including Schedule IV and V;
2. After 6 months, Respondent may prescribe and dispense Schedule IV and V CDS;
3. The disciplinary panel may issue administrative subpoenas to the Maryland Prescription Drug Monitoring Program on a quarterly basis for the Respondent's

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<sup>4</sup> If the Respondent's license expires during the period of probation, the probation and any conditions will be tolled.

CDS prescriptions. The administrative subpoenas will request the Respondent's CDS prescriptions from the beginning of each quarter.

4. The Respondent is subject to a chart and/or peer review conducted by the disciplinary panel or its agents as follows:

(a) the Respondent shall cooperate with the peer review process;

(b) the disciplinary panel, in its discretion, may change the focus of the chart and/or peer review if the Respondent changes the specialty of his practice;

(c) if the disciplinary panel, upon consideration of the chart and/or peer review and the Respondent's response, if any, determines that the Respondent is meeting the standard of quality care in his or her practice, the disciplinary panel shall consider the peer review condition of the Consent Order met;

(d) a peer and/or chart review indicating that the Respondent has not met the standard of quality care and/or has failed to keep adequate medical records may be deemed, by a disciplinary panel, a violation of probation and/or a violation of Health Occ. § 14-404(a)(22) and/or (40); and it is further

**ORDERED** that the Respondent's delegation agreement shall be modified to prohibit the respondent from supervising Physician Assistants in their prescribing of the categories of CDS as limited by this Order; and it is further

**ORDERED** that the Respondent shall not apply for early termination of probation; and it is further

**ORDERED** that, after the Respondent has complied with all terms and conditions of probation and the minimum period of probation imposed by the Consent Order has passed, the Respondent may submit to the Board a written petition for termination of probation. After consideration of the petition, the probation may be terminated through an order of the disciplinary panel. The Respondent may be required to appear before the disciplinary panel to discuss his or her petition for termination. The disciplinary panel may

grant the petition to terminate the probation, through an order of the disciplinary panel, if the Respondent has complied with all probationary terms and conditions and there are no pending complaints relating to the charges; and it is further

**ORDERED** that a violation of probation constitutes a violation of the Consent Order; and it is further

**ORDERED** that, if the Respondent allegedly fails to comply with any term or condition imposed by this Consent Order, the Respondent shall be given notice and an opportunity for a hearing. If the disciplinary panel determines there is a genuine dispute as to a material fact, the hearing shall be before an Administrative Law Judge of the Office of Administrative Hearings followed by an exceptions process before a disciplinary panel; and if the disciplinary panel determines there is no genuine dispute as to a material fact, the Respondent shall be given a show cause hearing before a disciplinary panel; and it is further

**ORDERED** that after the appropriate hearing, if the disciplinary panel determines that the Respondent has failed to comply with any term or condition imposed by this Consent Order, the disciplinary panel may reprimand the Respondent, place the Respondent on probation with appropriate terms and conditions, or suspend with appropriate terms and conditions, or revoke the Respondent's license to practice medicine in Maryland. The disciplinary panel may, in addition to one or more of the sanctions set forth above, impose a civil monetary fine on the Respondent; and it is further

**ORDERED** that the Respondent is responsible for all costs incurred in fulfilling the terms and conditions of this Consent Order; and it is further



**ORDERED** that the effective date of the Consent Order is the date the Consent Order is signed by the Executive Director of the Board or her designee. The Executive Director signs the Consent Order on behalf of the disciplinary panel which has imposed the terms and conditions of this Consent Order, and it is further

**ORDERED** that this Consent Order is a public document. *See* Md. Code Ann., Health Occ. §§ 1-607, 14-411.1(b)(2) and Gen. Prov. § 4-333(b)(6).

11/26/2019  
Date

*Signature on File*

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Christine A. Farrelly  
Executive Director  
Maryland State Board of Physicians

CONSENT

I, Bernhard Birnbaum, M.D., acknowledge that I have consulted with counsel before signing this document.

By this Consent, I agree to be bound by this Consent Order and all its terms and conditions and understand that the disciplinary panel will not entertain any request for amendments or modifications to any condition.

I assert that I am aware of my right to a formal evidentiary hearing, pursuant to Md. Code Ann., Health Occ. § 14-405 and Md. Code Ann., State Gov't §§ 10-201 et seq. concerning the pending charges. I waive this right and have elected to sign this Consent Order instead.

I acknowledge the validity and enforceability of this Consent Order as if entered after the conclusion of a formal evidentiary hearing in which I would have had the right to counsel, to confront witnesses, to give testimony, to call witnesses on my behalf, and to all other substantive and procedural protections as provided by law. I waive those procedural and substantive protections. I acknowledge the legal authority and the jurisdiction of the disciplinary panel to initiate these proceedings and to issue and enforce this Consent Order.

I voluntarily enter into and agree to comply with the terms and conditions set forth in the Consent Order as a resolution of the charges. I waive any right to contest the Findings of Fact and Conclusions of Law and Order set out in the Consent Order. I waive all rights to appeal this Consent Order.

I sign this Consent Order, without reservation, and fully understand the language and meaning of its terms.

1/19/19  
Date

*Signature on File*

Bernhard Birnbaum, M.D.  
Respondent

**NOTARY**

STATE OF Maryland  
CITY/COUNTY OF Baltimore

I HEREBY CERTIFY that on this 19<sup>th</sup> day of November 2019, before me, a Notary Public of the foregoing State and City/County, personally appeared Bernhard Birnbaum, M.D., and made oath in due form of law that signing the foregoing Consent Order was his voluntary act and deed.

AS WITNESSETH my hand and notarial seal.

Karen J. Miller  
Notary Public

My Commission expires: 12/2/23

