

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

In the Matter of the Petition for )  
Reduction of Penalty of: )  
)  
)  
JAMES H. I. BICHER, M.D. ) File No. 04-2000-114479  
)  
)  
Physician's and Surgeon's )  
Certificate No. A 37798 )  
)  
Petitioner/Respondent. )  
\_\_\_\_\_ )

**DECISION**

The Proposed Decision of Julie Cabos-Owen, Administrative Law Judge, dated September 24, 2009, in Los Angeles, is attached hereto. Said decision is hereby amended, pursuant to Government Code Section 11517 (c)(2)(C) to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

1. Page 1 - the heading of "Case No. 20-2008-189725" is stricken and replaced with "Case No. 04-2000-114479."

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

This Decision shall become effective at 5:00 p.m. on November 18, 2009 .

IT IS SO ORDERED October 19, 2009 .

MEDICAL BOARD OF CALIFORNIA

By: Shelton Duruisseau  
Shelton Duruisseau, Ph.D., Chair  
Panel A

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

**In the Matter of the Petition for Reduction  
of Penalty of:**

**JAMES H. I. BICHER, M.D.**

**Physician's and Surgeon's Certificate  
Number A 37798,**

**Respondent.**

**Case No. 20-2008-189725**

**OAH No. L2009040734**

**PROPOSED DECISION**

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on August 27, 2009, in Los Angeles, California. James H. I. Bicher, M.D. (Petitioner) appeared and was represented by Henry R. Fenton, Attorney at Law. Pursuant to the provisions of Government Code section 11522, the Attorney General of the State of California was represented by Gloria L. Castro, Deputy Attorney General.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on August 27, 2009.

**FACTUAL FINDINGS**

1. Petitioner is the holder of Physician and Surgeon's Certificate Number A 37798, issued on December 12, 1981. That certificate was scheduled to expire on May 31, 2009, unless renewed. The evidence did not disclose whether the license has been renewed. However, even if the license was not renewed, the Board retains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

Background Information

2. Petitioner practices medicine in the fields of radiation oncology and hyperthermia. Born in Argentina in 1937, he attended medical school in Buenos Aires and Jerusalem. After an internship in Israel, he served residencies in radiation

therapy at the University of Arkansas for Medical Sciences in Little Rock, Arkansas, and at Roswell Park Memorial Institute in Buffalo, New York.

3. Petitioner is the Director of Valley Cancer Institute (VCI) in Los Angeles. He has formerly served as Chief of the Hyperthermic Clinic at the Western Tumor Medical Group in Van Nuys, California, former Director of Non-Ionizing Radiation, Cancer Treatment Center at Henry Ford Hospital in Detroit, Michigan, and Associate Chief of the Department of Radiation Medicine at Roswell Park Memorial Institute in Buffalo, New York. He is a former Associate Professor of Pharmacology at the University of Arkansas for Medical Sciences in Little Rock, Arkansas, former Associate Professor of Anatomy and Research Medicine and Assistant Professor of Anatomy at the Medical University of South Carolina in Charleston, former Clinical Associate Professor in Radiology at the State University of New York, and former Associate Professor in the Department of Biology at Wayne State University in Detroit, Michigan.

4. Petitioner is a member of the American Society of Therapeutic Radiologists, American Microcirculatory Society, European Society of Microcirculation, International Society on Oxygen Transport of Tissue (also past president), North American Hyperthermia Group (also founder and past president), European Society of Hyperthermic Oncology (and a founding member), Radiation Research Society, Western Hyperthermia Group (also its founder), and the American Society of Clinical Hyperthermic Oncology (also its founder and a past president). Respondent holds several medically related patents. He has authored over 200 publications, including a book he co-authored which was published in 2009.

#### Disciplinary History

5. In a Decision and Order in Case No 04-2000-114479, effective September 30, 2004 (2004 Decision), the Medical Board of California (Board) revoked Petitioner's certificate, stayed the revocation and placed Petitioner on probation for five years on specified terms and conditions, including: reimbursement of \$6,999.95 to the Board for its investigative and expert witness costs; completion of a medical record keeping course; and the oversight of Petitioner's practice by a Board-approved monitor.

6. The 2004 Decision was based on Petitioner's care of two terminally ill cancer patients whom he treated with radiation and hyperthermia. The 2004 Decision found that Petitioner committed gross negligence, repeated negligent acts, failure to maintain adequate and accurate records, and false/misleading advertising. The gross negligence and repeated negligence findings were based on the frequency and dosage of hyperthermia and radiation in Petitioner's treatment of the two patients. The 2004 Decision's specified factual basis for the four sustained causes for discipline included the following, quoted verbatim:

**Patient E.F.**

[Petitioner's] treatment of E.F. using hyperthermia alone constituted a simple departure from the standard of care.

[Petitioner's] failure to properly indicate the location of the temperature probes used in the hyperthermia treatments constituted an extreme departure from the standard of care, and a failure to maintain adequate and accurate records.

[¶] . . . [¶]

[Petitioner's] treating E.F. with daily hyperthermia constituted an extreme departure from the standard of care.

[Petitioner] failed to document the existence of left lateral abdomen involvement or the need for treatment in that area. That omission constituted a failure to maintain adequate and accurate records.

[Petitioner's] periodic use of hyperthermia alone during the main course of [E.F.'s] treatment constituted an extreme departure from the standard of care.

[Petitioner's] failure to take an adequate number of Port films, and his failure to take Port films that included the chest wall, each constituted a simple departure from the standard of care.

[S]everal treatment records, reflecting various individual hyperthermia treatments, were generated by the hyperthermia apparatus. However, many of those records were not printed and placed into E.F.'s chart. It was not until this action had commenced that the records were retrieved from a diskette and printed. A few of the records are still missing. The failure to print those records and place them into E.F.'s chart constituted a failure to maintain adequate and accurate records.

**Patient J.K.**

[A]s in E.F.'s case, early in J.K.'s treatment, [Petitioner] prepared a treatment plan for J.K. That treatment plan included a hand-drawn chart showing the intended placement of thermocouples in the treatment fields to measure tumor temperature. However, the chart did not indicate whether the thermocouples were to be placed on or under the skin or, if

under the skin, the depth to which they were to be inserted. [Petitioner's] failure to properly indicate the location of the temperature probes used in the hyperthermia treatments constituted an extreme departure from the standard of care, and a failure to maintain adequate and accurate records.

[Petitioner] administered an excessive total radiation dose to J.K. over an excessive number of treatments. His doing so constituted an extreme departure from the standard of care.

[O]ver the course of J.K.'s treatment, [Petitioner] decreased the radiation dose per treatment to well below the necessary 180-200 cGy. His doing so constituted an extreme departure from the standard of care. . . .

[O]ver the course of J.K.'s treatment, [Petitioner] administered an excessive number of hyperthermia treatments. His doing so constituted an extreme departure from the standard of care.

[O]n February 17, 1999, [Petitioner] ordered J.K.'s radiation treatments temporarily stopped and hyperthermia given alone for a period of two weeks. . . . In J.K.'s case, the use of hyperthermia alone posed the risk of diminishing the efficacy of the limited amount of radiation the patient could safely tolerate due to the effect of thermotolerance. [Petitioner's] administration of hyperthermia alone constituted an extreme departure from the standard of care.

[Petitioner] failed to properly document some of the radiotherapy and hyperthermia treatments J.K. received. That failure constituted a simple departure from the standard of care and a failure to maintain adequate and accurate records.

[Petitioner] failed to take a sufficient number of Port films over the course of the treatment to satisfy the standard of care. His failure to do so constituted a simple departure from the standard of care.

[Petitioner] believes he saw the patient on a daily basis, but only charted a visit every couple of weeks. [Petitioner's] failure to properly chart his patient visits constituted a simple departure from the standard of care and a failure to maintain adequate and accurate records.

[D]uring the course of treatment, several treatment records generated by the hyperthermia apparatus were not printed and placed into J.K.'s chart. . . The failure to print those records and place them into J.K.'s chart constituted a failure to maintain adequate and accurate records.

[¶] . . . [¶]

### Statements on the Website

[I]n 1998, the [Valley Cancer Institute (VCI)] website contained several representations about VCI, and about hyperthermia as a treatment for cancer. . . . [T]he representations on the VCI website that (1) the lungs are treatable with hyperthermia, (2) that hyperthermia is effective on its own, and (3) that anyone at any age can receive hyperthermia treatments, were false. Those misrepresentations constituted false or misleading advertising.

7. In the 2004 Decision, the Board (adopting the Administrative Law Judge's findings) stated:

[E]ven though [Petitioner] deviated from the standard of care in connection with patients E.F. and J.K., his methods were not necessarily clinically "incorrect." Both patients were suffering from metastatic cancer and were terminal when they presented. Under [Petitioner's] care, one patient experienced a 95% resolution of the original tumor; the other, a 50% resolution. The weight of the evidence determined the standard of care in Respondent's geographic area during the relevant time period, but not the efficacy of Respondent's treatment methods. Although the two patients whose care and treatment were the subject of this action did not survive, a great many others have, some of whom testified at the hearing as to their remarkable stories of recovery.

It is axiomatic that the standard of care is a fluid concept that shares a symbiotic and inter-dependent relationship with medical progress. Only time will tell whether Respondent is a pioneer or a renegade. He deviated from the standard of care in his treatment methods, and for that, his license is disciplined.

8(a). On July 12, 2005, another Accusation was filed against Petitioner, alleging, *inter alia*, gross negligence and repeated negligent acts in his treatment of five patients during a time frame prior to the 2004 Decision (from approximately 1997 through 2002). The 2005 Accusation was filed at a time Petitioner was in the

process of pursuing a Writ of Mandate regarding the 2004 Decision. Rather than proceeding to hearing on the 2005 Accusation, Petitioner chose to resolve the 2005 Accusation via stipulated settlement.

8(b). In a Decision adopting a Stipulated Settlement and Disciplinary Order in Case No 04-2003-142240, effective August 23, 2006 (2006 Decision), the Board revoked Petitioner's certificate, stayed the revocation and placed Petitioner on probation for two years, in addition to the five-year term of probation in the 2004 Decision. The 2006 Decision imposed additional terms and conditions of probation which included the successful completion of the Physician Assessment and Clinical Education (PACE) Program at the University of California, San Diego School of Medicine, and the approval of protocols by an Institutional Review Board (IRB) and compliance with any IRB-approved protocols.

8(c). The Stipulated Settlement and Disciplinary Order specifically stated:

All of the terms and conditions of the [2004 Decision] remain in effect with the exception of term 9 (Cost Recovery). This order does not affect the application of Business and Professions Code section 2307, subdivision (b)(2); the computation of time for filing any petition for modification of penalty runs from September 30, 2004.

9(a). Prior to the 2004 and 2006 Decisions, Petitioner's physician and surgeon's certificate had been disciplined. On July 2, 1993, an Accusation was filed against Petitioner which was followed by a Supplemental Accusation on December 16, 1994. Several of the allegations in those pleadings, and the issues relating to them, were substantially similar to those in the 2004 Decision. The matter was heard by an Administrative Law Judge with the Office of Administrative Hearings in April and September of 1995. The Board adopted the Administrative Law Judge's Proposed Decision, in which he recommended a stayed revocation with five years probation under various terms and conditions. Petitioner petitioned the Superior Court for a Writ of Mandate, and the Superior Court remanded the case to the Board on November 18, 1996. On January 3, 1997, the Board issued a Decision After Remand, and Petitioner filed a second Petition for Writ of Mandate. The case settled while that matter was pending.

9(b). Pursuant to the terms of the settlement agreement, Petitioner's license was revoked. However, the revocation was stayed, and Petitioner was placed on probation for 18 months under various terms and conditions. The Board adopted the Stipulated Settlement and Disciplinary Order on June 24, 1997, with an effective date of December 29, 1995. Therefore, the 18-month probationary period ran prior to the settlement agreement's adoption, and Petitioner was not required to remain on probation after the adoption.

## Current Probation

10. Petitioner is in full compliance with the probationary terms and conditions set forth in the 2004 and 2006 Decisions. He has paid all costs and has completed a record keeping course and the PACE Program (completed in 2007). Petitioner has a practice monitor, Stanley R. Klein, M.D., who has submitted reports as required.

11. Petitioner has obtained approval of protocols by an IRB, Western Institutional Review Board (WIRB), and is in compliance with WIRB-approved protocols. Petitioner must pay a fee to WIRB and submit quarterly reports while under its supervision. WIRB approval was first obtained in November 2007, and renewed in 2008. Renewal of WIRB approval is due to expire on November 29, 2009, and Petitioner intends to obtain renewal for another year.

12. Petitioner is pleased that the Board had imposed the requirement of IRB approval. According to Petitioner, in academic practice, institutional IRBs are "par for the course," but he had been unaware of the existence of regional IRBs such as WIRB until after the 2006 Decision. He believes that use of an IRB is beneficial because it helps the quality of his practice and because prior approval of research protocols helps define the standard of care. He also feels that IRBs protect the patients. All the patients at VCI must read and sign the WIRB-approved consent form, and he intends to continue using this form or another IRB-approved form. If patients refuse to sign the consent forms, they are turned away.

13. In an effort to comply with Board requirements, Petitioner began making changes to his practice even before the 2004 Decision. VCI's medical charts have been improved and are more detailed. All test results are properly positioned in the chart, and documentation is clear, so that any subsequent reviewer can ascertain what occurred in the patient's treatment. VCI's use of thermocouples includes photography of their placement and documentation of temperature measurements, so that a researcher can determine how temperature measurements are being made. Petitioner hired medical oncologist, Nazar Al-Bussam, M.D., F.A.C.P., since Petitioner and his partner, Ralph S. Wolfstein, M.D., are radiological oncologists. Petitioner has also improved training of all technicians so that they understand how to properly use equipment and how to keep adequate records.

14. Since Petitioner is the Director of VCI, he performs administrative tasks for the clinic, which include compliance with Board and WIRB requirements. Drs. Al-Bussam and Wolfstein treat the patients and supervise the technicians. Petitioner only occasionally sees patients for "very special cases." Once per week, he and the two treating physicians, Drs. Al-Bussam and Wolfstein, conduct a "tumor board" for quality assurance. During the "tumor boards," the physicians and staff review treatment plans, patient responses and results for each patient. Petitioner is typically at VCI approximately four hours per day, two to three weeks per month. Since his

children and grandchildren live on the East Coast, Petitioner has a residence in Virginia and commutes there approximately one week per month. However, he still conducts "tumor boards" when he is out-of-state, via computer teleconference.

15. Petitioner believes that all problems have been addressed, and he intends to continue with IRB oversight. He assured the Board that he is not a danger to the public, and that he will continue to improve his practice to the best of his ability. Petitioner is seeking termination of his probation because he believes there is no reason to continue with what amounts to a "serious status of guilt." According to Petitioner, probation is deleterious to his practice. He noted that a website on the Internet called "Quack Watch" identifies physicians who are on probation, and that he is identified on that website. Petitioner does not believe he deserves "to pass into history as a quack."

16. Petitioner's practice monitor, Stanley R. Klein, M.D., testified credibly on his behalf. Dr. Klein opined that Petitioner is an excellent physician who practices within the standard of care. He has reviewed Petitioner's medical records since April 2005 and found them to be comprehensive, well organized, and up-to-date. They are complete and clear with no deficiencies. Petitioner's treatment plans are detailed and easy to follow, and indicate where the thermocouples are placed. Also, Petitioner's forms of investigation are now monitored and apply protocols approved by an IRB, which was the major concern of the Board. Consequently, Dr. Klein believes public safety is assured as long as IRB protocols are in place. Dr. Klein fully supports early termination of Petitioner's probation. However, he is willing to continue acting as Petitioner's practice monitor for the duration of his probation.

17. Petitioner has the support of his partners Drs. Bussam and Wolfstein, who wrote letters of recommendation on his behalf and who supported the termination of his probation. They described him as an excellent, dedicated and conscientious physician, committed to providing his patients the highest level of care.

18. Petitioner also has the support of A. M. Nisar Syed, M.D., who is the Director of the Department of Radiation Oncology & Endocurietherapy at the Memorial Cancer Institute, Memorial Medical Center in Long Beach, California, and a Radiation Oncologist at Saddleback Memorial Medical Center in Laguna Hills, California. Dr. Syed is currently a Clinical Professor in the Department of Radiology Radiation Medicine Unit at University of Southern California School of Medicine; Clinical Professor in the Department of Radiological Sciences at the University of California at Irvine; Professor, Service Series, Department of Radiology, Charles Drew University of Medicine & Science in Los Angeles; Chancellor and Vice-Chairman of the American College of Radiation Oncology in Philadelphia; Chairman of the Radiation Oncology Committee of the Indo-American Cancer Society; and Clinical Professor in the School of Medicine, Department of Radiation Oncology, University of Kansas Medical Center. Dr. Syed has known Petitioner in a professional capacity for over 25 years. He previously testified as an expert for

Petitioner at the hearing leading up to 2004 Decision, and he oversaw Petitioner's preceptorship for the PACE Program. Dr. Syed wrote a letter of recommendation on Petitioner's behalf and supported the termination of his probation. He described Petitioner as a conscientious and dedicated physician.

### LEGAL CONCLUSIONS

1. Petitioner has made the necessary showing that it would be consistent with the public interest to permit early termination of his probation, by reason of Findings 1 through 18.

2. Petitioner bore the burden of proving both his rehabilitation and his fitness to practice medicine. (*Houseman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092; *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 546-547.) Petitioner's burden required a showing that he is no longer deserving of the adverse character judgment associated with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Petitioner has sustained his burden of proof.

3. Business and Professions Code section 2307, subdivision (e), states in pertinent part:

The panel of the division or the administrative law judge hearing the petition may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts, general reputation for truth, and professional ability. . .

4. California Code of Regulations, title 16, section 1360.2<sup>1</sup> states:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:

(a) The nature and severity of the act(s) or crime(s) under

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<sup>1</sup> Although the Deputy Attorney General cited California Code of Regulations, title 16, section 1657, as the applicable regulation, that section applies to licensees of the Osteopathic Medical Board.

consideration as grounds for denial.

(b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

(d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).

(e) Evidence, if any, of rehabilitation submitted by the applicant.

5. The Deputy Attorney General argued that it would be against public policy to allow to an "immediate" petition for probation at the commencement of the Petitioner's final two years of probation. However, when the 2006 Decision extended Petitioner's five-year probation for two years, it did not require that Petitioner wait until he serves his additional probationary period to file his petition for modification of penalty. Instead, the 2006 Decision specified that "the computation of time for filing any petition for modification of penalty runs from September 30, 2004." Consequently, Petitioner was not required to serve more than five years probation prior to seeking termination of his penalty.

6. Petitioner has completed five of his combined seven-year probationary period. Petitioner has complied with all probationary terms and conditions set forth in the 2004 and 2006 Decisions. He has paid all costs and has completed a record keeping course and the PACE Program. Petitioner has obtained IRB approval and is in compliance with the IRB-approved protocols. He appreciates the value of having IRB approval and intends continue seeking renewal of IRB approval. Petitioner has been supervised by a practice monitor, Dr. Klein, who observed that Petitioner practices within the standard of care and who recommended the termination of Petitioner's probation. The totality of the evidence established that, in the event his probation is terminated, Petitioner would no longer pose a danger to the public, particularly since IRB protocols are in place and since Petitioner intends to continue utilizing such protocols.

7. Petitioner has sustained his burden of proof that he is rehabilitated and entitled to early termination of his probation.

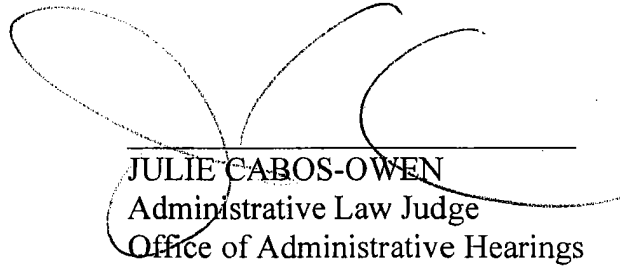
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**ORDER**

**WHEREFORE, THE FOLLOWING ORDER is hereby made:**

The petition of James H. I. Bicher, M.D., for termination of probation is granted.

Dated: September 24, 2009



JULIE CABOS-OWEN  
Administrative Law Judge  
Office of Administrative Hearings