

**Professional Services
Review Tribunal**

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No. 2 of 1996

Between

**Dr. James Dimitrios
Demirtzoglou**

Applicant

- and -

Dr. Anthony Adams

Determining Officer

Respondent

Tribunal:

The Hon. Mrs Margaret Lusink, President
Dr. Peter Joseph, Member
Professor David Tiller, Member

Dates of Hearing:

30 June 1997
30 April 1998

Date of Decision:

30 April 1998

Decision

The final determination made by the Respondent dated 26 November 1996 is, pursuant to section 119 (1) (b) (ii) of the *Health Insurance Act 1973*, set aside and in lieu thereof it is directed in accordance with section 106U (1) (b) of the Act, the applicant be counselled by the Director of the Professional Services Review or his nominee.

.....Mrs M Lusink (sgd).....
President

Reasons for Decision

On 20 December 1996 a request for review of a final determination was forwarded to the Minister by the solicitors for the applicant Dr. James Demirtzoglou, under section 114 of the *Health Insurance Act 1973* (hereinafter referred to as "the Act").

The grounds for the request were that:

- (a) *the Determining Officer had erred in law in concluding that Dr. Demirtzoglou had engaged in inappropriate practice, as that expression is defined in Section 82 of The Health Insurance Legislation (Professional Services Review) Amendment Act No.22 ("the Amendment Act");*
- (b) *the findings on material questions of fact are erroneous; and*
- (c) *the directions made by the Determining Officer on 26 November 1996 are harsh, excessive and oppressive and not commensurate with the findings of fact made by the Determining Officer.*

In August 1995 the applicant had been referred by the Health Insurance Commission (H.I.C.) to the Director of the Professional Services Review, (D.P.S.R.) who, having followed the legislative procedures, then set up Professional Services Review (P.S.R.) Committee No. 3. Dr. Demirtzoglou appeared before that Committee on 26 October and 9 November 1995.

The Committee report dated 14 February 1996 found that:

"Dr Demirtzoglou's conduct in relation to the referred services was unacceptable to the general body of vocationally registered general practitioners".

The final determination was made on 26 November 1996 by Dr. Anthony Adams the then Determining Officer, directions being made for counselling, repayment to the Commonwealth of the sum of \$150,266.00, partial disqualification for six months and total disqualification for three months.

The hearing of the review commenced on 30 June 1997. It was adjourned on the same day at the close of the address by Counsel for the applicant, when a request was made by the Tribunal for production of a copy of the draft determination and submissions received in reply. This request was refused and the review was adjourned to allow the Determining Officer to obtain a ruling from the Federal Court of Australia as to the status of the documents. On 12 February 1998, Sundberg J. in the Federal Court of Australia, after observing that the draft determination is superseded by the final determination went on to say:

"... in the face of the clear words of sections 118 and 119 I do not consider it possible to imply a power in the Tribunal to receive material in addition to that contemplated by those provisions. The fact that they deal with the final determination suggests to me an express legislative intention to exclude the draft determination from the Tribunal's consideration".

On 30 April 1998 the review resumed. At the conclusion of the hearing the Tribunal decided that the final determination made by the Respondent dated 26 November 1996 be set aside. The parties were advised that reasons for the decision would be given later. The following are those reasons.

Dr Demirtzoglou is a medical practitioner who was born in Greece and came to Australia with his parents in 1968 when he was eight years old. He graduated in medicine in Sydney in 1985 and was vocationally registered in 1994. He is married with two young children. After graduation he worked at Westmead Hospital N.S.W. and later at the Austin Hospital in

Melbourne and Bendigo Base Hospital in Victoria. He then worked for a time at a Heritage Clinic at Knox and is now the Medical Director at the Heritage Medical Centre at Dandenong. The clinic no longer provides a 24 hour service as it previously did, but is open from 7.00 am to 11.00 pm weekdays and 8.00 am to 11.00 pm weekends. The centre is one of five owned by a company called Region Dell Pty. Ltd. The practitioners pay administration and rental fees to the company. There is no contract of employment and Dr Demirtzoglou conducts his medical practice independently within the group.

During the referral period of January to December 1994, the Applicant also conducted, when not rostered for duty at the clinic, a separate and distinct private practice from the home of his parents at 32 Mount Street, Glen Waverley. This practice consisted almost entirely of Greek patients, for whom he mainly conducted home visits. The Mount Street property is no longer a practice location.

The Applicant was first visited by an adviser from the H.I.C. in October 1990 when the doctor was told that the Commission had noted the extent of his income and were worried about certain practice methodology. Four years later, in September 1994 (during the third quarter of the referral period) further concerns were expressed by the H.I.C. and counselling was provided. Two months later Dr. Demirtzoglou repaid the sum of \$835.85 for services admittedly misitemised.

In April 1995 the doctor was advised that his case would be referred to the D.P.S.R.. Although the report of the Committee was published on 14 February 1996 the final determination did not become available until 26 November 1996.

Section 106S of the Act states that in the event that the report of the Committee contains a finding of inappropriate practice, the Determining Officer must within 14 days of receiving the report give a copy of a draft determination to the person under review and the D.P.S.R.. By subsection (4) the draft determination is not invalidated in the event that this is not done within the 14 days.

Section 106T then reads:

“Final determinations relating to persons under review

106T (1) After the end of the 14 day period during which the person under review may make submissions, and within 35 days after receiving the Committee’s report under section 106L, the Determining Officer must make a final determination in accordance with section 106U relating to the person under review.

(2) Failure to make the determination within the 35 day period does not affect the validity of the final determination.

Allowing that compliance with the time stipulated is not a precondition of the validity of the determination it is noted that the delay between the time allowed and the date of the final determination was approximately 251 days. Delays in proceedings under the Act (although this decision was prior to the amendments) were discussed by Woodward J. in Freeman v McKenzie (1988) F.C.A. 461. Whilst this delay is not as serious as in that case, the lack of action for such a period of time would seem to warrant explanation.

The Referral

On 31 August 1995 the Medical Director of the H.I.C. referred to the D.P.S.R. the conduct of the Applicant “in relation to whether he has engaged in inappropriate practice in connection with the rendering of Medicare services as defined by the Act.” The referral period was 1 January 1994 - 31 December 1994.

The referral reads in part:

Referred Services

2. For the purpose of section 87(1) of the Act the referral relates to all services rendered by Dr. Demirtzoglou from his practice locations in the State of Victoria.

Reasons for the Decision to Refer

3. The Health Insurance Commission is concerned that Dr. Demirtzoglou would not be able to provide an appropriate level of clinical input when consistently rendering such high volumes of services in conjunction with a high level of long home visits.

The referral continued by alleging that during the referral period Dr. Demirtzoglou provided 17,080 services from a patient base of 7552 patients, a regime which necessitated him working extremely long hours throughout the year.

On these points the comment was made:

“The Health Insurance Commission believes that the appropriate level of clinical input could not be maintained for such long hours on a regular and continuing basis.”

The referral further noted the number of home visits conducted by Dr. Demirtzoglou (1817) of which 1014 were noted as level C consultations. The Commission found that the home visits provided by Dr. Demirtzoglou *“were not reasonably medically necessary for the care of these patients.”*

The document concluded:

For these reasons the H.I.C. believes that Dr. Demirtzoglou’s conduct in connection with rendering of Medicare services is unacceptable to the general body of General Practitioners.”

The Committee

Committee No. 3 was set up on 22 September 1995 and the hearing date was fixed for 26 October 1995. Despite the fact that the doctor was first informed in April 1995 by the H.I.C. that the matter was going to be referred to the D.P.S.R. such referral was not effected until 31 August 1995. Dr Demirtzoglou was advised by letter dated 9 October 1995 from the Secretary of the Committee that the matter would be heard on 26 October 1995 and 9 November 1995.

The letter stated inter alia:

“As a guide the Committee will be interested in:

- your practice arrangements, i.e. type of practice/patients
- staffing financial and clerical arrangements
- pathology and radiology referrals
- referrals to consultants
- ancillary services and arrangements
- absences from the practice, i.e. holidays;

Assuming the notification reached the applicant on the day after posting, only 10 working days were allowed for the doctor to gather information and documentation in answer to the most searching request for material set out in the letter and attached Notice to Produce. The letter gave a brief description of procedure but no indication of allegations which would have to be answered, the basis for a possible adverse finding or the ramifications of any such finding.

The hearing commenced on 26 October 1995 and resumed and concluded on 9 November 1995. On 14 February 1996 the report of the Committee was published. It found that Dr.

Demirtzoglou's conduct in relation to the referred services was unacceptable to the general body of vocationally registered general practitioners. The reasons for the finding were given in summary as follows:

"Dr. Demirtzoglou has demonstrated a pattern of claiming for higher level home visits than warranted. The Committee has reached this conclusion following an examination of a random sample of the clinical records and on questioning Dr. Demirtzoglou.

Dr. Demirtzoglou has developed a pattern of practice at the Heritage Medical Centre where he had a rapid throughput of patients. This rapid throughput is reflected in an inadequacy in the clinical records. This is of particular concern considering the importance of such records in the situation where other medical practitioners are likely to be involved in the care of the patient.

On average the consultation times provided by Dr. Demirtzoglou at the Heritage Medical Centre are minimal. These short consultation times are insufficient to allow appropriate practice in the elucidation of the clinical history, examination and management of the patient.

There is clearly a lack of availability of after hours services to the patients of the Heritage Medical Centre. When the centre is closed, there is no obvious arrangement for patients to obtain medical care from Dr. Demirtzoglou or the other practitioners at the centre.

The hearing opened on the first day with an introduction by the Chairman as to the general plan to be followed, in the course of which he said "we will wish to discuss some matters, and this list of course is not necessarily - is not completely inclusive." He then indicated a wide range of topics including staffing, type of practice, referrals, understanding of responsibilities under the Vocational Registration programme, views on opinions expressed by experts and the draft standards of practice by the Royal Australian College of General Practitioners. Documents were then introduced into evidence and books and records produced by the Managing Director of the Heritage Group of Clinics.

The day was spent in what might be described as a wide ranging "fishing expedition" with no specific allegations made and no individual patient care being investigated. Near the conclusion of the hearing the doctor was told that the two practices would be treated as separate entities and the legislative provisions as to statistical sampling (sections 106 G-K of the Act - since repealed) would be partially relied upon in its investigation. The secretary of the P.S.R. then brought to the attention of the Chairman that there were some errors in the documents forwarded to the doctor regarding the question of the random sampling. The applicant was told that it would be necessary for him to produce more records on the adjourned hearing. This was confirmed by letter to Dr. Demirtzoglou and the records of three more families were also requested.

The hearing on November 9 involved a perfunctory investigation into the home visits. Whilst the sampling provisions of the Act were attempted to be invoked, and there was an attempt to show that some visits were wrongly categorised and not medically necessary, proper procedures were not followed and there were not enough samples to validate the exercise.

The total records that the Committee actually had were 30 out of the sample for 18 May 1994 from the Heritage surgery, and records for the year of the parents of the doctor and the records of three named families from the home practice. This was from a total of 17,081 services during the referral period. Of the 18 May records the Committee only looked at six patients and no finding of inappropriate practice was identified in relation to any patient.

The doctor was at no time given in writing, details of allegations made, specific findings which might be made against him nor the basis of any such findings. Whilst the transcript reveals that at the end of the last day Dr. Demirtzoglou was told that he had ten days to make submissions, there was no indication of the matters upon which the Committee required clarification or reply. The comment was made "you may wish to take advice re the statutory sampling and the possible consequences from an adverse finding from us.." but there was no mention of an extension of time if compliance was difficult to achieve.

Committee procedure to be followed in giving due and proper notice, examining a large enough sample of services and identifying “inappropriate practice” in those samples to satisfy the provisions of the legislation, has been discussed by Woodward J. in Freeman’s case (op cit), Davies J. in Yung v Adams Federal Court of Australia N.S.W. Registry NG 705 of 1996 at page 9, and recently by the majority of the Full Bench of the Federal Court of Australia in Adams v Yung Federal Court of Australia N.S.W. Registry NG 11 of 1998. We do not believe that the procedures followed by the Committee satisfy the criteria laid down by their Honours, even if the widest interpretation is given to the guidelines.

The next question is whether the Committee conducted its investigation within the terms of reference under which it was authorised to operate.

Burchett and Hill JJ. in a majority judgment in Adams v Yung (op cit) at page 15, in looking at the status of such a referral said:

“... a referral is not merely the instrument which initiates the series of administrative enquires which in the present case were undertaken. It also provides the framework in which those enquires are to be held...”

Their Honours later added:

“..the function of the Committee therefore, and the hearing it is required to undertake on the evidence given and the documents produced is limited to considering the matters that are the subject of the referral..”

The referred services in this case related to all services rendered by Dr. Demirtzoglou from his practice locations in the State of Victoria. The reasons for the referral were expressed as being concern about the ability of the applicant to provide an appropriate level of clinical input when consistently rendering high volumes of services and a high level of long home visits for long hours on a regular and continuing basis. Home visits, some of which were believed to be not reasonably medically necessary, were also mentioned.

Davies J. in Yung v Adams (op cit - where the referred services were in substantially the same terms as in this case, and where the H.I.C. also directed its concerns to the high volume of services and an inability to give an appropriate level of clinical input into those services) had this to say at page 11:

“.. It will be seen that the referral turned its attention to a relevant matter, namely whether Dr. Yung had given the appropriate level of clinical input in the services which he had rendered. However, the referral contained an inherent defect. The concern of the Commission that the appropriate level of clinical input could not be maintained on a regular and continuing basis for the long hours worked by Dr. Yung could not readily be translated into an allegation of “inappropriate practice” in relation to specified services. The fact that Dr. Yung saw what was considered to be an excessive number of patients a day was not a basis for concluding that Dr. Yung gave inadequate care and attention to all his patients, to any particular proportion of patients or to any particular patient. Where, as in the present case, a referral relates to all the services rendered by the medical practitioner within defined premises

(note: the referral in Dr. Yung’s case specified the practice premises - here the referral related to all services rendered by Dr. Demirtzoglou “from his practice locations in the State of Victoria.)

it may be difficult to investigate the matter referred unless the content for the reasons for referral shows that the cause of the concern is a matter relating to all patients, such as inadequate or dirty premises or records which were wholly inadequate or some like matter.”

In their report the Committee spelt out specific concerns which led them to conclude as they did. These included long hours of work, extended time spent on home visits, treatment of family members, claims on Workcare, inappropriate pethidine prescribing, little involvement in

continuing education, and specifically the organisation of the Heritage Clinic. On the practitioners, the Committee commented that “they could be at risk of being considered as not fulfilling the requirements for Vocational Registration.”

The Committee did not restrict itself to the terms of reference of the H.I.C. as it must do. The finding that Dr Demirtzoglou’s conduct in relation to the referred services was unacceptable to the general body of vocationally registered general practitioners was based mainly on the volume of patients serviced, statistics and many considerations unrelated to clinical input. These included:

- lack of availability of an after hours service
- lack of medical direction at the clinic
- no organised educational effort or time for professional interaction at the clinic
- minimal consultation times
- rapid throughput of patients reflected in “barely adequate” records

It is now established law that it is open to the tribunal appointed to review the determination to take a different view to the Committee and set aside the determination. We have considered as we are enjoined to do, the matter to which the determination relates having regard to the grounds set out in the request, the documents forwarded by the Minister with the request for review and addresses by Counsel.

This tribunal finds that there were serious flaws in the procedures followed by the Committee and that the conclusion reached was based on evidence that was insufficient to satisfy the requirements of the legislation. The tribunal further finds that the Committee acted on matters outside the terms of the referral of the H.I.C. to the D.P.S.R.

Accordingly the final determination made by the Respondent dated 26 November 1996 is, pursuant to section 119 (1) (b) (ii) of the *Health Insurance Act 1973*, set aside and in lieu thereof it is directed in accordance with section 106U (1) (b) of the Act, the applicant be counselled by the Director of the Professional Services Review or his nominee.

Counsel for the applicant: Mr Niall
Solicitors for the applicant: Holding Redlich
Counsel for the respondent: Ms Henderson
Solicitor for the respondent: Australian Government Solicitor
Dates of hearing: 30 June 1997 and 30 April 1998
Date of decision : 30 April 1998
Date of written reasons: 13 July 1998

This and the preceding 9 pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by The Hon. Mrs Margaret Lusink, Dr. Peter Joseph and Professor David Tiller given on the 30th day of April 1998.

Dated this 13th day of July 1998

..... Diane Popple (sgd).....
Registrar