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Professional Services Review

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Federal Court Judgment – *Hamor v Commonwealth* [2020] FCA 1748

The Federal Court has dismissed an application by Dr George Hamor, a Respiratory and Sleep Physician, for judicial review of a Draft Report and Final Report of a PSR Committee, which had found that he had engaged in inappropriate practice in connection with rendering home sleep studies (MBS item 12250).

The judgment vindicated the PSR Committee process and its interpretation of the relevant MBS item.

Dr Hamor alleged that the Committee's decision-making was affected by a reasonable apprehension of bias, and that the Committee had misconstrued its statutory task. The Court rejected both grounds.

One focus of the allegation of reasonable apprehension of bias was on social media posts made by one of the Committee members about professional ethics in the context of commercial relationships between practitioners and suppliers of CPAP equipment. The Court noted:

> [101] Professor Grunstein's appointment to the Committee was *ad hoc*. A fair-minded lay person would be unlikely to expect a temporary appointee to refrain from public comment in the same way, for example, as is customary for judges.
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> [102] The posts do not suggest that Professor Grunstein held an adverse view about Dr Hamor. Nor do they suggest that Professor Grunstein held an adverse view about specialists who conduct home sleep studies in conjunction with companies that sell CPAP machines *per se*, except to the extent that they form part of the wider class of medical practitioners whose patients or potential patients may purchase CPAP machines.
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> [103] None of Professor Grunstein's posts convey strong views about any matter of direct relevance to Dr Hamor's practices in the provision of home sleep studies, such as what constitutes adequate supervision of technicians or scorers. While his comments indicate a view that home sleep studies may be used in cases where a full sleep study is more appropriate, there is nothing to indicate such a view is wrongful or inappropriate.

Dr Hamor alleged that the Committee members' comments and questions during the hearing might be apprehended as demonstrating bias, but the Court rejected that submission, quoting extensively from the transcript of the Committee hearing, and noting that the Chair was:

> [108] … seeking to understand the commercial arrangements that might have affected Dr Hamor's provision of the item 12250 services. That was a legitimate and unremarkable line of inquiry. …

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> [114] A fair-minded lay person would understand that the hearing was an occasion for the Committee to investigate, among other things, what facts were relevant to the provision of the relevant services. A fair-minded lay person would also appreciate that, by expressing concerns, the Committee gave Dr Hamor an opportunity to address them, including by submitting that they were irrelevant. Thus, the hypothetical fair-minded lay person would not be concerned about the impartiality of the Committee based on the concerns identified above, particularly where they were expressed as "concerns" and were followed by an opportunity for Dr Hamor to make submissions on the draft report.
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> [123] A fair-minded lay person would understand the Committee to have had concerns that it was not in the best interests of Dr Hamor's patients that HSS [Healthy Sleep Solutions] was involved in the provision of home sleep studies as well as the sale of CPAP machines. This concern had an evidentiary basis: there was no dispute that HSS conducted a business involving sleep studies and sale of CPAP machines. Further, as Dr Hamor himself acknowledged, it was "unconscionable" for physicians to "not only diagnose but sell". It follows that it was not unreasonable or inappropriate for the Committee to investigate and question whether Dr Hamor's arrangements with HSS placed him in substantially the same situation as the one that Dr Hamor identified as "unconscionable".

Another submission made by Dr Hamor was that being questioned as to why complex patients were provided with home sleep studies rather than being referred for attended studies indicated a bias against home sleep studies given that MBS item 12250, at that time, did not make such a distinction. The Court said:

> [127] Dr Hamor noted that, during the review period, item 12250 did not distinguish between complicated and uncomplicated patients. After 1 November 2018, the item number was changed to apply only to less complex patients.
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> [128] Dr Hamor referred to an observation by Professor Grunstein during the hearing, in the following passage of the transcript:
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> > Professor Grunstein:…My view is this patient is quite complex. It would not be my practice to refer this patient to a home sleep study but would feel that they would require specialist consultation and consideration for full body sonography. That's my view and my concern and I share Professor Naughton's concerns and my previous concerns remain.
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> > Dr Napier: Doctor Hamor, would you like to make any comments regarding that particular service?
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> [129] The fact that the item number was changed after the review period to apply to less complex patients is a strong indicator that it was not wrongful or inappropriate for Professor Grunstein to hold the opinion that the complexity of the patient was relevant to whether it was appropriate practice to do the home sleep study in her case. Accordingly, a fair-minded lay person would not have questioned Professor Grunstein's identification of his practice in relation to a complex patient for Dr Hamor's comment.

A further submission was that the Committee had inappropriately referred a number of times in its Reports to the location of the scorers of the sleep study data being in India. The Court said:

> [137] A fair-minded lay person would consider the Committee's repeated references to the location of the scorers to indicate scepticism as to Dr Hamor's practical capacity to supervise adequately the scorers. Contrary to Dr Hamor's submission, it is not obvious that the location of the scorers was irrelevant. That would depend upon the nature and extent of the obligation upon Dr Hamor to provide supervision, and whether any obligation was discharged adequately, having regard to the physical distance between Dr Hamor and the scorers.

The Court summed up the Committee's questioning of Dr Hamor during the hearing, and said:

> [141] The portions of the transcript identified by Dr Hamor do not suggest an inappropriate or unfairly challenging style of questioning by the Committee, or that the repeated expression of concerns was not genuine.
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> [142] The transcript of the hearing indicates that the Committee was seeking to discharge its role conscientiously by investigating Dr Hamor's provision of services in the wider context of the overall treatment of the relevant patients, as well as by giving detailed attention to Dr Hamor's provision of services to the sample cases. The transcript indicates that Dr Hamor was given many opportunities to comment on the relevance or correctness of the Committee's concerns over a two day hearing, which could not reasonably be considered to indicate the formation of any inappropriate fixed or final view. Subsequently, Dr Hamor was given an opportunity to make written submissions and to respond to the preliminary findings in the Committee's draft report.

The Committee had found that Dr Hamor had failed to adequately supervise the technicians who assisted in the provision of the services. The Court said:

> [159] Nor do I accept that a fair-minded lay person might have concluded that the Committee's finding about "minimal supervision" reflected a predisposition against commercial providers of home sleep studies. Dr Hamor did not suggest that the finding was not open on the evidence. The finding was squarely addressed to the particular circumstances of the services provided by Dr Hamor.
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> [160] The complaint about the Committee's finding that, with better supervision, Dr Hamor might have been able to minimise a conflict of interest goes nowhere. It is no answer to claim, as Dr Hamor does, that he could not have supervised the technicians in the relevant circumstances. It was a matter for Dr Hamor to ensure that, to the extent the services were provided by technicians, they were performed under Dr Hamor's supervision in accordance with accepted medical practice, as required by cl 1.2.8, so that item 12250 applied. The Committee was not required to explain how Dr Hamor could have met this requirement.
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> [161] Dr Hamor contended that a lay person would doubt the Committee's claim that it merely expressed concerns during the hearing, and gave Dr Hamor an opportunity to respond, because the Committee did not engage with Dr Hamor's evidence or submissions on the issue. I do not accept that the Committee failed to engage with Dr Hamor's submissions. To the contrary, a fair-minded lay person would observe that the Committee dealt with the submissions by identifying their substance and rejecting them on the basis that its statements at the hearing were no more than expressions of concern which it was giving Dr Hamor an opportunity to address.

The Court held that the Committee had not misconstrued MBS item 12250, when it held that the general body of the specialty would expect that the sleep physician would have a role in supervising the technicians and scorers in order to ensure an appropriate quality of service provision, and that a detailed and reliable patient history should be available to the physician before commencing the home sleep investigation. The Court said:

> [174] … In this case, the Committee was required to consider whether the medical services to which item 12250 was said to apply were given by a person or persons who in accordance with accepted medical practice acted under the supervision of a medical practitioner, to the extent that they were not provided by Dr Hamor himself.
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> [175] Ultimately, there was no dispute that the relevant medical services were given, in part, by the technicians and scorers engaged by HSS. There was no suggestion that any medical practitioner other than Dr Hamor supervised the technicians or the scorers to the extent that they were involved in giving the relevant medical services.
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> [176] Dr Hamor contended that his role in supervising the technicians and scorers was limited, by the language of item 12250, to establishing quality assurance procedures for data acquisition of the kind identified in item 12250 clause (e)(i). Clause (e)(i) imposed a separate requirement on the practitioner to establish the specified quality assurance procedures for data acquisition, where the efficacy of the investigation evidently depends upon the acquisition of meaningful data. That requirement is not expressed as a qualification to, or replacement for, the supervision requirement expressed in cl 1.2.8. Dr Hamor did not argue that the role of the technicians and scorers in the provision of the services was confined to data acquisition within the meaning of item 12250.
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> [184] The Committee's findings indicate that it considered that the qualified sleep medicine practitioner was required to take, or have available, a history in order to confirm the necessity for the provision of a home sleep study under item 12250 investigation. I am not persuaded that the Committee misconstrued item 12250 in reaching that conclusion. It is implicit in item 12250 that the qualified sleep medicine practitioner is required to confirm the necessity for the investigation by reference to relevant information. It was open to the Committee to conclude, as a matter of fact, that this aspect of item 12250 required Dr Hamor to take a history or to supervise a technician who would take such a history, in accordance with accepted medical practice.

The Court dismissed the application for judicial review and ordered Dr Hamor to pay the Commonwealth's costs.

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4 December 2020