

PENNSYLVANIA (Osteo)

FISHEIN,

Mark, D. O.

BQ

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

Federation of State Medical Boards
of the United States

BEFORE THE STATE BOARD OF
OSTEOPATHIC MEDICAL EXAMINERS

SEP 07 1984

PREV. CORRES. 4-5
ANS. FILE 22-3
CHECK _____
BY _____

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE
LICENSE TO PRACTICE OSTEOPATHIC MEDICINE AND SURGERY,
LICENSE NO. OS-2884-L, ISSUED JULY 7, 1972 TO

MARK B. FISHEIN, D.O.

303.7

ADJUDICATION AND ORDER

STANLEY A. MILLER, COMMISSIONER
PROFESSIONAL AND OCCUPATIONAL AFFAIRS

BEN L. AGRESTI, D.O.
STATE BOARD OF OSTEOPATHIC MEDICAL EXAMINERS

SIXTH FLOOR
TRANSPORTATION AND SAFETY BUILDING
HARRISBURG, PENNSYLVANIA 17120

M.S.W.

HISTORY

This case comes before the State Board of Osteopathic Medical Examiners (the Board) on its Citation charging Mark B. Fishtein, D.O. (the Respondent) with committing a violation under the Osteopathic Medical Practice Act, the Act of October 5, 1978, P.L. 1109, Section 1 et seq., 63 P.S. §271.1 et seq. (the Act).

The Citation and Notice of Hearing was issued by the Board and served upon the Respondent in accordance with Section 15(b) of the Act, 63 P.S. §271.15(d), and the Administrative Agency Law to Pa. C.S. §501 et seq.

Respondent was charged under Section 15(a) (6) of the Act, 63 P.S. §271.15(a) (6) which provides as follows:

(a) The Board shall have authority to refuse, revoke or suspend the license of a physician for any of the following reasons:

(6) Violating a regulation promulgated by the Board or an Order of the Board previously entered by it in a disciplinary proceeding.

The Commonwealth alleged the following facts:

1. At all times material herein, the Respondent was licensed by the Commonwealth of Pennsylvania as an osteopathic physician, License No. OS-2884-L.
2. On November 17, 1981, the Respondent was served with a Citation and Notice of Hearing by the Pennsylvania State Board of Osteopathic Medical Examiners charging him with violations of the Osteopathic Medical Practice Act, the Act of October 5, 1978, P.L. 1109, No. 261, §15, 63 P.S. §271.15, by engaging in conduct and activities which would warrant a suspension or revocation of his license.
3. On December 22, 1981, the Respondent entered into a Stipulation and Consent Agreement with the State Board of Osteopathic Medical Examiners in which he admitted, while duly sworn according to law, that:

(a) From 1979 through October 1979, the Respondent wrote

seventy-three (73) prescriptions for Demerol, said prescriptions being written for and in the names of Ralph Gabriel, William Cameron, Dr. Edward Zebooker and Barry Guthrie;

(b) After writing said prescriptions, Respondent personally took the prescriptions to various pharmacies located in the area of his practice, specifically the Hill Pharmacy, Cannings Drugs, Sunset Pharmacy, Rea & Derrick Pharmacy, and Professional Pharmacy, where he then obtained the Demerol;

(c) Respondent appropriated the Demerol so obtained for his own personal use, rather than delivering it to the persons in whose names the prescriptions were written;

(d) Respondent had been addicted to the use of opiate substances, specifically Demerol;

(e) On January 28, 1980, Respondent was charged with seventy-two (72) counts of violating the Controlled Substances, Drug, Device and Cosmetic Act, Act 63 of 1972, §13, Clause 12, based upon his acts as described in Paragraphs 1 through 3 above;

(f) On July 7, 1980, the Respondent was placed on Accelerated Rehabilitative Disposition for a period of one (1) year under conditions which included using only Talwin, a Schedule IV controlled substance, in his osteopathic medical practice, receiving professional aid with respect to his addiction problem, and utilizing only one pharmacy (Professional Pharmacy, 929 N. Charlotte Street, Pottstown, PA) to obtain Talwin for his patients;

(g) On July 6, 1981, Respondent successfully completed his program of Accelerated Rehabilitative Disposition and the criminal charges brought against him were dismissed;

(h) For the past year, the Respondent had not self-administered any narcotic substances, and was, at that time, free from addiction to, or physiological or psychological craving for, any narcotic substance.

4. Pursuant to the Stipulation and Consent Agreement referred to in Paragraph No. 2 of this Citation, the Respondent consented to the imposition of a three (3) year suspension, said suspension however was to be stayed and considered a period of probation provided that Respondent complied with the following terms and conditions:

(a) That Respondent submit after three (3) months but before six (6) months, have elapsed from the date this Stipulation and Consent Agreement takes effect, to a general physical and psychiatric examination by an osteopathic physician mutually acceptable to both the Respondent and the Board; said osteopathic physician shall report the results of the examination to the Board, which, if said results indicate a relapse into the use of narcotic substances, may, in its discretion, dissolve the stay

and impose the suspension for the remainder of the three (3) year period;

(b) That Respondent appear personally before the Board when six (6) months and twelve (12) months (sic) have elapsed from the date the Stipulation and Consent Agreement becomes effective;

(c) That Respondent shall not, during the term of probation, prescribe or dispense any controlled substances under the laws of Pennsylvania or the United States in the course of his professional practice, with the exception of Talwin, a Schedule IV controlled substance.

5. On March 11, 1982, the State Board of Osteopathic Medical Examiners issued an Order finding Respondent guilty of violating the Osteopathic Medical Practice Act, supra, and imposing the three (3) year stayed suspension including the terms and conditions as described in Paragraph No. 4 of this Citation.

6. During the months of April, May, and June of 1982, the Respondent issued eight (8) prescriptions for Percodan, for Tylox, and three (3) prescriptions for Desoxyn, all of which are Schedule II controlled substances under the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, Act. No. 64 of 1972, as amended, 35 P.S. §780-101 et seq.

7. The Respondent failed to submit to a general physical and psychiatric examination by an osteopathic physician mutually acceptable to both Respondent and the Board within six (6) months from the date the Stipulation and Consent Agreement took effect.

Based on the aforementioned factual allegations, the Commonwealth charged that:

I. The Respondent, by prescribing Schedule II controlled substances in contravention of the terms of his probation which only permits the use of Talwin, a Schedule IV controlled substance in his practice, Respondent has violated an Order of the Board previously entered by it in a disciplinary proceeding.

II. The Respondent, by failing to submit to a physical and psychiatric examination during the time period required in the Stipulation and Consent Agreement, has violated an Order of the Board previously entered by it in a disciplinary proceeding.

Respondent, through his counsel, filed an Answer to the Citation and Notice of Hearing in which he admitted he prescribed the drugs in question but claimed he did so based on his understanding that the Stipulation and Consent Agreement prohibited him only from dispensing or prescribing injectable drugs and not drugs to be taken orally. He also averred that he

submitted to a psychiatric and physical examination during the time period required by the Stipulation and Consent Agreement.

A formal hearing was convened on the charges on October 21, 1982. Presiding at the hearing was John Wills Beach, Esquire. Mary S. Wyatte, Esquire, served as Counsel to the Board. Arthur K. Hoffman, Esquire, represented the Commonwealth. Respondent appeared in person, but was not represented by counsel.

FINDINGS OF FACT

1. Respondent is licensed to practice osteopathic medicine and surgery in this Commonwealth holding License No. OS-2884-L, issued July 7, 1972. (Records of the Board)

2. The Citation and Notice of Hearing was served upon the Respondent in accordance with law and was received by him. (Exhibit C-2)

3. Respondent was advised of his right to be represented by counsel at the hearing before the Board, but elected to proceed without counsel. (N.T. 3, 4)

4. On December 22, 1981, Respondent entered into a Stipulation and Consent Agreement in which he admitted that he had misappropriated Demerol for his own personal use and consented to be placed on probation for a period of three years, the conditions of which were, inter alia, that he undergo a physical and psychiatric examination by an osteopathic medical physician acceptable to the Board and that he not prescribe or dispense any controlled substances with the exception of Talwin. (N.T. 37-40; Exhibit C-5)

5. By Order dated March 11, 1982, the Board accepted the terms of the Stipulation and Consent Agreement. (Exhibit C-5)

6. From April through June, 1982, Respondent issued several prescriptions for controlled substances to his patients. (N.T. 11-16, 25-18; Exhibits C-7, C-10)

7. On August 6, 1982, Respondent received a comprehensive psychiatric evaluation and physical examination from John Yardumian, D.O.

Dr. Yardumian concluded that Respondent was in good health and that there was no evidence he was suffering from drug withdrawal, intoxication or dependence, or any psychosis. (N.T. 34; Exhibit R-1)

8. Dr. Yardumian is an osteopathic medical physician acceptable to the Board for the purpose of performing the physical and psychiatric examination of Respondent. (Determination of the Board)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this case.
 2. Respondent was notified of the charges filed against him and was given the opportunity to be heard.
 3. Findings of Fact Nos. 4-6 establish that the Respondent prescribed controlled substances in violation of an Order of the Board previously entered by it in a disciplinary proceeding, and is, therefore, subject to disciplinary action under Section 15(a) (6) of the Act.
 4. Findings of Fact do not establish that the Respondent failed to submit to a physical and psychiatric examination during the time period required in the Stipulation and Consent Agreement. Therefore, the charge that he has violated an Order of the Board previously entered by it in a disciplinary proceeding, under Section 15(a) (6) of the Act, is dismissed.
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DISCUSSION

Respondent had suffered from drug dependency, and had voluntarily sought treatment for his condition. Subsequently, he entered into a Stipulation and Consent Agreement in which he admitted that he had committed violations under the Act by fraudulently procuring controlled substances for his own use. Respondent consented to be placed on probation for three years, the terms of which included that he be prohibited from dispensing or prescribing controlled substances, with one exception, and that he submit to a psychiatric and physical examination by a physician mutually acceptable to him and to the Board.

During the three months after the Board issued an Order incorporating the terms of the Stipulation and Consent Agreement, Respondent continued to issue prescriptions to his patients for controlled substances in the regular course of his practice. Respondent admitted that he had done so, but claimed that he understood the Stipulation and Consent Agreement to refer only to injectable substances and not to drugs taken orally. The Board cannot accept Respondent's feeble excuse for not complying with its lawful Order. As a literate individual, who knowingly and voluntarily entered into the Stipulation and Consent Agreement, Respondent was charged

~~with abiding by its terms. Surely, it was his responsibility to~~

familiarize himself completely with the restrictions on his practice.

While the Board cannot ignore his violation of its Order, it finds no evidence that Respondent's prescribing practices were not in accord with good medical judgment, or that he was using the drugs himself. Therefore, the Board does not feel that it must vacate the probation and impose instead a lengthy period of suspension. Accordingly, the Board has entered

an Order suspending Respondent's license for a minimum period, after which the terms of probation incorporated in its earlier Order of March 11, 1982, are to continue.

The Board's Order also required Respondent to seek a physical and psychiatric examination from a physician mutually acceptable to him and to the Board, after three months, but within six months of the date on which it was issued. Respondent did receive a psychiatric and physical examination five months from the date of the Board's Order. However, he neglected first to secure the Board's approval of the osteopathic medical physician he selected. He described his failure to do so also due to his misunderstanding of the terms of the Stipulation and Consent Agreement. While the Board again cannot accept this excuse, it has determined that Dr. Yardumian was acceptable for this purpose. Therefore, the Board has not found him in violation of its Order in this respect.

ORDER

AND NOW, to wit, this 31st day of August, 1984,
the State Board of Osteopathic Medical Examiners, having duly convened and
considered this entire record, on the basis of the foregoing Findings of
Fact, Conclusions of Law and Discussion by unanimous vote of its members,
hereby orders that the license of the Respondent, Mark B. Fishtein, D.O.,
to practice osteopathic medicine and surgery in this Commonwealth be and
hereby is suspended for thirty days. After said suspension, Respondent's
probation will continue pursuant to the terms of the Board's Order of March
11, 1982.

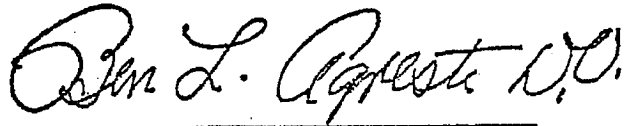
This Order will take effect thirty days from the date hereof.

BY ORDER:

PROFESSIONAL & OCCUPATIONAL AFFAIRS

STATE BOARD OF OSTEOPATHIC MEDICAL
EXAMINERS


Stanley A. Miller, Chairman


Ben L. Agresti, D.O., Chairman

Respondent's Address: 933 North Charlotte Street
Pottstown, Pennsylvania 19464

Board Attorney: Mary S. Wyattte, Esquire

File No.: 82-OS-1090