

On November 29, 2004, Judge Bittner issued an order affording Respondent an opportunity to respond to the Government's Motion. On December 13 and 14, 2004, Respondent filed his response, objecting to a summary disposition of the proceeding and requesting an indefinite stay. In it, he argued that his state criminal convictions and the Medical Board's revocation order were then-pending appear and they should not be used as a basis for adverse action on his DEA registration. However, Respondent did not deny that as of December 17, 2004, he was no longer licensed to practice medicine in Massachusetts.

On December 27, 2004, Judge Bittner issued her Opinion and Recommended Decision of the Administrative Law Judge (Opinion and Recommended Decision). In it, she granted the Government's Motion, finding Respondent lacked authorization to handle controlled substances in his state of DEA registration and she recommended that his registration be revoked.

No exceptions were filed by either party to the Opinion and Recommended Decision and on February 2, 2005, the record of these proceedings was transmitted to the Office of the DEA Deputy Administrator.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67, hereby issues her final order, based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, in full, the Opinion and Recommended Decision of the Administrative Law Judge.

The Deputy Administrator finds Respondent currently holds DEA Certificate of Registration AK8615013 as a practitioner and that on November 17, 2004, the Massachusetts Medical Board revoked his license to practice medicine in that state, effective as of December 17, 2004. That action was predicated on Respondent's criminal convictions which under Massachusetts law, either undermined the public's confidence in the integrity of the medical profession or showed Respondent's lack of moral character.

The Deputy Administrator therefore finds Respondent is not currently licensed to practice medicine in Massachusetts and lacks authorization to handle controlled substances in that state.

DEA does not have statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances in the state in which he

conducts business. See 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See Stephen J. Graham, M.D., 69 FR 11,661 (2004); Dominick A. Ricci, M.D., 58 FR 51,104 (1993); Bobby Watts, M.D., 53 FR 11,919 (1998).

Here, it is clear Respondent is not currently licensed to handle controlled substances in Massachusetts, the jurisdiction in which he holds a DEA registration. Therefore, he is not entitled to registration in that state.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AK8615013, issued to Kennard Kobrin, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective July 7, 2005.

Dated: May 25, 2005

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Scott H. Nearing, D.D.S., Grant of Restricted Registration

On January 27, 2003, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Scott H. Nearing, D.D.S. (Dr. Nearing/Respondent) of Wichita, Kansas. Dr. Nearing was notified of an opportunity to show cause as to why DEA should not deny this application for a DEA Certificate of Registration as a practitioner on the grounds that his registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).

The Order to Show Cause alleged in sum, that between April 1989 and May 1993 Dr. Nearing wrote and presented more than 100 fictitious prescriptions to local pharmacies for controlled substances and ordered narcotic and benzodiazepine controlled substances from a wholesale drug company, all for his personal use and not for legitimate medical purposes. As a result of these actions, he surrendered his DEA Certificate of Registration on June 23, 1993, and on July 11, 1994, pled guilty to one count of violating 21 U.S.C.

843(a)(3) and was sentenced to four months home confinement and placed on probation for four years. It was further alleged that between 1994 and 2000, the Kansas State Dental Board (Dental Board) took several disciplinary actions against Respondent, ranging from license suspensions in 1994 and 1998 to discipline imposed in 2000 for practicing without a license.

Respondent, acting *pro se*, requested a hearing and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following pre-hearing procedures, a hearing was held in Topeka, Kansas, on July 15, 2004. At the hearing, both parties called witnesses to testify and introduced documentary evidence. Subsequently, both parties filed Proposed Findings of Fact, Conclusions of Law, and Argument.

On January 3, 2005, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (Opinion and Recommended Ruling), recommending that Respondent's application for registration as a practitioner be granted, with the following restrictions: (1) Respondent shall not write any prescriptions for himself, and shall not obtain or possess for his use any controlled substance except upon the written prescription of another licensed medical professional, and (2) for at least two years from the date of the entry of a final order in this proceeding, Respondent shall continue to attend Caduceus meetings on a monthly basis. No Exceptions to the Opinion and Recommended Ruling were filed and on February 2, 2005, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67, hereby issues her final order based upon findings of fact and conclusions of law hereinafter set forth. The Deputy Administrator adopts in full, the recommended ruling, findings of fact and conclusions of law of the Administrative Law Judge and agrees Respondent's application should be approved, with restrictions.

The record before the Deputy Administrator shows Dr. Nearing graduated from the University of Missouri, Kansas City Dental School in 1983. In March 1984, he purchased a small dental practice from the widow of another dentist located in Overland Park, Kansas and nine years later, DEA began investigating Respondent after local pharmacies began questioning prescriptions he had written.

Based on records from approximately 30 Kansas City pharmacies, DEA Diversion Investigators determined that between 1989 and 1993, Respondent presented multiple fictitious prescriptions for narcotic controlled substances, using false names of patients. Most were for drugs containing hydrocodone, a Schedule III controlled substance, but some were for oxycodone, a Schedule II controlled substance. It was also determined Respondent had ordered narcotic and benzodiazepine controlled substances for his personal use from a wholesale drug company.

On June 22, 1993, Diversion Investigators went to Respondent's office and confronted him about the fictitious prescriptions. After initial denials, he cooperated and admitting writing the fraudulent prescriptions to feed his drug abuse problem. Dr. Nearing also executed a DEA Form 1204, voluntarily surrendered his DEA Certificate of Registration and agreed to not reapply for registration for a minimum of two years.

Records introduced at the hearing showed that between May 1, 1989 and April 27, 1993, Respondent issued approximately 188 fraudulent prescriptions for Schedule II and III controlled substances, most of which were for 16 or 20 dosage units. Further documentary evidence showed that between March 27 and June 10, 1993, Dr. Nearing ordered approximately 1700 dosage units of Vicodin, Darvocet N-100 and Valium from two drug wholesalers. Vicodin is the brand name for a product containing hydrocodone, Valium is the brand name of a product containing diazepam, a Schedule IV controlled substance and Darvocet N-100 is the brand name for a product containing propoxyphene, also a Schedule IV controlled substance. Dr. Nearing testified at the hearing that while most of the Valium was provided to patients, he probably personally used the other drugs. There is no evidence that Dr. Nearing ever diverted any of these controlled substances to others or that any patient was harmed as a result of his personal abuse problems.

As a result of this investigation, on June 8, 1994, Respondent was charged in a one-count information in the United States District Court for the District of Kansas, with violating 21 U.S.C. 843(a)(3) by fraudulently obtaining a Schedule III narcotic controlled substance. Dr. Nearing pled guilty to that offense and on September 19, 1994, was placed on probation for four years, sentenced to four months home confinement, ordered to participate in a substance abuse

treatment program and required to pay a \$1,000.00 fine.

On March 22, 1994, the Dental Board entered into a stipulation with Respondent under which his license to practice dentistry was suspended for one year. However, the suspension was stayed so long as he met certain conditions, including complying with a rehabilitation program and refraining from any use of alcohol or controlled substances. This program included attendance at twelve-step meetings, personal counseling, working with a sponsor, participation in an aftercare group and drug testing upon demand.

The administrator of the Impaired Provider Program (IPP) later advised the Dental Board that Respondent was not complying with the program's requirements because he had refused therapy. As a result, Respondent entered into a Stipulation Agreement and Enforcement Order with the Dental Board in December 1996. Under that Order, his license would be suspended for twelve months; however, this suspension was also not put into effect, as long as Respondent re-enrolled in IPP and adhered with its requirements.

Respondent did reenter IPP, however, as a result of a second refusal to undergo therapy, the administrator again advised the Dental Board that he was not in compliance with the program. As a consequence, in a Final Order dated January 16, 1998, Respondent's dental license was suspended for twelve months. During this period, Respondent failed to renew his license and it was cancelled, effective March 1, 1999. In late 1999, after his suspension period had run, Respondent was seen practicing dentistry by a state investigator and because he had not renewed his license, Respondent was then practicing without a license.

He applied for a new license and in a Stipulation and Final Agency Order dated May 20, 2000, the Dental Board granted his application. However, as a sanction, it suspended his license to practice while he underwent additional rehabilitation. Respondent then entered a program run by the Professional Renewal Center (Center) of Lawrence, Kansas. This included intensive psychotherapy and treatment for a previously undiagnosed problem, which the Center had discovered.

In January 2001, the Center's then-Director wrote the Dental Board supporting Respondent's request to return to practice, noting Dr. Nearing's significant progress, the support of his family and his significant motivation for change. The Director supported Dr. Nearing's resumption of practice under enumerated conditions, which included

continued participation in Caduceus, a support group for health professionals patterned after Alcoholics Anonymous and Narcotics Anonymous. The Director further recommended that Dr. Nearing not engage in a solo practice, as the strains of running such a business had contributed to his original abuse problems.

Based on this recommendation, in an Order dated January 30, 2001, the Dental Board lifted Dr. Nearing's license suspension and as of the date of the DEA hearing, he is fully licensed to practice dentistry in Kansas.

Respondent testified at the hearing, describing his history of violations and rehabilitative efforts. Immediately after the June 1993 interview, where he was apprised that authorities were aware of his activities, he entered his first in-patient treatment program. From 1994 to 1997 he underwent rehabilitative treatment as recommended by the Dental Board. However, he did stop seeing the therapist which the program's director had recommended. Dr. Nearing attributed this to confusion over whether seeing the therapist was mandatory and his then-belief the therapy was not helping him. This resulted in the first letter to the Dental Board that he was not in compliance with the program. Although he discontinued therapy, his urine screens were all negative and he attended Alcoholics Anonymous meetings. Dr. Nearing was reinstated into the program but in 1998 was dropped once more, again apparently for not seeing a therapist as directed.

On the recommendation of the Dental Board, he finally entered the Center's program in Lawrence, which addressed problems that had previously gone undiagnosed and this led eventually to full reinstatement of his license to practice dentistry. Respondent testified that he has not used drugs since August 18, 1994, and has not consumed alcohol since at least August 1999.

At the time of the hearing, Dr. Nearing was the supervising dentist in a clinic owned by another dentist. He oversees the professional practice of several other dentists, but does not have the business responsibilities which contributed to his abuse problems while operating a solo practice. He described his current situation as a "wonderful practice" and there is no evidence he has relapsed or abused any drugs since 1994. Dr. Nearing continues to attend Caduceus meetings and testified that he would not object to having conditions placed on his registration if the application was granted.

The current director of the Center and Respondent's monitoring physician

jointly wrote DEA in support of his application for registration. They reported Dr. Nearing was in sustained full remission and characterized his dependence recovery as being "remarkable."

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny any pending application for registration if she determines that registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered in determining the public interest:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable state, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight she deems appropriate in determining whether a registration should be revoked or an application for registration denied. *See* Henry J. Schwartz, Jr., M.D., 54 FR 16,422 (1989).

With regard to factor one, the recommendation of the appropriate state licensing board or professional disciplinary authority, Judge Bittner found Respondent is now fully licensed by the State of Kansas to practice dentistry and has authority to handle controlled substances in that state. She therefore found this factor weighed in favor of registration. Nevertheless, as noted by the Administrative Law Judge, state licensure is a necessary, but not sufficient condition for registration, and therefore this factor is not dispositive. *See e.g.*, Wesley G. Harline, M.D., 65 FR 5,665-01 (2000); James C. LaJevic, D.M.D., 64 FR 55,962 (1999). The Deputy Administrator agrees.

With regard to factor two, Respondent's experience in handling controlled substances, he abused controlled substances after obtaining them through fictitious prescriptions and ordering them from wholesalers. Judge Bittner concluded that even though Respondent never inappropriately prescribed, administered or otherwise dispensed controlled substances to any patient, this factor weighed in favor of a finding

that Respondent's registration would be inconsistent with the public interest. The Deputy Administrator concurs.

The record also establishes Respondent entered a guilty plea to a charge of violating federal law by fraudulently obtaining a Schedule III narcotic controlled substance. Thus, as also found by Judge Bittner, factor three weighs in favor of a finding that Respondent's registration would be inconsistent with the public interest.

With regard to factor four, compliance with applicable laws relating to controlled substances, Respondent's use of purported prescriptions with fictitious names violated statutory and regulatory requirements that prescriptions be issued only for legitimate medical purposes and must bear the full name and address of the patient. As found by Judge Bittner, this factor also weighs against registration.

Finally, with regard to factor five, beyond the violations addressed above, the Deputy Administrator agrees with Judge Bittner that Respondent has not engaged in other conduct that may threaten the public health or safety.

Applying the above factors, Judge Bittner concluded the record clearly establishes grounds for finding that Respondent's registration would be inconsistent with the public interest. However, she recommended that the Deputy Administrator, in the exercise of her discretion, grant Respondent's application, with restrictions.

Judge Bittner noted Respondent cooperated with DEA investigators when he was first confronted with his misconduct in 1994. He admitted his abuse of controlled substances and the fraudulent means used to acquire them. He immediately sought treatment and there is no evidence that Dr. Nearing has abused any controlled substances for almost 11 years. While terminated from his initial rehabilitation program over the therapy issue, he did not return to drug use and eventually Dr. Nearing successfully completed an intensive program for impaired professionals.

The Administrative Law Judge, who observed Respondent's demeanor during the hearing, credited his testimony that he has continued rehabilitation and concluded that Dr. Nearing is unlikely to repeat his past misconduct. She therefore found that granting Respondent's application would not be inconsistent with the public interest, subject to the enumerated restrictions.

The Deputy Administrator also finds that adequate grounds exist for denying Respondent's application for DEA registration. Having concluded that there is a lawful basis upon which to

deny Respondent's application, the question remains as to whether the Deputy Administrator should, in the exercise of her discretion, grant or deny the application. Like Judge Bittner, the Deputy Administrator concludes that it would not be inconsistent with the public interest to grant Respondent's pending application. *See* Karen A. Kreuger, M.D., 69 FR 7,016 (2004) [grant of restricted registration]; Jeffrey Martin Ford, D.D.S., 68 FR 10,750 (2003) [same].

The Deputy Administrator finds significant Respondent's willingness to cooperate with investigators and accept responsibility, both administratively and criminally. Upon discovery of his activities he immediately entered rehabilitation and most recently completed an intensive program for health professionals tailored to a diagnosis made only upon Dr. Nearing's admission to that program.

Most importantly, there is no evidence he has misused any controlled substances for almost eleven years now and he is in a responsible professional situation that is conducive to his continued compliance with the laws and regulations governing controlled substances. In sum, it appears from these positive developments that Respondent has acknowledged his past problems and taken steps to ensure continued recovery.

However, given the concerns about Respondent's past mishandling of controlled substances, a restricted registration is warranted. Accordingly, the Deputy Administrator adopts the following restrictions upon the Respondent's DEA registration, as recommended by Judge Bittner:

1. Respondent shall not write any prescriptions for himself, and shall not obtain or possess for his use any controlled substance except upon the written prescription of another licensed medical professional.

2. For at least two years from the date of the entry of a final order in this proceeding, Respondent shall continue to attend Caduceus meetings on a monthly basis.

Additionally,

3. Respondent's controlled substance handling authority shall be limited to the administering of controlled substances in his office and the writing of prescriptions only.

4. Respondent shall inform the DEA, within 30 days of the event, of any adverse action taken by any state upon his license to practice dentistry or upon his authorization to handle controlled substances within that state.

Accordingly, the Deputy Administrator of the Drug Enforcement

Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for DEA Certificate of Registration submitted by Scott H. Nearing, D.D.S. be, and it hereby is, granted, subject to the above described restrictions. This order is effective July 7, 2005.

Dated: May 25, 2005.

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 02-28]

Felix K. Prakasam, M.D. Revocation of Registration

On February 6, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Felix K. Prakasam, M.D. (Respondent) notifying Respondent of an opportunity to show cause as to why DEA should not revoke his DEA Certificates of Registration BP3420344 and BP44160029, pursuant to 21 U.S.C. 824(a)(1) and (a)(4) on the grounds he had materially falsified four DEA renewal applications and that his continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4). The Order to Show Cause also proposed that any pending applications for renewal should be denied under 21 U.S.C. 823(f).

The Order to Show Cause alleged, in sum, that during 1995-1996, Respondent failed to maintain complete and accurate records of controlled substances dispensed at this medical offices located in Redlands and Salinas, California, and accountability audits during this period revealed overages and shortages of controlled substances at both registered locations. As a result, on March 10, 1997, after an informal administrative hearing at the DEA San Francisco office, Respondent entered into a Memorandum of Understanding with DEA in which he agreed to address the record-keeping violations and provide effective controls against theft and diversion of controlled substances.

The Order to Show Cause further alleged that on April 30, 1997, the California Medical Board (California Board) brought on Accusation against Respondent's California medical license. As a result, on February 11,

1998, the California Board revoked Respondent's medical license, effective March 13, 1998. However, the Board stayed the revocation, placing Respondent's license on probation for three years, with conditions. On March 20, 2001, as a result of the California action, Respondent entered into a Consent Order with the Louisiana State Board of Medical Examiners (Louisiana Board) in which he agreed to an indefinite suspension of his Louisiana medical license.

Finally, it was alleged that in February 1998 and February 2001, Respondent materially falsified a total of four applications for renewal of his DEA registrations by failing to disclose the California Board's action placing his medical license in a probationary status.

Respondent requested a hearing on the issues raised by the Order to Show Cause and following pre-hearing procedures, a hearing was held in San Francisco, California, on March 12 and 13, 2003. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted proposed findings of fact, conclusions of law, and argument.

On January 30, 2004, Presiding Administrative Law Judge Mary Ellen Bittner (Judge Bittner/ALJ) issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge (Opinion and Recommended Ruling) in which she recommended that Respondent's two DEA registrations be revoked and any pending applications for renewal denied. No exceptions were submitted by the parties, and on March 2, 2004, Judge Bittner transmitted the record of these proceedings to the then-Acting Deputy Administrator of DEA.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67, hereby issues her final order based upon finding of fact and conclusions of law as hereinafter set forth.

The Deputy Administrator adopts the findings of fact and recommendation of the Administrative Law Judge that Respondent's DEA Certificates of Registration be revoked.¹

¹ In an evidentiary/discovery ruling which did not impact relevant findings of fact or her recommendation for revocation, the ALJ concluded the Government should have provided Respondent copies of several DEA-6 Reports of Investigation which had been prepared by a DEA Diversion Investigator while investigating the allegations, several years before the hearing. Before testifying for the Government, the Diversion Investigator had used the reports to refresh his memory and Respondent's request for the documents was made after the Diversion Investigator completed testifying on direct examination. Notwithstanding the ALJ's

The record before the Deputy Administrator shows Respondent received his medical degree in 1971 from Christian Medical College in Vellore, India. He interned and completed a residency in Maryland and in 1981 was licensed to practice in California. He also practiced medicine in Louisiana from an undetermined date until 1992, when he moved to California and opened a practice in Redlands. He eventually began working in the Salinas office of Rinaldo Fong, M.D. and took over that practice when Dr. Fong was deported. Respondent has held DEA Certificate of Registration BP3420344 for the Redlands location since November 18, 1992, and DEA resignation BP4416029 for the Salinas office since May 8, 1995. While Respondent is Board eligible in anesthesiology, his specialty at all relevant times has been bariatric medicine *i.e.*, weight control.

In July 1996, after reports were received of Respondent's possible purchase of excessive quantities of controlled substances, DEA Diversion Investigators, accompanied by an investigator from the California Board, conducted an inspection and accountability audit at Respondent's Salinas office. The inspection revealed Respondent had not complied with multiple regulatory requirements, including failures: (1) Maintain an inventory of controlled substances as of a specific date and as of the opening or closing of business; (2) maintain

ruling, the Government declined to provide Respondent the reports, contending they were not releasable under the rules and statutes governing DEA administrative hearings. Transcript, pages 168-169; Opinion and Recommended Ruling, page 5, fn. 1.

The reports appear to be Jencks Act material (18 U.S.C. 3500) and the Deputy Administrator has previously ruled that "pursuant to applicable law and regulations governing DEA administrative hearings, neither the principles of the Jencks decision nor the Jencks Act are applicable to these proceedings." *See e.g.*, Branex Inc., 69 FR 8,682, 8,685 (2004) (Emphasis added) [Confirming predecessor Deputy Administrator's interlocutory decision that the Government is not required to supply a respondent at an administrative hearing, statements made and adopted by Government witnesses during their direct testimony.]

Applying the principles of Branex and its predecessors, which addressed evidentiary/discovery standards applicable to DEA administrative hearing and detailed the Government's limited obligations to provide discovery before and during the course of hearings under the Administrative Procedures Act (5 U.S.C. 556(d)) and DEA regulations (21 CFR 1316.54-1316.59), the Deputy Administrator concludes the Government correctly declined to provide Respondent the reports in question here. *See e.g.*, Nicholas A. Sychak, d.b.a. Medicap Pharmacy, 65 FR 75,959, 75,960-75,961 (2000) [No requirement for Government to disclose potentially exculpatory information to respondents in DEA administrative hearings]; Rosalind A. Cropper, M.D., 66 FR 41,040, 41,041 (2001) ["the Federal Rules of Evidence do not apply directly to these proceedings"].