

Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Michael G. Sargent, M.D. of Katy, Texas (Respondent), proposing to revoke his DEA Certificate of Registration, AS2512374, as a practitioner and deny any pending application for registration as a practitioner. The statutory basis for the Order to Show Cause was that Respondent's continued registration as a practitioner would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f) and 824(a)(4).

Respondent, through counsel, requested a hearing on the issues raised in the Order to Show Cause, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held on January 5 and 6, 1994, in Houston, Texas. On August 25, 1994, the administrative law judge issued her opinion and recommended ruling, findings of fact, conclusions of law and decision recommending that Respondent's registration be revoked. Respondent filed exceptions to the opinion on September 19, 1994.

On October 13, 1994, the administrative law judge transmitted the record of the proceeding to the Deputy Administrator. After a careful consideration of the record in its entirety, the Deputy Administrator enters his final order in this matter, in accordance with 21 CFR 1316.67, based on findings of fact and conclusions of law as set forth herein.

The administrative law judge found that, in July 1991, DEA investigators in Houston, Texas, received an anonymous complaint that Respondent was prescribing controlled substances to individuals without a legitimate medical purpose. As a result, DEA investigators conducted prescription surveys of pharmacies located near Respondent's office. These surveys established that Respondent was prescribing Tylenol #3 with codeine, a Schedule III controlled substance, in conjunction with Valium, a Schedule IV controlled substance.

Judge Bittner further found that, on five separate occasions from August 16, 1991 through April 16, 1992, Respondent prescribed combinations of Tylenol #3 with codeine and Valium to two undercover agents without a legitimate medical purpose and not in the usual course of professional medical practice. Respondent failed to conduct and record an appropriate patient history and failed to conduct a physical examination of either agent prior to prescribing this combination of controlled substances.

The administrative law judge considered testimony from the Government's expert medical witness who concluded that Respondent was not acting within the normal course of his professional practice when these prescriptions were issued. Conversely, Respondent's expert medical witness concluded that Respondent issued the prescription at issue for a legitimate medical need and in the normal course of professional practice, and, at worse may have exercised poor judgment with respect to prescribing Tylenol with codeine.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any application for such registration, if he determines that continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The [registrant's] experience in dispensing or conducting research with respect to controlled substances.
- (3) The [registrant'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 and safety."

The Deputy Administrator may properly rely on any one or a combination of these factors, and give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. *Henry J. Schwartz, Jr., M.D.* 54 FR 16422 (1989). In the present case, the administrative law judge found that factors two, four and five were relevant in determining whether Respondent's registration should be revoked.

Judge Bittner found that Respondent's prescribing of controlled substances to the undercover agents was not for a legitimate medical purpose. Further, Respondent did not conduct comprehensive physical examinations of the two agents and failed to maintain proper records regarding his prescribing of controlled substances.

The administrative law judge concluded that the record does not support Respondent's contentions that the controlled substances he prescribed were warranted by, and appropriate for, the medical ailments that the investigators presented to him. She further found that the record

demonstrates Respondent neither conducted anything resembling comprehensive physical examinations nor asked probing questions of the agents as to their symptoms, the possible causes of these symptoms, or alternative treatments for their complaints. *See James H. Brown, M.D.*, 59 FR 37778 (1994). Respondent additionally was remiss in his responsibilities as a DEA registrant by failing to keep appropriate patient files on the agents.

Judge Bittner additionally found that a negative inference is warranted where, as in the present case, Respondent did not testify. *See Raymond A. Carlson, M.D.*, 53 FR 7425 (1988). The administrative law judge concluded that Respondent has not discharged his responsibilities as a DEA registrant in the past and there is no indication that he is more likely to do so in the future. Judge Bittner recommended that Respondent's DEA Certificate of Registration be revoked and any pending applications for registration as a practitioner be denied.

Respondent took exception to Judge Bittner's opinion and recommendation arguing that there was not sufficient, reliable, probative, and substantial evidence to support such recommendation of revocation. Respondent further contended that Judge Bittner, in finding that 21 U.S.C. 823(f) (2), (4) and (5) were relevant, failed to discuss Respondent's threat to the public interest under these factors. Respondent additionally argued that the record, as a whole, does not support a conclusion that his behavior was egregious, that Judge Bittner failed to address the requirements of 21 CFR 1306.04 concerning valid prescriptions, that Respondent did not have inadequate recordkeeping practices, and that a negative inference was not warranted from Respondent's decision not to testify. Respondent further objected to the characterization that he did not perform any diagnostic tests, and to the administrative law judge's description of the agents' visit to Respondent's office on March 23, 1992. Respondent also took exception to the use of the testimony given by the Government's expert medical witness.

The Deputy Administrator adopts the opinion and recommended decision of the administrative law judge in its entirety. The Deputy Administrator concurs with the administrative law judge's finding that the Government had met its burden of proof with respect to establishing the factors set forth under 21 U.S.C. 823(f) (2), (4) and (5). The Deputy Administrator finds that Respondent prescribed controlled