STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

August 14, 1992

Rupert H. May, M.D.
1362 Guild Street
Port Charlotte, Florida 33952

Dear Doctor May:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Kevin P. Byers, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of the Minutes of the State Medical Board, meeting in regular session on August 12, 1992, including a Motion approving and confirming the Findings of Fact and the Conclusions of Law of the Hearing Examiner, and adopting an amended Order.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal may be taken to the Franklin County Court of Common Pleas only.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Carla S. O'Day

Carla S. O'Day, M.D.
Secretary

CSO:em

Enclosures

CERTIFIED MAIL RECEIPT NO. P 741 123 775
RETURN RECEIPT REQUESTED

cc: Kevin Kerns, Esq.

CERTIFIED MAIL NO. P 741 123 776
RETURN RECEIPT REQUESTED

Mailed 8/20/92

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STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of Kevin P. Byers, Attorney Hearing Examiner, State Medical Board; and an excerpt of Minutes of the State Medical Board, meeting in regular session on August 12, 1992, including a Motion approving and confirming the Findings of Fact and the Conclusions of Law of the Hearing Examiner, and adopting an amended Order, constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Rupert H. May, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

(SEAL)

Carla S. O'Day, M.D.
Secretary

8/13/92
Date

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

*

RUPERT H. MAY, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio the 12th day of August, 1992.

Upon the Report and Recommendation of Kevin P. Byers, Hearing Examiner, Medical Board, in this matter designated pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board for the above date.

It is hereby ORDERED that, although sufficient legal basis exists to take action against the medical license of Rupert H. May, M.D., for violation of Section 4731.22(B)(25), Ohio Revised Code, no further action by the State Medical Board of Ohio is necessary in this matter in light of the sanction that has already been imposed by the United States Department of Health and Human Services.

This ORDER shall become effective immediately upon approval by the State Medical Board of Ohio.

Carla S. O'Day

Carla S. O'Day, M.D.
Secretary

(SEAL)

8/13/92
Date

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REPORT AND RECOMMENDATION
IN THE MATTER OF RUPERT H. MAY, M.D.

On May 11, 1992 the Matter of Rupert H. May, M.D., came on for hearing before Kevin P. Byers, Attorney Hearing Examiner for the State Medical Board of Ohio.

INTRODUCTION AND SUMMARY OF EVIDENCE

I. Basis for Hearing

A. By letter dated November 13, 1991, mailed November 15, 1991 (State's Exhibit #1), the State Medical Board notified Rupert H. May, M.D., that it intended to determine whether to take disciplinary action against his certificate to practice medicine and surgery or to reprimand or place him on probation due to a three year exclusion from the Medicare program which was levied against him by the U. S. Department of Health and Human Services on or about April 3, 1991. This exclusion was reportedly due to Dr. May's failure to prescribe antidepressant therapy according to accepted standards, his failure to monitor antidepressant drug levels to rule out drug toxicity, and his failure to document the need for anticholinergic medication. The Board alleged that Dr. May's exclusion from the Medicare program constituted "termination or suspension from medicare or medicaid programs by the department of health and human services or other responsible agency for any act or acts that would also constitute a violation of division (B)(2), (3), (6), (8), or (19) of this Section" as that clause is used in Section 4731.22(B)(25), Revised Code, to wit: Section 4731.22(B)(2) and (B)(6), Revised Code.

B. By letter received by the Board on December 3, 1991 (State's Exhibit #2), Dr. May requested a hearing.

II. Appearances

A. On behalf of the State of Ohio: Lee I. Fisher, Attorney General, by Odella Lampkin, Assistant Attorney General

B. On behalf of the Respondent: Emens, Kegler, Brown, Hill & Ritter, by R. Kevin Kerns, Esq., and William J. Brown, Esq.

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III. Testimony Heard

A. Presented by the Respondent

1. Rupert H. May, M.D.

2. Kurt A. Bertschinger, M.D.

3. Friedrich Albert Lingl, M.D., by deposition

IV. Exhibits Examined

In addition to those noted previously, the following exhibits were identified and admitted into evidence in this Matter:

A. Presented by the State

1. State's Exhibit #3: December 4, 1991 letter to Dr. May from the State Medical Board advising him that a hearing set for December 17, 1991 was postponed until further notice pursuant to Section 119.09, Revised Code.

2. State's Exhibit #4: December 11, 1991 letter to Attorneys Kerns and Brown from the State Medical Board scheduling Dr. May's hearing for April 14, 1992.

3. State's Exhibit #5: March 11, 1992 Entry by the State Medical Board granting Dr. May's continuance request and rescheduling the hearing for May 11, 1992.

4. State's Exhibit #6: May 5, 1992 Entry by the State Medical Board granting Dr. May's request to depose two witnesses on May 6, 1992.

* 5. State's Exhibit #7: May 14, 1991 four-page letter from the Department of Health and Human Services, Inspector General, advising Dr. May that a three year exclusion from the Medicare program was being imposed against him. Also included in this exhibit is an October 10, 1991 cover letter to the State Medical Board from the Inspector General's office.

* 6. State's Exhibit #8: November 5, 1990 four-page sanction recommendation authored by an official of the Peer Review Systems, Inc.

* 7. State's Exhibit #9: Transcript of Dr. May's August 30, 1990 meeting with the physician panel of Peer Review Systems, Inc.

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** 8. State's Exhibit #10: Patient chart for Patient #1.

B. Presented by the Respondent

** 1. Respondent's Exhibit A: Selected portions of Patient #1's chart, already in evidence as State's Exhibit #10.

2. Respondent's Exhibit B: December, 1989 article from the Journal of Clinical Psychiatry certified "Fluoxetine Added to Non-MAOI Antidepressant Converts Nonresponders to Responders: A Preliminary Report."

3. Respondent's Exhibit C: Dr. Lingl's three-page curriculum vitae.

4. Respondent's Exhibit D: Transcript of the May 6, 1992 telephone deposition of Dr. Lingl.

5. Respondent's Exhibit E: Three-page curriculum vitae of Dr. Bertschinger.

* SEALED TO PROTECT PEER REVIEW CONFIDENTIALITY PURSUANT TO 42 CFR 476.107

** SEALED TO PROTECT PATIENT CONFIDENTIALITY PURSUANT TO REVISED CODE 4731.22(C)(1)

V. Other Matters

Upon request of counsel at hearing, the record in this Matter was held open until June 12, 1992 in order to allow respective counsel to file written summations. On June 10, 1992, the parties were granted until June 16, 1992 to file their written closings. The closings filed by counsel for Respondent and the State are hereby made a part of the record in this Matter.

FINDINGS OF FACT

1. Dr. May is a native of Germany and received his education in that country. He served in the German army from 1941 to 1945 and entered medical school upon his military discharge. He obtained his medical certification in Germany and it remains current to date. He completed the equivalent of an internship through the University of Marburg. This was primarily in internal medicine. Dr. May also completed a German internship in OB/GYN and then immigrated to the United States. In 1954 he entered a rotating internship at St. Joseph's Hospital in Yonkers, New York. He followed this with a psychiatric residency at the Ohio State

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University in Columbus, Ohio. During his residency he obtained a masters degree in psychiatry from the Ohio State University. He received his Ohio certificate to practice medicine and surgery in 1955. In 1957 Dr. May moved to Cleveland, Ohio and began working for the Cleveland Psychiatric Institute. Within the next year or two he started a private practice while maintaining his Cleveland Psychiatric Institute job. In 1962 he entered private practice full time. During the course of his private practice in the Cleveland area, Dr. May had admitting privileges at a number of area hospitals. Dr. May has never before been disciplined or sanctioned by any agency or regulatory body. He has been board certified in Psychiatry and Neurology since 1959. In April of 1991 Dr. May sold his practice and has not practiced medicine or surgery in the State of Ohio since that time.

These facts are established by the testimony of Dr. May (Tr. at 39-47 and 78-80).

2. In August, 1990, Dr. May met with a physician review panel of Peer Review Systems, Inc. (PRS) in order to discuss his treatment of Patient #1 from July 24 through July 31, 1989. PRS is the responsible agency for Medicare in Ohio under the Health Care Finance Administration (HCFA). This panel consisted of three independent psychiatrists, a physician-officer of PRS, and two registered nurses employed by PRS. Dr. May was represented by counsel and engaged in a detailed review of Patient #1. The psychiatrists on the panel each had significant questions of Dr. May and the meeting lasted three hours. As a result of the PRS panel review of Patient #1, Dr. May received a copy of a November, 1990 PRS report which recommended that the Inspector General of Health and Human Services initiate sanction proceedings due to Dr. May's "gross and flagrant violation of Medicare obligations."

   In March, 1991, Dr. May received notice that the Inspector General was excluding him from Medicare for three years. Based upon the PRO report, the Inspector General specifically found that Dr. May:

   a) failed to prescribe antidepressant therapy according to accepted standards;

   b) failed to monitor antidepressant drug levels to rule out drug toxicity; and,

   c) failed to document the need for anticholinergic medication.

   Part of the reason for the three year exclusion was Dr. May's perceived resistance to remedial training. Dr. May had long-standing personal committments abroad and could not attend the

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symposium when it was originally suggested by PRS. In October, 1991 Dr. May attended the symposium and still believes his prescribing practices were appropriate.

These facts are established by the testimony of Dr. May (Tr. at 47-49, 85-86) and State's Exhibits #7, #8 and #9.

3. Dr. May began treating Patient #1 in 1975 at which time he was diagnosed as suffering from manic depressive psychosis and mild organic brain syndrome with beginning cerebral arteriosclerosis. A number of other physical maladies were noted at the initiation of the physician-patient relationship. In addition to the 1975 psychiatric hospitalization noted above, seven subsequent hospitalizations for psychiatric conditions are noted in Dr. May's July 24, 1989 admission note for Patient #1.

   In June, 1989 Dr. May admitted 78 year-old Patient #1 to Deaconess Hospital for depression. During his hospital stay on the psychiatric unit, he fell and fractured a hip. He was transferred to the orthopedic unit and underwent surgery. Once he was sufficiently ambulatory, he was transferred back to the psychiatric unit under Dr. May's care on July 24, 1989. At this time Dr. May's diagnoses were manic depressive illness, depressive type; fracture, left upper femur; old fracture, right femur; osteoarthrosis of spine, with narrowing L4-5 disc spaces; and, intermittent hypertension. Dr. May charted his treatment plan as: "increase in antidepressant medication, as much he tolerates it; recreational therapy; group therapy; medical psychotherapy; and, other supportive measures as can be arranged."

   These facts are established by the testimony of Dr. May (Tr. at 50-56), State's Exhibit #10, and Respondent's Exhibit A.

4. Prior to July, 1989 Dr. May had read about the augmenting qualities of fluoxetine (Prozac) when used with other antidepressant medications. Fluoxetine became available to United States physicians in 1988 or 1989 and Dr. May decided to prescribe fluoxetine to Patient #1 in an effort to enhance other antidepressant medications which Dr. May was prescribing for him. Specifically, Dr. May undertook a prescribing regimen for depression which involved nortriptyline (Pamelor), imipramine (Trofanil), and fluoxetine (Prozac). The first two medications are tricyclic antidepressants while Prozac is classed as a propylamine antidepressant. At the time that Dr. May undertook the combination prescribing at issue, Patient #1 was confined to the hospital on the psychiatric unit and was refractory to treatment. During the period in question, July 24, 1989 through July 31, 1989, the daily Pamelor dosages prescribed by Dr. May ranged from 20 mg. to 50 mg. per day. The daily Trofanil dose was 20 mg. as was the daily Proazc dose. The customary therapeutic window for Pamelor is around 75 to 100 mg. per day, depending upon patient reaction,

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metabolism, and other characteristics of the patient. Similarly, an estimated therapeutic level of Trofanil would be 75 to 150 mg. per day.

These facts are established by the testimony of Dr. May (Tr. at 50, 57-59, 64-73, 86-87), the testimony of Dr. Bertschinger (Tr. at 107-118), and the testimony of Dr. Lingl (Depo. at 15-20, 43).

5. Dr. May utilized two tricyclic antidepressants of similar chemical structure in conjunction with Prozac in an attempt to treat Patient #1 with minimal dosages in the hope of avoiding deleterious side effects. Dr. May felt that if he relied solely on one antidepressant, he would need to prescribe it in such a large quantity for efficacy that the side effects suffered by Patient #1 would be intolerable. However, one of Dr. May's expert witnesses testified that combination prescribing of two tricyclic antidepressants along with Prozac would not lessen the chance of side effects as compared with a larger dose of one of the tricyclics. Furthermore, both of Dr. May's witnesses testified that they felt his prescribing practices conformed with minimal standards of care, although neither one of them would prescribe three antidepressants in combination. They felt that there was no clearcut benefit of using three drugs in lower dosages in lieu of one or possibly two antidepressants in higher dosages, although all the witnesses agreed that Prozac may be properly prescribed to augment another antidepressant.

   These facts are established by the testimony of Dr. May (Tr. at 69-73, 82, 88-89), the testimony of Dr. Bertschinger (Tr. at 125-129), and the testimony of Dr. Lingl (Depo. at 20-21, 41-44, 52).

6. Dr. May felt that Patient #1 had previously exhibited Parkinsonian features as a side effect from antidepressant medications. In an effort to alleviate or minimize tremors, akathisia, and other common side effects of tricyclic antidepressants, Dr. May prescribed Cogentin prophylactically during the hospitalization of Patient #1 from July 24 through July 31, 1989. The witnesses all agreed that the tremors and other side effects from antidepressant medications are quite disconcerting and anxiety-inducing. According to the witnesses, Dr. May's purpose in prescribing the Cogentin was readily apparent from review of the hospital chart although he did not specifically document the purpose or rationale for the Cogentin prescription. Dr. May admitted that the prophylactic use of Cogentin was not a common prescribing practice by psychiatrists in the Cleveland area in 1989, even though he had previously used this technique with Patient #1 and with other similarly situated depressed patients. The physician, when prescribing prophylactically, must consider the patient's history and other personal knowledge about the patient and his affliction

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when making medical judgments about medication. Such foundational information is commonly not extensively documented in hospital and office charts.

These facts are established by the testimony of Dr. May (Tr. at 51-54, 62-78, 82, 88), the testimony of Dr. Bertschinger (Tr. at 120, 130-133), the testimony of Dr. Lingl (Depo. at 22-26, 32-33), State's Exhibit #10 and Respondent's Exhibit A.

7. During the one week at issue, Dr. May personally examined Patient #1 five times. Dr. May used these examinations to gauge drug toxicity without the use of laboratory drug levels. On a practical note, by the time Dr. May obtained blood level feedback from the lab, Patient #1 likely would have been discharged or in another unit of the hospital. Furthermore, there was no known method to obtain reliable fluoxetine blood levels since scientific correlations between efficacy and blood levels did not exist in 1989.

   These facts are established by the testimony of Dr. May (Tr. at 85-89) and the testimony of Dr. Bertschinger (Tr. at 116-120, 131-136).

CONCLUSIONS

The evidence submitted by the State clearly establishes that Dr. May was terminated or suspended from Medicare "for any act or acts that would also constitute a violation of division (B)(2), (3), (6), (8), or (19) of this section" as that clause is used in Section 4731.22(B)(25), Revised Code. The Medicare authorities specifically made findings that Dr. May failed to prescribe antidepressant therapy according to accepted standards; failed to monitor antidepressant drug levels to rule out drug toxicity; and, failed to document the need for anticholinergic medication. The State alleged and proved that Dr. May was sanctioned by Medicare for conduct which violated Sections 4731.22(B)(2) and (6), Revised Code, relative to failing to use reasonable care discrimination in the administration of drugs or failure to employ acceptable scientific methods in the selection of drugs and departing from or failing to conform to minimal standards of care of similar practitioners under the same or similar circumstances. Although Dr. May was allowed to present two experts on his behalf, their testimony has been considered only in devising an appropriate order in this Matter. The expert testimony cannot prevail over the factual findings of the Medicare authorities and the clear legal import the subsequent sanction has upon this Board under 4731.22(B)(25), Revised Code. Significant mitigating factors include the fact that Dr. May has completed the pharmacology symposium orignally suggested to him by the Peer Review Organization, his lengthy practice of psychiatry with no prior Board actions, the unlikelihood of recurrence, and the absence of adverse impact on others.

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PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Rupert H. May, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time, but not less than thirty (30) days. Such SUSPENSION is stayed, subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least two (2) years.

   a. Dr. May shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in the State of Ohio.

   b. Within thirty (30) days of the effective date of this Order, Dr. May shall provide documentation acceptable to the Board or its designee evidencing his attendance at the October, 1991 prescribing symposium at Harvard about which he testified at hearing.

   c. Within 180 days of the effective date of this Order, or as otherwise directed by the Board, Dr. May shall provide documentation acceptable to the Board or its designee evidencing his successful completion of a course dealing with the prescribing of controlled substances, such course to be approved in advance by the Board or its designee.

   d. Dr. May shall submit quarterly declarations under penalty of perjury stating that there has been compliance with all the terms of PROBATION.

   e. Dr. May shall appear in person for interviews before the full Board or its designated representative at three (3) month intervals or as otherwise directed by the Board.

   f. In the event that Dr. May should leave Ohio for three (3) consecutive months or reside or practice outside the state, he must notify the State Medical Board in writing of the dates of departure and return. Periods of time spent outside of Ohio will not apply to the reduction of this probationary period unless otherwise determined by motion of the Board in instances where the Board can be assured that PROBATIONARY monitoring is otherwise being performed.

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2. If Dr. May violates the terms of this Order in any respect, or fails to timely comply with sections 1.b. and 1.c., above, the Board, after giving him notice and an opportunity to be heard, may set aside the stay order and impose the suspension of Dr. May's certificate to practice medicine and surgery in Ohio.

3. Upon successful completion of PROBATION, Dr. May's license will be fully restored.

This Order shall become effective immediately upon mailing of notification of approval by the State Medical Board of Ohio.

Kevin P. Byers
Kevin P. Byers
Attorney Hearing Examiner

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

EXCERPT FROM THE MINUTES OF AUGUST 12, 1992

REPORTS AND RECOMMENDATIONS

Dr. Gretter announced that the Board would now consider the Findings and Orders appearing on the Board's agenda.

Dr. Gretter asked whether each member of the Board had received, read, and considered the hearing record, the Proposed Findings, Conclusions, and Orders, and any objections filed in the matters of Steven C. Mann, D.O., and Rupert H. May, M.D. A roll call was taken:

ROLL CALL:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Mr. Jost	- abstain
	Dr. Kaplansky	- aye
	Dr. Heidt	- aye
	Dr. Hom	- aye
	Dr. Agresta	- aye
	Dr. Gretter	- aye

Dr. Gretter asked whether each member of the Board understood that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Mr. Jost	- abstain
	Dr. Kaplansky	- aye
	Dr. Heidt	- aye
	Dr. Hom	- aye
	Dr. Agresta	- aye
	Dr. Gretter	- aye

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

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Dr. Gretter asked Dr. Stephens whether he had received, read, and considered the

hearing record, the Proposed Findings, Conclusions, and Orders, and any objections filed in the matters of Steven C. Mann, D.O., and Rupert H. May, M.D. Dr. Stephens indicated that he had.

Dr. Gretter asked Dr. Stephens whether he understood that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. Dr. Stephens stated that he did.

.....

REPORT AND RECOMMENDATION IN THE MATTER OF RUPERT H. MAY, M.D.

Dr. Gretter stated that if there were no objections, the Chair would dispense with the reading of the proposed findings of fact, conclusions and order in the above matter. No objections were voiced by Board members present.

Dr. Gretter advised Mr. Kerns that there is not a court reporter present, but instead the Board's minutes serve as the Board's official record of the meeting. Mr. Kerns stated that he did not have any objection to the absence of a court reporter.

Dr. Gretter reminded Mr. Kerns that the Board members have read the entire hearing record, including the exhibits and any objections filed. He added that the Board will not retry the case at this time, and that pursuant to Section 4731.23(C), Revised Code, oral arguments made at this time are to address the proposed findings of fact and conclusions of the hearing examiner. Dr. Gretter stated that Mr. Kerns would be allowed approximately five minutes for his address.

Mr. Kerns advised that he and Dr. May have no objections to the Hearing Officer's Findings of Fact. In fact, they would concur with those findings in light of the fact that there was no finding that Dr. May violated any acceptable medical standards in his treatment of Patient No. 1. The Findings of Fact indicate that the Department of Human Services disciplined Dr. May relative to treatment of a patient for five days during 1989. Under the statute, discipline by the Department of Health and Human Services can be a basis for Board action so long as the acts would also constitute a violation of other divisions. The two divisions applicable in this case concern: 1) acts that would constitute a failure to use reasonable care discrimination in the administration of drugs; and 2) a breach of acceptable medical standards in the care and treatment of the patient. Two Cleveland physicians, certified in psychiatry and neurology, testified at the hearing to the effect that they had evaluated the record and determined that Dr. May did not fall below acceptable medical standards. Mr. Byers found that any testimony presented at the hearing by these physicians could go only to mitigation in this case. Dr. May

submits that a reading of this statute clearly provides that the discipline by the Department of Human Services must be with respect to an act or act that would constitute the violation of inappropriate prescribing or falling below acceptable medical standards. Mr. Kerns stated that it is his and Dr. May's position that the Board should consider the testimony at the hearing, and not just accept the Department of Human Services' findings.

Mr. Kerns stated that there is no doubt in this case that Dr. May's prescribing during that five-day period did not fall below acceptable standards, and he did not fail to monitor antidepressant drug therapy. In fact, the test at the hospital wouldn't have come back within that time frame and during that period of time there wasn't even a serum test that would calculate therapeutic fluoxetine levels. Concerning the finding of a failure to document the need for Cogentin, Dr. May had treated the patient over a period of 20 years and on many occasions had seen tremors, Parkinsonian symptoms and akathisia. Although Dr. May didn't write these down in the chart, the prescription was clearly indicated.

Mr. Kerns stated that if the Board depends on the judgment of the Department of Human Services, which they feel is erroneous, and if it follows Mr. Byers' interpretation of the statute, which they feel is incorrect, they would ask that the Board consider that two of Dr. May's peers evaluated the case and determined that Dr. May had not failed in his treatment of the patient and didn't depart from any acceptable medical standards. Dr. May came to Ohio 37 years ago and obtained a license. Dr. May is now retired, but feels his license is important. He continues to read literature and attend seminars. Peer Review had asked him to attend a seminar in 1990. He could not because of family commitments. Dr. May has since gone to Harvard to take that pharmacology course. Dr. May's license is important to him. His treatment of patients has never been questioned.

Mr. Kerns asked that the Board not let the Department of Human Services evaluate this case and tell the Board whether Dr. May fell below acceptable standards. He asked that the Board read the record. Two qualified psychiatrists testified that there was no breach.

Mr. Kerns added that Dr. May's problems began after he requested an audit of Medicare reimbursements. Dr. May was told that if he was going to ask for that, he would also be audited. In light of the medical testimony in this case, Dr. May wonders whether the Department of Human Services' evaluation is correct. Mr. Kerns asked that the Board reject the Hearing Officer's Proposed Order.

Dr. Gretter asked Ms. Lampkin whether she wished to respond.

Ms. Lampkin stated that it is the State's opinion that the Legislature, in enacting the statute that the Medical Board has alleged Dr. May violated, had not

contemplated that the Board retry these kinds of cases. The Hearing Examiner explained it very well when he stated that the expert testimony cannot prevail over the factual findings of the Medicare authorities and the clear legal import of the subsequent sanction. There is no question that Dr. May was suspended. There is no question that the Department of Human Services made specific findings that Dr. May was practicing below minimum standards.

Ms. Lampkin stated that regarding the testimony of the two experts, both testified that Dr. May's combination of the two tricyclics with the Prozac was not below minimal standards, but then went on to testify that neither of them used that combination nor knew anyone other than Dr. May who would prescribe in this way. Ms. Lampkin stated that it is the credibility of the expert witnesses that is at issue. The experts did admit to being aware of prescribing one tricyclic with Prozac, but not the combination of all three of them. Furthermore, Dr. May admitted that the prophylactic use of Cogentin was not a common prescribing practice in the Cleveland area in 1989, even though he had previously used it himself with different patients.

Ms. Lampkin urged the Board to adopt the Hearing Officer's Report and Recommendation and the proposed sanction.

MR. ALBERT MOVED TO APPROVE AND CONFIRM MR. BYERS' PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF RUPERT H. MAY, M.D. DR. HEIDT SECONDED THE MOTION.

Dr. Stephens stated that he wouldn't question the credibility of the expert witnesses. He added that everyone has the right to have an opinion as far as the use of drugs is concerned, and some opinions are different. However, he does feel that the Board cannot retry the facts in this case. The Board must go with the charges and acts for which Dr. May was found guilty.

Dr. Gretter asked if there were any questions concerning the proposed findings of fact, conclusions, and order in the above matter.

Dr. Stienecker stated that he agrees in part with Mr. Kerns. He stated that he is uncomfortable with having to rubber stamp a report from a P.R.O. only because it is related to Medicare. In the P.R.O. proceedings Dr. Kerns was denied the chance to present expert witnesses. The Board doesn't have a record of the P.R.O.'s deliberations following the hearing. The Board has the hearing format, but not what was said or what the vote was. The Board doesn't know that there was a consensus of all involved. Dr. Stienecker stated that he doesn't want to abrogate the Board's rights. He added that he cannot accept Mr. Byers' finding that the expert witness testimony can only be mitigating.

DR. AGRESTA MOVED THAT THE PROPOSED ORDER IN THE MATTER OF RUPERT H. MAY, M.D., BE

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AMENDED BY SUBSTITUTING THE FOLLOWING:

It is hereby ORDERED that, although sufficient legal basis exists to take action against the medical license of Rupert H. May, M.D., for violation of Section 4731.22(B)(25), Ohio Revised Code, no further action by the State Medical Board of Ohio is necessary in this matter in light of the sanction that has already been imposed by the United States Department of Health and Human Services.

This ORDER shall become effective immediately upon approval by the State Medical Board of Ohio.

DR. O'DAY SECONDED THE MOTION.

Dr. Agresta stated that, from the information he has received, the Board did have sufficient legal basis to initiate formal action in this case.

Dr. Heidt stated that, although Dr. May probably was in a good position to have taken the actions he took, they were out of the area of normal practice and he had intended to suggest a reprimand. Dr. Heidt stated that Dr. Agresta's suggestion, however, is appropriate.

Dr. Stephens stated that he would like to reemphasize the fact that the Board does have the legal right to take action against a physician based on action taken by the Department of Human Services. Dr. Stephens stated that he would support Dr. Agresta's amendment.

Dr. Hom stated that the process is doing what it is supposed to do. That is, charges were made, a hearing was held, and the Board makes the final decision.

A roll call vote was taken on Dr. Agresta's motion to amend:

ROLL CALL VOTE:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Dr. Stephens	- aye
	Mr. Jost	- abstain
	Dr. Kaplansky	- aye
	Dr. Heidt	- aye
	Dr. Hom	- aye
	Dr. Agresta	- aye

The motion carried.

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

MR. ALBERT MOVED TO APPROVE AND CONFIRM MR. BYERS' PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF RUPERT H. MAY, M.D. DR. HEIDT SECONDED THE MOTION. A roll call vote was taken:

ROLL CALL VOTE:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Dr. Stephens	- aye
	Mr. Jost	- abstain
	Dr. Kaplansky	- aye
	Dr. Heidt	- aye
	Dr. Hom	- aye
	Dr. Agresta	- aye

The motion carried.

STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

November 13, 1991

Rupert H. May, M.D.
1362 Guild Street
Port Charlotte, FL 33952

Dear Doctor May:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand or place you on probation for one or more of the following reasons:

(1) On or about April 3, 1991 you were excluded from participating in the Medicare program and any State health care program as defined in the Social Security Act for a period of three (3) years. This exclusion was adopted after a determination was made by the U.S. Department of Health and Human Services that you grossly and flagrantly violated the obligations imposed on you by the Social Security Act, to wit:

a. You failed to prescribe antidepressant therapy according to accepted standards;

b. You failed to monitor antidepressant drug levels to rule out drug toxicity; and

c. You failed to document the need for anticholinergic medication.

Your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "termination or suspension from medicare or medicaid programs by the department of health and human services or other responsible agency for any act or acts that would also constitute a violation of division (B)(2), (3), (6), (8), or (19) of this section," as that clause is used in Section 4731.22(B)(25), Ohio Revised Code, to wit: Section 4731.22(B)(2) and (6), Ohio Revised Code.

Mailed 11/15/91

November 13, 1991

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand or place you on probation.

Copies of the applicable sections are enclosed for your information.

Very truly yours,

Henry G. Cramblett, M.D.
Secretary

HGC:jmb
Enclosures:

CERTIFIED MAIL #P 055 328 958
RETURN RECEIPT REQUESTED