STATE OF TENNESSEE
DEPARTMENT OF HEALTH

IN THE MATTER OF: ) BEFORE THE TENNESSEE BOARD
KEN D. BERRY, M.D. ) OF MEDICAL EXAMINERS
RESPONDENT ) CASE NO: 2014010961
CAMDEN, TENNESSEE )
TENNESSEE LICENSE NO. 35476 )

CONSENT ORDER

Comes now the Division of Health Related Boards of the Tennessee Department of Health (hereinafter the “Department”), by and through the Office of General Counsel, and Respondent, Ken D. Berry, M.D., (hereinafter “Respondent”), who would respectfully move the Tennessee Board of Medical Examiners (hereinafter the “Board”) for approval of this Consent Order affecting Respondent’s medical license in the State of Tennessee.

The Board is responsible for the regulation and supervision of medical doctors licensed to practice in the State of Tennessee. See Tennessee Medical Practice Act, Tennessee Code Annotated Section (hereinafter “TENN. CODE ANN.”) § 63-6-101, et seq. It is the policy of the Board to require strict compliance with the laws of this State, and to apply the laws so as to preserve the quality of medical care provided in Tennessee. It is the duty and responsibility of the Board to enforce the Tennessee Medical Practice Act in such a manner as to promote and protect public health, safety, and welfare in every practicable way, including disciplining medical doctors who violate the provisions of TENN. CODE ANN. § 63-6-101, et seq. or the Rules and Regulations promulgated by the Board and recorded in the Official Compilation Rules and Regulations of the State of Tennessee (hereinafter “TENN. COMP. R. & REGS.”).
Respondent, Ken D. Berry, M.D., by his signature to this Consent Order, waives the right to a contested case hearing and any and all rights to judicial review in this matter. Respondent agrees that presentation to and consideration of this Consent Order by the Board for ratification and all matters divulged during that process shall not constitute unfair disclosure such that the Board or any of its members shall be prejudiced to the extent that requires their disqualification from hearing this matter should this Order not be ratified. Likewise, all matters, admissions, and statements disclosed or exchanged during the attempted ratification process shall not be used against Respondent in any subsequent proceeding unless independently entered into evidence or introduced as admissions.

Respondent expressly waives all further procedural steps and expressly waives all rights to seek judicial review of or to challenge or contest the validity of this Consent Order. Respondent understands that by signing this Consent Order, Respondent is allowing the Board to issue its order without further process. Respondent acknowledges that this is a formal disciplinary action and will be reported to the Health Integrity and Protection Data Bank and/ or a similar agency. In the event that the Board rejects this Consent Order for any reason, it will be of no force or effect for either party.

I. STIPULATIONS OF FACT

1. Respondent has been at all times pertinent hereto licensed by the Board as a medical doctor in the State of Tennessee, having been granted Tennessee medical license number 35476 by the Board on June 21, 2001, which has a current expiration date of December 31, 2016.

2. Respondent is the owner and operator of a clinic located in Camden, Tennessee.
3. From 2004 to the present, Respondent provided treatment to multiple patients.

4. The Department conducted an investigation that included the review of seventeen (17) of the patient records prepared and kept by Respondent.

5. The treatment Respondent provided included prescribing controlled substances and other medications that were not documented as medically necessary for the patients’ diagnosed condition.

6. Respondent’s charts do not contain documented medical decision making regarding how Respondent arrived at his diagnosis, with the majority of charts inspected by the Department showing normal physical exams.

7. Though the narcotic amounts prescribed by Respondent are relatively low, Respondent frequently prescribes his patients combinations of opioids and benzodiazepines, or opioids, benzodiazepines, and carisoprodol, all addictive substances, without sufficient monitoring for compliance. Since the review of Respondent's charts by the Department, he has instituted office policies requiring pain monitoring contracts with all patients prescribed medication for pain management longer than a three month period, and he has initiated a policy of random urine drug screening for patients chronically taking controlled substances.

8. Respondent's documentation does not indicate use of modalities alternative to oral medication, and Respondent rarely charted a treatment plan other than continuing the patients' present medication. Respondent avers that while he often discussed modalities alternative to oral medication with patients, he admits that these discussions were not always well documented in patients' charts.
9. Respondent prescribed controlled substances for his ex-wife and grandfather. Respondent avers that controlled substances prescribed to his grandfather were prescribed for palliative care at the end of his grandfather's life. Respondent's grandfather passed away as a result of bladder cancer in 2014.

II. GROUNDS FOR DISCIPLINE

The facts stipulated to in the Stipulations of Fact are sufficient to establish that grounds for discipline of Respondent's medical license exist. Specifically, Respondent has violated the following statutes or rules which are part of the Tennessee Medical Practice Act, (TENN. CODE ANN. § 63-6-101, et seq.) for which disciplinary action before and by the Board is authorized:

10. The facts stipulated in paragraphs 5 through 9, supra, constitute a violation of TENN. CODE ANN. § 63-6-214(b)(1):

   Unprofessional, dishonorable or unethical conduct.

11. The facts stipulated in paragraphs 5 through 8, supra, constitute a violation of TENN. COMP. R. & REG. RULE 0880-2-14 (6)(e); which authorizes disciplinary action against a Respondent who prescribes, orders, administers or dispenses dangerous drugs or controlled substances without observing Board guidelines.

12. The facts stipulated in paragraphs 5 through 8, supra, constitute a violation of TENN. COMP. R. & REG. RULE 0880-2-14 (7)(a):

   Except as provided in subparagraph (b), it shall be a prima facie violation of T.C.A. § 63-6-214 (b) (1), (4), and (12) for a physician to prescribe or dispense any drug to any individual, whether in person or by electronic means or over the Internet or over telephone lines, unless the physician, or his/her licensed supervisee pursuant to appropriate protocols or medical orders, has first done and appropriately documented, for the person to whom a prescription is to be issued or drugs dispensed, all of the following:

   1. Performed an appropriate history and physical examination; and
2. Made a diagnosis based upon the examinations and all diagnostic and laboratory tests consistent with good medical care; and
3. Formulated a therapeutic plan, and discussed it, along with the basis for it and the risks and benefits of various treatments options, a part of which might be the prescription or dispensed drug, with the patient; and
4. Insured availability of the physician or coverage for the patient for appropriate follow-up care.

13. The facts stipulated in paragraph 9, supra, constitute a violation of TENN. COMP. R. & REG. RULE 0880-02-.14(8):

   Code of Ethics – The Board adopts, as if fully set out herein and to the extent that it does not conflict with state law, rules or Board Position Statements, as its code of medical ethics the “Code of Medical Ethics” published by the A.M.A. Council on Ethical and Judicial Affairs as it may, from time to time, be amended.

14. The facts stipulated in paragraph 9, supra, constitute a violation of the Principles of Medical Ethics 8.19, Self-Treatment or Treatment of Immediate Family Members, of the Code of Medical Ethics of the American Medical Association.

II. POLICY STATEMENT

The Tennessee Board of Medical Examiners takes this action in order to protect the health, safety, and welfare of the citizens of the State of Tennessee.

IV. ORDER

NOW THEREFORE, Respondent, for the purpose of avoiding further administrative action with respect to this cause, agrees to the following:

15. The Tennessee medical license of Ken D. Berry, M.D., license number 35476, is hereby placed on PROBATION for a period of at least three (3) years.

16. Respondent acknowledges that probation is an encumbrance on his license.
17. Respondent shall obtain practice monitoring through Affiliated Monitors or another practice monitoring program preapproved by the Board’s Medical Director within thirty (30) days of the entry of this Order. The monitoring agreement shall require the following:

i. The monitoring shall continue for a period of at least three (3) years.

ii. Respondent shall receive training in appropriate prescribing of controlled medication and medical record keeping from the practice monitoring program, if recommended by the practice monitoring program. Any such instruction shall be in addition to any continuing medical education required to maintain licensure.

iii. Respondent shall not have less than ten (10) of his patients' records for patients seen within the prior ninety (90) days receiving controlled substances reviewed by the practice monitor every ninety (90) days. The practice monitor shall randomly determine which records to review and may at his or her discretion review more than ten (10) of the Respondent’s controlled substance records. If Respondent has not prescribed any controlled substances during a prior ninety (90) day period, Respondent shall certify such to the practice monitor, and submit to the practice monitor a printout of the controlled substance monitoring database for at least the prior ninety (90) day period.

iv. Respondent shall comply with all recommendations of the practice monitor program.
v. Respondent shall cause the practice monitor to issue a report to the Board’s Medical Director every three months beginning three months after the entry of this Order detailing the findings of the practice monitor in regards to the Respondent's:

1. Compliance with practice monitor’s recommendations,

2. Completion of any educational program prescribed by the practice monitor,

3. Respondent’s prescribing practices,

4. Respondent’s medical record keeping, and

5. Respondent’s treatment of chronic or intractable pain.

18. Respondent is currently enrolled in the November 10-11, 2016, medical course entitled “Intensive Course in Medical Documentation” offered at The Case Western Reserve University Continuing Medical Education Program at The Case Western Reserve University School of Medicine located in Cleveland, Ohio. Respondent shall complete this course, and within thirty (30) days after completion of such course, Respondent shall mail or deliver proof of compliance with this course requirement to: Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, Nashville, Tennessee 37243. Any Continuing Medical Education (hereinafter “CME”) course hours earned from attendance and completion of the course required by this paragraph shall be in addition to the CME hours required to maintain licensure.

19. Respondent is currently enrolled in the September 15-16, 2016, course entitled, “Medical Ethics, Boundaries and Professionalism,” which is offered at the School of Medicine, Case Western Reserve University in Cleveland, Ohio. Respondent shall complete this
course, and within thirty (30) days after completion of such course, Respondent shall mail or deliver proof of compliance with this course requirement to: Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, Nashville, Tennessee 37243. Any CME course hours earned from attendance and completion of the course required by this paragraph shall be in addition to the CME hours required to maintain licensure.

20. Respondent is currently enrolled in the June 15-17, 2016, medical course entitled, "Prescribing Controlled Drugs: Critical Issues and Common Pitfalls" offered by Vanderbilt University Medical Center. Respondent shall complete this course, and within thirty (30) days after completion of such course, Respondent shall mail or deliver proof of compliance with this course requirement to: Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, Nashville, Tennessee 37243. Any CME course hours earned from attendance and completion of the course required by this paragraph shall be in addition to the CME hours required to maintain licensure.

21. Respondent is assessed and must pay, pursuant to TENN. CODE ANN. §63-6-214 and Rule 0880-02-.12(1)(h) of the Official Compilation Rules and Regulations of the State of Tennessee, five (5) Type “A” Civil Penalties, representative of each factual paragraph recording violations of the practice act, in the amount of one thousand dollars ($1,000.00) each, for a total Civil Penalty of Five Thousand Dollars ($5,000.00).

22. Respondent must pay, pursuant to TENN. CODE ANN. § 63-6-214(k) and Rule 0880-02-.12(1)(j) of the Official Compilation Rules and Regulations of the State of Tennessee, the actual and reasonable costs of prosecuting this case to the extent allowed by law,
including all costs assessed against the Board by the Department’s Bureau of Investigations in connection with the prosecution of this matter. These costs will be established by an Assessment of Costs prepared and filed by counsel for the Department. The maximum amount for the assessment of costs shall be three thousand dollars ($3,000.00).

23. At the conclusion of the probationary period, and completion of all requirements herein, Respondent becomes eligible to petition the Tennessee Board of Medical Examiners for an “Order of Compliance” lifting the restrictions imposed by this Consent Order, pursuant to Rule 0880-02-.12(2) of the Official Compilation Rules and Regulations of the State of Tennessee. As part of his petition for an “Order of Compliance,” Respondent shall appear personally before the Tennessee Board of Medical Examiners. Upon demonstrating to the Board compliance with all the terms of this order, Respondent’s probation may be lifted.

24. Respondent understands that this is a formal disciplinary action and will be reported to the National Practitioner Data Bank (N.P.D.B.) and/or similar agency.

IV. NOTICE

25. Any and all civil penalties and costs shall be paid in full within twelve (12) months from the issuance of the Assessment of Costs, with Respondent to make quarterly payments. Payment shall be made by certified check, cashier’s check, or money order, payable to the State of Tennessee, Department of Health. Any and all payments shall be forwarded to the Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, Nashville, Tennessee 37243. A
notation shall be placed on said money order or such check that it is payable for the Civil
Penalty and Costs of Ken D. Berry, Case No. 2014010961.

This CONSENT ORDER was approved by a majority of a quorum of the Tennessee
Board of Medical Examiners at a public meeting of the Board and signed this 18th day
of May, 2016.

Chairperson
Tennessee Board of Medical Examiners

APPROVED FOR ENTRY:

Ken D. Berry, M.D.
Respondent
Tennessee License Number 35476
30 East Main
Camden, TN 38320

Alex Scarborough Fisher (B.P.R. # 031391)
Attorney for Respondent
Thompson Burton PLLC
One Franklin Park
6100 Tower Circle, Suite 200
Franklin, Tennessee 37067

5-9-16
DATE
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon Respondent, Ken D. Berry, via his counsel, Alex S. Fisher, at Thompson Burton, 6100 Tower Circle, Suite 200, Franklin, TN 37067, by delivering same in the United States Mail, Certified Number 7016 0910 0000 2431 5010, return receipt requested, and United States First Class Postage Pre-Paid Mail, with sufficient postage thereon to reach its destination.

This 19th day of Mary, 2016.

Mary Katherine Bratton
Deputy General Counsel
Tennessee Department of Health