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DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

[Docket No. 11-66]
JAMES L. HOOPER, M.D.
DECISION AND ORDER

On August 9, 2011, Chief Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached recommended decision. On August 25, 2011, the Respondent filed Exceptions to the ALJ's decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, and Respondent's Exceptions, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended order.[1]

In his Exceptions, Respondent contends "that the proper decision is suspension" of his DEA Registration to be effective co-extensively with the one-year suspension of his state license to practice medicine. Exceptions at 1. He argues that because his state license has been suspended for a definite period after which it will be "automatic[ally] reinstate[d]," his case is unlike those cases relied on by the Government and ALJ because they involved state suspensions which were of an indefinite or indeterminate duration. Id.

According to Respondent, the Agency's decision in Anne Lazar Thorn, M.D., 62 FR 12847 (1997), stands for the proposition that the Agency's consistent practice of revoking registrations based on a loss of state authority "rests on the indefinite nature of a State suspension." Exceptions at 1-2. Respondent quotes the following passage from Thorn:

> [T]he Acting Deputy Administrator recognizes that he has discretionary authority to either revoke or suspend a DEA registration. However, given the indefinite

[1] All citations to the ALJ's recommended decision are to the slip opinion as issued by the ALJ.

> nature of the suspension of Respondent's state license to practice medicine, the Acting Deputy Administrator agrees with [the ALJ] that revocation is appropriate in this case.

Id. at 2 (quoting 62 FR at 12848).

Notwithstanding the implication of the above passage, no decision of this Agency has held that a suspension (rather than a revocation) is warranted where a State has imposed a suspension of a fixed or certain duration. To the contrary, in the case of practitioners, DEA has long and consistently interpreted the CSA as mandating the possession of authority under state law to handle controlled substance as a fundamental condition for obtaining and maintaining a registration. See, e.g., Leonard F. Faymore, 48 FR 32886, 32887 (1983) (collecting cases). As the Thorn decision further explained:

> DEA has consistently interpreted the Controlled Substances Act to preclude a practitioner from holding a DEA registration if the practitioner is without authority to handle controlled substances in the state in which he/she practices. This prerequisite has been consistently upheld.
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> * * *
>
> The Acting Deputy Administrator finds that the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather it is whether the Respondent is currently authorized to handle controlled substances in the state. In the instant case, it is undisputed that Respondent is not currently authorized to handle controlled substances in the [state in which she practices medicine]. Therefore, . . . Respondent is not currently entitled to a DEA registration.

62 FR at 128438 (citing and quoting 21 U.S.C. §§ 823(f) and 802(21) and collecting cases). Accordingly, in Thorn, the Agency rejected the Respondent's contention that her registration should be suspended rather than revoked.

Respondent nonetheless argues that "[r]evocation is not mandated for a [state license] suspension for a time certain," and that "[i]n such circumstances, suspension of the [DEA registration] is the more appropriate remedy." Exceptions at 3. Respondent returns to the Thorn

language that "'[t]he Acting Deputy Administrator recognizes that he has the discretionary authority to either revoke or suspend a DEA registration,'" and argues that "[t]here are reason[s] the statutory framework (21 U.S.C. § 824(a)) provides for both suspension and revocation. The [ALJ's] Recommended Decision reads the suspension option out of the statute." Id.

It is acknowledged that the opening sentence of section 824(a) provides that a registration "may be suspended or revoked by the Attorney General" upon the Attorney General's finding that one of the five grounds set forth exist. 21 U.S.C. § 824(a). However, Respondent does not elaborate on the "reason[s]" Congress granted the Agency authority to suspend or revoke and how they apply in the context of a proceeding brought under section 824(a)(3). In any event, this general grant of authority in imposing a sanction must be reconciled with the CSA's specific provisions which mandate that a practitioner hold authority under state law in order to obtain and maintain a DEA registration. See Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application."); see also Bloate v. United States, 130 S.Ct. 1345, 1354 (2010) (quoting D. Ginsberg & Sons, Inc., v. Popkin, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.")).

In enacting the CSA, Congress defined the term "practitioner" to "mean[] a physician …licensed, registered, or otherwise permitted, by…the jurisdiction in which he practices…to distribute, dispense, [or] administer…a controlled substance in the course of professional practice." 21 U.S.C. § 802(21). Consistent with this definition, Congress, in setting forth the requirements for obtaining a practitioner's registration, directed that "[t]he Attorney General shall register practitioners . . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense…controlled substances under the laws of the State in which he

practices."' Id. § 823(f) (emphasis added). As these provisions make plain, a practitioner can neither obtain nor maintain a DEA registration unless the practitioner currently has authority under state law to handle controlled substances. Moreover, Respondent ignores that even where a practitioner's state license has been suspended for a period of certain duration, the practitioner no longer meets the statutory definition of a practitioner. Accordingly, notwithstanding the language of the grant of authority in section 824(a), I conclude that the revocation of Respondent's registration is warranted.[2]

Finally, Respondent argues that while the Consent Order constitutes resolution of the Board's charges, he did "not admit any of the facts found or any wrongdoing." Exceptions, at 4 n.1. As stated above, Respondent's argument is not well taken because the State's action in suspending his medical license is by itself, and independent ground to revoke his registration. 21 U.S.C. § 824(a)(3).

Accordingly, I will adopt the ALJ's recommended decision and will order that Respondent's DEA registration be revoked and that any pending applications for renewal be denied.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. §§ 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration BH4289028, issued to James L. Hooper, M.D., be, and it hereby is, revoked. I further order that any pending application of James L. Hooper, M.D., to renew or modify his registration, be, and it hereby is, denied. This

[2] This case presents no occasion to consider whether a state suspension of a practitioner's controlled substance authority is of such a short duration that revocation of his registration would be deemed arbitrary and capricious.

Order is effective immediately.[3]

Dated: November 8, 2011

Michele M. Leonhart
Administrator

[3] Based on the extensive findings set forth in the State Consent Order establishing that Respondent diverted controlled substances, and the State Board's ultimate conclusion that he "prescribed . . . drugs for illegitimate medical purposes in violation of state law," GX A, at 23; I conclude that the public interest requires that this Order be made effective immediately. 21 CFR 1316.67

Jonathan P. Novak, Esq., for the Government

Allen H. Sachsel, Esq., for the Respondent

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION AND RECOMMENDED DECISION

John J. Mulrooney, II, Chief Administrative Law Judge. The Deputy Assistant Administrator, Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC), dated June 27, 2011, proposing to revoke the DEA Certificate of Registration (COR), Number BH4289028, of James L. Hooper, M.D. (Respondent), pursuant to 21 U.S.C. § 824(a)(3) and (4) (2006), because, according to the Government, the Respondent's continued registration is inconsistent with the public interest as that term is used in 21 U.S.C. § 823(f) (2006 & Supp. III 2010). Among several alleged factual predicates presented in support of revocation, the Government's OSC alleges that the Respondent is without authority to handle controlled substances in Maryland, the registered location of his COR. OSC at 1.

On July 22, 2011, the Respondent, through counsel, filed a timely request for hearing (Hearing Request). Therein, the Respondent conceded that he is presently under a one-year suspension from the practice of medicine by the Maryland Board of Physicians (Maryland Board) and acknowledged that he has turned in his DEA COR to that body.

On July 25, 2011, I issued an order which directed, inter alia, that the Government provide evidence to support its allegation that the Respondent lacks authority to handle controlled substances in the state in which he is registered with DEA, and set out a schedule for the parties to brief the issues.

On July 26, 2011, the Government timely filed a document styled "Motion for Summary Disposition" (Motion for Summary Disposition), wherein it avers that the Respondent was licensed by the state of Maryland to practice medicine, but through a Consent Order between the

Respondent and the Maryland Board of Physicians effective June 7, 2011 (attached to the Motion for Summary Disposition), his state medical license was, inter alia, suspended for a period of one year. See Gov't Mot. for Summ. Dispo. at 1, Ex. A at 23. The Government has simultaneously requested a stay of proceedings pending a ruling on its Motion for Summary Disposition. Id. at 2.[1]

On its face, the Consent Order from the Maryland Board suspends the Respondent's license with the voluntary assent of the Respondent, id., Ex. A at 27, after concluding that, inter alia, "Respondent is guilty of unprofessional conduct in the practice of medicine, in violation of [Md. Code Ann., Health Occ.] § 14-404(a)(3)(ii); is professionally . . . incompetent, in violation of [Md. Code Ann., Health Occ.] § 14-404(a)(4); and [had] prescribed . . . drugs for . . . illegitimate medical purposes in violation of [Md. Code Ann., Health Occ.] § 14-404(a)(27)," id., Ex. A at 23. Persistently scrutinized among the Board's findings is the Respondent's prescribing practices related to controlled substances.

In its motion, the Government correctly contends that state authority is a necessary condition precedent for the acquisition or maintenance of a DEA registration, and the suspension of the Respondent's state practitioner's license precludes the continued maintenance of his DEA COR, thus requiring revocation. Id. at 1-2; see id., Ex. A at 23.

The Respondent's timely-filed response in opposition asserts, in essence, that the CSA does not strictly require COR revocation pursuant to 21 U.S.C. § 824(a)(3) where a registrant's state license has been suspended and the registrant has lost state authorization to dispense controlled substances. Resp't Resp. at 3. The Respondent argues that sanctions provided for under the CSA that are less severe than revocation are appropriate, such as suspension of his

[1] At present, there are neither directives pending compliance, nor are there outstanding event dates scheduled by this tribunal, aside from the briefing schedule previously issued in this matter.

COR.[2] Id. As a mitigating basis for a sanction recommendation less than revocation, the Respondent points out that the cases cited by the Government in its summary disposition motion involve DEA COR revocations based on a state disciplinary action other than a temporary, definite-period suspension of a state medical license. Id. For that reason, the Respondent argues that a summary disposition in these DEA proceedings, based on the suspension of his state licensure, would be inconsistent "with the rationale of prior DEA decisions." Id. at 4.

The Respondent also argues that the structure of the Consent Order somehow affects the Agency's ability to issue or maintain a COR in the absence of state authority. Specifically, the Respondent posits that under his circumstances, where "a self-executing [o]rder . . . restores [his] medical license . . . automatically, and at a time certain," that the appropriate remedy is "suspension coextensive with the loss of State privileges . . . and [that] is consistent with the rationale of prior DEA decisions." Resp't Resp. at 4-5 (emphasis removed). However, the plain language employed by the Agency in the principal case cited by the Respondent in support of his position, Anne Lazar Thorn, M.D., 62 Fed. Reg. 12847 (1997), undermines any action short of summary revocation. In Thorn, the Agency affirmed the Administrative Law Judge's summary disposition recommended decision and specifically rejected the view that a COR could coexist in the face of an absence of state authority to handle controlled substances. In that case, the Agency held that:

> the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances in the state. In the instant case, it is undisputed that Respondent is not currently authorized to handle controlled substances in the [state where his COR has its listed address]. Therefore, . . . Respondent is not currently entitled to a DEA [COR].

Id. at 12848 (emphasis supplied). The controlling question posed on the acknowledged facts

[2] See 21 U.S.C. § 824(a) (2006) ("A registration . . . may be suspended or revoked . . . .") (emphasis supplied).

here must, like the Respondent's petition for a hearing, be answered in the negative. In this regard, it is also imperative to acknowledge that it is DEA's responsibility to determine suitability to maintain a COR, not the Maryland Board. See Edmund Chein, M.D., 72 Fed. Reg. 6580, 6590 (2007) (ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government), aff'd, Chein v. DEA, 533 F.3d 828 (D.C. Cir. 2008), cert. denied, __ U.S. __, 129 S. Ct. 1033, 1033 (2009); Mortimer B. Levin, D.O., 55 Fed. Reg. 8209, 8210 (1990) (even reinstatement of state medical license does not affect DEA's independent responsibility to determine whether a registration is in the public interest). The considerations employed by, and the public responsibilities of, a state medical board in determining whether a practitioner may continue to practice within its borders are not coextensive with those attendant upon the determination that must be made by DEA relative to continuing a registrant's authority to handle controlled substances. Put another way, adopting the Respondent's argument would imbue the drafters of state medical board orders to circumscribe the options of the DEA relative to its registrants. Such a result finds no support in the statutes and regulations governing DEA or the Maryland Board and is contrary to logic.

In Calvin Ramsey, M.D., 76 Fed. Reg. 20034, 20036 (2011), the Agency stated its position regarding the current factual scenario with such unambiguous precision that little room is realistically left for debate on the matter:

> DEA has repeatedly held that the CSA requires the revocation of a registration issued to a practitioner whose state license has been suspended or revoked. David W. Wang, 72 [Fed. Reg.] 54297, 54298 (2007); Sheran Arden Yeates, 71 [Fed. Reg.] 39130, 39131 (2006); Dominck A. Ricci, 58 [Fed. Reg.] 51104, 51105 (1993); Bobby Watts, 53 [Fed. Reg.] 11919, 11920 (1988). This is so even where a state board has suspended (as opposed to revoked) a practitioner's authority with the possibility that the authority may be restored at some point in the future. [Roger A. Rodriguez, 70 Fed. Reg. 33206, 33207 (2005)].

The Controlled Substances Act (CSA) requires that a practitioner must be currently authorized to handle controlled substances in "the jurisdiction in which he practices" in order to maintain a DEA registration. See 21 U.S.C. § 802(21) ("[t]he term 'practitioner' means a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice"); see also id. § 823(f) ("The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices."). Therefore, because "possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration," this Agency has consistently held that "the CSA requires the revocation of a registration issued to a practitioner who lacks [such authority]." Alfred E. Boyce, M.D., 76 Fed. Reg. 17672, 17673 (2011) (emphasis supplied) (quoting Scott Sandarg, D.M.D., 74 Fed. Reg. 17528, 174529 (2009); John B. Freitas, D.O., 74 Fed. Reg. 17524, 17525 (2009)); Roy Chi Lung, 74 Fed. Reg. 20346, 20347 (2009); Roger A. Rodriguez, M.D., 70 Fed. Reg. 33206, 33207 (2005); Stephen J. Graham, M.D., 69 Fed. Reg. 11661 (2004); Dominick A. Ricci, M.D., 58 Fed. Reg. 51104 (1993); Abraham A. Chaplan, M.D., 57 Fed. Reg. 55280 (1992); Bobby Watts, M.D., 53 Fed. Reg. 11919 (1988).

Denial of an application or revocation of a registration via a summary disposition procedure is also warranted if the period of a suspension is temporary, or if there exists the potential that Respondent's state controlled substances privileges will be reinstated, because "revocation is also appropriate when a state license has been suspended, but with the possibility of future reinstatement," Rodriguez, 70 Fed. Reg. at 33207 (citations omitted), and even where

there is a judicial challenge to the state medical board action actively pending in the state courts. Michael G. Dolin, M.D., 65 Fed. Reg. 5661, 5662 (2000).

In order to revoke a registrant's DEA registration, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 C.F.R. § 1301.44(e) (2011). Once DEA has made its prima facie case for revocation of the registrant's DEA COR, the burden of production then shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. Morall v. DEA, 412 F.3d 165, 174 (D.C. Cir. 2005); Humphreys v. DEA, 96 F.3d 658, 661 (3d Cir. 1996); Shatz v. U.S. Dept. of Justice, 873 F.2d 1089, 1091 (8th Cir. 1989); Thomas E. Johnston, 45 Fed. Reg. 72311 (1980).

Regarding the Government's request for summary disposition of the present case, it is well-settled that where no genuine question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, see Jesus R. Juarez, M.D., 62 Fed. Reg. 14945 (1997); Dominick A. Ricci, M.D., 58 Fed. Reg. 51104 (1993), under the rationale that Congress does not intend for administrative agencies to perform meaningless tasks. See Philip E. Kirk, M.D., 48 Fed. Reg. 32887 (1983), aff'd sub nom. Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984); see also Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 605 (1st Cir. 1994); NLRB v. Int'l Assoc. of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, 549 F.2d 634 (9th Cir. 1977); United States v. Consol. Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). To paraphrase the Agency's view as stated in Ramsey,

> [t]here being no dispute that the Respondent lacks the requisite authority, there [is] no need for an evidentiary hearing, as summary judgment has been used for more than 100 years to resolve legal "actions in which there is no genuine issue as to any material fact" and has never been deemed to violate Due Process. See Fed.

R. Civ. P. 56 (Advisory Committee Notes 1937 Adoption). Cf. Codd v. Velger, 429 U.S. 624, 627 (1977).

76 Fed. Reg. at 20036.

The record evidence in the instant case clearly demonstrates that no genuine dispute exists over the established material fact that Respondent currently lacks state authority to handle controlled substances in Maryland, his state of registration with the DEA, since his state medical practitioner's license was suspended (with his own consent) on June 7, 2011. Notwithstanding the Respondent's arguments to the contrary, the dispositive consideration lies in his absence of state authority to handle controlled substances, which inexorably dictates that he is not entitled to maintain his DEA registration. Simply put, there is no contested factual matter adducible at a hearing that can provide the Agency with authority to continue (or a fortiori for me to recommend) his entitlement to a COR under the circumstances, and further delay in ruling on the Government's Motion for Summary Disposition is not warranted.

Accordingly, the Government's Motion for Summary Disposition is hereby **GRANTED**, its motion for a stay of proceedings is **DENIED** as moot, and in view of the presently uncontroverted fact that the Respondent lacks state authority to handle controlled substances, it is herein recommended that the Respondent's DEA registration be **REVOKED** forthwith and any pending applications for renewal be denied.

Dated: August 9, 2011

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JOHN J. MULROONEY, II
Chief Administrative Law Judge

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