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UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

Docket No. 11-49
BARRY M. SCHULTZ, M.D.
DECISION AND ORDER

On June 17, 2011, Administrative Law Judge (ALJ) Gail A. Randall issued the attached recommended decision. Neither party filed exceptions to the ALJ's decision.

Having reviewed the record in its entirety, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended order.

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 BS1314210, issued to Barry M. Schultz, M.D., be, and it hereby is, revoked. I further order that any pending application of Barry M. Shultz, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[1]

Dated:
December 8, 2011

Michele M. Leonhart
Administrator

[1] For the same reasons that led me to order the Immediate Suspension of Respondent's registration, I conclude that the public interest requires that this order be effective immediately. See 21 CFR 1316.67.

Dedra S. Curteman, Esq., for the Government
Michael R. Lowe, Esq., for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. FACTS

Gail A. Randall, Administrative Law Judge. On April 19, 2011, the Administrator, Drug Enforcement Administration ("DEA" or "Government"), issued an Order to Show Cause and an Immediate Suspension of Registration ("Order to Show Cause" or "Order"), immediately suspending the DEA Certificate of Registration, Number BS1314210, of Barry M. Schultz, M.D., ("Respondent"), as a practitioner, pursuant to 21 U.S.C. § 824(d) (2006), because the Respondent's continued registration constitutes an imminent danger to the public health and safety. The Order also proposed to revoke the Respondent's registration, pursuant to 21 U.S.C. § 824(a)(4), and deny any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. § 823(f), because the Respondent's continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. § 823(f). Specifically, the Order alleged that between May of 2009 and August of 2010, the Respondent issued prescriptions for an inordinate amount of controlled substances to ten patients for illegitimate medical purposes. [Order at 1]. The Government set out the various circumstances of those prescriptions including that during one month, the Respondent prescribed "over 5,000 thirty milligram oxycodone tablets to R.L.," and "on one occasion [the Respondent] prescribed 1,980 thirty milligram oxycodone tablets per day that equates to an individual ingesting 66 thirty milligram oxycodone per day." [Id. at 2].

The Order also alleged that from March 2009 through December 2009, the Respondent ordered approximately 281,000 dosage units of oxycodone to be delivered to his pain management clinic in Del Ray Beach, Florida. [Id. at 3]. The Order similarly alleged that from January 2010 through August 2010, the Respondent ordered approximately 378,000 dosage units

of oxycodone. [Id. at 3].

Further, the Government alleged that on March 24, 2011, the Respondent was arrested and charged with trafficking in oxycodone and writing illegal prescriptions. [Id. at 3].

Last, the Order alleged that on April 14, 2011, the Florida Department of Health suspended the Respondent's authority to practice medicine in Florida. [Id. at 3].

On May 19, 2011, the Respondent, through counsel, timely filed a request for a hearing in the above-captioned matter.

On May 20, 2011, the Government filed its Motion for Summary Disposition and Motion to Stay Proceedings ("Government's Motion"). Therein, the Government requested that I grant its Motion for Summary Disposition, terminate the hearing in this matter, and forward the matter to the Deputy Administrator for a Final Order with a recommendation that the Respondent's registration be revoked and pending applications be denied. [Government's Motion ("Govt") at 2].

The Government argues that summary disposition is appropriate where the Respondent lacks state authority to handle controlled substances as the DEA is barred by statute from continuing the Respondent's registration. [Id. at 1 (citing 21 U.S.C. §§ 801(21), 823(f), 824(a)(3); Layfe Robert Anthony, M.D., 67 Fed. Reg. 20,346 (2009)]. Hence, the Government argues, the DEA has consistently revoked such registrations. [Govt. at 1 (citing Roy Chi Lung, M.D., 74 Fed. Reg. 20,346 (2009); Michael Chait, M.D., 73 Fed. Reg. 40,382 (2008); Shahid Musud Siddiqui, 61 Fed. Reg. 14,818 (1996); Michael D. Lawton, 59 Fed. Reg. 17,792 (1994); Abraham A. Chaplan, M.D., 57 Fed. Reg. 55,280 (1992)].

In addition, the Government argues that summary revocation is appropriate even where

the suspension of the state license is temporary and, thus, may be reinstated. [Govt. at 2 (citing Stuart A. Bergman, M.D., 70 Fed. Reg. 33,193 (2005); Roger A. Rodriguez, M.D., 70 Fed. Reg. 33,206 (2005)].

Consequently, the Government argues that summary revocation of the Respondent's registration in this case is appropriate as he currently lacks state authority to handle controlled substances. [Govt. at 1-2]. The Government attached to its motion an order for the emergency suspension of the Respondent's medical license ("ESO"), issued by the State of Florida Department of Health on April 13, 2011. [Govt. Exhibit ("Exh.") A].

On May 24, 2011, I ordered the Respondent to respond to the Government's Motion, if at all, on or before June 1, 2011. On June 6, 2011, the Respondent, through counsel, filed Respondent's Motion For Extension Of Time For Respondent To File His Response To The DEA's Motions For Summary Disposition And To Stay Proceedings ("Respondent's Motion"). On June 3, 2011, I granted the Respondent's Motion and ordered him to file his response on or before June 13, 2011.

On June 13, 2011, the Respondent filed Respondent's Response To DEA's Motion For Summary Disposition And To Stay Proceedings ("Respondent's Response"). Therein, the Respondent did not dispute that his Florida medical license is currently suspended. [Respondent's Response ("Response") at 1]. However, the Respondent requests that the proceedings be held in abeyance pending the outcome of his appeal of the ESO before the 1st District Tribunal of Appeals, State of Florida. [Id. at 1]. In the alternative, the Respondent requests to be heard as to why the Attorney General should order a "narrowly tailored suspension, allowing Respondent to continue practicing in the areas of geriatric, internal and primary care." [Id. at 5].

In support of his request, the Respondent first argues that summary disposition is inappropriate because the state's ESO, "which forms the basis of the Government's integrity behind requesting Summary Disposition, is currently under review and challenge" due to its non-compliance with statutory standards. [Id. at 2-3]. Specifically, the Respondent avers that that order is invalid because of its lack of particularized allegations and failure to be narrowly tailored. [Id. at 2].

Next, the Respondent contends that several questions of material fact as well as procedural issues remain, and that summary disposition is inappropriate absent their resolution. [Id. at 3]. Some of those factual and procedural issues include: whether the immediate suspension of the Respondent's registration was based on a valid inspection and investigation; whether the continued registration of the Respondent constitutes an imminent danger to the public health and safety; and whether other grounds exist for the United States Attorney General to limit the suspension of the Respondent's registration. [Id. at 3-4]. In furtherance of this argument, the Respondent states that he "calls into question the validity of the DEA's inspection and the manner in which the investigation was carried out." [Id. at 4].

Further, the Respondent argues that the DEA's reliance on Layfe Robert Anthony, M.D., 67 Fed. Reg. 35,582 (DEA 2002), is inappropriate on the basis that that case "involved a suspension resulting from a closed door hearing at which Dr. Anthony argued he was unable to question witnesses or present evidence." [Id.]. Here, the Respondent distinguishes, his appeal of the ESO is pending in state court on grounds that it fails to comply with state law. [Id.]

Last, the Respondent highlights the Attorney General's authority to issue a limited suspension or revocation of the Respondent's registration, and asks that he be afforded the opportunity to plead certain facts that would merit such a finding. Specifically, the Respondent

seeks to inform this tribunal that the ESO is based on roughly 1% of the Respondent's medical practice, 6-8 patients total, and that a full suspension of his license "is not so narrowly tailored as to adhere to Florida Law and to protect his due process rights." [Id. at 4-5]. The Respondent concludes that granting him a hearing before this Court will afford him due process "by allowing him to petition this Tribunal for either an abeyance of the Administration's proceedings or the recommendation to the Attorney General that a narrowly tailored suspension be entered allowing Respondent to practice medicine in the areas of geriatric, internal and primary care." [Id. at 5].

For the reasons set forth below, I will grant the Government's Motion and recommend that the Deputy Administrator revoke the Respondent's DEA Certificate of Registration and deny any currently pending applications to renew this registration.

II. DISCUSSION

The DEA will not maintain a controlled substances registration if the registrant is without state authority to handle controlled substances in the state in which the registrant practices. The Controlled Substances Act ("CSA") provides that obtaining a DEA registration is conditional on holding a state license to handle controlled substances. [See 21 U.S.C. § 802(21) (2006) (defining "practitioner" as "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. § 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"). See also § 824(a)(3) (stating "a registration may be suspended or revoked by the Attorney General upon a finding that the registrant has had his State license or registration suspended, revoked or denied by competent State authority")]. The DEA, therefore, has consistently held that the CSA requires the DEA to revoke the

registration of a practitioner who no longer possesses a state license to handle controlled substances. [See e.g. Joseph Baumstarck, 74 Fed. Reg. 17, 525, 17, 527 (DEA 2009) (stating the "ALJ applied the Agency's long-settled ruled [sic] that a practitioner may not maintain his DEA registration if he lacks authority to handle controlled substances under the laws of the state in which he practices"); Roy Chi Lung, M.D., 74 Fed. Reg. 20,346 (DEA 2009); Gabriel Sagun Orzame, M.D., 69 Fed. Reg. 58,959 (DEA 2004); Alton E. Ingram, Jr., M.D., 69 Fed. Reg. 22,562 (DEA 2004); Graham Travers Schuler, M.D., 65 Fed. Reg. 50,570 (DEA 2000); Dominick A. Ricci, M.D., 58 Fed. Reg. 51,104 (DEA 1993)].

Here, the Respondent does not dispute that he currently lacks state authority to handle controlled substances. Regardless, the Respondent requests that this tribunal grant him a hearing before the DEA to afford him his due process rights. However, I find that the Respondent will be afforded due process in the state proceedings. Furthermore, I find the Respondent's other arguments unpersuasive for granting his request.

A. Right to a Hearing and Due Process

First, while the Respondent correctly asserts that the due process clause applies, I find that the Respondent's hearing in state court satisfies that right.

The Respondent has a constitutionally protected property interest in his DEA registration. [See Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 196 (2001) (finding that a claimant has a right to due process where "the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation"). See also Wedgewood Village Pharmacy v. Ashcroft, 293 F. Supp. 2d 462, 469-70 (D. N.J. 2003) (finding that "[d]epriving [a company] of its rights to dispense and receive controlled drugs without notice and a hearing would violate . . . due

process")].

In the event of an immediate suspension of his DEA registration, the Respondent must, therefore, be provided with notice and a meaningful post-deprivation hearing. [See Edwards v. Dunn, No. 3:10-CV-0145-O-BH, 2010 WL 1644134, at *3 (N.D. Tex. March 31, 2010) (stating "[w]hen a temporary license suspension 'falls within the public health and safety class of due process cases ... the Due Process Clause requires no more than adequate post deprivation process' and finding that post-deprivation due process applies to the immediate suspension of respondent's DEA license") (quoting Camuglia v. City of Albuquerque, 375 F. Supp. 2d 1299, 1306 (D. N.M. 2005))].

Further, where the state has revoked or suspended a registrant's license to handle controlled substances, summary revocation of the registrant's DEA registration is only appropriate if the registrant will be afforded a state hearing on the merits of the state revocation or suspension. [See Roger A. Rodriguez, M.D., 70 Fed. Reg. 33,206, 33,207 (DEA 2005) (finding summary disposition appropriate where a hearing was scheduled before the state board regarding the temporary suspension of the Respondent's state license); Hichman K. Riba, D.D.S., 73 Fed. Reg. 75,773, 75,774 (DEA 2008) (finding summary disposition appropriate where the respondent was seeking judicial review of state proceedings); Bourne Pharmacy, Inc., 72 Fed. Reg. 18,273, 18,274 (DEA 2007) (summary disposition appropriate where the state revocation was "pending a final decision on the merits"); Odette Louise Campbell, M.D., Docket No. 09-62 (April 16, 2010) (unpublished) (finding summary disposition inappropriate where "granting the Government's request will deny her any opportunity to litigate the allegations upon which both the Federal and State suspension orders are based")].

Here, the Respondent will be afforded such a hearing. Pursuant to Florida law, the

Respondent is entitled to judicial review of the ESO, and the Respondent has pursued such review. [Fla. Stat. §§ 120.6, 120.68 (2007); Response at 1]. Therefore, I find that the Respondent will be afforded due process via the state hearing, and accordingly, under the facts of this case, has no constitutional right to a hearing before this agency.

B. Respondent's Other Arguments

I similarly find the Respondent's other arguments unpersuasive as to why this Court should not grant the Government's Motion in this proceeding.

First, while the Respondent may have raised genuine disputes of fact, those disputes are immaterial in light of the Respondent's lack of state registration. Indeed, the Controlled Substances Act and DEA case law make clear that as a pre-requisite to registration the Respondent must have state authority and that without such authority all other issues before this Court are moot. [21 U.S.C. § 802(21) (defining "practitioner" as "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") § 823(f) (requiring the agency to register "practitioners"); Baumstarck, 74 Fed. Reg. at 17, 527 (interpreting that language to require state licensure)]. Thus, where there is no dispute of material fact, the Respondent's lack of state authority to handle controlled substances, there is no need for a plenary, administrative hearing. [See Michael G. Dolin, M.D., 65 Fed. Reg. 5,661 (DEA 2000); Jesus R. Juarez, M.D., 62 Fed. Reg. 14,945 (DEA 1997); see also Philip E. Kirk, M.D., 48 Fed. Reg. 32,887 (DEA 1983), aff'd sub nom Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984)].

Furthermore, to the extent that the Respondent believes that the agency's immediate suspension of the Respondent's registration was inappropriate, either substantively or

procedurally, that matter is not reviewable by this tribunal, and must be pursued in federal District Court or directly to the Administrator. [See § 824(d) (stating that an immediate suspension order remains in effect "until either withdrawn by the Administrator or dissolved by a court of competent jurisdiction"); 21 C.F.R. § 1301.36 (2010) (identical language)].

In addition, to the extent that the state's ESO is invalid due to its non-compliance with Florida law, that issue is certainly not before this agency, and should be litigated in the Respondent's state hearing.

Next, while the Respondent may have factually distinguished between the present case and Layfe Robert Anthony, that distinction is without a difference, as that case is relied on by the Government not for its factual similarities to the present one but for the principle that without state authority the Respondent may not maintain a federal controlled substances registration. [Govt. Brief at 1-2]. As the agency has reiterated that principle in several of its other decisions, I am not persuaded that any distinction between this case and Anthony is a meaningful one. [See e.g. Riba, 73 Fed. Reg. at 75,774; Bourne Pharmacy, Inc., 72 Fed. Reg. at 18,274].

Last, the Respondent's argument that due process affords him the right to "petition this Tribunal for . . . the recommendation to the Attorney General that a narrowly tailored suspension be entered allowing Respondent to continue practicing in the areas of geriatric, internal and primary care" mischaracterizes the scope of this agency's regulatory authority.[1] The DEA is charged with regulating the handling of controlled substances and list I chemicals, and not the practice of medicine generally. [See Dispensing Controlled Substances for the Treatment of Pain, 76 Fed. Reg. 52,715, 52717 (2006) (stating "although DEA is the agency responsible for

[1] In addition, the Respondent overlooks that the Attorney General's authority under the Controlled Substances Act has been delegated to the Deputy Administrator of the DEA. [See 21 U.S.C. § 871(a); 28 C.F.R § 0.100].

administering the CSA, DEA does not act as the Federal equivalent of a State medical board overseeing the general practice of medicine. State laws and State licensing bodies (such as medical licensing boards) collectively regulate the practice of medicine")]. Therefore, nothing in the DEA's Order generally precludes the Respondent from continuing to practice in those areas. Rather, the DEA's Order affects the Respondent's ability to handle controlled substances.

III. CONCLUSION, ORDER, AND RECOMMENDATION

Consequently, there is no genuine dispute of material fact as there is no dispute that the Respondent currently lacks state authority to handle controlled substances and that he is entitled to a hearing on the merits of the state's ESO in state court. Therefore, summary disposition for the Government is appropriate.[2]

Accordingly, I hereby

GRANT the Government's Motion for Summary Disposition.

I also forward this case to the Deputy Administrator for final disposition. I recommend that the Respondent's DEA Certificate of Registration, Number BS1314210, be revoked and any pending renewal applications for this registration be denied.

Date: June 17, 2011

Gail A. Randall
Administrative Law Judge

[FR Doc. 2011-32393 Filed 12/16/2011 at 8:45 am; Publication Date: 12/19/2011]

[2] This opinion does not reach the other factual issues made in the Order to Show Cause. Rather, this opinion solely addresses the Respondent's loss of his ability to practice medicine in the State of Florida, and, thus, his ability to handle controlled substances.