BILLING CODE: 4410-09-P

DEPARTMENT OF JUSTICE

DRUG ENFORCEMENT ADMINISTRATION

[Docket No. 12-48]

LARRY ELBERT PERRY, M.D.
DECISION AND ORDER

On July 2, 2012, Chief Administrative Law Judge John J. Mulrooney, Jr., issued the attached Recommended Decision. Neither party filed exceptions to the Recommended Decision.

Having reviewed the entire record, I have decided to adopt the ALJ's findings of fact, conclusions of law, and recommended order. Accordingly, I will order that Respondent's DEA Certificate of Registration be revoked and that any pending application to renew or modify his registration 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 Number BP2742357, issued to Larry Elbert Perry, M.D., be, and it hereby is, revoked. I further order that any pending application of Larry Elbert Perry, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective [**INSERT DATE THIRTY DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Dated: October 26, 2012

Michele M. Leonhart
Administrator

Theresa Krause, Esq., for the Government
Frank J. Scanlon, Esq., for the Respondent

ORDER GRANTING THE GOVERNMENT'S UNOPPOSED MOTION FOR SUMMARY DISPOSITION, DENYING THE GOVERNMENT'S MOTION TO STAY AND RECOMMENDED DECISION

Chief Administrative Law Judge John J. Mulrooney II. On May 4, 2012, the Deputy Assistant Administrator of the Drug Enforcement Administration (DEA), issued an Order to Show Cause (OSC), proposing to revoke the DEA Certificate of Registration (COR), Number BP2742357, of Larry Elbert Perry, M.D. (Respondent), pursuant to 21 U.S.C. § 824(a)(3) and (4) (2006), and to deny any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. § 823(f). In the OSC, the Government alleges that revocation is necessary because the Respondent does "not have authority to practice medicine or handle controlled substances in the State of Kentucky," the State of the Respondent's registration. OSC, at 1-2.

On June 6, 2012, the DEA Office of Administrative Law Judges (OALJ) received from the Respondent, through counsel, a timely filed request for hearing (Hearing Request) that contained a request for continuance, and which conceded that the Respondent lacks authority to handle controlled substances in the State of Kentucky. The Respondent's Hearing Request contended that the loss of his Kentucky authority was based, in large part, on a disciplinary action by the Tennessee Board of Medicine, and that an extension should be granted for "a reasonable period of time to allow [the Respondent] to regain his licenses in Tennessee and Kentucky." The same day, by order of this tribunal, the Respondent's motion for a continuance was denied. Order Denying the Respondent's Request for Continuance and Directing the Filing of Government Evidence in Support of its Lack of State Authority Allegation and Briefing Schedule ("Briefing Schedule Order"), at 1. In addition to denying the request for a continuance,

the Briefing Schedule Order directed the Government "to provide evidence to support the allegation that the Respondent lacks state authority to handle controlled substances [on or before] June 15, 2012." Id. at 2. In this regard, the Schedule Order set a June 15, 2012, deadline for the Government to file a motion for summary disposition regarding the Respondent's alleged lack of state authority and a June 25, 2012, deadline for any response to such motion. Id. at 2.

On June 7, 2012, the Government filed a Motion for Stay of Proceedings and Summary Disposition ("MSD") , seeking: (1) summary disposition; (2) a recommendation that "the Respondent's DEA COR as a practitioner be revoked, based on the Respondent's lack of a state licensure;" (3) the transmission of the instant matter to the Administrator for Final Agency Action; and (4) "a stay of these administrative proceedings pending the results of this Government motion." MSD, at 5. A copy of a November 19, 2009, Emergency Order of Suspension (Suspension Order) issued by the Commonwealth of Kentucky Board of Medical Licensure, and a copy of a September 26, 2011, Agreed Order of Surrender, which memorialized the Respondent's surrender of his state license to practice medicine, were both attached to the MSD. The Respondent did not file a response to the Government's motion within the time allowed.[1] Accordingly, the motion will be deemed unopposed.

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). Thus, it is well-settled that, where no genuine question of fact is involved, or

[1] Indeed, a week has passed since the response due date with no word from the Respondent or his counsel.

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), Here, both parties agree that the Respondent is without authorization to practice medicine or handle controlled substances in Kentucky, the jurisdiction where the Respondent holds the DEA COR that is the subject of this litigation.

In order to revoke a registrant's DEA registration, the Government has the burden of proving that the requirements for revocation are satisfied. 21 C.F.R. § 1301.44(e). Once the Government has made its prima facie case for revocation of the registrant's DEA COR, the burden of production shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would be inappropriate. 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).

The Controlled Substances Act (CSA) requires that, in order to maintain a DEA registration, a practitioner must be authorized to handle controlled substances in "the jurisdiction in which he practices." 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]." Roy Chi Lung, 74 Fed. Reg. 20346, 20347 (2009); Scott Sandarg, D.M.D., 74 Fed. Reg. 17528, 174529 (2009); John B. Freitas, D.O., 74 Fed. Reg. 17524, 17525 (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); see also Harrell E. Robinson, 74 Fed. Reg. 61370, 61375 (2009).

As explained above, summary disposition of an administrative case is warranted where, as here, "there is no factual dispute of substance." See Veg-Mix, Inc., 832 F.2d 601, 607 (D.C. Cir. 1987) ("an agency may ordinarily dispense with a hearing when no genuine dispute exists").[2] At this juncture, no genuine dispute exists over the fact that the Respondent lacks state authority to handle controlled substances in the State of Kentucky. Because the Respondent lacks such state authority, both the plain language of applicable federal statutory provisions and Agency interpretive precedent dictate that the Respondent is not entitled to maintain his DEA registration. Simply put, there is no contested factual matter adducible at a hearing that would provide sufficient grounds to allow the Respondent to continue to hold his COR. I therefore conclude that further delay in ruling on the Government's motion for summary disposition is not warranted. See Gregory F. Saric, M.D., 76 Fed. Reg. 16821 (2011) (stay denied in the face of Respondent's petition based on pending state administrative action wherein he was seeking reinstatement of state privileges).

[2] Even assuming arguendo the possibility that the Respondent's state controlled substances privileges could be reinstated, summary disposition would still be warranted 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).

Accordingly, I hereby

GRANT the Government's Motion for Summary Disposition;

DENY the Government's Motion for Stay of Proceedings as moot; and further

RECOMMEND that the Respondent's DEA registration be **REVOKED** forthwith and any pending applications for renewal be **DENIED**.

Dated: July 2, 2012

/s/ JOHN J. MULROONEY, II
Chief Administrative Law Judge

[FR Doc. 2012-27522 Filed 11/09/2012 at 8:45 am; Publication Date: 11/13/2012]