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UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

Docket No. 13-24

TRENTON F. HORST, D.O.
DECISION AND ORDER

On March 25, 2014, Administrative Law Judge Gail A. Randall (ALJ) issued the attached Recommended Decision.[1] The Government filed Exceptions to the Recommended Decision.

Having reviewed the record in its entirety, I have decided to adopt the ALJ's findings of fact and conclusions of law.[2] However, for reasons explained below, I respectfully amend the ALJ's recommended sanction because it is contrary to precedent and, in my opinion, gives insufficient weight to the Agency's interest in deterring intentional diversion, both on the part of Respondent and the community of registrants. See David A. Ruben, 78 FR 38363, 38386 (2013). A discussion of the Government's Exceptions follows.

The Government's Exceptions

The Government raises two exceptions to the ALJ's recommended decision: First, it takes exception to the ALJ's finding that Respondent "'has sufficiently accepted responsibility for his actions and instituted remedial measures to ensure that the misconduct will not reoccur.'"

[1] All citations to the Recommended Decision (R.D.) are to the ALJ's slip opinion as originally issued.

[2] As ultimate factfinder, I am familiar with my obligations under the Administrative Procedure Act and the role of the ALJ's recommended decision. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951) ("The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. . . . The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.") (emphasis added). So too, the courts are quite familiar with the standard of review of an Agency decision. Accordingly, I decline to publish the ALJ's discussion of the substantial evidence test and the standard of review.

Exceptions, at 2 (quoting R.D. 36). Second, it argues that the ALJ's recommended sanction is inconsistent with agency precedent. Exceptions, at 5-6.

As for the first exception, the Government urges that I reject this finding, contending that Respondent "continues to[] minimize the nature of his misconduct." Id. at 4-5. As support for its contention, the Government cites Respondent's testimony regarding his treatment at a rehabilitation center which it maintains was inconsistent with his conduct during his stay. More specifically, the Government notes Respondent's testimony that:

> it was a little bit difficult to acclimate myself for the first few weeks, probably six weeks. It took me a while to kind of get into the flow of things. Thereafter, I'd like to think I became a model participant. I spent seven months there.

Tr. 210. The Government then notes that Respondent was subject to a "no female contract" during the initial four months of his treatment, and that he breached the contract when he had contact with another patient and engaged in sexual relations with her approximately two months into his stay. Exceptions, at 2. The Government implies that his testimony was disingenuous because the incident occurred two weeks later than Respondent claimed it did. Id. The Government does not, however, explain why it matters whether the incident occurred six weeks or two months into his stay.

The Government also maintains that Respondent engaged in a pattern of minimizing his misconduct, both during his time in treatment and in his testimony at the hearing. In support of this contention, it cites evidence showing that Respondent admitted his breach of the no-female contract to the treatment center staff only upon learning that he was going to be subject to a polygraph. As for his testimony, the Government argues that "Respondent did not divulge that he broke [the] contract . . . on direct examination." Id. at 3. It then argues that even on cross-examination, Respondent failed to truthfully answer its questions because he did not admit to

having sexual relations with the female patient until he was specifically asked if he had sex with female patients.[3] However, when the Government specifically asked the question, he did answer it truthfully.

Most significantly, to the extent the Government relies on this incident and Respondent's testimony regarding it to contend that he "has consistently minimized his misconduct," Exceptions, at 5; its argument is misplaced. As the Government acknowledges, the incident and his testimony "ha[ve] little or nothing to do with controlled substances." Id. at 2 (emphasis added). Nor does the Government cite to any case holding that an applicant's breach of the terms of a treatment contract, which does not involve a violation of the Controlled Substances Act or applicable state law (as would failing a drug test), constitutes conduct which may threaten public health or safety. Cf. Mark G. Medinnus, 78 FR 62683, 62684 (2013) (rejecting contention that violation of internal clinic operating policy, which did not otherwise violate CSA or state law, constituted conduct inconsistent with the public interest.).

Because Respondent's breach of his no-female contract does not constitute actionable misconduct under the public interest standard, his testimony regarding the incident is not relevant in assessing whether he has accepted responsibility for his misconduct. While this evidence is

[3] The Government initially asked Respondent: "How did you break that contract?" Tr. 263. Respondent answered that he was "a friendly person, and they would approach me, and it's kind of hard when people talk to you, to not talk to them, to completely ignore them." Id. While this may not have been the answer the Government was seeking, there is no evidence that Respondent's answer was untruthful.

Following this, the Government asked Respondent: "Did you do more than speaking with females?" Id. Respondent answered:

> I had basically what could be called a girlfriend. She was very attentive to me, which I was appreciative of. My marriage was likely in ruins, and it was something that was – it was nice to have someone to talk to. And once that was – basically once that was discovered, I was placed on my no-female contract, and – well, actually I was on my no-female contract when that was discovered, and basically I got reprimanded and eventually I got my act together.

Id. at 264. Here again, this may not have been the answer the Government was seeking, but there is no evidence that it was untruthful.

arguably relevant in assessing Respondent's claim that he has been rehabilitated, it is undisputed that he successfully completed inpatient treatment, that he has been in compliance with his Oklahoma Health Professionals Program contract, and that he passed all of his random drug tests. RX 2.

There is, however, evidence that supports the Government's contention that Respondent does not fully acknowledge his misconduct. As ultimate fact-finder, I am not bound by the Government's failure to cite this evidence which I conclude is properly considered in reviewing the Government's contention that the ALJ's recommended sanction is inconsistent with agency precedent.

The ALJ found that Respondent not only abused methamphetamine, but that he also wrote prescriptions for controlled substances for A.B., his then-girlfriend (and fellow methamphetamine abuser), as well as for S.M. and Z.M., who were two of her friends. With respect to A.B., the evidence showed that between July 29, 2010 and September 12, 2011, Respondent issued her 15 prescriptions for Lortab 7.5mg and 10mg (then a schedule III controlled substance[4] which combines hydrocodone and acetaminophen), as well as one prescription for both Xanax (alprazolam, a schedule IV drug) and promethazine with codeine cough syrup (schedule V). Moreover, the Lortab prescriptions, which ranged from 40 to 80 tablets, authorized 28 refills. In total, the prescriptions, with refills, provided A.B. with approximately 2,540 tablets of hydrocodone.

[4] Combination hydrocodone products have since been placed in schedule II of the Controlled Substances Act. See Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II, 79 FR 49661 (2014).

With respect to S.M., at a minimum, the evidence showed that Respondent issued him a prescription for 60 tablets of hydrocodone/apap with three refills.[5] See GX 13. As for Z.M., the evidence shows that Respondent issued him a prescription for 40 tablets of Lortab 7.5 with two refills. GX 14.

Respondent did not dispute that he failed to perform a physical exam on A.B., S. M., and Z.M., or that the prescriptions were improper. Indeed, he testified that: "[i]mproper, I think, is a weak word. I think it was stupid. I think you used the word 'idiotic' earlier." Tr. 201 (testimony regarding prescriptions to A.B.); see also id. at 203 (admitting that the prescriptions to S.M. and Z.M. were "very improper").

While Respondent also asserts that he received no monetary gain from writing these prescriptions, see Tr. 204, this is irrelevant. What is relevant is that Respondent knowingly and improperly diverted controlled substances to three individuals, including his girlfriend A.B., whom he knew was a drug abuser.

Further, while Respondent acknowledged that the prescriptions were improper, he then maintained that he prescribed to A.B. "out of compassion" because "[s]he was in pain." Id. at 252. And he further asserted that she did not "use hydrocodone as a drug of choice, as far as recreational drugs" because "[s]he was a methamphetamine addict." Id. at 253.

The ALJ rejected the Government's contention that Respondent's testimony was an attempt to minimize his misconduct. According to the ALJ, "[w]hile the reasons Respondent gave for prescribing hydrocodone to A.B. certainly do not justify his improper methods of prescribing, they also do not represent an attempt to minimize or rationalize his behavior." R.D.

[5] The record includes three documents from Walgreens which have the caption: "Audit/Board of Pharmacy Inspection Report." While each of the documents contains a copy of a prescription issued by Respondent on January 27, 2011, each document lists a different prescription number, a different store number, and a different sold date. GX 13. Thus, it is unclear whether two of the documents were simply refills of the original prescription or whether Respondent issued S.M. multiple prescriptions on the same date.

at 35. In the ALJ's view, this was so because Respondent prefaced this testimony with "his statement that 'it was improper and I admit that.'" Id. (quoting Tr. 252).

Read more broadly, however, his testimony most certainly was an attempt to minimize his misconduct. Indeed, on further questioning, Respondent testified that:

> . . . . I'm exquisitely sorry that I ever prescribed these things, these medicines for these people. You know, I know that I did it improperly. I know I didn't have proper documentation. Deep down, when I was writing them, I knew better.

Id. at 258 (emphasis added). Continuing, Respondent testified that:

> Deep down, whenever I was writing them, I knew better. I let my heart and my empathy get the best of me, more than my brain. I know better now. I've gone through extensive counseling, extensive instruction, boundaries course times two, to understand what my infractions were.

Id. (emphasis added).

Contrary to Respondent's assertion, this was not simply a matter of not having proper documentation to support the prescriptions. Notably, while the ALJ apparently credited his testimony that A.B. was in pain, noting that this testimony "went unrebutted," see R.D. at 35, the evidence shows that while Respondent prescribed to A.B for more than one year, he made no claim that he ever conducted a physical exam on her or performed any diagnostic tests to determine whether she legitimately had pain or whether her pain warranted the prescribing of controlled substances. See Tr. 172-74 (testimony of Government's expert that the hydrocodone prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice).

As for his assertion that he prescribed "out of compassion" and "empathy," this too is amply refuted by his failure – over the course of more than one year – to take appropriate steps to determine the source of her purported pain. And given his acknowledgement that he knew

early in his relationship with A.B. that she was a meth addict, his claim that he prescribed to her "out of compassion" begs the question of why he did not usher her into treatment.[6]

Respondent also justified A.B.'s hydrocodone prescriptions on the ground that she did not "use hydrocodone as a drug of choice, as far as recreational drugs" because "[s]he was a methamphetamine addict." Id. at 253. Apparently the possibility that A.B. could also have been abusing hydrocodone to bring her down from the meth she abused or was selling the drug to support her meth addiction never dawned on him.

Finally, Respondent attempted to rationalize his prescribing to A.B. on the ground that he did not understand the boundaries applicable to the practice of medicine. Id. However, this excuse does not explain his decision to prescribe controlled substances to both S.M. and Z.M. Indeed, it is unclear what his excuse is for prescribing to S.M. and Z.M.

Thus, this does not strike me as an "unequivocal acceptance of responsibility for his misconduct." R.D. at 36. I need not, however, reject the ALJ's finding that "Respondent has sufficiently accepted responsibility for his actions" because as the ALJ properly noted, "[e]ven when a respondent is genuinely remorseful and has instituted sufficient remedial measures," DEA has "impose[d] sanctions to deter egregious violations of the CSA" and "has placed special emphasis on the need to deter intentional diversion of controlled substances." Id. at 36 (citing David A. Ruben, 78 FR 38363, 38386-87 (2013); Joseph Gaudio, 74 FR 10083, 10094-95 (2009)).

The ALJ noted that "Respondent's improper prescriptions to A.B., S.M., and Z.M. clearly constitute intentional diversion." R.D. at 37. I agree. So too, she noted that while his

[6] Even assuming that the ALJ credited Respondent's testimony that A.B. was in pain, see R.D. at 33, because it was undisputed that he lacked a legitimate medical purpose and acted outside of the usual course of professional practice in issuing the prescriptions to her, I decline to give this testimony any weight. Indeed, the ALJ later found that the prescriptions "clearly constitute intentional diversion." Id. at 35.

"improper prescribing practices were limited to A.B. and a few of her friends, under DEA precedent they clearly warrant sanctions to deter Respondent and others from repeating the practice." Id. Again, I agree.

The ALJ also noted "[w]here the respondent intentionally diverted controlled substances, the Agency required the respondents to periodically submit logs of all controlled substances they prescribe and suspended [their] registrations for a period of time commensurate with the severity of the misconduct." Id. at 38 (citing Ruben, also citing Michael S. Moore, 76 FR 45867, 45868 (2011), and Gregory D. Owens, 74 FR 36751, 36757-58 (2009)) (emphasis added). Yet notwithstanding that she found Respondent's prescriptions "troubling to say the least," id. at 37, the ALJ recommended no period of suspension.

The ALJ offered no explanation as for why she believed a period of outright suspension is unwarranted. To be sure, earlier in her decision, the ALJ opined that the Agency "has granted registrations with restrictions to respondents whose misconduct was more egregious and/or lasted longer than the misconduct of Respondent here." Id. (citing Ruben, Owens, Moore, and Roger D. McAlpin, 62 FR 8038, 8040 (1997)).

Yet in both Ruben and Moore, the Agency suspended each respondent's registration for a period of one year. As for the ALJ's assertion that the respective registrant's misconduct in each of these cases was more egregious than Respondent's, that is certainly true with respect to Ruben. But Respondent's misconduct in knowingly diverting controlled substances to three persons, including his girlfriend to whom he provided some 2,540 dosage units of hydrocodone and did so knowing that she was meth addict, is itself, sufficiently egregious to warrant a suspension for a period of one year. As for Moore, while the physician's misconduct in growing marijuana for his own and his wife's use was certainly egregious, there was inconclusive

evidence as to whether he knowingly distributed it to others; thus, it is debatable whether his misconduct was more egregious than Respondent's.

As for Owens, the ALJ asserted that the Agency "grant[ed] a registration to a respondent who prescribed controlled substances for seven years based on an expired registration." R.D. at 37. However, the actual decision to grant a registration to Dr. Owens notwithstanding the above-described misconduct had been made in a proceeding which was resolved seven years earlier and there was no evidence that he was diverting controlled substances. See Gregory D. Owens, 67 FR 50461 (2002). So too, the misconduct which gave rise to the second Owens decision did not involve the diversion of controlled substances and was comparatively minor.[7]

Moreover, the 2002 Owens order predates the Agency's decision in Southwood Pharmaceuticals, Inc., 72 FR 36487, 36504 (2007), which held for the first time that notwithstanding the remedial nature of proceedings under 21 U.S.C. §§ 823 and 824, the Agency can consider the need to deter similar acts on the part of both the individual registrant/applicant and the community of registrants. Indeed, this Agency recently denied a physician's application for a new registration based, in substantial part, on his issuance of prescriptions after his registration had expired. See Anthony E. Wicks, 78 FR 62676, 62678 (2013); see also Linda Sue Cheek, 76 FR 66972 (2011) (denying application based, in part, on physician's issuance of prescriptions without being registered). For the same reason, I respectfully disagree with the ALJ's reliance on McAlpin.

Accordingly, notwithstanding that I do not reject the ALJ's finding that Respondent has "sufficiently accepted responsibility for his actions" and has produced evidence of his remedial

[7] As for the conduct which gave rise to the second Owens proceeding, Dr. Owens was found to have not complied with the 2002 order because he failed to file a quarterly drug activity log during a four-month period between September 3 and December 31, 2002, and failed to report a 2005 state board action. 74 FR at 36756-58. While Dr. Owens' misconduct was considerably less egregious than that involving the intentional diversion of controlled substances, the Agency nonetheless suspended his registration outright for a period of three months. Id. at 36758.

efforts, R.D. at 36, I conclude that the ALJ's recommended order fails to give appropriate weight to the Agency's substantial interest in deterring the intentional diversion of controlled substances. While I will grant Respondent's application, consistent with similar cases, I will order that his registration be suspended outright for a period of one year. See Ruben, 78 FR at 38386 (imposing one-year suspension based on acts of intentional diversion notwithstanding ALJ's finding that registrant accepted responsibility for his misconduct and undertook remedial training); Gaudio, 74 FR at 10095 (imposing one-year suspension based on acts of intentional diversion and holding renewal application in abeyance pending registrant's acknowledgement of his misconduct); Jayam Krishna-Iyer, 74 FR 459, 463 (2009) (imposing one-year suspension based on acts of intentional diversion where registrant acknowledged her misconduct).[8]

Moreover, upon the completion of the suspension, Respondent's registration shall be subject to the following conditions for a period of two years:

Respondent shall keep a log of all controlled substances he prescribes on a monthly basis for each calendar month. The log shall list each prescription in chronological order; the patient's name and address; the name, quantity, strength and dosing instructions for each drug prescribed; and the number of refills authorized. Respondent shall submit a copy of the log to the local DEA Field Office no later than five business days following the last day of each month.

In the event Respondent opens his own practice, he shall consent to unannounced inspections of his registered location and waive his right to require DEA personnel to obtain an administrative inspection warrant prior to conducting an inspection.

[8] The scope of Respondent's unlawful prescribings far exceeds those of Dr. Krishna-Iyer, who wrote unlawful prescriptions during three undercover visits. See Jayam Krishna-Iyer, 71 FR 52148, 52158 (2006). Moreover, this Agency has held that proof of a single act of intentional diversion can support the denial of an application or the revocation of an existing registration. See Dewey C. MacKay, 75 FR 49956, 49977 (2010), pet. for rev. denied, MacKay v. DEA, 664 F.3d 808 (10th Cir. 2011).

Respondent shall not prescribe any controlled substances to himself, a family member, or any person with whom he has or had a personal or romantic relationship.

Respondent shall have no intentional contact with A.B., S.M., or Z.M.

Respondent shall notify the local DEA Field Office of the results of any drug test he fails, no later than three business days after receiving notification of having failed any such test. This condition shall apply whether the test in conducted by the Oklahoma Board of Osteopathic Examiners, the Oklahoma Health Professions Program, any other licensing authority, any hospital at which he seeks or obtains privileges, or any other employer.

Respondent shall further notify the local DEA Field Office in the event that the Oklahoma Board of Osteopathic Examiners or the Oklahoma Bureau of Narcotics and Dangerous Drug Control (or any other licensing authority) initiates any proceeding, or imposes sanctions against his medical license or state controlled substance registration respectively. Respondent shall make such notification no later than three business days upon being notified of any such action, regardless of whether he has been formally served with either a complaint or order issued by any such agency.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 823(f), as well as 28 CFR 0.100(b), I order that the application of Trenton F. Horst, D.O., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, granted subject to the conditions set forth above. I further order that Respondent's Certificate of Registration be, and it hereby is, suspended for a period of one year. This Order is effective immediately.

Dated: July 6, 2015

Chuck Rosenberg
Acting Administrator

Dedra S. Curteman, Esq., for the Government.

Spencer B. Housley, Esq., for the Respondent.

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

I. INTRODUCTION

Gail A. Randall, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., to determine whether the Drug Enforcement Administration ("DEA" or "Government") should deny[1] a physician's application for a DEA Certificate of Registration pursuant to 21 U.S.C. § 823(f) (2006). Without his registration, the physician, Trenton F. Horst, D.O. ("Respondent" or "Dr. Horst"), would be unable to lawfully prescribe, dispense or otherwise handle controlled substances in the course of his medical practice.

II. PROCEDURAL HISTORY

The Deputy Assistant Administrator, Drug Enforcement Administration ("DEA" or "Government"), issued an Order to Show Cause ("Order") dated February 27, 2013, proposing to revoke[2] the DEA Certificate of Registration, No. BH9311604, of Respondent, as a practitioner, pursuant to 21 U.S.C. §§ 824(a)(3)–(4), and deny any pending applications for renewal or modification of such registration because Respondent does not "have authority to handle controlled substances in the State of Oklahoma" and because the Respondent's continued registration would be inconsistent with the

[1] DEA regulations and precedent clearly establish that "a registrant, who has been served with an Order to Show Cause, [must] file his renewal application at least 45 days before the expiration of his registration, in order for it to continue in effect past its expiration date and pending the issuance of a final order by the Agency." Paul Weir Battershell, N.P., 76 Fed. Reg. 44359, 44361 (DEA 2011) (citing Paul Volkman, 73 Fed. Reg. 30,630, 30,641 (DEA 2008)); 21 C.F.R. 1301.36(i). Respondent's Certificate of Registration, Number BH9311604, expired by its own terms on October 31, 2013, about eight months after the Order to Show Cause was served, and Respondent did not apply for renewal until October 31, 2013. [ALJ Exh. 14]. Thus, Respondent's application for renewal will be considered an application for registration. See Battershell, 76 Fed. Reg. at 44,361 (holding that although the registration had expired, the renewal application may be considered). Accordingly, the issue in this case is whether DEA should grant Respondent's application, not whether DEA should revoke his registration.

[2] As explained supra note 1, the issue is whether the DEA should grant Respondent's application, not whether his registration should be revoked, as the Order to Show Cause suggests.

public interest, as that term is used in 21 U.S.C. §823(f). [Administrative Law Judge Exhibit ("ALJ Exh.") 1 at 1].

Specifically, the Order alleged that Respondent was "registered with the DEA as a practitioner in Schedules II–V under DEA registration BH9311604 at St. Mary's Physician Associates, LLC, 330 South Fifth Street, Suite 103, Enid, Oklahoma 73701." [Id.]. The Order further alleged that Respondent was without authority to handle controlled substances in the state of Oklahoma, which is the state that listed on his DEA Certificate Of Registration ("COR"), since his Oklahoma Bureau of Narcotics ("OBN") registration expired on October 31, 2011. [Id.]. The Order further alleged that Respondent's state osteopathic license was suspended[3] on June 21, 2012, for a period of five years, by the Oklahoma State Board of Osteopathic Examiners ("Oklahoma State Board"). [Id. at 2]. Thus, the Order stated that the DEA must revoke Respondent's DEA registration because he lacks authority to handle controlled substances in the state of Oklahoma. [Id. at 1].

On March 27, 2013, the Respondent, through counsel, timely filed a request for a hearing. [ALJ Exh. 2].

On April 3, 2013, the Government filed its Motion for Summary Disposition [ALJ Exh. 3]. On April 18, 2013, the Respondent, through his attorney, filed a timely Response to Motion for Summary Disposition. [ALJ Exh. 4]. On April 29, 2013, the Government filed a reply to the Respondent's Response to Motion for Summary Disposition, [ALJ Exh. 5], and on May 7, 2013, the Government filed a Renewed Motion for Summary Disposition, [ALJ Exh. 6].

On May 10, 2013, I issued my Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge ("Summary Disposition"), recommending that the Administrator summarily revoke Respondent's DEA registration because Respondent was without state

[3] I note here that the Oklahoma State Board of Osteopathic Examiners did not, in fact, suspend Respondent's license; rather, it placed the license on probation for five years. [Gov't Exh. 6 at 4].

authority to dispense controlled substances and thus was ineligible for a DEA registration as a practitioner. [ALJ Exh. 7 at 9–12].

On July 30, 2013, after my Summary Disposition was delivered to the Administrator, but before a final decision was rendered by the Administrator, Respondent filed a Notice to Court and Amended Motion to Reconsider. [See ALJ Exh. 8 at 1]. Therein, Respondent informed DEA that he had obtained an Oklahoma Board of Narcotics license which gave Respondent authority to handle controlled substances, so "the fundamental facts of the case have now changed." [Id.]. Consequently, the Deputy Administrator ruled that "the finding necessary to support the revocation of Respondent's registration under section 824(a)(3) can no longer be made." [Id.]. Noting that the Order to Show Cause also alleged that Respondent's continued DEA registration would be "inconsistent with the public interest," the Deputy Administrator ordered the Government to notify his office as to whether the Government will seek a remand of the case to adjudicate that matter. [ALJ Exh. 10 at 2]. The Government requested a remand on August 6, 2013, [ALJ Exh. 9], which the Deputy Administrator granted on August 23, 2013, [ALJ Exh. 8].

The hearing in this case took place on December 17 through December 18, 2013, at the U.S. Tax Court in Oklahoma City, Oklahoma. [ALJ Exh. 13]. Respondent and the Government were each represented by counsel. At the hearing, the Government introduced documentary evidence and called six witnesses and Respondent introduced documentary evidence and called five witnesses, including himself.

After the hearing, the Government and the Respondent submitted proposed findings of fact, conclusions of law and argument.

III. ISSUE

The issue in this proceeding is whether the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration ("DEA" or "Government") should deny the application[4] of Trenton F. Horst, D.O. ("Respondent"), as a practitioner, 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 his continued registration would be inconsistent with the public interest, as that term is defined in 21 U.S.C. § 823(f).

IV. FINDINGS OF FACT

A. Stipulated Facts

The parties have stipulated to the following facts:

1. Respondent's DEA registration BH9311604, which authorized Respondent to handle controlled substances in Schedules II–V at St. Mary's Physician Associates, LLC, 330 South Fifth Street, Suite 103, Enid, Oklahoma 73701, expired by its terms on October 31, 2013.
2. Respondent submitted a renewal application for a DEA registration on October 31, 2013.
3. Respondent has an active and valid license to practice medicine in the State of Oklahoma.
4. Respondent has an active and valid license to handle controlled dangerous substances from the Oklahoma Bureau of Narcotics.
5. Respondent has not been charged with or convicted of any federal or state crimes relating to the manufacture, distribution, or dispensing of controlled substances.

[ALJ Exh. 14].

[4] As explained supra note 1, the issue is whether the DEA should grant Respondent's application, not whether his registration should be revoked, as the Order to Show Cause suggests.

B. Respondent's Background, Employment, Registration, and Licensure

Respondent testified credibly regarding his medical background, employment, and training, facts which were undisputed at the hearing. [Tr. 182–192]. Respondent graduated from Oklahoma State University College of Osteopathic Medicine with honors in 1999. [Tr. 183]. Shortly thereafter, Respondent completed both an internship and residency at the Tulsa Regional Medical Center. [Tr. 184–85]. Upon completion of his internship and residency, Respondent was awarded a fellowship at the Scott & White Clinic and Memorial Hospital in Temple, Texas, where he learned the specialty of gastroenterology from 2002 to 2005. [Tr. 185–86]. In 2005, Respondent began working in a private "single-specialty group" called Digestive Disease Specialists, Incorporated. [Tr. 187].

By 2007, Respondent was board-certified in both internal medicine and gastroenterology. [Tr. 186–87]. He began working for St. Mary's Hospital in Enid, Oklahoma "on or about June 1, 2010" in a hospital-owned clinic named Red Carpet Gastroenterology.[5] [Gov't Exh. 6 at 2; Tr. 192]. As explained in further detail below, during his employment at St. Mary's, Respondent abused controlled substances, resulting in St. Mary's terminating his employment and the DEA issuing the Order to Show Cause. After completing therapy at an in-patient substance abuse rehabilitation facility, Respondent obtained employment as a delivery driver for Pizza Hut while he searched for employment as a physician. [Tr. 229; see also Tr. 33, 60–61]. Respondent later worked as a "patient liaison" at New Beginning Women's Healthcare from the fall of 2012 until April 2013, and then as a "chart reviewer" for Prairie View Hospice. [Tr. 230–31]. Since May 2013, Respondent has been employed as a physician at Accident Care and Treatment Center ("ACTC"). [Tr. 231].

[5] While Respondent was technically an employee of St. Mary's, he principally worked at Red Carpet, a clinic across the street from the hospital that at least one witness described as "a private practice." [Tr. 78, 100, 130, 131, 150]. Respondent was the only physician working at Red Carpet, and he designed the clinic's name and logo. [Tr. 78, 130, 135–136, 150].

On June 29, 2005, Respondent was issued DEA Certificate of Registration ("COR") Number BH9311604, which is the COR at issue in this case. [Gov't Exh. 22 at 3]. That COR expired by its terms on October 31, 2013. [Tr. 27, ALJ Exh. 14]. Respondent also holds an active, valid license to practice medicine in the State of Oklahoma and an active, valid license from the Oklahoma Bureau of Narcotics to handle controlled substances. [ALJ Exh. 14].

C. Respondent's Substance Abuse

In 2009, while Respondent was employed at Digestive Disease Specialists, Respondent met and began an extra-marital relationship[6] with A.B.,[7] a medical assistant employed at the same location. [Tr. 78–79, 194–95, 250]. Respondent first became aware that A.B. was abusing controlled substances in November of 2010, when she called him and asked him to bail her out of jail after she was charged with possession of marijuana, a controlled substance. [Tr. 195–96]. Soon after that, in December 2010, Respondent began using illegal substances with A.B. and eventually moved in with A.B. on July 4th or 5th, 2011. [Tr. 195, 196, 198, 199].

Respondent credibly testified, and the Government did not refute, that before moving in with A.B., Respondent had never taken amphetamines or methamphetamine. [Tr. 194–95]. Also, Respondent credibly testified, and the Government did not refute, that he has never been charged with or convicted of any crimes involving illegal substances. [Tr. 195; ALJ Exh. 14].

Several St. Mary's employees testified that they noticed "red spots," "boils," or "lesions" on Respondent's neck and elbow on at least two occasions. [Tr. 86; 119–122]. Although the reason for the

[6] Despite the Government's argument that Respondent speaking with co-workers about his relationship with A.B. is probative of Factor Five, I ruled at the hearing that the details of Respondent's romantic relationship with A.B. are not relevant to these proceedings. [Tr. 81, 86–87]. I now reaffirm that ruling, and only mention Respondent's relationship to give factual context to the events that led to Respondent's drug abuse and improper prescribing, which are, of course, relevant. In making my determinations about whether Respondent's registration is in the public interest, I assign no weight to Respondent's marital indiscretions.

[7] Before the hearing, I issued a Protective Order which protects the identities of third parties in these proceedings. [ALJ Exh. 12].

Government soliciting testimony about the red spots is unclear, the insinuation seemed to be that the red spots were an indication of drug use. [Tr. 119. 121–22 (Government witness describing marks on the fleshy area of the elbow)]; 199 (Respondent counsel stating that "[t]here's been insinuations at least by the Government that [Respondent was] IV drug-using")]. Respondent denied ever using IV drugs, [Tr. 199], and, other than the red spots, the Government offered no evidence to the contrary. Indeed, a drug screen taken by Respondent in July of 2011 did not indicate any such use, and the witnesses who testified about the spots never explicitly linked the spots to drug use. In fact, the witness the Government used as an expert linked the spots to a bacteria, not to drug use. [Tr. 120–21]. While cross examining this expert, Respondent's attorney suggested that the explanation for the red spots was Respondent's cycstic acne. [Tr. 124–25]. At that time, the Government's witness admitted that it was beyond the scope of her expertise to testify about such conditions. [Tr. 125]. The Government's witness also testified that the red spots "appeared to be a boil, a bite," [Tr. 121], which is consistent with what Respondent told his receptionist when she inquired about the spots, [Tr. 86]. Given the thin evidence offered by the Government regarding the source of the red spots on Respondent's skin and Respondent's several explanations for the spots, I find that the Government failed to meet its burden of proof to show that Respondent used IV drugs or that the red spots on Respondent's elbow and neck were related to illicit drug use.

Respondent's receptionist at Red Carpet, Brenda Martin, testified that Respondent told her that he had been present on at least one occasion while A.B. made a "drug run." [Tr. 81–82; see also Gov't Exh. 19]. Ms. Martin noted, however, that Respondent pointed out he did not participate in the drug transactions; he stayed in the back seat of the car while the transaction was completed. [Tr. 81–82]. Ms. Martin also testified that in conversations she had with Respondent, he admitted to being present while A.B. and her associates were "in the garage making meth," although Respondent also told Martin that he "didn't have anything to do with it." [Tr. 85].

Several witnesses testified that at some point during his employment at St. Mary's, Respondent began coming to work tired and tardy on a regular basis.[8] [Tr. 85, 94 (testimony of Brenda Martin); 104 (testimony of Michelle Lee Bays); 139 (testimony of Krista Ann Roberts); 241–44 (testimony of Respondent)]. Ms. Martin testified that Respondent's fatigue got so bad that he would take "catnap[s]" in his office between patient visits and had to reschedule several appointments after being late to work. [Tr. 83–84]. Staff members took special notice of Respondent's fatigue when they saw an incoherent notation written by Respondent on a patient's progress note that referenced the patient "still having pain from right pink chair." [Tr. 85–86, 139; Gov't Exh. 17]. Respondent corrected the error by creating a new note from memory of the patient visit, and he admitted that he had trouble focusing the day he wrote the original note. [Tr. 136–140; Gov't Exh. 17].

Respondent's staff at Red Carpet expressed their concerns about Respondent's tardiness, fatigue, and personal life to Michelle Bays, the practice administrator at St. Mary's. [Tr. 100, 104–105]. As a result of these reports, St. Mary's solicited a signed statement from Ms. Martin about her conversations with and observations of Respondent while at work. [Tr. 102–05; Gov't Exh. 19]. Respondent voluntarily submitted to a drug test, apparently requested by St. Mary's,[9] on July 18, 2011.

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[8] The witnesses at the hearing did not all agree on the longevity of Respondent's fatigue and tardiness. Ms. Martin testified that for the first few months she worked for Respondent, Respondent was "very efficient and punctual" and that Respondent's fatigue began approximately one month before his termination. [Tr. 91, 93; Gov't Exh. 9]. Respondent himself also testified that "[m]ost of my, quote, tiredness came during the month of July." [Tr. 243]. Michelle Bays, the St. Mary's employee in charge of overseeing day-to-day operations at hospital clinics, is the only witness who testified that Respondent's fatigue and tardiness lasted longer than a month. She testified that the fatigue and tardiness occurred for "more than a month and a half" and that "[i]t was an issue for the time I—my whole time when I worked with him." [Tr. 100, 106]. Ms. Bays's recollection of the chronology of events, however, is not reliable for several reasons. First, as noted above, her testimony regarding the timing of Respondent's fatigue and tardiness conflicts with the testimony of two other witnesses. Second, she testified that she began overseeing Red Carpet in September 2009 and that Respondent "was already there" at that time, [Tr. 100], but it is clear from the record that Respondent did not begin working at Red Carpet until June 2010 [Gov't Exh. 6 at 2; Tr. 131]. Thus, while I find Ms. Bays to be generally credible, I find that her testimony regarding the timing of events in this case not credible. I also find that Respondent's tiredness and tardiness at work occurred approximately during the month immediately preceding his termination from St. Mary's.

[9] The Government's witnesses did not explain who requested the drug test, but Respondent, when asked who initiated the test, testified that Michelle Bays "escorted me to the facility where [the drug test] was done." [Tr. 205].

[Tr. 115–116, 205; Gov't Exh. 8]. The drug test came back positive for marijuana, methamphetamine, and amphetamines, and resulted in Respondent's termination from St. Mary's in August, 2011. [Tr. 118, 120, 131, 206, 245; Gov't Exh. 8]. Respondent admits to using methamphetamine, but at the hearing he offered explanations for why marijuana and amphetamines were in his system. [Tr. 245].

Regarding Respondent's methamphetamine use, Respondent credibly testified that he began using it in December 2010 and stopped around August of 2011. [Tr. 196–97]. Respondent testified that he used methamphetamine "maybe twice a month" before moving in with A.B. in July of 2011, and "maybe once or twice a week at most" after moving in with A.B. [Tr. 197]. Respondent also credibly testified that before becoming involved with A.B., he had never used methamphetamine or any other illicit drug. [Tr. 196]. The Government offered no evidence rebutting this testimony.

With respect to the positive result for marijuana on the drug test, Respondent credibly testified that marijuana was in his system at the time of the drug screen because he was "exposed" to it while living with A.B., who regularly smoked marijuana with her associates. [Tr. 245]. Dr. Westcott, whom I certified at the hearing as an expert in addiction management, testified that second-hand marijuana smoke could cause a positive result on a drug screen if the subject were exposed to a concentrated amount, but also testified that positive results for marijuana on a drug screen normally mean the subject used the drug. [Tr. 379–82]. The Government, on the other hand, presented no evidence to rebut Respondent's explanation for the drug test's positive result for marijuana, opting instead to simply argue that Respondent's explanation was an "attempt[] to minimize the significance of his failed drug screen." [Government Brief ("Gov't Br.") at 33].

To be sure, Respondent has used marijuana in the past. At the Board hearing, Respondent testified that he had used marijuana with friends on a "sporadic, recreational" basis. [Gov't Exh. 21 at 11]. Furthermore, Respondent's discharge summary from Santé, appended to the Board hearing

transcript, notes that Respondent had "secondary" issues with "cannabis abuse." [Gov't Exh. 21, Attach. 1]. But none of this evidence contradicts Respondent's testimony at the hearing in these proceedings regarding his marijuana use. In these proceedings, Respondent never testified that he had never used marijuana; Respondent merely testified that the particular drug screen he failed was the result of exposure to marijuana rather than his personal use. [Tr. 245]. Indeed, the Government never asked Respondent generally whether he had ever used marijuana; it only asked whether the failed drug screen was the result of marijuana use. [Tr. 245]. In context, this testimony cannot be construed as a general denial by Respondent of any and all allegations of marijuana use. Thus, Respondent's testimony is not inconsistent with other evidence that proves Respondent has used marijuana in the past.

I therefore find that Respondent's explanation for the positive marijuana result on the drug screen, which was corroborated by Dr. Westcott's testimony on cross examination and unrebutted by the Government, is credible. I also find that Respondent has used marijuana in the past, but that the frequency of such use is unclear from the record. In the absence of any evidence to rebut Respondent's credible testimony regarding the drug test, however, I find that the Government failed to establish that the positive result for marijuana on the drug test was the result of Respondent's personal use.

With respect to the drug screen's positive result for amphetamines, Respondent testified that amphetamines were in his system due to a prescription drug he was taking called Vyvanse. Respondent and Dr. Westcott both testified that Vyvanse is a medication used to treat Attention Deficit Disorder ("ADD"), and that it is "in the amphetamine class." [Tr. 246–48, 382–83]. Respondent testified that he was issued a valid prescription for Vyvanse in 2009, and began taking pills leftover from that prescription every day when ADD symptoms began to reoccur about a week and a half before he failed the drug screen at St. Mary's. [Tr. 246, 248–49]. This explanation is corroborated by two exhibits the Government itself introduced. First, the Board Order found that Respondent "contacted the Board and confirmed

that he had tested positive for . . . Vyvanse." [Gov't Exh. 6 at 2]. Second, at the Board hearing, Respondent testified to the same facts regarding his Vyvanse use as he did at the hearing in these proceedings. [Gov't Exh. 21 at 14–15]. Respondent and Dr. Westcott also testified that Vyvanse stays in the system for at least two days, and that in a drug test it would likely result in a positive result for amphetamines. [Tr. 248, 383]. Similar to its approach to the marijuana issue, the Government opted to not offer any evidence to rebut Respondent's explanation of the positive amphetamine result, instead arguing that "Respondent would have the Court believe [his] less than plausible explanation in the face of unrefuted evidence that he tested positive at a time when he was dating a methamphetamine addict and living at her house where methamphetamine was manufactured."[10] [Gov't Br. at 33]. This circumstantial evidence is not convincing in light of the credible testimony Respondent gave at the hearing in these proceedings, which was nearly identical to the testimony he gave at the Board hearing. I therefore find that the Government has failed to establish that Respondent improperly used amphetamines.

Respondent further testified that he never possessed or used illicit drugs while at work, and St. Mary's employees testified that they never concluded otherwise. [Tr. 123, 149, 200–01]. The Government refutes Respondent's assertion, arguing that Respondent's use of illicit drugs at work is evidenced by the fact that "he tested positive for these drugs while on the job and commuted a great distance to his job." [Gov't Br. at 29–30]. Yet, Respondent's expert witness testified on cross examination that methamphetamine and amphetamines stay in the system for two to four days, and Respondent testified that it was "widely known" that marijuana can stay in your system for up to thirty

[10] The Government also suggested, without overtly accusing, that Respondent acted improperly by taking "a two year-old prescription for which he did not seek the care of a doctor in a recent visit." [Gov't Br. at 33 (emphasis in original); Tr. at 246 (Government counsel asking Respondent, "So you took it outside the usual course of professional practice[?]")]. The Government, however, cites no regulation, and I can find none, that forbids the use of "leftover" prescription drugs. Further, the Government has offered no evidence to establish that the Respondent's prescription for Vyvanse restricted his use of the drug two years after the issuance of the prescription. I therefore find that the Government failed to establish any wrongdoing by Respondent regarding his consumption of Vyvanse.

days. [Tr. at 254, 382]. The Government failed to introduce any evidence to rebut this testimony, making considerably less plausible the suggestion that Respondent's drug use at home would wear off during his long commute. I therefore find that the Government failed to establish that Respondent used or possessed illicit drugs while at work.

Within hours of his termination, which immediately followed his failed drug test, Respondent voluntarily reported himself to the State Board of Osteopathic Examiners ("State Board" or "Board") and the Oklahoma Health Professional Program ("OHPP"). [Tr. 206–07; Gov't Exh. 6 at 2]. However, Respondent did not report himself to the DEA. [Tr. 273]. In fact, Respondent did not communicate with the DEA about his drug abuse until about a year later. [Tr. 274].

As a result of Respondent contacting the Board, the Board conducted an investigation and held a hearing on June 21, 2012, after Respondent returned home from in-patient therapy.[11] [Gov't Exh. 6 at 1; Tr. 207–208]. The same day as the hearing, the Board issued a Findings of Fact, Conclusions of Law, and Agreed Order of Probation ("Board Order"), which is pertinent to these proceedings and binding on this Court under the principles of collateral estoppel. [Gov't Exh. 6; Tr. 30]; David A. Ruben, 78 Fed. Reg. 38,363, 38,365 (DEA 2013); Robert L. Dougherty, M.D., 76 Fed. Reg. 16,823, 16,830 (DEA 2011). Specifically, in relation to Respondent's drug abuse, the Board found the following:

> 3. On or about August 2, 2011, St. Mary's Regional Medical Center ("Hospital") in Enid, Oklahoma terminated Dr. Horst's employment at the Hospital. Dr. Horst had failed a drug screen and tested positive for marijuana, methamphetamine and another drug.
>
> 4. Dr. Horst contacted the Board and confirmed that he had tested positive for marijuana and a C-II medication Vyvanse for ADHD. Dr. Horst also confirmed that the Hospital had terminated his employment.

[11] As explained below, the hearing took place so long after Respondent's termination from St. Mary's because Respondent had checked into an in-patient rehabilitation center and his hearing was continued. [See Gov't Exh. 5].

[Gov't Exh. 6 at 2]. Respondent stipulated to and "[did] not contest any of the factual allegations raised by the Board." [Gov't Exh. 6 at 2]. Respondent also testified at the hearing in the present proceedings that he agreed with the Board's findings. [Tr. 217].

D. Improper Prescriptions

In addition to Respondent's illicit drug use, the Government proved, and Respondent admitted, that Respondent issued illegitimate prescriptions for purposes other than legitimate medical purposes. [Tr. 170–172, 201–04; Gov't Exhs. 9–14, 16]. Respondent wrote the prescriptions in question for three patients: A.B., Z.M., and S.M. [Tr. 170–172, 201–04; Gov't Exhs. 9–14, 16]. Patient A.B. was the same A.B. with which Respondent was romantically involved, and the other two were A.B.'s friends. [Tr. 201, 203]. Respondent admitted that he knew A.B. abused controlled substances when he issued her the improper prescriptions. [Tr. 196–97, 251–52].

To prove Respondent illegitimately issued the prescriptions in question, the Government offered Dr. Arthur Douglas Beacham, III as an expert witness in the area of osteopathic medicine with an emphasis in pain management. [Tr. 164; Gov't Exh. 15]. Dr. Beacham reviewed patient files and prescriptions written by Respondent for A.B., Z.M., and S.M., and testified that he could "find no documentation that would support the legitimate medical purpose of controlled medications." [Tr. 170–172; Gov't Exhs. 9–14, 16]. Specifically, Dr. Beacham testified that there was "no documentation to support history or present illness or a physical exam or an assessment nor a plan." [Tr. 172–73]. Thus, Dr. Beacham concluded that, in his expert opinion, "the prescriptions were written for a matter outside medical necessity." [Tr. 173–74]. Dr. Beacham also prepared a report containing these same conclusions, which was also admitted into evidence without objection. [Tr. 171; Gov't Exh. 16]. Respondent admitted to issuing the improper prescriptions and did not refute the testimony of the Government's expert witness. [Tr. 201–04].

Respondent filed the patients' records of A.B., S.M., and Z.M. in his own desk rather than with Red Carpet's other patient files. The records were found by a St. Mary's employee[12] in Respondent's desk drawer after Respondent's termination from St. Mary's, and Respondent admits that he should have filed those files with the rest of the clinic's records. [Tr. 131–36, 203; Gov't Exhs. 9–11].

The Board Order included factual findings regarding Respondent's illegitimate prescriptions. These findings, as noted above, are binding on this court. Ruben, 78 Fed. Reg. at, 38,365; Dougherty, 76 Fed. Reg. at 16,830. Specifically, the Board found the following:

> 6. Upon Dr. Horst's termination of employment by [St. Mary's], staff at the [Red Carpet] Clinic discovered patient charts in Dr. Horst's office that were kept separate and apart from the Clinic's patient records. These separate charts represented patients never scheduled or seen by Clinic staff. They represent patients AB, SM, and ZM.
>
> 7. Patient AB's chart includes a patient registration and medical history, but no physical examination. Chart is on the Clinic's patient record forms. There are no prescribed medications or exam notes recorded. Beginning July 29, 2010 Dr. Horst issued to patient AB sixteen (16) prescriptions of controlled dangerous substances (CDS) with seventeen refills up until his termination by the Hospital. None of these prescriptions are charted. They include Hydrocodone, Promethazine with Codeine syrup, and Alprazolam. Dr. Horst admitted that he had an extramarital affair with patient AB.
>
> 8. Patient SM's chart includes a patient registration and medical history, but no physical examination. Chart is on the Clinic's patient record forms. There are no prescribed medications or exam notes recorded. Beginning January 27, 2011 Dr. Horst issued patient SM two (2) CDS prescriptions of Hydrocodone with one (1) refill. None of these prescriptions are charted.
>
> 9. Patient ZM's chart includes a medical history, but no patient registration and no physical examination. Chart is on the Clinic's patient record forms. There are no prescribed medications or exam notes. On November 29, 2010 Dr. Horst issued patient

[12] There are no allegations of privacy invasions regarding the St. Mary's employee finding the files in Respondent's desk drawer. The St. Mary's employee who found the patient files in Respondent's desk, Krista Roberts, testified that she found the files after she offered to help Respondent clean out his desk and that Respondent consented to her help. [Tr. 132–33].

ZM one (1) CDS prescription of Hydrocodone with two (2) refills. This prescription is not charted.

[Gov't Exh. 6 at 2–3]. As noted above, Respondent stipulated to all of these facts at the Board hearing and testified at the hearing in the present proceedings that he agreed with the Board's findings. [Gov't Exh. 6 at 2; Tr. 217]. Additionally, the Board concluded that Respondent's actions constituted "a violation of the Oklahoma Osteopathic Medicine Act, 59 O.S. §§ 620 et seq., and specifically . . . § 637(A)(2)(f)(g)(12) and (13)." [Gov't Exh. 6 at 4].

E. Respondent's Remedial Actions and Oversight of Respondent

Upon suggestion by the former OHPP president, Respondent checked himself into an in-patient rehabilitation facility in Argyle, Texas, called Santé Center for Healing ("Santé") on October 12, 2011. [Tr. 208–09]. Respondent testified that he paid for his time at Santé by "cash[ing] in everything we had as far as IRAs, 401(k)s, profit-sharing, anything that we'd saved up over the years." [Tr. 210]. Half of the money Respondent gathered went to Santé, and the other half "went to sustaining [his] family while [he] was gone." [Tr. 210]. Respondent also testified that even after "cashing out" many of his assets, Respondent still owes Santé $87,000. [Tr. 210].

Respondent described his experience at Santé as "intensive," especially in the beginning. [Tr. 209–210]. The staff there did various tests and evaluations on Respondent when he arrived, and the daily therapy regimen started early in the morning and lasted until 7:00 P.M., utilizing several different techniques such as group and one-on-one therapy. [Tr. 209–210]. While at Santé, Respondent was required to isolate himself from those outside the treatment facility, and was not even permitted to discuss medical issues with other patients. [Tr. 214–15]. Respondent candidly admitted during direct examination that "it was a little bit difficult to acclimate myself for the first few weeks, probably six weeks," but after the initial acclamation phase, he "became a model participant." [Tr. 210; see also Tr. 258–260; but see Tr. 408; Gov't Exh. 21, Attach. 1]. On cross examination, Respondent also admitted

that he broke a "no female contract" at Santé by having a sexual relationship with a female patient.[13] [Tr. 260–64].

In addition to his drug abuse therapy, Respondent completed a program at Santé entitled "Maintaining Proper Boundaries," which, according to a letter from the medical director at Santé, is a

> comprehensive educational and experiential course designed to address the factors that lead to boundary violations, result from boundary violations and are required in the reparation and prevention of any further boundary issues. The course focuses particularly on sexual boundary issues: including sexual boundary transgressions and interpersonal sexual boundary violations, however also recognizes verbal, ethical, moral and legal boundary violations.

[Resp't Exh.. 3; Tr. 212–13].

Respondent completed his time at Santé on May 25, 2012, whereupon he received a "certificate of sobriety." [Resp't Exh. 2; Tr. 213–14, 224]. Respondent testified that his "sobriety date" is October 12, 2011. [Tr. 208–09].

Respondent testified that in June 2012, after returning from seven months of therapy at Santé, he met with State Board members and investigators to discuss how he can "make things right and get on with my life, and hopefully piece my career and life back together." [Tr. 217–18]. On June 21, 2012, the Board held a hearing for Respondent's case, which was attended by Respondent without counsel, and issued the Board Order the same day. [Gov't Exh. 6]. The Board Order, to which Respondent had previously agreed in his meeting with the Board members, placed Respondent's medical license on five years' probation and required that Respondent (1) enter into and comply with a contract with OHPP; (2) regularly attend counseling sessions with "A Chance to Change" and report to the Board on his progress in counseling; (3) have no contact with A.B.; (4) appear at the next regularly scheduled Board meeting

[13] I admitted evidence of this relationship for impeachment purposes only. [Tr. 292–93].

and, when requested, at subsequent Board meetings; and (5) reimburse the Board for the costs it incurred in conducting its proceedings. [Gov't 6 at 4; Tr. 217–20].

Respondent's agreement with the OHPP required Respondent to submit to random bimonthly drug tests and attend at least 75 percent of the weekly "Caduceus meetings" conducted by OHPP. [Tr. 218–19; Resp't Exh. 1]. Caduceus meetings are similar to Alcoholics Anonymous meetings, but tailored specifically for physicians. [Tr. 351–52]. Dr. Robert Westcott, the president of the OHPP, testified that Caduceus meetings are a place where physicians can "discuss issues about being in recovery and being a physician that you really can't talk about in just a regular open AA meeting." [Tr. 352]. Respondent testified that since entering into an agreement with OHPP, he has not failed any of his required drug tests and has 100 percent attendance at the weekly Caduceus meetings.[14] [Tr. 219–21]. Respondent testified that the OHPP has also asked him to "attend other 12-step type meetings," and that he normally attends those meetings two or three times per week. [Tr. 219]. Respondent also offered into evidence an attendance log which showed that between June 16, 2012, and September 12, 2013, Respondent attended Alcoholics Anonymous meetings almost every week, usually attending more than one meeting per week.[15] [Resp't Exh. 4; Tr. 221–23].

Dr. Westcott, the president of the OHPP, testified that Respondent has fully cooperated with his OHPP contract, that Respondent has "done very well" in his recovery, and that he has "every reason to believe that [Respondent will] continue to do so." [Tr. 372, 377]. He also testified that under OHPP

[14] Although the letter from OHPP offered into evidence by Respondent reports slightly less than 100 percent attendance, [Resp't Exh. 1], Respondent credibly testified on direct examination that the reason for the discrepancy is that he was not aware of the sign-in procedures during the first few weeks he attended the meetings. [Tr. 219]. In any case, both the letter from the OHPP and Respondent's testimony verify that Respondent has been faithful to his contract with the OHPP regarding meeting attendance.

[15] The attendance logs indicated that Respondent did not attend OHPP meetings for the weeks of July 8–14, 2012, September 16–22, 2012, October 21–27, 2012, October 28–November 3, 2012, January 13–19, 2013, and April 7–13, 2013. [Resp't Exh. 4]. However, the logs do not indicate whether meetings were scheduled during those weeks; they only list the meetings Respondent actually attended. Thus, it is impossible to tell from the logs alone what percentage of scheduled meetings Respondent attended.

supervision, "it would (be) very, very unusual for a person to be able to use and continue to use without being caught." [Tr. 369]. In fact, Dr. Westcott testified that the OHPP has a 90% success rate of helping physicians stay sober. [Tr. 367–68]. The Government offered no evidence to refute that Respondent has been diligent in abiding by the terms of his probation.

In addition to the conditions of Respondent's probation, the Board itself conducts a certain amount of oversight over physicians who have been disciplined. Most notably, at least every quarter, the Board uses the Prescription Monitoring Program ("PMP")[16] to review the prescriptions issued by disciplined physicians. [Tr. 370–71]. DEA investigators also have access to the PMP, and use it to monitor registrants suspected of misconduct. [See Tr. 39–40].

Respondent is also subject to oversight at his current place of employment, ACTC. [Tr. 422]. Dr. Richard Swenson, the medical director in charge of supervising the physicians at ACTC, testified that the "locked cabinet or closet" in which the controlled substances are stored at ACTC is "under constant video surveillance" and the drugs themselves are not dispensed by the physicians. [Tr. 418, 438]. Respondent is not permitted to issue prescriptions for controlled substances; he must obtain approval from a doctor with an unfettered license who personally meets and examines the patient before issuing the prescription. [Tr. 419, 437–38].

Although no formal procedures are in place for licensed physicians to review Respondent's charts, Dr. Swenson testified that almost all of the clinic's patients come in for multiple visits and see multiple doctors throughout the course of their treatment. As such, the charts for each patient are normally reviewed by multiple doctors. [Tr. 423–24, 433]. Dr. Swenson also testified that ACTC has a "no tolerance" policy regarding diversion of controlled substances, meaning he would immediately report any concerns of diversion. [Tr. 424–25]. On cross examination, Dr. Swenson testified that ACTC

[16] DI Survovec described the PMP as "a real-time recording of controlled substance prescriptions that are issued." [Tr. 40]

does not conduct drug screens or enter into pain contracts before prescribing controlled substances known to be abused. [Tr. 433–36]. However, Dr. Swenson explained that such precautions are normally used only at "chronic pain management clinics." [Tr. 434]. Even Group Supervisor John Kushnir, the Government's representative at counsel table at the hearing, testified that while ACTC had some minor bookkeeping issues, the oversight ACTC conducts over controlled substances dispensing is "good." [Tr. 335].

Notably, ACTC has experience with disciplined physicians because it works with the State Board to employ disciplined physicians. [Tr. 420–21]. This practice began under the clinic's former medical director, who had himself experienced substance abuse problems and was "interested in seeing what he could do to help other providers that found themselves in that same circumstance." [Tr. 421]. Other than Respondent, ACTC currently employs one other physician and one medical assistant with restricted licenses. [Tr. 420, 421]. Dr. Swenson testified that ACTC has a good track record of helping physicians remain sober and reestablish their professional careers. [Tr. 421–22].

F. DEA Investigations of Respondent

DEA first interviewed Respondent in August of 2012, after learning that Dr. Horst's medical license had been put on probation by the State Board. [Tr. 26, 32]. In attendance at that interview were Diversion Investigator Mary Surovec, Group Supervisor John Kushnir, Respondent, and Dr. Robert Westcott. [Tr. 32]. Dr. Westcott attended the meeting at the request of Respondent. [Tr. 32, 275, 387]. Notably, DI Surovec testified that when asked about the allegations in the Board Order, Respondent "didn't really deny anything." [Tr. 33]. DI Surovec and GS Kushnir also asked Respondent to surrender his DEA registration. [Tr. 32, 55, 226, 318]. Respondent asked what his options were, and he was told that he could either surrender his license or be served with an order to show cause. [Tr. 56, 227, 320]. Respondent told DI Surovec and GS Kushnir that "he was going to think about surrendering." [Tr. 33;

227]. Respondent testified that he was hesitant to surrender his COR because other physicians had told him that after surrendering a DEA registration, "you never get it back." [Tr. 276].[17] Indeed, both DI Surovec and GS Kushnir testified that they did not recall making any indications to Respondent that he would be able to regain a surrendered COR through demonstrated compliance and rehabilitation. [Tr. 61–62].

V. STATEMENT OF LAW AND DISCUSSION

A. Positions of the Parties

1. Government's Position

The Government timely filed Government's Proposed Findings of Fact and Conclusions of Law ("Government's Brief") with this Court on January 31, 2014. In its brief, the Government set forth proposed findings of fact, conclusions of law, and arguments in favor of denying Respondent's COR. The Government argues that it met its burden of proving a prima facie case, primarily focusing on factors two, four, and five of the public interest analysis set forth in 21 U.S.C. § 823(f). [Gov't Br. at 24, 28].

With respect to factors two and four, the Government points out that Respondent stipulated to the factual allegations in the Board Order regarding his positive drug test and improper issuing of prescriptions. [Id. at 25]. Moreover, the Government relies on its expert witness, who testified that Respondent's prescribing of controlled substances to A.B., S.M., and Z.M. were without a legitimate medical purpose. [Id. at 25–27].

Regarding factor five, the Government argues that Respondent's actions of prescribing controlled substances to A.B., someone he knew to be a drug abuser, were particularly harmful to the

[17] The Government sought testimony from Dr. Westcott that, in fact, he was the one who advised Respondent to not surrender his registration, but Dr. Westcott credibly denied doing such. [Tr. 391–392].

public health and safety given Respondent's "practic[e] as a solo gastroenterologist in a small community." [Gov't Br. at 28–29]. The Government also argues that Respondent's admitted abuse of illicit and controlled substances also posed a threat to public health and safety. [Id. at 29]. Although Respondent insists that he never used or possessed illicit drugs at work, the Government argues that "the sheer fact that he tested positive for these drugs while on the job and commuted a great distance to his job demonstrates that Respondent's behavior while he was employed as a physician caused a threat to the public health and safety." [Id. at 29–30].

The Government also argues that Respondent's remedial actions are not sufficient to entrust him with a DEA COR because Respondent has demonstrated a lack of candor with the DEA. The Government points out that (1) Respondent did not report to DEA the positive results of the drug test he took while working for St. Mary's, (2) Respondent "could not admit that his self-abuse . . . contributed to his inability to perform as a doctor," (3) Respondent's testimony was "rife with inconsistencies," and (4) Respondent was not forthright in his testimony about his experience at Santé. [Gov't Br. at 32–33].

Finally, the Government argues that even if Respondent has shown sufficient remorse and instituted remedial measures, his actions were too egregious to warrant his registration. [Gov't Br. at 34–36]. Further, the Government argues that in light of the current prescription drug abuse epidemic, the need to deter improper prescribing weighs in favor of denying Respondent's registration. [Id. at 36].

2. Respondent's Position

Respondent timely filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Argument ("Respondent's Brief") on January 30, 2014. Therein, Respondent "fully admits to writing improper prescriptions to three individuals" and "further admits to using methamphetamine, sometimes as often as twice a week." [Resp't Br. at 7]. Respondent also notes that the entirety of his

impropriety was during a six month time period, but does not dispute that the Government has proved its prima facie case. [Id.].

Rather, Respondent argues that it has rebutted the case against him with evidence that he takes responsibility for his actions and has instituted sufficient remedial actions to justify his registration. Respondent argues that he has made "significant, dramatic, and substantial efforts at rehabilitation and [has] demonstrated commitment to fully comply with any and all regulations placed upon him by state licensure boards." [Id. at 7]. In particular, he argues that his participation in (1) a seven-month inpatient substance abuse program, (2) boundaries training, (3) OHPP programs, (4) random drug testing, and (5) support groups demonstrate his commitment both to recovery from substance abuse and compliance with the Board's conditions of licensure. [Id.]. Respondent also argues that his substance abuse was short-lived, and that he has now been sober for over two years. [Id.]. Moreover, Respondent argues that his circumstances have "changed drastically since the time of his misconduct"; he has reconciled with his wife, attended family counseling, ended his relationship with A.B., and even shortened his commute to work. [Id. at 9].

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. § 823(f) (2011), the Deputy Administrator may deny an application for a DEA COR if he determines that such registration would be inconsistent with the public interest.[18] Similarly, pursuant to 21 U.S.C. §824(a)(4), the Deputy Administrator may revoke a DEA COR, if he determines that such registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

[18] The Deputy Administrator has the authority to make such a determination pursuant to 28 C.F.R. §§ 0.100(b), 0.104 (2013).

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. § 823(f) (2011).

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Robert A. Leslie, M.D., 68 Fed. Reg. 15,227, 15,230 (DEA 2003) (citing Henry J. Schwartz, Jr. M.D., 54 Fed. Reg. 16,422, 16,424 (DEA 1989)). Moreover, the Deputy Administrator is "not required to make findings as to all of the factors." Hoxie v. DEA, 419 F.3d 477, 482 (6th Cir. 2005); see also Morall v. DEA, 412 F.3d 165, 173-74 (D.C. Cir. 2005). Thus, "this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor" each party. Jayam Krishna-Iyer, M.D., 74 Fed. Reg. 459, 462 (DEA 2009). "Rather, it is an inquiry which focuses on protecting the public interest[.]" Id.

The Government bears the ultimate burden of proving that the requirements for registration are not satisfied. 21 C.F.R. § 1301.44(d) (2014). Specifically, the Government must show that Respondent has committed acts that are inconsistent with the public interest. 21 U.S.C. § 823(f); Jeri Hassman, M.D., 75 Fed. Reg. 8,194, 8,227 (DEA 2010). However, where the Government has made out a prima facie case that Respondent's application would be "inconsistent with the public interest," the burden of production shifts to the applicant to

"present[] sufficient mitigating evidence" to show why he can be trusted with a new registration. See Medicine Shoppe—Jonesborough, 73 Fed. Reg. 364, 387 (DEA 2008). To this point, the Agency has repeatedly held that the "registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." Id.; see also Samuel S. Jackson, D.D.S., 72 Fed. Reg. 23,848, 23,853 (DEA 2007). The Respondent must produce sufficient evidence that he can be trusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not reoccur. See id.; see also Samuel S. Jackson, D.D.S., 72 Fed. Reg. at 23,853. The DEA has consistently held the view that "past performance is the best predictor of future performance." Alra Laboratories, 59 Fed. Reg. 50,620 (DEA 1994), aff'd Alra Laboratories, Inc. v. DEA, 54 F.3d 450, 451 (7th Cir 1995).

Factor One: Recommendation of Appropriate State Licensing Board

Recommendations of state licensing boards are relevant, but not dispositive, in determining whether a respondent should be permitted to maintain a registration. See Gregory D. Owens, D.D.S., 74 Fed. Reg. 36,751, 36,755 (DEA 2009); see also Martha Hernandez, M.D., 62 Fed. Reg. 61,145, 61,147 (DEA 1997). According to clear agency precedent, a "state license is a necessary, but not a sufficient condition for registration." Robert A. Leslie, M.D., 68 Fed. Reg. at 15,230; John H. Kennedy, M.D., 71 Fed. Reg. 35,705, 35,708 (DEA 2006).

DEA possesses "a separate oversight responsibility with respect to the handling of controlled substances," which requires the Agency to make an "independent determination as to whether the granting of [a registration] would be in the public interest." Mortimer B. Levin D.O., 55 Fed. Reg. 8,209, 8,210 (DEA 1990); see also Jayam Krishna-Iyer, M.D., 74 Fed. Reg. at 461. Even the reinstatement of a state medical license does not affect this Agency's independent responsibility to determine whether a

DEA registration is in the public interest. Levin, 55 Fed. Reg. at 8,210. The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within a state government. Edmund Chein, M.D., 72 Fed. Reg. 6,580, 6,590 (DEA 2007), aff'd Chein v. DEA, 533 F.3d 828 (D.C. Cir. 2008).

Here, it is undisputed that Respondent holds a valid license to practice medicine in the state of Oklahoma. [Gov't Br. at 21; ALJ Exh. 14]. Because his licensure does not constitute a recommendation from the Board, however, I find that factor one weighs neither for nor against Respondent's registration.

Factors Two and Four: Registrant's Experience with Controlled Substances and Registrant's Compliance with Applicable State, Federal, or Local Laws Relating to Controlled Substances

Respondent's experiences with handling controlled substances, as well as his compliance with laws related to controlled substances, are relevant considerations under the public interest analysis. Pursuant to the Controlled Substances Act, "[p]ersons registered by the Attorney General under this subchapter to … dispense controlled substances … are authorized to possess … or dispense such substances … to the extent authorized by their registration and in conformity with the other provisions of this subchapter." 21 U.S.C. § 822(b); Leonard E. Reaves, III, M.D., 63 Fed. Reg. 44,471, 44,473 (DEA 1998); see also 21 C.F.R. § 1301.13(a) (providing that "[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person."). As such, the DEA properly considers practitioners' past compliance with CSA requirements and DEA regulations in determining whether registering such a practitioner would be in the public interest.

The regulation applicable here is DEA's long-standing requirement that a prescription be issued for "a legitimate medical purpose by an individual practitioner acting in the usual course

of his professional practice." Ralph J. Chambers, M.D., 79 Fed. Reg. 4,962, 4,970 (DEA 2014) (quoting 21 C.F.R. § 1306.04(a)). DEA precedent further establishes that "a practitioner must establish and maintain a bona-fide doctor-patient relationship in order to be acting 'in the usual course of . . . professional practice' and to issue a prescription for a 'legitimate medical purpose.'" Paul H. Volkman, 73 Fed. Reg. 30,630, 30,642 (DEA 2008). Whether a valid doctor-patient relationship was established is determined by looking to state law. Id.

Here, Respondent issued prescriptions to A.B., S.M., and A.M. outside the usual course of his professional practice. The Government's expert credibly testified at the hearing that after reviewing the prescriptions and the patient files, he could "find no documentation that would support the legitimate medical purpose of controlled medications" because there was "no documentation to support history or present illness or a physical exam or an assessment nor a plan." [Tr. 170–173; Gov't Exhs. 9–14, 16]. Dr. Beacham's written report credibly reached these same conclusions. [Tr. 171; Gov't Exh. 16]. Respondent admitted to issuing the prescriptions improperly and did not refute the testimony of the Government's expert witness. [Tr. 201–04]. [19]

In addition to his issuing of improper prescriptions, Respondent's possession[20] of methamphetamine violated federal law. Under the CSA, it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." 21 U.S.C. § 844(a). It is undisputed that Respondent

[19] The Government also produced evidence, and Respondent admitted, that Respondent stored A.B.'s, S.M.'s, and Z.M.'s patient files in his own desk rather than with Red Carpet's other patient files. [Tr. 132–36, 203; Gov't Exhs. 9–11]. While this was certainly suspicious and Respondent admitted it was improper, I can find no regulation Respondent violated by storing the files in his desk, and the Government cites none. Indeed, the Government's argument section in its brief makes no mention of the location of the files.

[20] In order to follow agency precedent, I will take into consideration evidence of Respondent's self- abuse of illicit drugs under the fifth public interest factor. Tony T. Bui, M.D., 75 Fed. Reg. 49,979, 49,989 (DEA 2010). Thus, under factor four I only consider Respondent's possession of methamphetamine and not his use.

possessed methamphetamine, which is a Schedule III controlled substance under 21 U.S.C. § 812, without a prescription. [See Tr. 200; Resp't Br. at 3].

I find that Respondent's possession of a controlled substance without a prescription, combined with his improper issuing of prescriptions to A.B., S.M., and Z.M., clearly weigh against Respondent's registration under factors two and four of the public interest analysis.

Factor Three: Registrant's Conviction Record Relating to Controlled Substances

Pursuant to 21 U.S.C. § 823(f)(3), the Deputy Administrator may deny a pending application for a certificate of registration upon a finding that the applicant has been convicted[21] of a felony related to controlled substances under state or federal law. See Thomas G. Easter II, M.D., 69 Fed. Reg. 5,579, 5,580 (DEA 2004); Barry H. Brooks, M.D., 66 Fed. Reg. 18,305, 18,307 (DEA 2001); John S. Noell, M.D., 56 Fed. Reg. 12,038, 12,039 (DEA 1991).

Here, the Government concedes that it "did not introduce any evidence during this proceeding regarding a Federal or State conviction for Respondent relating to controlled substances." [Gov't Br. at 23]. Indeed, the parties stipulated that "Respondent has not been charged with or convicted of any federal or state crimes relating to the manufacture, distribution, or dispensing of controlled substances." [ALJ Exh. 14]. However, the Government also correctly points out that under DEA precedent, factor three is not dispositive and "is of considerably less consequence in the public interest inquiry." [Gov't Br. at 23 (quoting Ruben, 78 Fed. Reg. at 38,379 n.35]. I therefore find that this factor weighs neither for nor against Respondent's registration.

[21] The Administrator interprets the term "conviction" by affording it the "broadest possible meaning." Donald Patsy Rocco, D.D.S., 50 Fed. Reg. 34,210, 34,211 (DEA 1985). Thus, evidence of a guilty plea is probative under the third factor of the public interest analysis. See e.g., Farmacia Ortiz, 61 Fed. Reg. 726, 728 (DEA 1996); Roger Pharmacy, 61 Fed. Reg. 65,079, 65,080 (DEA 1996).

Factor Five: Such Other Conduct Which May Threaten the Public Health and Safety

Under the fifth public interest factor, the Agency considers "[s]uch other conduct which may threaten the public health and safety." 21 U.S.C. § 823(f)(5). The Administrator has clarified this language by reasoning that since Congress used the word "may," factor five includes consideration of conduct "which creates a probable or possible threat (and not an actual) threat [sic] to public health and safety." Roni Dreszer, M.D., 76 Fed. Reg. at 19,434; Michael J. Aruta, 76 Fed. Reg. 19,420, 19,420 (DEA 2011); Beau Boshers, M.D., 76 Fed. Reg. 19,401, 19,402 n.4 (DEA 2011); Jacobo Dreszer, M.D., 76 Fed. Reg. 19,386, 19,386 n.3 (DEA 2011).

Taking into consideration Congress's clear statutory language and legislative intent under the CSA, misconduct considered under factor five also "must be related to controlled substances." Terese, Inc. D/B/A Peach Orchard Drugs, 76 Fed. Reg. 46,843, 46,848 n.11 (DEA 2011); Tony T. Bui, M.D., 75 Fed. Reg. at 49,989 ("In short, DEA has never held that a practitioner's prescribing practices with respect to non-controlled substances provide an independent basis for concluding that the practitioner has engaged in conduct which may threaten public health and safety and has thus committed acts inconsistent with the public interest.").

Long-standing agency precedent indicates that a "practitioner's self-abuse of a controlled substance is a relevant consideration under factor five." Tony T. Bui, M.D., 75 Fed. Reg. at 49,989; Allan L. Gant, D.O., 59 Fed. Reg. 10,826, 10,827 (DEA 1994); David E. Trawick, D.D.S, 53 Fed. Reg. 5,326 (DEA 1988). This Agency has upheld such a position, "even when there [was] no evidence that the registrant abused his prescription writing authority" or when there was "no evidence that the practitioner committed acts involving unlawful distribution to others." Tony T. Bui, M.D., 75 Fed. Reg. at 49,989. In determining the likelihood that a

respondent's self-abuse would impair the public interest, the DEA may look to the duration of the drug abuse. See Roger D. McAlpin, D.M.D., 62 Fed. Reg. 8,038, 8,040 (DEA 1997) (finding "serious questions regarding Respondent's fitness to possess a DEA registration" because of "his self-abuse of controlled substances from at least 1974 to 1990").

Here, it is undisputed that Respondent self-abused controlled substances. Respondent admitted at the hearing that he used methamphetamine with A.B. for about eight months and admitted at the Board hearing that he has sporadically used marijuana in the past. Under factor five of the public interest analysis, this self-abuse weighs against Respondent's registration.

In addition to his self-abuse of drugs, other aspects of Respondent's behavior are also troubling under factor five. For example, Respondent continued prescribing hydrocodone, a highly abused drug, to A.B. despite knowing that A.B. regularly abused controlled substances such as methamphetamine and marijuana. Also, while Respondent did not personally take part in the sale or manufacturing of any illegal drugs, he was present or nearby while an illegal transaction took place and while methamphetamine was being manufactured. Taking into consideration these facts, combined with Respondent's self-abuse of controlled substances, I find that factor five weighs against Respondent's registration.

Having found that factors two, four, and five weigh against Respondent, I find that the Government has met its burden to prove a prima facie case that Respondent's registration would not be in the public interest. I now turn to whether remedial measures instituted by Respondent show that he can be trusted with a DEA registration.

Remedial Measures

Where the Government has made out a prima facie case that Respondent's registration would be inconsistent with the public interest, the burden of production shifts to the applicant to "present[]

sufficient mitigating evidence" to show why he can be trusted with a new registration. See Medicine Shoppe—Jonesborough, 73 Fed. Reg. at 387. To this point, the Agency has repeatedly held that the registrant must "accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct. Id.; see also Samuel S. Jackson, D.D.S., 72 Fed. Reg. 23,848, 23,853 (DEA 2007). Specifically, to rebut the Government's prima facie case, the respondent is required "to accept responsibility for [the established] misconduct, [and] also to demonstrate what corrective measures [have been] undertaken to prevent the re-occurrence of similar acts." Jeri Hassman, M.D., 75 Fed. Reg. 8,194, 8,236 (DEA 2010) (citing Jayam Krishna-Iyer, M.D., 74 Fed. Reg. 459, 464 n.8 (DEA 2009)).

In determining whether a respondent has accepted responsibility and whether misconduct will reoccur, the Agency has historically looked to a number of considerations, including genuine remorse and admission of wrongdoing, Lawrence C. Hill, M.D., 64 Fed. Reg. 30,060, 30,062 (DEA 1999), lapse of time since the wrongdoing, Norman Alpert, M.D., 58 Fed. Reg. 67,420, 67,421 (DEA 1993), candor with the court and DEA investigators, Jeri Hassman, M.D., 75 Fed. Reg. 8,194, 8,236 (DEA 2010), and attempts to minimize misconduct, Ronald Lynch, M.D., 75 Fed. Reg. 78,745, 78,754 (DEA 2010). In self-abuse cases, the Agency has acknowledged that successful rehabilitation efforts are an important consideration in determining whether a respondent can be trusted with a registration. Steven M. Abbadessa, D.O., 74 Fed. Reg. 10,077, 10,082 (DEA 2009); Tony T. Bui, M.D., 75 Fed. Reg. 49,979, 49,990 (DEA 2010).

At the hearing, Respondent stated several times that "'regret' is not even a strong enough word. I'm very remorseful for my ever going down that pathway." [Tr. 197, 238]. He unequivocally stated that he accepts "full responsibility" for his misconduct and that he is "appalled at [his] behavior." [Tr. 196, 238, 256, 257]. Respondent also testified, and the Government did not rebut, that he has been sober since October of 2011, confirming the effectiveness of his treatment and his commitment to remaining

sober. [Tr. 259]. Most importantly, Respondent provided unrebutted evidence of his successful rehabilitation at an inpatient facility, where he received intensive therapy for about seven months. [Tr. 210 ; Resp't Exh. 2;]. Notably, Respondent displayed his genuine intent to become and remain sober by spending his own money—including retirement investments—to pay for his rehabilitation. [Tr.210]. Moreover, Respondent provided evidence, largely unrebutted by the Government, that he faithfully attended support group meetings, passed random drug tests, and was otherwise successful in abiding by the terms of his probation.

The Government argues that Respondent cannot be trusted with a COR because he was not candid with DEA investigators or this Court and that his testimony was "rife with inconsistencies." [Gov't Br. at 33]. I disagree. The Government's first argument to this effect is that Respondent failed to self-report his failed drug screen to DEA, and that when Respondent first met with DEA investigators, he "failed to admit . . . the fact that he issued illegal prescriptions to A.B., S.M., or Z.M., and did not admit his self-abuse of marijuana." [Gov't Br. at 32]. DI Surovec, however, testified that in her first meeting with Respondent, "[w]e asked him about the allegation in the board order, and he really didn't deny anything." [Tr. 33]. The Board Order mentioned Respondent's improper prescribing and the positive result for marijuana on the drug screen. [Gov't Exh. 6 at 2, 3]. In that context, it can hardly be said that Respondent was attempting to conceal facts from the DEA that were contained in the very document about which the DEA was questioning him. Furthermore, Respondent's failure to self-report to the DEA does not show a lack of candor, given that he had already self-reported to the Board. [Tr. at 273–74]. Rather, Respondent's explanation that he did not know he needed to self-report is the more plausible explanation. [Tr. 273–74].

The Government also argues that Respondent was not candid because he "could not admit that his self-abuse . . . contributed to his inability to perform as a doctor." [Gov't Br. at 32]. Respondent

testified that he was tired at work because of his commute, heavy workload, and lack of sleep at A.B.'s house and that using methamphetamine, which is a stimulant, did not contribute to his fatigue. [Tr. 243–44, 249]. While this may seem like Respondent was trying to minimize the effects of his drug use, I find that this was merely Respondent's honest assessment of his situation at the time. Indeed, the Government elicited this testimony itself. [Tr. 243–44].

The Government similarly argues that Respondent minimized his misconduct by testifying that he prescribed hydrocodone to A.B., a known drug abuser, "out of compassion [because] [s]he was in pain," and that "hydrocodone was not her drug of choice." [Gov't Br. at 33]. Again, this testimony was specifically elicited by Government counsel and went unrebutted. While the reasons Respondent gave for prescribing hydrocodone to A.B. certainly do not justify his improper methods of prescribing, they also do not represent an attempt to minimize or rationalize his behavior. Indeed, Respondent's explanation for prescribing to A.B. was preceded by his statement that "it was improper and I admit that." [Tr. 252]

Additionally, the Government argues that Respondent's testimony was "rife with inconsistencies." [Gov't Br. at 33]. For example, the Government points to Respondent's explanations as to why he tested positive for marijuana and amphetamine. As explained above, however, Respondent's explanation about these drug test results were credible and went unrebutted by the Government.

The Government also argues that Respondent was not "forthright regarding his treatment at Santé" because he failed on direct examination to disclose that he broke his "no female contract" at the treatment center. [Gov't Br. at 33]. The Government points out that on direct examination Respondent testified that he was a "model patient," but that his breaking of the no-female contract contradicts that

statement. [Gov't Br. at 33].[22] The Government, however, ignores Respondent's testimony that directly precedes his "model patient" statement: "[I]t was a little bit difficult to acclimate myself for the first few weeks, probably six weeks. It took me a while to kind of get into the flow of things. Thereafter, I'd like to think I became a model participant." [Tr. 210]. While Respondent did not divulge on direct examination every detail about his struggles in rehabilitation, his statement that he became a "model participant" was not an attempt to conceal anything.

I therefore find that Respondent has sufficiently accepted responsibility for his actions and instituted remedial measures to ensure that the misconduct will not reoccur. At the hearing, Respondent was consistent, sincere, and unequivocal in his acceptance of responsibility for his misconduct. The success of Respondent's rehabilitation is evidenced by his more than two years of sobriety and his faithful attendance at support group meetings since being discharged from therapy. His separation from A.B., the epicenter of most of his problems, displays his commitment to avoiding influences that could lead to a relapse into abusing controlled substances or improperly issuing prescriptions.

Even when a respondent is genuinely remorseful and has instituted sufficient remedial measures, however, the Agency sometimes imposes sanctions to deter egregious violations of the CSA. David A. Ruben, M.D., 78 Fed. Reg. 38,363, 38,386 (DEA 2013); Joseph Gaudio, M.D., 74 Fed. Reg. 10,083, 10,094–95 (DEA 2009). In light of the prescription drug epidemic, the Agency has placed special emphasis on the need to deter intentional diversion of controlled substances, which includes issuing prescriptions "outside of the usual course of professional practice and [without] a legitimate medical purpose." David A. Ruben, M.D., 78 Fed. Reg. at 38,386–87; but see Tyson D. Quy, M.D., 78 Fed. Reg. 47,412, 47,412 n.2 (DEA 2013) ("Because there is no evidence that Respondent diverted controlled

[22] Over Respondent counsel's vehement objection at the hearing, I allowed the Government to introduce evidence of Respondent's relationship with a woman at Santé. [Tr. 261–263]. However, because this subject was not disclosed prior to the hearing, I admitted the evidence for impeachment purposes only. [Tr. 293].

substances to others and this is a first offense, I conclude that consideration of the Agency's deterrence interests is not warranted."). "Indeed, this Agency has revoked a practitioner's registration upon proof of as few as two acts of intentional diversion and has further explained that proof of a single act of intentional diversion is sufficient to support the revocation of a registration." David A. Ruben, M.D., 78 Fed. Reg. at 38,386 (citing Dewey C. MacKay, M.D., 75 Fed. Reg. 49,956, 49,977 (DEA 2010)).

Respondent's improper prescriptions to A.B., S.M., and Z.M. clearly constitute intentional diversion. He admits to improperly prescribing a highly abused drug, hydrocodone, to a known drug addict, A.B., and two of her friends, S.M. and Z.M.. While he only wrote one prescription each to S.M. and Z.M., he continued to prescribe controlled substances to A.B. for over a year, totaling fifty-four distributions of controlled substances, including refills. [Gov't Exhs. 12–14]. Thus, although Respondent's improper prescribing practices were limited to A.B. and a few of her friends, under DEA precedent they clearly warrant sanctions to deter Respondent and others from repeating the practice.

I will not recommend, however, that the Agency deny Respondent's registration altogether. While Respondent's improper prescriptions are troubling to say the least, the DEA has granted registrations with restrictions to respondents whose misconduct was more egregious and/or lasted longer than the misconduct of Respondent here. David A. Ruben, M.D., 78 Fed. Reg. at 38,386 (granting a registration to a respondent who improperly prescribed drugs after being placed on probation by state board); Gregory D. Owens, D.D.S., 74 Fed. Reg. 36,751, 36,755, 36,757–58 (DEA 2009) (granting a registration to a respondent who prescribed controlled substances for seven years based on an expired registration); Michael S. Moore, M.D., 76 Fed. Reg. 45,867, 45,868 (DEA 2011) (granting a registration to a respondent who was convicted of growing and distributing marijuana); Roger D. McAlpin, D.M.D., 62 Fed. Reg. 8,038, 8,040 (DEA 1997) (granting a registration to a respondent who self-abused controlled substances for sixteen years and forged a prescription to obtain controlled substances).

In each of these cases, the DEA granted the respondents' registrations but also imposed restrictions, suspensions, or conditions. Where the respondent intentionally diverted controlled substances, the Agency required the respondents to periodically submit logs of all controlled substances they prescribe and suspended the respondents' registrations for periods of time commensurate with the severity of the misconduct. See Ruben, M.D., 78 Fed. Reg. at 38,387–88; Gregory D. Owens, D.D.S., 74 Fed. Reg. at 36,757–58; Moore, 76 Fed. Reg. at 45,869. Where the respondent self-abused controlled substances, the Agency required the respondent to submit to random drug tests. See Moore, 76 Fed. Reg. at 45,869; McAlpin, 62 Fed. Reg. at 8,040–41. Given that Respondent has a history of self-abuse and improper prescriptions, similar conditions are appropriate here.

I also note that some of the oversight currently placed over Respondent may not be present if he is granted a DEA registration. Specifically, it is not clear from the record how much of the oversight of Respondent by ACTC would be conducted if Respondent had an unfettered DEA registration. Indeed, some of the oversight conducted by ACTC, such as approval from other doctors for prescriptions of controlled substances, is done precisely because Respondent has no DEA registration and thus is not authorized to dispense controlled substances. This part of oversight would presumably—though not necessarily—be lifted if Respondent were granted a DEA registration. Moreover, Respondent expressed at the hearing his desire to work as a gastroenterologist, so he may not be under ACTC supervision much longer. [Tr. 233]. Given Respondent's history of improper prescribing, DEA is justified in placing certain restrictions on Respondent's COR to ensure precise compliance with the CSA and DEA regulations in the event that ACTC no longer supervises Respondent's prescribing practices.

VI. CONCLUSION AND RECOMMENDATION

Therefore, given that Respondent has a history of both self-abuse and intentional diversion but has demonstrated genuine remorse and instituted significant remedial measures, I recommend that Respondent's registration be granted with the following conditions:

(1) For six months following the publication of the Deputy Administrator's final order in this case, Respondent shall keep a log of all controlled substance prescriptions he issues. Said log shall be maintained in chronological order, and shall list each patient by name, and include the name of the drug prescribed, the number of refills authorized, the strength of the dosage unit, the quantity, and the dosing instruction. Not later than ten days following the end of each calendar month, Respondent shall provide the local DEA field office with a complete copy of the log for the preceding month. If during any month Respondent is required to maintain said logs he prescribes no controlled substances, he shall submit a letter declaring such to the local DEA field office no later than ten days following the end of that month.

(2) Respondent shall agree to have no intentional contact with A.B., S.M., Z.M., or any other person with whom Respondent abused controlled substances.

(3) Respondent shall comply with the terms of his probation instituted by the Board and shall comply with any other conditions the Board shall see fit to impose on his license or registration.

(4) Respondent shall notify the local DEA field office if he fails any drug screen administered by any entity.

I further recommend that Respondent's registration be suspended for six months following the effective date of his registration.

Dated: March 25, 2014

s/Gail A. Randall
Administrative Law Judge

[FR Doc. 2015-17309 Filed: 7/13/2015 08:45 am; Publication Date: 7/14/2015]