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UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

Docket No. 14-13
MARK WILLIAM ANDREW HOLDER, M.D.
DECISION AND ORDER

On October 9, 2014, Administrative Law Judge Christopher B. McNeil (hereinafter, ALJ) issued the attached Recommended Decision (hereinafter, cited as R.D.). On October 31, 2014, one day after the due date, see 21 CFR 1316.66, Respondent filed Exceptions to the Decision.

According to Respondent's counsel, on the day on which his Exceptions were due, her word processing program shut down and while she was able to find a recovered document, "it was not the most recent version and did not include the final arguments or footnotes." Resp. Mot. for the Administrator to Accept and Review the Updated Version of Respondent's Exceptions to the ALJ's Recommendations, at 1. Respondent's counsel represents that she immediately contacted the ALJ's law clerk to request an extension; according to Respondent's counsel, she spoke with the ALJ who stated that she could either submit the document "as is" or "send a motion to the [A]dministrator requesting an extension." Id. at 1-2.

Respondent's counsel chose to file his Exceptions "as is." Id. at 2. However, according to Respondent's counsel, the document contained "many errors and . . . was incomplete." Id. Respondent's counsel also represented that on the day before the Exceptions were due, she had to deal with a family medical emergency. Id. Accordingly, on November 5, 2015, Respondent's counsel filed the above-referenced motion along with a revised version of his Exceptions. Id. at 1. Having considered Respondent's motion, I find that good cause exists to excuse the untimely filing of his Exceptions and consider them in my review of the record.

Having considered the record in its entirety,[1] I adopt the ALJ's findings of facts and conclusions of law except as discussed throughout this decision. I agree with the ALJ's findings that Respondent 1) unlawfully prescribed controlled substances (Percocet and Xanax) to S.S., see R.D. at 59; 2) unlawfully obtained and self-administered Adderall, see id. at 59; 3) provided inconsistent and misleading accounts of his drug use to DEA Investigators, see id. at 61-62, 65-66; 4) materially falsified his application for a DEA registration; see id. at 62-63; and 5) failed to unequivocally acknowledge his misconduct in issuing unlawful prescriptions to S.S. , see id. at 41-42, as well as in materially falsifying his DEA application, id. at 66; and 6) failed to produce sufficient evidence of remediation. Id. at 66-67. Accordingly, I adopt the ALJ's ultimate conclusions of law that Respondent has materially falsified his application for a DEA registration and committed acts which render his registration inconsistent with the public interest, and that he has failed to rebut the Government's prima facie case. See id. at 67. I therefore adopt the ALJ's recommendation that I deny Respondent's application. A discussion of Respondent's Exceptions follows.

Respondent's Exceptions

[1] On November 3, 2014 (which was after the record had closed), Respondent filed a request for me to review an additional document, this being a chemical assessment performed on October 9, 2013 by Ms. Joan Hasper. Resp. Req. for Administrator to Review an Additional Document. Respondent argues that I should review this document because "[t]here is no way that [he] can prove that he gave [the DI] a copy of the HPSP file without access to the Government's file which would document receipt of the HPSP file," and that "it is necessary in the interest of justice to review the additional assessment which [the DI] testified that she did in fact receive." Id. at 3. Given that Ms. Hasper did not perform her assessments as part of the HPSP program, it is not clear why this document impeaches the DI's testimony that Respondent refused to provide releases for the records of his treatment which were maintained by the Florida PRN and the HPSP programs.

However, Respondent furthers argues that "this document shows that [the DI] received diagnosis, prognosis, and treatment [information], it further shows that Dr. Holder provided the necessary release which allowed [the DI] to meet with Ms. Hasper and discuss the process of the evaluation and its contents." Id. Respondent then acknowledges that "this document probably should have been included in the evidence introduced at the hearing." Id.

I agree. This document does not constitute newly discovered evidence and was obviously available to Respondent at the time of the hearing. I therefore decline to consider it. See Richard A. Herbert, 76 FR 53942, 53944 (2011); see also ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 286 (1987).

Respondent takes exception to three of the ALJ's enumerated factual findings (numbers 12, 13, and 14) asserting that they are not supported by the record. He also takes exception to five of the ALJ's conclusions of law (numbers 2, 5, 6, 9, and 13).

Exception to Finding of Fact #12

In Finding of Fact number 12, the ALJ found:

> In the course of investigating the circumstances surrounding state medical board action pertaining to Respondent's medical licenses in Florida and Minnesota, DEA Diversion Investigator Virginia McKenna met with or spoke with Respondent on several occasions between July 19, 2012 and August 23, 2013. Throughout this period, Investigator McKenna made repeated requests for Respondent to provide the DEA with copies of monitoring and treatment records reflecting action by the medical boards in Florida and Minnesota. Initially, and for a period extending more than six months, Respondent deferred complying with these requests while assuring Investigator McKenna he would comply. By April 2013, when the records still had not been produced, Investigator McKenna presented Respondent with release forms that would authorize the DEA to receive copies of these reports. Respondent refused to sign the releases, and advised Investigator McKenna that he would not permit the DEA access to the PRN report from Florida, and gave her what appears to be an incomplete set of records reflecting the report from Minnesota.

R.D. at 61.

Respondent asserts that this finding is not supported by the record, because the Diversion Investigator acknowledged in her testimony that she had received duplicate copies of a physician's report prior to obtaining some 82 pages of documents from Respondent, and that "[i]n order to receive a duplicate copy she must have received a previous copy of the report." Exceptions at 2. Respondent argues that the DI's statement that she did not receive "'much, if anything' is contradicted by the fact that she acknowledged receipt of 82 pages of information," which included "copies of notes [prepared by his case manager at the Minnesota Health Professionals Services Program (HPSP)], the quarterly reports[,] as well as a toxicology report provided to" the DI. Id. at 2-3.

Respondent also asserts that he provided the results of a chemical assessment, which included the diagnosis, prognosis and recommended treatment, by Ms. Hasper (who he saw outside of the HPSP program), as well as reports from Dr. Albert, a psychologist he saw some fifteen times as part of the HPSP program. Id. at 3 (citing Tr. 481). Respondent then argues that the DI "intentionally mislead [sic] the court when she stated that she did not receive any documentation of diagnosis, treatment and prognosis" and this calls "into question the credibility of the rest of her testimony." Id. at 4.

While Respondent acknowledges that he did not provide his Florida PRN file to the DI, he argues that he "provide[d] a copy of his HPSP information which reflected the most recent analysis of his treatment, diagnosis and prognosis" to the DI and that she did not "articulate what information she was missing from the HPSP file." Id. at 4. He then asserts that the DI, "[a]fter having [his] HPSP file for months, . . . returned to his place of work to request that he sign a release." Id. Respondent asserts that he "requested his entire file from HPSP and provided that file to [the DI] in January, four months before her visit to his office." Id. He then argues that "[t]here was no reason for him to believe that HPSP records beyond what he provided existed or that signing the release would have provided any additional information than what he had already provided to" the DI and that "[t]here was also no reason to believe that providing PRN information would lead to an outcome." Id.

I do not find Respondent's Exception to establish sufficient reason to reject the ALJ's finding, which was based largely on his assessment of the credibility of the DI and Respondent. As for Respondent's contention that because the DI testified that she received duplicate copies of a physician's report, she must have received the report previously, I do not agree. The DI testified that notwithstanding numerous requests she made of Respondent to provide his HPSP

records, including on July 19, 2012 and August 25, 2012, as well as on an unspecified date in November 2012, he did not provide the aforesaid 82 pages, which he represented as being the HPSP records, until the January 4, 2013 meeting. Tr. 464, 469-70, 472-73. Notably, before Government counsel even broached the subject of the January 4, 2013 meeting the DI had with Respondent, Government Counsel asked the DI: "and did you get the records?" to which the DI answered: "I did not." Id. at 473. Moreover, Respondent did not cross-examine the DI regarding her testimony that she received "a duplicate copy" of a quarterly report by Dr. Albert. Id. at 488-98. Indeed, the DI's testimony does not suggest that she had previously received the documents but that she received duplicate copies of various documents when on January 4, 2013, Respondent provided these documents to her. Id. at 474-75 (testimony of DI that after noting "three or four pages of notes from" his case manager, "the remainder of the information were [sic] duplicate copies of his agreement to work with HPSP, faxes going back and forth showing people submitting quarterly reports but the quarterly reports didn't have a lot of detail. There was a duplicate copy from Dr. Albert on a quarterly report and the third page of that was from a second quarterly report which was almost identical to the first one and then there were a whole bunch of releases that he signed for different entities to receive some of these records").[2]

[2] As the 82 pages Respondent provided the DI were not submitted as a discrete exhibit (some of the documents may have been submitted as other exhibits), I have no basis to conclude whether the records were complete. However, the quarterly reports submitted as Respondent's Exhibit M (which covered the quarters ending on April 15, 2012 and July 15, 2012) were essentially three page documents, one page being the "Participant Update," the second page being the "Treatment Provider Report Form," and the third page being a letter from the Executive Director of Physicians Serving Physicians attesting to his attendance at various meetings. RX M. As for the Treatment Provider Report Forms, they list the primary and secondary treatment foci, Respondent's symptoms, and then provide a "diagnostic impression," a "Treatment Plan," "Client/Patient Insight," and "Medications." See RX M. While it is certainly true that these forms listed Dr. Albert's diagnosis and recommended treatment, given the brevity of the notes, which did not include a discussion of Respondent's history (including his history of substance abuse) and Dr. Albert's initial evaluation of him, it is understandable that the DI did not believe that Respondent had provided his complete HPSP file.

As for Respondent's contention that in January 2013, he provided his complete HPSP file, the evidence nonetheless establishes that in August 2013,[3] the DI, who still believed that Respondent had not provided the full file (indeed, he had not provided any material from the Florida PRN program), went to his place of employment and requested that he provide releases so that the DI could directly obtain his records from the HPSP and PRN programs. Tr. 478. Respondent again asserted that he had provided the DI with "everything." Id. at 479. However, even after the DI told Respondent that she "needed to obtain [the records] for [her]self in order to be sure that [she] had everything," Respondent declined to execute the releases saying that he wanted to talk to his attorney. Id. However, when the DI called him ten days later and asked whether "he was willing to sign the releases," Respondent stated "that he had already given me all of HPSP's records, that PRN's records were full of inaccuracies, and that it would be inappropriate for me to have that information and to use it at this point." Id.

It is true that during this phone call, Respondent told the DI that he was going to undergo a chemical assessment by Ms. Hasper, which he did outside of the HSPS, as he had already completed the program. Id. at 480-81. Respondent also apparently agreed to release the contents of his file with Dr. Hasper to the DI. Id. at 480. However, upon reviewing the file, the DI found that it contained notes from Dr. Albert (the psychologist who treated him under the HPSP program) for Respondent's first two visits (when generally a history and evaluation are completed). Id. at 481. According to the DI, she had not previously seen these notes in the documents Respondent submitted. Id. at 482.

Thus, contrary to Respondent's Exception that the DI did not "articulate what she was missing from the HPSP file," Exceptions at 4, the DI did identify information that was likely in

[3] While the record establishes that in April 2013, the DI had a further conversation with Respondent about obtaining his records, including those from the Florida PRN program (which she "hadn't received anything about"), the record does not establish the precise scope of this conversation. Tr. 478.

his HPSP file.[4] And even if this information was not in the file, I find that the rest of the ALJ's factual finding is supported by a preponderance of the evidence. I therefore reject this exception.

Exception to Finding of Fact #13

In Finding of Fact Number 13, the ALJ found:

> In meetings and conversations conducted by DEA Diversion Investigator McKenna . . . Henderson, and . . . Capello, Respondent gave evasive and conflicting answers to questions regarding his history of drug abuse, his use and abuse of marijuana and Adderall, the sources supplying him with controlled substances, his ability to recall the events immediately prior to and after the June 13, 2008 crash, the nature and severity of injuries he and his passenger sustained due to the crash, his use of controlled substances while working at MD Now, and his reasons for answering registration application Question Three in the negative. He provided similarly evasive and conflicting answers to questions presented to him by the medical boards in Florida and Minnesota, particularly minimizing the severity of injuries he and his passenger sustained in the June 13, 2008 crash. Respondent continued providing evasive, inconsistent, and deflecting responses during the evidentiary hearing he requested upon his receipt of the pending DEA Order to Show Cause.

R.D. at 61-62.

In excepting to this finding, Respondent takes issue with the ALJ's credibility findings with respect to multiple witnesses for the Government. These include: 1) the DI whose testimony is discussed above; 2) S.S., who testified, inter alia, that Respondent wrote a fraudulent prescription for Adderall in S.S.'s name, which S.S. filled, and after taking some of the pills, then provided to Respondent, as well as that he provided other drugs such as cocaine and marijuana to Respondent; 3) a paramedic who responded to the scene after Respondent crashed his vehicle; and 4) N.P., a passenger in Respondent's vehicle, who was injured in the crash. Exceptions at 5-14.

[4] As the DI testified, the notes showed that Respondent told Dr. Albert that he had "used Adderall one time in residency and a total of perhaps five times outside of residency." Tr. 482.

As for the DI, Respondent raises a further challenge to her credibility. He notes that during her testimony regarding a meeting (on July 19, 2012) with Respondent and his attorney, during which the allegation that he materially falsified Question Three on his application was raised, the DI testified that:

> He answered on the application no. When I asked him about that, he said that he didn't understand the question, that he wasn't intending to lie, at which time Mr. Harbison interjected, why would he lie when he knew it was public record, but I had no, I don't know why he would or wouldn't do such a thing, so I showed him the application. And then he said that he didn't read the question thoroughly, and that's when I showed him a sample application that I had.

Tr. 463. According to Respondent, the DI later admitted that Respondent's "application was not presented to him at the meeting." Exceptions at 6. Respondent based this on the following colloquy during cross examination:

> Resp. Counsel: And concerning the application, when Mr. Harbison first requested the application, wasn't he told that you all were not able to provide him an application because it was done on the internet?
>
> DI: Yes, ma'am. That was my error. I spoke with . . . the section chief for Registration, and I misunderstood what he said. And I relayed that, my misunderstanding. And that's when they went further and were able to produce it.

Id. at 495.

I do not find this testimony sufficient to support Respondent's contention that the DI gave false testimony in the proceeding. The DI's testimony is simply insufficient to establish that at the July 2012 meeting, she showed the actual application filed by Respondent as opposed to the sample application she referred to in the next sentence. Notably, the DI's testimony that "so I showed him the application" does not specify that it was Respondent's actual application

which she showed him, and her continuing testimony supports the inference that it was only a sample application. [5] Accordingly, I reject Respondent's challenge to the DI's credibility.

Respondent further argues that the ALJ gave inappropriate weight to the testimony of S.S., who, in Respondent's words, "was willing to make many exaggerations/false statements against [him] for a get out of jail card." Exception at 7. Respondent contends that S.S. gave "internally conflicting testimony that he provided cocaine 'sporadically' and marijuana 'relatively regularly to Dr. Holder,'" and "he used these drugs with Dr. Holder." Id. at 7-8. According to Respondent, this is so because at the time of his drug use with Respondent, "he was on probation" and subject to drug testing, and yet testified that he did not fail any drug tests when he was living in Palm Beach County. Id. at 8. Respondent argues that this establishes that S.S.'s testimony is not credible because "how could he use marijuana and cocaine with [Respondent] and evidence of this drug use never reveal itself on any of his drug tests?" Id.

While S.S. testified that he was on probation during the same time-period in which he testified that he "used cocaine and marijuana with" Respondent, id. at 198, there is no evidence in the record as to how frequently S.S., who had been on probation for more than two years at this point, id. at 212, was subject to drug testing during this period. Moreover, evidence in the record establishes that following the accident, the Palm Beach County Sheriff's office obtained a blood specimen from Respondent which tested positive for Delta-9-Carboxy THC, see GX 13, a metabolite of THC, thus establishing that Respondent had used marijuana.

S.S. further testified that in June 2008, he was smoking marijuana with Respondent at the latter's residence, when Respondent told him that he needed a favor – this being for S.S. to come

[5] Indeed, if the DI had Respondent's actual application available to her at the time of the meeting, there would have been no need to then show him a sample application, as the actual application would have included the same question. Also, regarding her testimony at Tr. 463, it is not unusual for a witness to offer an answer, which she subsequently clarifies while reflecting on the question.

by the office and fill a prescription for Adderall, which S.S. was to then return to Respondent. Tr. 208. On June 11, 2008, Respondent either called or texted S.S., who went to Respondent's clinic, picked up a prescription for 60 tablets of Adderall 30 mg which was written by Respondent and listed S.S. as the patient. Id. at 208-09. S.S. then went to a Walgreens pharmacy located next to the clinic, filled the prescription, and after taking some pills for himself, gave the rest of the pills to Respondent. Id. at 209-11; see also GX 6.

To be sure, as Respondent argues, S.S. gave conflicting testimony as to how many of the Adderall pills he took from the prescription, initially stating that he took one or two pills, which was his "best recollection," before adding that "[i]t could have been three or four." Tr. 213-14. While Respondent argues that S.S. was "willing to say just about anything," Exceptions at 9, the evidence shows that following the accident, the police found in Respondent's car the prescription vial bearing S.S.'s name as the patient and listing the contents as amphetamine 30 mg, along with 41 pink tablets. GX 11, at 1. Moreover, the blood specimen obtained from Respondent following the accident showed that he had ingested amphetamines. GXs 13, 14. Thus, I find no reason to reject the ALJ's finding that S.S. gave credible testimony.[6]

As for N.P.'s testimony, which primarily focused on the scope of the injuries she suffered in the accident, whether she had only minor injuries as Respondent suggests or more serious injuries to include a dislocated elbow, shattered cervical disc, a broken back, and neurologic damage, is of only nominal relevance in resolving whether granting Respondent's application is consistent with the public interest. 21 U.S.C. § 823(f). In any event, given that the Government

[6] As for the discrepancy between the Palm Beach County EMS report which documented that Respondent had a seizure and the testimony of the paramedic that he did not witness Respondent having a seizure upon arriving at the accident scene or while transporting him to the hospital and that the paramedics "were just following our protocols [by administering Valium] in case he ha[d] a history," Tr. 258, it is unclear why this fact is material in assessing the ALJ's finding that Respondent gave inconsistent testimony regarding the circumstances surrounding the accident. However, even if it is material, I do not find adequate justification to reject the ALJ's credibility determination as to the paramedic's testimony.

disclosed to Respondent that it intended to elicit testimony from N.P. regarding the injuries she sustained and that the ALJ found her testimony credible, in the absence of medical records refuting her testimony, I find no reason to reject the ALJ's credibility determination.

Finally, Respondent takes exception to the ALJ's factual finding that "[h]e provided similarly evasive and conflicting answers to questions presented to him by the medical boards in Florida and Minnesota, particularly minimizing the severity of injuries he and his passenger sustained in the June 13, 2008 crash." R.D. at 62. As evidence for his finding that Respondent provided evasive and conflicting answers to the questions presented by the Florida Board, the ALJ did not cite any evidence in the record. [7] Moreover, other than Respondent's Petition for Reinstatement, the Record does not include any other evidence establishing what statements Respondent made to the Florida Board. Therefore, I do not find this portion of the ALJ's finding to be supported by substantial evidence.

There is, however, substantial evidence that Respondent provided false information on his Minnesota application. Respondent provided a yes answer with the notation to "Please View Addendum" to questions regarding: 1) whether his license to practice medicine in any state had been revoked, suspended, restricted or conditioned; 2) whether he had been notified of any

[7] Later in his decision, the ALJ quoted the following statement in Respondent's Petition for Reinstatement:

> The related criminal matter has been referred for pre-trial intervention and Respondent is currently complying with the requirements for successfully completing the Circuit Court's requirements to avoid prosecution for those criminal charges. These requirements include successful completion of the Comprehensive Alcoholism Rehabilitation Program (CARP) as ordered by the Court. This is a program providing a continuum of care to individuals affected by alcoholism, drug dependency and co-occurring disorders and PRN is monitoring Respondent's participation in the CARP.

R.D. at 37 (quoting GX 30, at 12). While the record establishes that Respondent did not complete the program because, in his words, the program was taking too long, there is no evidence that Respondent was not "currently complying" with the Drug Court program at the time of his petition. The ALJ did not cite this passage as support for his conclusion that Respondent gave evasive and conflicting answers to the questions of the Florida Board, but rather, only as support for his conclusion that although Respondent "participated in monitoring by PRN and the CARP program . . . [he] has effectively withheld from the Administrator records showing his treatment in Florida for these disorders." R.D. at 37.

investigation by any state board regarding the practice of medicine; 3) whether any criminal charges had ever been filed against him, regardless of whether they had been expunged; and 4) whether he had ever been charged with DWI or DUI. GX 34, at 6.

In the addendum, Respondent wrote that: "I had a seizure while driving on June 1, 2008. A collision with a sign post followed. Both the passenger and I were in seatbelts and only suffered minor injuries form [sic] airbag deployment." Id. at 9. Respondent stated that while he had "walked out of the car," he refused both a neck collar and to lie on a stretcher, after which he was restrained by the police. Id. Respondent then asserted that "[d]uring this restraining process I was tazed 14 times, and received multiple blows to my face, head and back" and that he was diagnosed with a "traumatic head injury (bleeding in three distinct lobes of my brain), multiple contusions in lungs bilaterally, 4 fractured bones in [the] maxillary region of face, complete nasal fracture with deviation of the septum, facial lacerations, lacerations in all extremities, right sides [sic] rotator cuff injury and respiratory failure." Id.

Respondent represented to the Board that "[n]o controlled substances were found in my possession or in [the] vehicle (via police report)." Id. And he further asserted that "[n]o charges were filed" until approximately three months after the incident when he was charged with "possession of a controlled substance without a prescription (Adderall), fraud to acquire a controlled substance, and driving under the influence (sub therapeutic levels of Adderall in blood)." Id.

The evidence also shows that the Minnesota application's question number 12 specifically included charges of disorderly conduct and required that he disclose any charge regardless of whether it had had been expunged or removed from his record by executive pardon. GX 34, at 6. In his testimony, Respondent admitted that that he had been charged with

disorderly conduct on another occasion. Tr. 151-52. Yet he failed to disclose this charge on the Minnesota application. GX 34, at 9. Respondent explained the omission, asserting that while his answer to the application question "may not have been complete . . . it was truthful," and that he was truthful about "the charges that I thought were actually most important" and that "the charges were dismissed." Tr. 151-52.

Respondent did acknowledge that the Florida Board of Medicine suspended his license, but that it had been reinstated. GX 34, at 10. He then wrote: "Admittedly, I did use Adderall as used for ADHD without a prescription while working long hours. I acquired from a colleague who worked in the Urgent Care where I worked." Id.

As the record shows, several of these statements were false. These include Respondent's statement that no controlled substances were found in his possession or vehicle,[8] as well as that he acquired the Adderall from a colleague.[9]

After the Minnesota Board's Licensure Committee denied his application, see GX 35, Respondent sought reconsideration of its decision. In his letter to the Board, Respondent's counsel again asserted that "[o]ne of the possible reasons that the prosecution decided to dismiss the case was that the original police report showed that there were no drugs or alcohol found in

[8] As for Respondent's assertion that this was per the police report, the Offense Report filed by the Sheriff's Office included the Supplemental Report of a crash scene investigator. See GX 46. In his report, the Investigator documented that another Investigator had conducted an inventory search of Respondent's car and found the aforementioned vial of 41 tablets of Adderall bearing a label which listed the patient as S.S. Id. at 6. So too, a further supplemental report prepared by a Detective stated that he learned "during the at[-]scene investigation," that the vial of 41 Adderall tablets was found in Respondent's car and that it listed S.S. as the patient and had been prescribed by Respondent. RX D, at 37 (page 36 of the report).

[9] The record includes the results of a blood test which shows that Respondent's level of amphetamine was 76 ng/ml. GX 14. While there is also testimony by the DI that she read the deposition of the toxicologist who certified the test results taken in the criminal case brought against Respondent, the deposition was not entered into evidence and the DI's testimony does not establish what constitutes a therapeutic level. Tr. 468-69. Of note, the DI testified that Respondent initially claimed that he had taken only one Adderall pill on the night of the accident. Id. at 469. The DI testified that based on her reading of the deposition, it was her "understanding that a therapeutic level is usually obtained from the regular maintenance on a medication" and that taking one "pill on the night of the crash would not be sufficient to provide a therapeutic level." Id. When, in a subsequent interview, the DI raised the issue, Respondent stated that he "might have taken two that night." Id.

the vehicle" and "[t]his obviously negated the charges of DWI and illegal possession of drugs." GX 37, at 2 (citing Respondent's Affidavit, at ¶ 5). Respondent's lawyer also asserted that "[t]he prosecution's dismissal also means that it did not have enough confidence in the charges even to pursue the claim that Dr. Holder somehow had a trace of marijuana in his blood." Id. Still later in his letter, Respondent's counsel wrote that "[h]e certainly acknowledges his bad judgment in obtaining the Adderall tablets, but that was an isolated instance of a questionable thought process." Id. at 5.

In support of his request for reconsideration by the licensure committee, Respondent submitted an affidavit. Therein, Respondent again asserted that "[t]he original police report showed that no alcohol or illegal drugs were found in my vehicle." Id. at 11 (¶ 5). He further asserted that he "definitely did not use or have marijuana as charged in the criminal case" and "ha[d] no idea where that claim comes from." Id.at 12 (¶ 8). While Respondent admitted to having used Adderall the day before the accident, he maintained that this was "because of a stupid error of judgment" and that he had obtained the drug "inappropriately from a friend." Id. Respondent then asserted that:

> I obtained the Adderall **only** for the purpose of helping me stay alert during a period when I was working hard for many hours. I definitely do not have a "drug problem," and have never had a history of anything even close to that. I realize and agree that what I did in obtaining the Adderall was wrong. I had never done that before and will never do it again.

Id. at 12 (¶ 10).

However, even if it is true that the "original" police report did not state that illegal drugs were found in his vehicle, several of the supplemental police reports establish that the Adderall vial was found in his car. Thus, his statement is nonetheless misleading. Moreover, his statement that he did not use marijuana is refuted by the blood test results. As for his statement

as to how he obtained the Adderall, while S.S. may have arguably been "a friend," the statement is nonetheless misleading in that Respondent attempted to minimize his culpability as he actually obtained the drug by writing a fraudulent prescription in S.S.'s name. Finally, Respondent's assertion that he did not have a drug problem is amply refuted by the record, which includes the blood test results following the accident, see GXs 13 & 14, the testimony of S.S. regarding Respondent's use of marijuana and cocaine, see Tr. 196, 198, as well as the evidence showing that while he was subject to the Florida Drug Court program, he tested positive for opiates, missed a drug test, and provided a diluted sample. See GX 18, 19, 20. Thus, there is substantial evidence that Respondent made multiple false statements to the Minnesota Board.

In his decision, the ALJ expressed the view "that Respondent's misrepresentations to these boards calls into question whether the actions taken by these regulators would be the same had they been told the same things [Respondent] reported as true during this administrative process." R.D. at 48. Continuing, the ALJ explained that "[t]he Government's identification of the nature of these misrepresentations accurately reflects the many ways in which the two state medical boards were acting with less than a complete and accurate record due to [Respondent's] duplicity." Id.

Respondent argues, however, that the Minnesota Board "had complete information" and that the Minnesota Board "conducted [a] hearing[] were [sic] [he] was vigorously questioned about his explanation of events."[10] Exceptions at 14-15. Respondent argues that while he was granted a restricted license by the Minnesota Board, "[a] review of those restrictions suggest that they were in response to improprieties with documenting medical visits or charting and drug

[10] While Respondent argues that both the Florida and Minnesota Boards "had complete information" and "conducted hearings" during which he "was vigorously questioned about his explanation of events," because I do not find that there is substantial evidence to support the ALJ's finding with respect to the Florida Board, I address this argument only with respect to the Minnesota Board proceeding.

use." Id. at 15. Respondent thus contends that "[t]he fact that [he] was granted a conditional license does not indicate that he was dishonest in these meetings, it simply indicates that he communicated his improprieties to both boards and they were willing to give him a chance to prove his trustworthiness." Id.

The record thus clearly establishes that Respondent made multiple false statements in both his applications to the Minnesota Board and in his affidavit in support of his request for reconsideration. The record also clearly establishes that on October 20, 2011, Respondent appeared before the Board's "Licensure Committee and discussed his use of controlled substances that had not been prescribed for him" and that "[t]he Committee decided to recommend that Applicant be granted licensure with conditions and restrictions based upon a report of chemical abuse and diversion of controlled substances for his own use." GX 39, at 4.

The evidence also includes the minutes of the Licensure Committee meeting. See GX 52. However, the minutes are marked as confidential, and in any event, do not offer any detail as to what representations Respondent made to the Board. Id. Moreover, there is no verbatim record of the proceeding and the Government did not call as a witness any person (other than Respondent) who either observed or participated in the proceeding and who could have testified as to the representations made by Respondent.[11] While the Government questioned Respondent about his appearance before the Committee and what it had asked him about, the Government did not ask Respondent whether he had made the same false statements and failed to disclose various facts to the Committee as he had in his prior submissions to the Board.[12] Tr. 153-54.

[11] According to a letter from the Board's Complaint Review Unit to the DI regarding a subpoena duces tecum which sought "all records, memorandums, notes of Board Members, and audio or video recordings of [Respondent's] appearance" before the Licensure Committee, "Committee meetings are not audio or video-recorded." GX 52.

[12] During the colloquy, Respondent stated the Committee "had a lot of questions," but when asked by the Government what the Committee had asked about, he initially answered "I don't know" before stating: "I mean,

The record of this proceeding thus does not establish whether Respondent made additional false statements when he appeared before the Minnesota Board's Licensure Committee.

Finally, Respondent takes exception to the ALJ's adverse credibility finding with respect to his testimony. He maintains, that "given his limitations in memory, [he] has made every effort to be upfront and honest about his improprieties." Exceptions at 9. He argues that "[o]rdinarily, it would be difficult to remember specific details of occurrences that occurred over six years ago" and that he "is not only impacted by the 'normal memory loss' from the passing of time, he experienced a severe brain injury." Id. at 10. Respondent points to the testimony of a neurologist who treated him after the accident that he suffered "'post-traumatic amnesia,' where he was in a state of confusion and not able to form new memory." Id. (quoting Tr. 510, 515). He further argues that he "is trying to understand what happened to him" and that "[g]iven his prior experiences with law enforcement he does not necessarily trust law enforcement's explanation of this event" and "does not believe that all of his injuries were caused by the accident and he has never wavered from this belief." Exceptions at 10.

However, Respondent's neurologist testified only that the injury affected his ability "to form new memory" and that it only "lasted maybe up to, even up to when he left the rehabilitation center." Tr. 510. Respondent's neurologist further explained that:

> [W]ith the extent of the injury he suffered, I would expect that he would have trouble recalling events even shortly after, and even a while after, because of his problem with what we call encoding. When someone says something to you, particularly when it comes through what we call short-term memory, there is a spot it goes [to] on your brain that allows you to retain it. In his case, he didn't have the ability to use that spot on his brain.

Id. at 515.

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they were asking me about incidences of the same [as] was described here and much of what was talking about, about the issues that happened in Florida. Etcetera. So forth." Tr. 153-54.

Still later, Respondent's neurologist testified that "there's a condition" that is "very common in people with traumatic brain injury called confabulation." Id. at 518. He then explained that "what happens is" that a person "pull[s] information from different parts of the brain in a disorganized manner, but the patient attempts to organize it in a way that makes sense to them, but to other people may not be factual." Id. at 519.

While this testimony may establish that Respondent had issues with his short-term memory, ultimately, it does not persuade me that Respondent's numerous false statements can be explained by his brain injury rather than his intent to deceive the Agency's Investigators, the ALJ, and this Office. Respondent made the false statements to the DIs four years after the accident, and he made the false statements in this proceeding six years after the accident. At no point, however, did the neurologist offer testimony to support the conclusion that Respondent would still be suffering from memory loss and the inability to piece together accurate information years after the accident.

Moreover, even if Respondent's brain injury accounts for the disparity between his testimony and the testimony of the other witnesses (and the various exhibits) regarding the accident, the scope of both his and N.P.'s injuries, and the cause of his extensive injuries, these issues are of only tangential relevance in assessing whether granting his application would be "consistent with the public interest." 21 U.S.C. § 823(f). What is relevant is that Respondent materially falsified his application, made false statements to the Agency's Investigators who investigated the application, and gave false testimony in this proceeding.

For example, during the investigation, Respondent provided multiple accounts as to how many Adderall tablets he had taken before the crash, initially telling a DI that he took only one tablet the day before the crash (on July 19, 2012). Tr. 465. However, upon being confronted by

the DI during a phone call (on August 25, 2012) that one pill would not provide a therapeutic level, Respondent then asserted that he might have taken two pills. Id. at 469. And yet during a subsequent phone conversation (on June 3, 2013) with another Investigator, he then claimed that he took "between four and six dosage units[,] but more than likely it was five." Id. at 328.

Likewise, when asked during the July 19, 2012 interview why the police found the Adderall in his car, Respondent asserted that he had no knowledge as to why the drugs were in his car and asserted that the police had planted them. Id. at 461. Still later, in the January 4, 2013 interview, Respondent again claimed that "[h]e did not know where the pill bottle came from," and while he admitted to having "used Adderall on a few different occasions," he claimed that "he obtained it from a colleague." Id. at 475.

Moreover, when asked at this interview about the Adderall prescription issued in the name of S.S., Respondent initially said that he had met with S.S. but did not document the prescription in S.S.'s medical record "because it had already been discussed." Id. at 476-77. Later in the conversation, Respondent then claimed that because "he had been in a coma" he did not recall issuing the prescription, only to subsequently revert to his original story that he wrote the prescription but did not do an exam or chart the prescription because it "was already in the prior record." Id. at 477.

In the July 19, 2012 interview, Respondent also denied having smoked marijuana, claiming that the blood test result was a false positive. Id. at 461-62. Also, during a November 2012 phone conversation, a DI asked Respondent if he had completed the Florida Drug Court Program. Id. at 471. Respondent initially "said that he had completed the program and the charges were dropped." Id. at 472. However, when confronted by the DI that he had not

completed the program, Respondent admitted that "he withdrew from the program because it was taking too long." Id.

During the hearing, Respondent testified that the Adderall prescription he wrote (which listed S.S. as the patient but was actually issued to obtain the drugs for his own use) was a refill of a prescription S.S. usually got. R.D. at 28 (quoting Tr. 95). Moreover, while in his testimony Respondent admitted to using Adderall on three or four occasions during the period in which he was working at MD Now (an urgent care clinic), he claimed that he got the drug from a colleague at the clinic, who was a physician's assistant (PA). Tr. 114. He also later testified that "took no more than four pills . . . when I worked at MD Now," and after asserting that this was four pills in total, he then testified that he never took more than one pill at a time.[13] Id. at 128. While Respondent testified that the PA's first name was William, he maintained that he did not remember William's last name. Id. at 114. Moreover, when asked if he had ever gotten Adderall from anyone other than William, Respondent answered: "No. Except for when I was in residency." Id. at 116-17.

Regarding his marijuana use, Respondent admitted that he had used marijuana in college and "on occasion on vacation." Id. at 129. When asked to explain the positive test for THC, Respondent claimed it was a false positive and asserted that he had not used marijuana in the period before the accident because he had worked "twelve days . . . in a row" and that there was "no time" to do so. Id. at 131. When then asked how many times he had used marijuana in

[13] As found above, during interviews with DEA Investigators, Respondent provided three different answers when asked how many Adderall pills he took on the night he crashed his car.

2008, Respondent testified that he could not remember, and when asked from whom he got his marijuana, answered: "I have no idea." Id.[14]

Still later, when testifying on his own behalf, Respondent testified that while there are "a lot of things that I'm very unproud of . . . I cannot remember diverting any medications with S.S. I cannot remember and I honestly cannot remember how the medication got into the car, got into my car, but I do admit completely to using Adderall without prescriptions." Id. at 590-91.

Contrary to his contention, the record amply establishes that Respondent "has not made every effort to be upfront and honest about his improprieties." Exceptions at 9. I thus find Respondent's Exception is well taken only with respect to the ALJ's finding that "[h]e provided similarly evasive and conflicting answers to questions presented to him by the" Florida Medical Board, and only to the extent the ALJ's finding suggests that he gave "evasive and conflicting answers to questions presented to him by the" Minnesota's Boards Licensure Committee during his appearance before the Committee.[15]

Exception to Finding of Fact #14

In his Finding of Fact Number 14, the ALJ discussed Respondent's evidence of remediation. While the ALJ acknowledged that Respondent successfully completed one year of monitoring under the Minnesota Health Professionals Services Program, that he produced letters

[14] As for the drug test results during the Florida Drug Court matter, Respondent asserted that his positive test for opiates was caused by an antibiotic which "cross react[s] with opiate derivatives." Tr. 135. The State Judge apparently did not agree, as he/she ordered Respondent to write a 500 word essay "on honesty." GX 18. As for the diluted drug test, Respondent testified that because he "didn't have a car" and had to walk "approximately six miles" in "Florida's hot sun," "I might have drank too much water before I started on my journey." Tr. 136. As for the drug test he missed, Respondent testified that he "forgot to call for one day and I missed that urine." Id. While this may be, the State Judge did not find this to be a persuasive excuse and sent him to jail for one day. GX 19.

[15] It is also acknowledged that Respondent asserted that he had a seizure the day before the hearing. To the extent Respondent's argument is that his numerous false statements during this proceeding should be excused because the seizure impacted his recollection of the various events, Exceptions at 23, I reject it as the evidence shows that his false testimony at the hearing was generally consistent with other false statements he made to the DIs, as well as on his Minnesota application and in the affidavit he submitted in support of his request for reconsideration. Notably, Respondent does not claim that he had seizures before his various interactions with the DIs and before he submitted his application and prepared his affidavit.

of support from patients and professional colleagues, and testified that he had changed his lifestyle, learned from his experiences, gotten married and had a daughter, the ALJ ultimately found that Respondent had not presented sufficient "evidence of remediation to overcome the Government's prima facie case." R.D. at 62.

As for his reasoning, the ALJ explained that he "question[ned] the weight that can be attributed to this evidence," noting that the monitoring program imposed by the Minnesota Board "was based on Respondent's material misrepresentation of the nature of the injuries he and his passenger sustained in the June 2008 crash, and his failure to disclose the extent and nature of his history of drug abuse." Id. As support for his finding, the ALJ also explained that while the Florida Board "ordered Respondent to participate in monitoring and a five-year period of probation, which Respondent failed to comply with, [he] surrender[ed] his medical license in that state in order to avoid these remedial requirements." Id.

With respect to the reasons given by ALJ as to why he gave less weight to the Minnesota Board's Order, Respondent argues that the Order "specifically states that ' . . . Respondent was licensed by the board pursuant to a Stipulation . . . based upon his unprofessional conduct, diversion of drugs for his own use, and disciplinary action taken against his license in another state or jurisdiction.'" Exceptions at 16. As explained previously, while the record establishes that Respondent made false statements to the Minnesota Board and failed to disclose other information in both his application and the affidavit he submitted in support of his request for reconsideration, the record does not establish whether he made the same false statements, as well as withheld material information, when he appeared before the Licensure Committee to discuss his unprofessional conduct and diversion of drugs for his own use. Of note, while once the Government established its prima facie case, Respondent bore the burden of production on the

issue of whether he had engaged in sufficient remedial measures, the Government retained the burden of proof throughout this proceeding. Thus, because there is no evidence in the record as to what statements Respondent made before the Licensure Committee, the ALJ's conclusion that Respondent's compliance with the Minnesota Board's Order is not entitled to weight cannot be sustained on the basis that he failed to fully and truthfully disclose the nature of his drug abuse and misconduct at the Licensure Committee hearing.[16]

Respondent also takes exception to the ALJ's finding that "the record establishes that Respondent surrender[ed] his [Florida] medical license . . . in order to avoid the[] remedial requirements" imposed by the Florida Board. Exceptions at 17. While I agree with Respondent that this finding is not supported by substantial evidence, ultimately this finding is of no consequence, because Respondent had the burden of production on the issue of whether he has undertaken sufficient remedial measures to demonstrate that he can be entrusted with a new registration. See Medicine Shoppe Jonesborough, 73 FR 364, 387 (2008) (quoting Samuel S. Jackson, 72 FR 23848, 23853 (2007)). The fact remains that less than three months after the Florida Board placed him on probation, Respondent withdrew from the practice of medicine in Florida and did not complete the probation ordered by the Board. Regardless of the reason he left the State, I agree with the ALJ that Respondent's interaction with the Florida Board does not support a finding that he has produced sufficient evidence of remediation to rebut the Government's prima facie case.

In Finding of Fact number 14, the ALJ did not rely on Respondent's failure to provide the DI with a release for his HPSP file as one of the reasons he discounted the weight to be given to

[16] The Application (GX 34) states that the "[f]ailure to answer all questions completely and accurately, omission or falsification of material facts . . . may be cause for denial of your application, or disciplinary action if you are subsequently licensed by the Board." GX 34, at 1. The Recommended Decision does not, however, cite any authority from Minnesota which discusses the materiality standard employed by the State.

his compliance with the HPSP. However, the ALJ did decline to consider the testimony of Respondent's case manager as to his "progress in the HPSP" because it was unclear whether the Government had ever been provided with a complete record of his treatment. R.D. at 24 (citing 21 CFR 1301.15[17]). Respondent takes exception to the ALJ's reasoning, arguing that while he "did not provide a release . . . he did provide the necessary documents," and that other evidence in the record, namely the Minnesota Board's Order of Unconditional License (GX 40), establishes that he "complied with the Minnesota Medical Board['s] conditions [as] well as the terms and conditions of the HPSP monitoring [p]lan." Id. at 17.

The Order of Unconditional License does constitute some evidence of Respondent's having undertaken remedial measures. It is also acknowledged that Respondent submitted into evidence various records regarding his treatment with the HPSP. While in his testimony Respondent maintained that he had provided the Agency with the entirety of his HPSP file, even if he had never made a misrepresentation to the Agency, the Investigators were under no obligation to take him at his word that he had provided the entire file to them given his history of abusing controlled substances. As for the records Respondent submitted into evidence, the DI's testimony supports a finding that this is not a complete set of records as it does not include the treatment notes for his first two visits with his psychologist. Tr. 481-82. Absent Respondent's consent to the disclosure of his complete HPSP file, there is no way to assess the adequacy of his remedial measures, as it is unclear what he disclosed to those who evaluated him and whether he

[17] This regulation provides that:

> [t]he Administrator may require an applicant to submit such documents or written statements of fact relevant to the application as he/she deems necessary to determine whether the application should be granted. The failure of the applicant to provide such documents or statements within a reasonable time after being requested to do so shall be deemed to be a waiver by the applicant of an opportunity to present such documents or facts for consideration by the Administrator in granting or denying the application.

21 CFR 1301.15.

disclosed the full extent of his substance abuse to those providers who created his treatment program.[18] I thus reject Respondent's exception to this factual finding.

Exception to the ALJ's Conclusion of Law #2

The ALJ found that the record establishes that Respondent materially falsified his application for a DEA registration because he denied that his medical license had been suspended or restricted and knew this to be a false answer. R.D. at 63. Respondent takes exception to this finding, asserting that he "did not intent [sic] to provide a false response" and "that any false information was due to the fact that he did not read the question correctly." Exceptions at 19. Continuing, Respondent argues that "[i]t would be stupid of [him] to lie about public information and he is not a stupid person." Id.

The evidence shows that on March 7, 2012, Respondent submitted an application for a DEA registration on which he was required to answer four questions with either a "yes" or "no." GX 2, at 1. Question Three asked: "Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation, or is any such action pending?" GX 2, at 3. Respondent answered "N" for no, notwithstanding that: 1) on January 26, 2009, the Florida Department of Health had ordered

[18] While it may appear that this is inconsistent with the discussion of the Government's obligation to show that Respondent continued to make the same false statements and failed to disclose material information when he appeared before the Licensure Committee, the difference is that the Government may have had some means of developing evidence as to the statements he made and did not make when he appeared before the Committee. Indeed, the Government could have questioned Respondent on these issues. However, because the Government repeatedly asked Respondent to provide the complete file, as well as to sign a release so that the Government could obtain the information directly from the HPSP, I agree with the ALJ's ruling declining to consider the testimony of his HPSP case manager regarding his compliance with the HPSP program. R.D. 24-25 (citing 21 CFR 1301.15). Indeed, absent provision of the compete file, it is unclear how the Government could have effectively cross-examined his case manager.

Finally, Respondent provided copies of the releases he had given to the credentialing departments of various insurers, and a local hospital, allowing them to obtain limited information from the HPSP. See RXs I, J, K, and L. It is not clear what this proves, and in any event, given the Agency's responsibility to ensure that granting Respondent's application would be consistent with the public interest, 21 U.S.C. § 823(f), the Agency was entitled to his complete file.

the emergency suspension of his medical license, GX 26, at 10-11; 2) on June 22, 2009, the Florida Board of Medicine had ordered that Respondent's medical license "be SUSPENDED until such time as he personally appear[ed] before the Board and demonstrate[d] the ability to practice medicine with appropriate skill and safety," GX 29, at 1-3; 3) on December 17, 2010, the Florida Board of Medicine granted his petition for reinstatement while placing him on probation for five years, GX 30, at 2-9; and 4) on November 12, 2011, the Minnesota Board of Medicine had grant him a medical license subject to various restrictions and conditions. GX 39. Thus, the evidence clearly shows that Respondent's answer was false.

At the hearing, Respondent did not testify regarding the circumstances surrounding his completion of the application. However, a DI testified that during an interview, Respondent asserted that "he didn't read the question thoroughly" and that when she provided a copy of an application to him, "[h]e went through it and underlined the first word, surrender, and stopped." Tr. 463. After the DI underlined the rest of the application, she asked Respondent if when he sat for his Boards, he "just gloss[ed] over the questions or . . . read them thoroughly in order to answer them?" Id. at 464. Respondent "said that he didn't gloss over" the questions. Id.

I reject Respondent's contention that he did not intentionally mislead the Agency. Notably, the question is neither lengthy nor ambiguous, and thus, I do not believe his contention that he did not thoroughly read the question. Indeed, even if he had glossed over the question, it is not credible that he did not note that the question asked about other types of state board disciplinary actions, and certainly Respondent was no stranger to state board disciplinary actions.[19] Moreover, as demonstrated by his experience with his Minnesota application,

[19] In his Exceptions, Respondent does not dispute whether his false statement was material. It clearly was because the various board orders were imposed based on Respondent's abuse of controlled substances and his unlawful obtaining of controlled substances, and under the public interest standard, the Agency is directed to consider an applicant's compliance with applicable laws related to controlled substances and such other conduct which may

Respondent was obviously aware that providing a truthful answer to question three would likely trigger the Agency's scrutiny into why both Boards imposed sanctions on his licenses and lead to the discovery that he was a drug abuser. Accordingly, I agree with the ALJ's finding that Respondent intentionally and materially falsified his application. This conclusion provides reason alone to deny his application. See 21 U.S.C. § 824(a)(1); see also Pamela Monterosso, 73 FR 11146, 11148 (2008) (holding that "the various grounds for revocation or suspension of an existing registration that Congress enumerated in section 304(a), 21 U.S.C. § 824(a), are also properly considered in deciding whether to grant or deny an application under section 303") (citations omitted); Jackson, 72 FR 23848, 23852 (2007).

Exception to the ALJ's Conclusion of Law #5

In this legal conclusion, the ALJ addressed the application of factor one under the public interest analysis, specifically – "[t]he recommendation of the appropriate State licensing board or professional disciplinary authority." 21 U.S.C. § 823(f)(1); see also R.D. at 46. The ALJ correctly noted that neither the Florida nor Minnesota Board has made a recommendation in this matter (whether to support or oppose Respondent's application), and that Agency precedent holds that even where an applicant possesses the requisite state authority, see 21 U.S.C. § 802(21), "the Administrator 'possesses a separate oversight responsibility with respect to the

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threaten public health and safety. 21 U.S.C. § 823(f)(4)-(5). Also, the Agency has long held that a practitioner's self-abuse of a controlled substance constitutes actionable misconduct under factor five. See Tony Bui, 75 FR 49979, 49989 (2010) (citing cases).

While in his decision, the ALJ correctly noted that "a false statement is material if it has a natural tendency to influence or was capable of influencing the decision making body to which it is addressed," R.D. at 55 (citation omitted), he then explained that "'[a]nswers to the liability question[s] are always material because DEA relies on the answers to these questions to determine whether it is necessary to conduct an investigation prior to granting an application.'" Id. (quoting Gov. Br. at 29-30 (quoting Theodore Neujahr, 65 FR 5680, 5681 (2000))). The latter statement, however, is incorrect. See Kungys v. United States, 485 U.S. 759, 771 (1988) ("It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation.") (quoted in Hoi Y. Kam, 78 FR 62694, 62696 (2013)). Instead, the test is "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision.'" Id. "'[T]he ultimate finding of materiality turns on an interpretation of substantive law.'" Id. at 772 (int. quotations and citations omitted).

handling of controlled substances' and therefore must make an 'independent determination as to whether the granting of an application would be in the public interest.'" R.D. at 46-47 (quoting Mortimer B. Levin, 55 FR 8209 (1990)). While this should have been the end of his discussion, with the conclusion that the factor neither supported nor refuted a finding that granting his application is consistent with the public interest, the ALJ found that "the actions of state medical regulators in" both States "establish a basis for finding that [Respondent's] application should be denied." R.D. at 46. The ALJ then explained:

> My concern with respect to evidence relating to the licensure actions taken by the medical boards in Florida and Minnesota rests not so much with their ultimate decisions, but with the process that led to those decisions being made. The Government is correct, in my view, in proposing that Respondent's misrepresentations to these boards call into question whether the actions taken by these regulators would be the same had they been told the same things [Respondent] reported as true during this administrative process.
>
> The Government's identification of the nature of these misrepresentations accurately reflects the many ways in which the two state medical boards were acting with less than a complete and accurate record due to [Respondent's] duplicity. Those misrepresentations regarding [his] ability to recall what happened immediately preceding the June 2008 crash, his description of his history of abusing marijuana and Adderall, and his description of the nature of his injuries and those of his passenger, all threaten the integrity of the administrative process by which the Florida and Minnesota boards performed their assessments of [Respondent's] fitness to practice medicine in those states. Accordingly, nothing in our record supports a finding that the elements of Factor One warrant a conclusion that granting Respondent's application would be consistent with the public interest.

R.D. at 48-49.[20]

Respondent takes exception to the ALJ's conclusion, noting that "where there is no specific recommendation from the state licensing board for or against an applicant's request for a

[20] There is, of course, a difference between stating that "the actions of state medical regulators . . . establish a basis for finding that [Respondent's] application should be denied," R.D. at 46, and that "nothing in our record supports a finding [under Factor One] . . .that granting Respondent's application would be consistent with the public interest." Id. at 49. While the latter statement suggests that he gave no weight to factor one either way, in his conclusion of law, the ALJ explained that "the circumstances attendant to the action of these boards constitute evidence tending to establish that Respondent's DEA registration would be inconsistent with the public interest under Factor One." Id. at 63-64.

. . . registration, the factor may not be considered [to] support the denial of" an application. Exceptions at 20. He then argues that "the appropriate state licensing board is the Minnesota Medical Board, which has not provided a specific recommendation for or against [Respondent's] request for a DEA registration." Id.

I agree with Respondent that the appropriate board is Minnesota, because it is the State where Respondent now seeks registration. With respect to the action of the Minnesota Board, I agree that the evidence shows that Respondent made multiple false statements to the Minnesota Board in both his application and his affidavit in support of his request for reconsideration. I also appreciate the ALJ's concern that his misrepresentations "threaten the integrity of the [State Board's] administrative process." I nonetheless respectfully disagree with the ALJ's analysis because it is not supported by the evidence and takes the Agency far beyond the appropriate scope of this factor.

As explained above, the record does not establish whether Respondent continued to make the same false statements before the Licensure Committee as he did in his application and affidavit. However, even if Respondent made the same false statements to the Committee, the ALJ's analysis simply assumes - without any evidence - that the Board would have come to a different result. Notably, it is not even clear why Respondent's misrepresentations regarding [his] ability to recall what happened immediately preceding the June 2008 crash and his description of the nature of his injuries and those of his passenger would have been material to the Board's decision. I therefore conclude that factor one neither supports nor refutes the conclusion that granting Respondent's application would be "inconsistent with the public interest."[21] 21 U.S.C. §823(f).

[21] As for the concerns expressed by both the Government and the ALJ that Respondent made false statements in obtaining his medical licenses which threaten the integrity of the state administrative process, nothing prevents the

Exception to Conclusion of Law #6

In this legal conclusion, the ALJ summarized his conclusions regarding the evidence relevant to factor two - Respondent's experience in dispensing controlled substances. Specifically, the ALJ explained that:

> [w]hile there is some evidence that through the course of his education, training, and employment Respondent has acquired sufficient experience to appropriately fulfill those responsibilities attendant to persons authorized to prescribe controlled substances, the preponderant evidence of Respondent's experience in procuring controlled substances creates material questions regarding the benefit Respondent obtained from his positive experiences, where those experiences should have instilled in Respondent a greater sense of responsibility when procuring and using highly addictive controlled substances. If granted the authority to prescribe often-diverted controlled substances, Respondent's experience . . . would, in the event of relapse constitute a threat to the public interest, particularly where Respondent continues to deny having drug abuse problems notwithstanding a history of abuse. While this risk is attenuated during Respondent's sustained period of stable recovery, it is sufficiently present here, given the absence of any on-going monitoring or treatment, to warrant a finding that granting this application is consistent with the public interest.

R.D. at 64.

Respondent takes exception to the ALJ's conclusion contending that the ALJ "minimize[d] [his] experience and training in dispensing controlled substances and assert[ed] that [he] 'entered the world of drug dealers, using his association with Patient S.S. to acquire cocaine and marijuana on a regular basis.'" Exceptions at 21 (quoting R.D. at 51). Respondent argues that "many medical doctors apply for and are granted a DEA . . . Registration while in the last stages of medical residency of [sic] immediately following the completion of their medical residency program" and "have less experience that [his] experience at MD Now [but] that experience is not used against them." Id.

It is true that the ALJ engaged in a lengthy discussion of Respondent's medical career and his experience in prescribing controlled substances therein. For example, the ALJ found that

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Government from providing the evidence it obtained in the course of this investigation and proceeding to the respective state boards.

"[a]fter successfully completing his residency, [Respondent] continued to gain experience in a clinical practice in fields not generally associated with dispensing controlled substances" and then listed various activities Respondent engaged in in Liberia which do not appear to have involved clinical practice, let alone the dispensing of controlled substances. R.D. at 50. The ALJ then noted that Respondent's "most significant post-graduate prescribing experience . . . is that which he obtained while working at MD Now [an urgent care clinic] for seven months and while serving in his family medicine residency at the University of Miami from 2004 to 2007." Id. at 51. The ALJ explained that "while this experience includes training in critical care and emergency medicine (both of which may emphasize the use of controlled substances), the residency reflects a curriculum that was not concentrated in a practice requiring dispensing of controlled substances, including emphases in infectious diseases, pediatrics, 'wards' medicine, and women's health." Id. The ALJ thus opined that "while [Respondent's] experiences as an independent contractor at MD Now and parts of his residence [sic] do suggest experience in dispensing controlled substances, the overall arc of his practice has not been one that would support a finding that his experience in dispensing controlled substances is substantial." Id.

To be sure, the word "experience" connotes that the Agency is authorized to conduct an inquiry into the adequacy of a practitioner's training in prescribing controlled substances as well as his/her "direct observation of or participation in" prescribing controlled substances. See JM Pharmacy Group, d/b/a Farmacia Nueva and Best Pharma Corp., 80 FR 28667, 28667 n.2 (2015). However, under 21 U.S.C. § 823(f), DEA is directed to register an applicant to dispense controlled substances "if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he[/she] practices." Thus, with the exception of those instances in which a practitioner has been shown to have committed violations of the CSA (and in which a

practitioner must produce evidence of the remedial measures he/she has undertaken to rebut the Government's prima facie case), in making the public interest determination, DEA does not look beyond the State's determination that the practitioner possesses adequate training to prescribe controlled substances.[22]

Here, however, Respondent's experience as a dispenser of controlled substances includes not only the fraudulent June 11, 2008 Adderall prescription listing S.S. as the patient, but also the unlawful prescriptions he issued to S.S. on June 4, 2008 for Percocet (oxycodone) and Xanax (alprazolam), which the ALJ found were "issued outside the usual course of professional practice and for other than a legitimate medical purpose." R.D. at 58-59. Moreover, the evidence shows that Respondent induced S.S. to fill the Adderall prescription as "a favor" for his having provided S.S. with the Percocet and Xanax prescriptions. Tr. 207-08; 210-11.

As explained above, the ALJ found that Respondent "us[ed] his experience and his association with Patient S.S. to acquire cocaine and marijuana on a regular basis." R.D. at 51. There is, however, no evidence that Respondent used his registration to trade controlled substance prescriptions for street drugs, and as the Agency has previously explained, "factor two does not call for an inquiry into a practitioner's life experience generally or even his experience related in any manner to controlled substances, but rather, only his "experience in dispensing . . . controlled substances." Abbas E. Sina, 80 FR 53191, 53199 (2015). Nonetheless, the evidence

[22] While under 21 CFR 1301.18 an applicant, who seeks to conduct research with respect to a schedule I controlled substance, must submit a research protocol which contains his/her "[q]ualifications, including a curriculum vitae and an appropriate . . . list of publications," the CSA requires that the application "be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol." 21 U.S.C. § 823(f). Cf. id. § 823(g)(1)(A) ("The Attorney General shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment . . . if the application is a practitioner who is determined by the Secretary to be qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought[.]"); id § 823(g)(2)(B)(i) & (G)(ii)(VII) (authorizing the Secretary to promulgate by regulation criteria for determining that a "physician has such other training or experience as the Secretary considers to demonstrate the ability of the physician to treat and manage opiate dependent patients" by prescribing schedule III through V drugs approved for maintenance or detoxification treatment).

does show that Respondent used his prescription writing authority to induce S.S. to fill the fraudulent Adderall prescription for him. This conduct is relevant in assessing Respondent's experience as a dispenser of controlled substances.[23]

Exception to Conclusion of Law #9

In this conclusion, the ALJ discussed the evidence relevant to factor five – "such other conduct which may threaten public health and safety." R.D. at 65; see also 21 U.S.C. §823(f)(5). Specifically, the ALJ found that the record establishes:

> that Respondent refused without good cause shown to execute releases granting the DEA access to monitoring reports in Minnesota and Florida; provided misleading accounts of the circumstances surrounding the June 13, 2008 motor vehicle crash in reports tendered to medical boards in Florida and Minnesota and in his accounts of the same to DEA investigators; and provided inconsistent and misleading accounts of his history of drug use to the DEA and to medical boards in Florida and Minnesota.

R.D. at 65-66. For these reasons, the ALJ found that this factor supports the conclusion that granting Respondent's application "would be inconsistent with the public interest." R.D. at 66.

Respondent takes exception to the ALJ's conclusion. According to Respondent, the ALJ's conclusion "rest [sic] on the testimony of [the DI] and N.P. and ignores the testimony of [Respondent], the undisputed testimony of Dr. Nedd [the neurologist who treated him after the crash] and the fact that . . . the incident which occurred in 2008 occurred over 6 years ago." Exceptions at 22-23. Respondent argues that he stipulated to many of the facts outlined in the Government's Pre-Hearing Statements and that at the hearing, he did not dispute paragraphs two through six of the Order to Show Cause. Id. at 23. He further argues that he did not mean "to be evasive," but "simpl[y] . . . cannot remember the details" of the accident because he "suffers

[23]Respondent also takes exception to the ALJ's discussion that Respondent continues to deny that he has a drug abuse problem and presents a risk of relapse "given the absence of any on-going monitoring or treatment, to warrant a finding that [his] experiences in dispensing controlled substances contradicts a finding that granting this application is consistent with the public interest." R.D. at 64. I conclude, however, that the issue of whether Respondent presents an unacceptable risk of relapse does not involve his experience in dispensing, but rather, whether he has produced sufficient evidence to rebut the Government's prima facie case. Accordingly, Respondent's arguments are addressed in that discussion.

from post-traumatic amnesia" and was "under stress during the weeks prior to the hearing and had to try to gather pieces about a very traumatic incident he does not remember." Id. Finally, he argues that he had a seizure the day before the hearing and that "[d]uring the hearing [he] was post-ictal and his emotional defenses and skills" were compromised. Id.

For the reasons explained in my discussion of Respondent's exceptions to the ALJ's factual findings numbers 12 and 13, I reject Respondent's exception to the ALJ's conclusions of law with respect to factor five.[24] Moreover, with respect to factor five, I further find that Respondent made material false statements in this proceeding. These included: 1) when he testified that the Adderall prescription he wrote for S.S. was a refill of a prescription S.S. usually got and that while he had used Adderall, he obtained it from a physician's assistant at the clinic but could not remember the PA's last name; 2) when he testified that he could not "remember diverting medications with SS" and could not "remember how the [Adderall] got into his car," 3) when he denied having used marijuana even though he tested positive for the drug following the accident and then asserted that he had "no idea" from whom he obtained the marijuana; 4) as well as in his testimony regarding why he tested positive for opiates and provided a diluted sample while subject to the Florida Drug Court program.

Accordingly, I reject Respondent's Exception to factor five and conclude that this factor supports the conclusion that granting Respondent's application would be "inconsistent with the public interest." 21 U.S.C. § 823(f)(5); Hoxie v. DEA, 419 F.3d 477, 483 (6th Cir. 2005); John v. Scalera, 78 FR 12092, 12100 & n.21 (2013); Robert F. Hunt, 75 FR 49995, 5004 (2010); Rose Mary Jacinta Lewis, 72 FR 4035, 4042 (2007).

[24] However, for reasons explained previously, I do not adopt the ALJ's conclusion to the extent it states that Respondent provided misleading accounts of the accident and his history of drug use to the Florida Board. Nor do I adopt the ALJ's conclusion to the extent it suggests that Respondent providing misleading statements when he appeared before the Minnesota Board's licensure committee.

Exception to Conclusion of Law # 13

Finally, Respondent takes exception to the ALJ's legal conclusion that he has failed to produce sufficient evidence to rebut the Government's prima facie showing that granting his application would be inconsistent with the public interest. In this conclusion, the ALJ found that:

> The record . . . establishes that Respondent has failed to timely provide the DEA with reports of his treatment or monitoring from the Florida Medical Board and PRN and from the Minnesota Board of Medical Practice and HPSP; failed to acknowledge the need to provide forthright, accurate, and complete responses to questions presented regarding his prescription practice and his history of drug abuse; and failed to account for his false statement in making this application[.]

R.D. at 66.

Moreover, earlier in his discussion of Respondent's evidence of remediation, the ALJ explained that:

> [t]he most probative evidence of [Respondent's] efforts to address any drug abuse problems he may have had would have come from the reports by monitors in the Florida PRN program and Minnesota's HPSP program. Even as he insists he has and had no drug abuse problem, the evidence of drug abuse associated with the 2008 crash, his abuse of marijuana and cocaine prior to the crash, and his adamant determination to deflect and minimize the adverse impact of his drug use are all both abundant and troubling. [Respondent] has thwarted a complete review of the steps he has taken (or has failed to take) by refusing [the DI's] request for releases that would allow the DEA to see the PRN and HPSP reports. We have what appears to be only part of the report maintained by HPSP, and none of the report by PRN. In the absence of such evidence, I cannot find Respondent has established by at least preponderant evidence that he has accepted responsibility for his wrong-doing and has put in place effective corrective measures that would guard against future misconduct.

R.D. at 57-58.

Respondent nonetheless contends that at the hearing, he "took full responsibility for his drug use and diversion of controlled substances." Exceptions at 25. He also argues that he acknowledged his use of marijuana and his diversion of Adderall in his first meeting with the DIs, and that Minnesota Board's decision to grant him a conditional license "is evidence of his

acknowledgment of his past drug use and diversion of prescription drugs," because the Board noted that it "discussed [with him] his use of controlled substances that had not been prescribed to him." Id. at 24-25.

I reject Respondent's contention. His assertion that he acknowledged his use of marijuana at his first meeting with the DI is counterfactual, as Respondent asserted that his positive drug test following the accident "was a false positive" and that "he had not used marijuana in a long time." Tr. 462. Moreover, while at the hearing, Respondent admitted to facts which establish that the prescriptions he issued to S.S. for Percocet and Xanax were outside of the usual course of professional practice and which lacked a legitimate medical purpose (see R.D. at 5-7; Tr. 610-11), he continued to deny that he wrote the Adderall prescription in S.S.'s name for the purpose of obtaining the drugs for his own use and that S.S. had given him the filled prescription.[25] Tr. 612. Moreover, Respondent failed to acknowledge his misconduct in intentionally and materially falsifying his application for his DEA registration. Also, he failed to acknowledge that he made various false statements to the Agency's Investigators.

Accordingly, I reject Respondent's contention that he accepted responsibility for the full extent of the misconduct which has been proven on this record. See MacKay v. DEA, 664 F.3d 808, 820 (10th Cir. 2011) ("The DEA may properly consider whether a physician admits fault in determining if the physician's registration should be revoked. When faced with evidence that a doctor has a history of distributing controlled substances unlawfully, it is reasonable for the Deputy Administrator to consider whether that doctor will change his . . . behavior in the future.

[25] As for his contention that the Minnesota Board's decision to grant him a conditional license "is evidence of his acknowledgement of his past drug use and diversion of prescription drugs," while Respondent may have admitted to some misconduct in that proceeding, it is unclear exactly what he admitted to in that proceeding. Also, under Agency precedent, Respondent is required to acknowledge his misconduct with respect to the full extent of the misconduct proved on the record of this proceeding. See Robert L. Dougherty, 76 FR 16823, 16834 (2011); Jeffrey Patrick Gunderson, 61 FR 26208, 26211 (1996); Prince George Daniels, 60 FR 62884, 62887 (1995).

And that consideration is vital to whether continued registration is in the public interest.") (citing Hoxie v. DEA, 419 F.3d 477, 483 (6th Cir. 2005)).

This is reason alone to conclude that Respondent has not rebutted the Government's prima facie showing that granting his application "would be inconsistent with the public interest." 21 U.S.C. § 823(f). Respondent nonetheless argues that he has put on "uncontested evidence of his efforts to rehabilitate his career." Exceptions at 25. He argues that he "participated in all the required programs[,] treatment plan and drug testing," and that he has "met fully every condition and gained the trust of the Minnesota Medical Board, his employer, his peers, and his patients." Id. Respondent further argues that "[t]he fulfillment of these conditions cannot simple [sic] be ignored because [he] did not sign a release for [the DI] to access HPSP directly" and that he "provided her with 82 pages of documentation which included the quarterly reports, results of toxicology test [sic], his case manager's notes." Id. at 26-27. He also argues that "[t]here is no justification for not considering the Minnesota Board's Order" and that "[t]he argument that [he] did not disclose the extent of his drug use and diversion of controlled substances to the Minnesota Medical Board is not supported by either" the Board's Order granting him a conditional license or the Order which granted him an unconditional license. Id. at 27.

The ALJ did, however, consider the Board's Order as evidence in remediation. See R.D. at 62 (FoF #14) ("Evidence of remediation in this record takes the form of Respondent's successful completion of a one-year period of monitoring under the auspices of the Minnesota Health Professional Services Program."). He just found it insufficient to satisfy Respondent's burden of production on the issue of the adequacy of his remedial measures.

As for Respondent's further contention that "[t]he fulfillment of these conditions cannot simple [sic] be ignored because [he] did not sign a release for [the DI] to access HPSP directly" and that he "provided her with 82 pages of documentation which included the quarterly reports, results of toxicology test [sic], his case manager's notes," id. at 26-27, where, as here, the evidence shows that Respondent has a history of abusing controlled substances, the Agency is not required to take him at his word that he provided his complete HPSP file. Here, while Respondent submitted various documents related to his participation in the HPSP program, there is ample reason to believe that these records are incomplete as they do not appear to include the initial evaluation conducted by Dr. Albert (his psychologist),[26] and thus, it remains unclear what he disclosed to the psychologist regarding his history of substance abuse. Accordingly, I agree with the ALJ's conclusion that Respondent has not produced sufficient evidence of his remedial measures to rebut the Government's prima facie case.[27]

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[26] The DI testified that upon receiving a file from Dr. Hasper, it contained notes for Respondent's "first two visits" with Dr. Albert, but these notes were not included in the HPSP records that Respondent provided to her. Tr. 481, 497. Notwithstanding that Respondent had the burden of production on the issue of the adequacy of his remedial measures, he did not submit these documents for the record. See generally Resp. Exhibits. Moreover, although the Government was eventually provided with these notes, the fact remains that because Respondent would not agree to release his HPSP file and did not submit these documents, it remains unclear whether he fully disclosed his history of substance abuse to his treating professionals.

[27] As previously noted, in his legal conclusions pertaining to factor two, the ALJ explained that if Respondent was "granted the authority to prescribe often-diverted controlled substances, [his] experience as demonstrated in this record would, in the event of relapse, constitute a threat to the public interest, particularly where Respondent continues to deny having drug abuse problems notwithstanding a history of abuse." R.D. at 64. The ALJ then explained that "[w]hile this risk is attenuated during [his] sustained period of stable recovery, it is sufficiently present here, given the absence of any on-going monitoring or treatment, to warrant a finding that [his] experience in dispensing controlled substances contradicts a finding that granting this application is consistent with the public interest." Id.

Respondent argues that "there is nothing in the record which shows [that he] has a risk of relapse." Exceptions at 21. He argues that "[h]e was not diagnosed with a drug problem," but "with authority conflicts" and that he "fully shared his history of drug uses with Dr. Albert" and "completed his treatment plan." Id. He then argues that if the Board "believed that he had a risk of relapse they never would have removed the conditions on his medical license" and that the Government "did not provide any evidence, testimonial or otherwise, by any professional, serving those with a history of drug abuse, to contradict" the conclusions of Dr. Albert and the Board. Id. at 22.

I agree that there is no evidence establishing what Respondent's risk of relapse is. I conclude, however, that because Respondent would not provide the Government with a release allowing it to obtain his HPSP file directly

SUMMARY

The Government has made out a prima facie case to deny Respondent's application based on his material falsification of his DEA application, his diversion of controlled substances to both S.S. and himself, his substance abuse, and the numerous false statements he made to DEA Investigators and in this proceeding. Notably, at most, Respondent has acknowledged his misconduct only with respect to the Percocet and Xanax prescriptions he issued to S.S. While Respondent's failure to acknowledge his misconduct in materially falsifying his application, the circumstances surrounding his issuance of the Adderall prescription, and his false statements to the Investigators, provides reason alone to conclude that he has not rebutted the Government's case, he also failed to produce sufficient evidence in remediation. Because I conclude that Respondent's misconduct is both extensive and egregious, I agree with the ALJ that granting his application "would be inconsistent with the public interest." 21 U.S.C. § 823(f). Accordingly, I will adopt the ALJ's recommended order and deny his application.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 823(f) and 28 CFR 0.100(b), I order that the application of Mark William Andrew Holder, M.D., for a DEA Certificate of Registration be, and it hereby is, denied. This Order is effective **immediately.**

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from the program so that it could verify whether he actually "fully shared his history of drug use" with his treating professional, his evidence as to his rehabilitation is insufficient.

Of further note, as found above, Respondent also unlawfully distributed Percocet (oxycodone) and Xanax (alprazolam) to S.S. See 21 U.S.C. § 841(a)(1); 21 CFR 1306.04(a). While Respondent admitted to the facts which establish the violation, he has failed to produce any evidence of remedial training he had undertaken in the proper prescribing of controlled substances. Thus, Respondent has failed to produce sufficient evidence of remedial measures with respect to these violations.

Date: November 5, 2015

Chuck Rosenberg
Acting Administrator

Krista Tongring, Esq., for the Government.

Yende Anderson, Esq., for the Respondent.

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

NATURE OF THE PROCEEDING

Christopher B. McNeil, Administrative Law Judge. These are proceedings before the Drug Enforcement Administration and the United States Department of Justice, under DEA docket number 2014-13, captioned "In the Matter of Mark William Andrew Holder, M.D." The proceedings are being held pursuant to sections 303 and 304 of the Controlled Substances Act, Title 21 United States Code sections 823 and 824.

On March 7, 2012, Respondent Mark W.A. Holder, M.D., applied for a DEA Certificate of Registration as a practitioner in Controlled Substance Schedules 2, 2N, 3, 3N, 4 and 5, identifying the business location as 2810 Nicollet Avenue South, Minneapolis, Minnesota 55408-3160.[1] After reviewing this application the Drug Enforcement Administrator through her Deputy Assistant Administrator issued an order dated April 11, 2014 extending to Dr. Holder the opportunity to show cause why the Administrator should not deny this application.[2] In the order, the Administrator alleged that Dr. Holder's registration would be inconsistent with the public interest and thus should be denied pursuant to 21 U.S.C. § 823(f); and further alleged that Dr.

[1] Gov't Ex. Two at 1.
[2] A.L.J. Ex. One at 1.

Holder materially falsified a DEA registration application, warranting the denial of the application pursuant to 21 U.S.C. §§ 824(a)(1) and 824(a)(4).[3]

On May 8, 2014, the Office of Administrative Law Judges for the DEA received Respondent's May 6, 2014 request for a hearing to permit him the opportunity to establish why his application should not be denied. The parties presented evidence during a hearing conducted at the DEA Hearing Facility in Arlington, Virginia, on August 4 and 5, 2014.

SUMMARY OF THE EVIDENCE

Prior to the hearing, the parties entered into stipulations,[4] which will be presented here, along with summaries of testimony taken during two days of hearings conducted in Arlington, Virginia.

In articulating the bases upon which the Administrator proposed to deny Dr. Holder's application for a Certificate of Registration, the Deputy Assistant Administrator identified the following:

(1) The Government alleged improprieties with respect to Dr. Holder's prescription practice as it concerned Patient S.S. on June 4, 2008.[5] The Government alleged Dr. Holder prescribed Percocet and Xanax for this patient under conditions that were outside the usual course of professional practice and for other than a legitimate medical purpose.[6] The Government specifically alleged that Dr. Holder failed to document a complete medical history and physical exam prior to prescribing controlled substances to the patient, failed to determine the nature and intensity of the pain attributed to the patient, failed to determine the patient's true

[3] Id.
[4] A.L.J. Ex. 31.
[5] A.L.J. Ex. One at 1.
[6] Id.at 1–2 .

medication history, and failed to provide a legitimate diagnosis to support prescribing controlled substances to this patient, during an office visit on June 4, 2008.[7] The Administrator further alleged that on June 11, 2008, Dr. Holder issued a handwritten prescription to Patient S.S. for Adderall, a Schedule II controlled substance, without creating any written record of diagnosis or treatment for the prescription.[8]

(2) With respect to the prescription for Adderall dated June 11, 2008, the Administrator also alleged that Dr. Holder wrote this prescription in order to illegally obtain the medication for his own use; and that after taking control of the medication, Dr. Holder engaged in behavior resulting in a single-vehicle crash on June 13, 2008 that seriously injured Dr. Holder and his passenger, N.P., while Dr. Holder was under the influence of THC and amphetamines.[9]

(3) The Administrator further alleged that consequent to the crash involving Dr. Holder and his passenger, the Florida Department of Health indefinitely suspended Dr. Holder's license to practice medicine in that State, and the Minnesota Board of Medical Practice initially recommended the denial of his application to practice in that State, thereafter granting him a restricted, conditional license to practice medicine in Minnesota.[10] The Administrator alleged that despite his history of proceedings before the boards regulating the practice of medicine in Florida and Minnesota, when asked in his DEA application whether he ever had a state professional license suspended, denied, or restricted, Dr. Holder falsely answered in the negative.[11]

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[7] Id.
[8] Id. at 2.
[9] Id.
[10] Id.
[11] Id.at 2–3.

(4) The Administrator alleged that in the course of the investigation into whether Dr. Holder's application should be granted, Dr. Holder engaged in evasive conduct, evinced a lack of candor when responding to investigators, has given inconsistent or evasive reports of his past drug use, has refused requests from the DEA investigators seeking records demonstrating compliance with drug treatment programs in Florida and Minnesota, and has tested positive for prohibited controlled substances during periods of court supervision subsequent to the June 13, 2008 motor vehicle crash.[12]

BACKGROUND

Dr. Holder attended the University of Minnesota and Morehouse School of Medicine, completing his residency from 2004 to 2007 at Jackson Memorial Hospital in Miami, Florida, with a specialty in family medicine.[13] During his residency, he was trained in critical care, emergency medicine, infectious disease, pediatrics, wards medicine, and women's health.[14] Shortly after completing that residency program, Dr. Holder accepted employment as an independent contractor at an urgent care facility called MD Now, which has locations throughout southern Florida.[15] Respondent previously held DEA Certificate of Registration BH9956232, issued on November 21, 2007, with a registered address of 221 164th Street, NE, Suite 329, North Miami Beach, Florida.[16] This registration expired by its own terms on October 31, 2009.[17]

In addition to his experience as an urgent care medical doctor, Dr. Holder has evaluated the Cuban health care system to formulate a Student National Medical Association article

[12] Id. at 3.
[13] Tr. at 87.
[14] Gov't Ex. 37 at 59.
[15] Tr. at 88–89; A.L.J. Ex. 31 at 1.
[16] A.L.J. Ex. 31 at 1.
[17] Id.

promoting preventative medicine, and has conducted HIV prevention research and initiated recommended therapy in Accra and Ada, Ghana.[18]

When describing why he wanted to go to medical school, Dr. Holder stated: "I thought that medicine was a good way to kind of give back to the world. And I think there's a huge need for medicine in this nation and all over the world, and I thought this is a good way to use the energies that I had."[19]

DR. HOLDER'S PRESCRIPTION PRACTICE REGARDING PATIENT S.S.

In his testimony and through stipulation, Dr. Holder admitted that on June 4, 2008, he saw Patient S.S., a 25 year old male, at MD Now's Royal Palm Beach Facility.[20] This was Dr. Holder's initial encounter with Patient S.S. in a professional capacity, and it was Patient S.S.'s first visit of any kind to MD Now.[21] At this encounter, Dr. Holder prescribed Percocet and Xanax for Patient S.S., allegedly for back pain.[22] Percocet 10/235 is the brand name for oxycodone 10mg/acetaminophen 325 mg and is a Schedule II narcotic controlled substance.[23] Xanax is a brand name for alprazolam, a Schedule IV controlled substance.[24]

Dr. Holder acknowledged that when he issued these prescriptions, he was acting outside the usual course of his professional practice, and that he did so for other than a legitimate medical purpose.[25]

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[18] Gov't Ex. 37 at 60.
[19] Tr. at 573.
[20] Id.at 610; A.L.J. Ex. 31 at 1–2.
[21] Tr. at 610.
[22] Id.
[23] A.L.J. Ex. 31 at 2.
[24] Id.
[25] Tr. at 610.

Patient S.S. explained the circumstances under which he obtained these prescriptions from Dr. Holder. Patient S.S. testified that in 2007 and 2008, while he had a legitimate job working part-time in a restaurant and running a mortgage branch location, he also earned money as a drug dealer.[26] He said he was introduced to Dr. Holder by an associate who believed Dr. Holder was a potential client for cocaine and marijuana.[27] He said this introduction occurred six to twelve months before the 2008 vehicle crash, adding that he was able to recall the date of the crash because he received a phone call around 2:00 a.m. on the day of the crash.[28] He described selling marijuana to Dr. Holder once or twice a week during this period, and selling cocaine to Dr. Holder sporadically.[29] He said he would make these transactions either at Dr. Holder's personal residence or at locations that were near to where Dr. Holder was at the time.[30]

According to Patient S.S., he had been experiencing some pain in his back, and on June 4, 2008, he visited Dr. Holder at MD Now to discuss the matter.[31] Patient S.S. stated that during this visit, "[a] very brief examination was done after I filled out all the intake paperwork, from his front office staff. He came in the room, basic examination. [He] wrote me three prescriptions; one was for Xanax for anxiety, one was for Percocet for pain and one was Naproxen which was also used as an anti-inflammatory."[32] He said Dr. Holder took his blood pressure and weight, listened to his breathing, and told him "he had to make it look like a real examination, so he was going to spend about five to ten minutes with me."[33]

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[26] Id. at 193.
[27] Id. at 194.
[28] Id. at 195.
[29] Id. at 197.
[30] Id.
[31] Id. at 201, 206.
[32] Id. at 201.
[33] Id. at 204.

Dr. Holder agreed that the records of this encounter indicated his failure to document a complete medical history and physical examination, as well as his failure to determine either the nature or the intensity of the patient's pain.[34] He also acknowledged failing to determine the nature of Patient S.S.'s current and past treatments for the pain.[35]

Dr. Holder did not dispute the Government's claim that while Patient S.S. reported that he currently was taking Percocet, Flexeril, and Xanax, the patient's medical records contained no mention of who had prescribed these medications and no indication that Dr. Holder inquired as to the identity of the treating source or sources who prescribed these medications.[36] He agreed that his brief treatment records for Patient S.S. included a diagnosis of "disc degeneration," despite the complete absence of any indication that he reviewed any imaging studies or prior medical records that would support this diagnosis.[37]

Patient S.S. testified that the only narcotic pills he ever distributed to Dr. Holder were those in the prescription for Adderall written by Dr. Holder.[38] D-amphetamine Salt Combo is the generic substitute for Adderall, the brand name for a stimulant containing a mixture of amphetamine, a Schedule II controlled substance.[39]

Without objection, the Government presented the testimony of Mark Rubenstein, M.D., as an expert medical witness in the standard of care for patients with pain and also as an expert in biomedical engineering.[40] Drawing from his review of the medical records reflecting Dr.

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[34] Tr. at 610 and A.L.J. Ex. One at 1.
[35] Tr. at 610 and A.L.J. Ex. One at 2.
[36] Tr. at 610 and A.L.J. Ex. One at 2.
[37] Tr. at 610.
[38] Id. at 200.
[39] A.L.J. Ex. 31 at 2.
[40] Tr. at 303–04.

Holder's treatment of Patient S.S. on June 4, 2008 and the subsequent prescription of Adderall on June 11, 2008, Dr. Rubenstein prepared a written report, dated May 30, 2014.[41]

In his report, Dr. Rubenstein cited State of Florida Board of Medicine Rule 64B8-9.003, which requires that the medical record contain "sufficient information to support the diagnosis [and] justify the treatment," in opining that "there is no evidence that the prescription for Adderall is supported by the medical records."[42] Further, citing the requirement at Board of Medicine Rule 64B8-9.013 that the prescription of controlled substances for pain must be based on "a complete history and physical exam" documenting the "nature and intensity of the pain, current and past treatments for the pain, effect of pain on physical and psychological functioning, etc.," Dr. Rubenstein opined that the prescriptions for Percocet, Flexeril, and Xanax attributed to Dr. Holder were not supported by the medical records reviewed.[43]

Dr. Rubenstein also was present for the direct and cross examination of Dr. Holder in the Government's case in chief. Upon his consideration of the patient records and based on what Dr. Holder testified to during the first day of hearing, Dr. Rubenstein testified that nothing presented during the hearing caused him to change any of the findings set forth in his written report.[44] He added, with respect to Dr. Holder's decision to prescribe Xanax after Patient S.S.'s initial visit on June 4, 2008, that there was a clear risk of drug diversion presented, explaining that, "in [the] absence of pre-existing history, pre-existing documentation, or objective correlation, you can't just take necessarily the patient at their word in view of the risk of drug dependence, drug addiction, and drug diversion."[45] He opined similarly that the history taken and the physical

[41] Gov't Ex. 42.
[42] Id. at 4.
[43] Id.
[44] Tr. at 305.
[45] Id. at 313.

examination reported during the office visit on June 4, 2008, would not support Dr. Holder's prescription for Percocet for Patient S.S.[46] It was Dr. Rubenstein's opinion that Dr. Holder's June 4, 2008 prescriptions for Xanax and Percocet "cannot be deemed for a legitimate medical purpose".[47] Similarly, Dr. Rubenstein opined that the June 11, 2008 prescription for Adderall "was not provided in compliance with Florida Regulations and Rules . . . and cannot be deemed rendered for a legitimate medical purpose in the usual course of professional practice."[48]

THE ADDERALL PRESCRIPTION AND SUBSEQUENT AUTOMOBILE CRASH

Patient S.S. explained that before June 11, 2008, he and his ex-girlfriend went to Dr. Holder's house on "multiple occasions" to drop off marijuana and "a little bit of cocaine."[49] During the hearing, Patient S.S. described one such occasion:

> [A] couple of days prior [to June 11, 2008], we were sitting on his porch and we were actually smoking marijuana and he said, you know, I need a favor. Is there a chance that you can come by my office? I'll have a prescription for Adderall waiting for you. You're going to meet me around back of the office. I'm going to hand you the prescription, you're going to go get them filled. Bring it back here and I'll pay you for it. And he left the money in his car for, to cover my copay.[50]

When asked about why Dr. Holder turned to Patient S.S. for this favor, Patient S.S. testified that Dr. Holder told him that "since I did you a favor, now you owe me one. And the favor was that I come in, see him, pick up the prescriptions and have them filled . . . and release them to him."[51] Patient S.S. said he understood that the "favor" Dr. Holder had performed for him was "[t]he fact that he wrote me prescriptions [for Percocet, Flexeril, and Xanax] without

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[46] Id. at 315.
[47] Gov't Ex. 42 at 1–4.
[48] Id.
[49] Tr. at 207.
[50] Id. at 208.
[51] Id. at 211.

any real background or history . . . aside from what was on the initial patient consultation form."[52]

Patient S.S. stated that as requested, he picked up the Adderall prescription, went next door to Walgreens to fill the prescription, then delivered to Dr. Holder the filled prescription, either leaving it in his Cadillac or handing it to him directly (he could not recall with certainty which), after first retaining two tablets for his own use.[53] (Patient S.S. later testified that he may have taken as many as four tablets, but it was not more than four because, as he put it, "I was mostly using cocaine myself."[54])

Dr. Holder agreed that on June 11, 2008, he issued a handwritten prescription to Patient S.S. for 60 tablets of 30 mg Adderall, a Schedule II controlled substance.[55] He agreed that he issued these prescriptions from MD Now's Lake Worth, Florida facility, located at 4570 Lantana Road; and that the facility has no medical records or any other documentation of Patient S.S.'s visit on June 11, nor is there any record of the issuance of this prescription.[56] Dr. Holder did not dispute the Government's assertion that he wrote this prescription without conducting an examination of Patient S.S., acknowledging during the hearing that he wrote the prescription without making a diagnosis for any condition necessitating the prescription, and without documenting the fact that he had prescribed Adderall for Patient S.S.[57]

When asked during the hearing how the police found a bottle of Adderall identified as belonging to Patient S.S. in the car Dr. Holder was driving at the time of the crash, Dr. Holder

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[52] Id.
[53] Id. at 209.
[54] Id. at 212–13.
[55] Id. at 611 and A.L.J. Ex. One at 2.
[56] Tr. at 611 and A.L.J. Ex. One at 2.
[57] Tr. at 611 and A.L.J. Ex. One at 2.

said simply, "I can't explain that," adding that he might have offered an explanation for it in the past, but "right now, I'm at the place where I cannot explain how it got there. I do not recall how it got there."[58]

When questioned about the presence of the bottle of Adderall found in the Cadillac after the crash, Dr. Holder admitted to DEA Diversion Investigator Virginia McKenna that he used Adderall "on a few different occasions [and] that he obtained it from a colleague [but] he did not know where the pill bottle came from."[59]

According to Investigator McKenna, when she presented a copy of the Adderall prescription for Patient S.S. written by Dr. Holder,

> Initially he said that he did meet with SS and provide him the prescription, but it wasn't documented because it had already been discussed. Later during the conversation, he said he didn't recall giving the prescription, that he had been in a coma, and he did not have a good memory of it. And then later in the conversation, he admitted in fact that he did give the prescription and repeated that it was not documented or charted, no exam, because that was already in the prior record.
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> * * *
>
> His mother [Dr. Wilhelmina Holder] quite forcefully stated that law enforcement planted it in the car. That's when I turned to Dr. Holder and again asked him, how would law enforcement know to go specifically to that person, knowing that that person received a prescription for Adderall from you just two days prior, to get the bottle to plant. And he said he didn't know, that law enforcement had been looking through his phone and would have found his number. [60]

The passenger in Dr. Holder's car at the time of the crash, N.P., provided details of what took place on June 13, 2008. Because her testimony was internally consistent, consistent with the

[58] Tr. at 168.
[59] Tr. at 475.
[60] Tr. at 476–77.

evidence generally, and not contradicted by any other testimony or evidence, I found her testimony to be credible and gave it great weight.

N.P. testified that she met Dr. Holder in the early morning of June 13, 2008, when Dr. Holder introduced himself to her at a nightclub.[61] Although N.P. left the club as the passenger in another vehicle, she encountered Dr. Holder while in the other vehicle, at which time Dr. Holder caught her attention, and then arranged to follow the car to N.P.'s home.[62] Once at her home, N.P. asked Dr. Holder to take her to a 24-hour Walgreens, and the two then departed in Dr. Holder's Cadillac.[63]

While making the five-minute drive from her home to the drug store, N.P. observed that at first Dr. Holder was driving within the speed limit; but that, while engaged in conversation with her, Dr. Holder missed the turn that would have brought them to the drug store.[64] She said when she brought this to his attention, Dr. Holder "started moaning and . . . he stiffened up his back. His head was, he threw his head back on the seat and his eyes were rolling back in the back of his head."[65] She said Dr. Holder's foot pressed heavily on the accelerator, "his arms were stretched out holding the steering wheel," and the car was increasing in speed.[66]

At this point, N.P. sought to control the vehicle, with one hand reaching for the steering wheel and the other seeking the parking brake.[67] There was, however, neither braking nor any slowing, when the car hit a concrete signage wall and light pole.[68] Upon impact, N.P. thought she

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[61] Id. at 52.
[62] Id. at 53–54.
[63] Id. at 55.
[64] Id. at 58.
[65] Id. at 58–59.
[66] Id. at 59–60.
[67] Id. at 60.
[68] Id. at 61.

"was actually dead, because I couldn't see anything."[69] She then realized the passenger airbag had deployed, and Dr. Holder was slumped over her left shoulder, bleeding profusely.[70]

Taking her own condition into account, N.P. testified that she could hardly breathe and was in "a lot of pain."[71] She had a gash on her left leg, was in great pain, and learned upon being admitted to the hospital that she had a severely dislocated elbow, shattered cervical spinal discs, and a broken back.[72] According to N.P., however, her treatment at the scene had to be interrupted, as the first responders were diverted when it appeared Dr. Holder was yelling at those who had come to his aid.[73] She said that after surgery, she now has limited mobility in her neck, with sustained periodic back pain; and has been told to expect an increase in that pain as she ages.[74]

Also testifying were first responders who encountered Dr. Holder after he crashed his car. Ryan Biramontes is a driver operator and paramedic for the Palm Beach County Fire and Rescue squad, who described responding to a vehicle accident call at approximately 3 a.m. on June 13, 2008.[75] He described encountering N.P., who was crying and reporting that she was in pain.[76] He saw Dr. Holder, who appeared to have sustained a head injury, but was not responding to his name.[77]

Mr. Biramontes reviewed reports of the crash, and described his encounters with Dr. Holder after Dr. Holder got out of the vehicle and in an "altered" state began "screaming and

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[69] Id. at 62.
[70] Id.
[71] Id.
[72] Id. at 62, 66.
[73] Id. at 64–65.
[74] Id. at 66.
[75] Id. at 238.
[76] Id.
[77] Id. at 239.

stumbling around."[78] He described the steps other responders took to subdue Dr. Holder, generally describing Dr. Holder as "combative" and "resisting."[79] Included in the responses by these responders were multiple attempts to subdue Dr. Holder using a Taser, which proved to be less than effective.[80] He said that after repeated efforts by a team of responders, they were able to restrain Dr. Holder, administer Valium, and transport him to the Delray Medical Center for treatment.[81] The toxicology report provided by Delray Center noted that Respondent's blood taken shortly after the accident by law enforcement tested negative for alcohol and positive for the presence of amphetamines and THC, the active ingredient in marijuana.[82] Respondent admitted that he took amphetamines without a valid prescription on or about June 12, 2008.[83]

In addition, the Government presented testimony from Palm Beach County Sheriff's Deputy Jesse McCoy, who gave testimony that was substantially the same as that provided by Mr. Biramontes, in that he observed N.P. having sustained a dislocated elbow and finding Dr. Holder with a bloody face, grunting behind the wheel, refusing to acknowledge the deputy's presence.[84] He added that when members of the Fire Rescue team arrived, he saw the members having trouble restraining Dr. Holder so that he could be taken in to the hospital for treatment.[85]

Also called to the scene of the crash, although later in time, after Dr. Holder had departed for the hospital, was Palm Beach Sheriff's Office Investigator Robert Stephan.[86] Investigator Stephan described the crash scene, noted the condition of the Cadillac's windshield after the crash, and opined that from the spider-webbing fractures and pieces of organic material found on

[78] Id. at 250.
[79] Id. at 252.
[80] Id. at 254.
[81] Id. at 258, 260.
[82] A.L.J. Ex. 31 at 2.
[83] Id.
[84] Tr. at 405.
[85] Id. at 407.
[86] Id. at 270–71.

the inside of the driver's side of the windshield, it was likely the driver of the car was not wearing a seatbelt at the time of the crash.[87] He said this was confirmed during his review of the vehicle's on-board Crash Data Retrieval System report.[88]

The Government also presented the testimony of Palm Beach County Deputy Sheriff Judith Little, who testified regarding the condition of Dr. Holder's Cadillac on the morning after the crash. Specifically, Deputy Sheriff Little said she discovered the prescription bottle that had been issued to Patient S.S., located inside the vehicle.[89] She counted the pills inside the vial, and determined there were 41 pills remaining in the 60-pill June 11, 2008 prescription.[90] Palm Beach County Detective Daniel Morgado, too, testified about his review of the crash scene and vehicle in the morning after the crash.[91] He said he received the prescription bottle and determined that Dr. Holder had issued the prescription out of MD Now's office for Patient S.S.[92] There is no direct testimony from Dr. Holder accounting for the nineteen Adderall tablets missing from the prescription bottle found in Dr. Holder's Cadillac after the June 13, 2008 crash, although Patient S.S. acknowledged taking no more than four tablets prior to delivering the vial to Dr. Holder.[93]

Respondent subsequently was criminally charged in Palm Beach County with driving under the influence, possession of amphetamines, driving on a suspended license, and obtaining amphetamines by fraud. The State of Florida subsequently issued a nolle prosse for all criminal charges.[94]

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[87] Id. at 286–91.
[88] Id. at 279–81.
[89] Id. at 396.
[90] Id.
[91] Id. at 426–28.
[92] Id. at 429.
[93] Id. at 212–213.
[94] A.L.J. Ex. 31 at 2.

Regarding the crash, Dr. Holder presented the testimony of Kester Jimmy Nedd, M.D., who treated Dr. Holder upon his arrival at the hospital.[95] Dr. Nedd is a board certified neurologist and is the Medical Director for Neurological Rehabilitation at Jackson Memorial Hospital.[96] Dr. Nedd testified that from his review of treatment records, he was of the opinion that Dr. Holder "suffered a severe traumatic brain injury with hemorrhage in the brain" and that this "resulted in cognitive impairment."[97] He said Dr. Holder suffered from "post-traumatic amnesia, where he was in a state of confusion and not able to form new memory. This lasted maybe up to, even up to when he left the rehabilitation center," at which point Dr. Nedd followed him at the outpatient center.[98]

According to Dr. Nedd, Dr. Holder's "cognitive symptoms include trouble with judgment, reasoning, [and] executive function."[99] Dr. Nedd testified that even after many years, Dr. Holder "was still having issues,"[100] explaining that "for many patients with traumatic brain injury, this could be a life-long issue."[101] He added that he "would expect that [Dr. Holder] would have trouble recalling events" associated with the 2008 crash.[102] He added that not only might someone with these symptoms have difficulty remembering the events relating to the crash, such a person might also substitute alternative facts for what actually happened, called "confabulation," where "the patient actually combines many pieces of information and it's not always truthful."[103]

THE MISREPRESENTATION OF DR. HOLDER'S RECORD OF SUSPENSIONS

[95] Tr. at 509.
[96] Id. at 508–09.
[97] Id. at 510.
[98] Id.
[99] Id. at 510–11.
[100] Id. at 512.
[101] Id.
[102] Id. at 515–16.
[103] Id. at 519.

Dr. Holder acknowledged that on January 26, 2009, the Florida Department of Health issued an Emergency Suspension of his license to practice medicine.[104] He did not dispute that the Departmental action was the result of his illegal and unprofessional conduct surrounding his prescriptions to Patient S.S., as well as his unlawful possession and use of Adderall, and the subsequent traffic crash and DUI arrest.[105] Further, he acknowledged that on June 19, 2009, the Florida Board of Medicine issued a final order indefinitely suspending his medical license in Florida.[106]

Dr. Holder also acknowledged that on March 25, 2011, he applied for a medical license in Minnesota; and that the licensure committee of the Minnesota Board of Medical Practice initially recommended denial of the application for his failure to show good moral character.[107] He further agreed that in November 2011, he was granted a restricted and conditional medical license in Minnesota.[108]

The application for a DEA Certificate of Registration requires applicants to answer the following question: "[h]as the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?"[109] Despite holding a restricted and conditional license in Minnesota, and despite having had his Florida license suspended, when asked this question in

[104] Id. at 614 and A.L.J. Ex. One at 2.
[105] Tr. at 614 and A.L.J. Ex. One at 2.
[106] Tr. at 614 and A.L.J. Ex. One at 2
[107] Tr. at 614 and A.L.J. Ex. One at 2
[108] Tr. at 614 and A.L.J. Ex. One at 2
[109] Gov't Ex. Two at 3.

his application for a DEA Certificate of Registration on March 7, 2012, Dr. Holder answered in the negative.[110]

On July 19, 2012, Diversion Investigators McKenna and Joseph Cappello met with Dr. Holder and Dr. Holder's attorney, Kent G. Harbison, of Fredrikson & Byron, P.A., Minneapolis, Minnesota. Investigator McKenna said she questioned Dr. Holder about this response as part of her investigation, prior to the issuance of the Order to Show Cause. According to Investigator McKenna,

> [Dr. Holder] answered on the application no. When I asked him about that, he said that he didn't understand the question, that he wasn't intending to lie, at which time Mr. Harbison interjected, "why would he lie when he knew it was public record?" but I had no, I don't know why he would or wouldn't do such a thing, so I showed him the application. And then he said that he didn't read the question thoroughly, and that's when I showed him a sample application that I had.[111]

According to Investigator McKenna, upon being presented with the sample application, Dr. Holder:

> [W]ent through it and he underlined the first word – "surrendered" – and stopped. I then went on and underlined the rest: "revoked, suspended, denied, restricted or placed on probation, or is any other such action pending?"
>
> MR. LAWSON: So in other words, he was trying to tell you that he answered the question properly because he had never surrendered?
>
> MS. MCKENNA: That could have been the suggestion, and I [asked] about his training as a student for medical doctor and sitting for Boards, and I asked him if during those occasions, "did you just gloss over the questions or did you read them thoroughly in order to answer them?" And he said he didn't gloss over.[112]

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[110] Id.
[111] Tr. at 463.
[112] Id. at 463–64.

DR. HOLDER'S LACK OF CANDOR IN THE INVESTIGATIVE PROCESS

In its Order to Show Cause, the Government averred the existence of multiple instances in which it appeared Dr. Holder had been other than forthright and honest with state regulators and the DEA.[113] These instances included the following:

1. Dr. Holder provided inconsistent statements with respect to the number of doses of Adderall he consumed prior to the automobile crash, and gave inconsistent statements regarding how he obtained the medication, including a claim that the presence of Adderall (in the bottle bearing the prescription he wrote to Patient S.S.) was the product of Florida law enforcement officers planting the bottle in his car, or, alternatively, had been provided by an unnamed colleague at work.[114]
2. Dr. Holder attributed a positive screen for marijuana to be the result of a false positive, rather than to his own use of the drug.[115]
3. Dr. Holder provided evasive answers to DEA agents regarding his past use of controlled substances, and refused multiple requests from the DEA seeking the release of records showing his participation in court-ordered monitoring in Florida through the Florida Professional Resource Network, and during regulatory monitoring required in Minnesota by the Minnesota Health Professional Services Program.[116]
4. Records of drug screening results during court-ordered monitoring included positive testing for opiates on one occasion, the submission of a diluted urine sample on another, and skipping a call for random sampling on another occasion.[117]

Diversion Investigator Jack Henderson testified with respect to the process by which his office evaluated Dr. Holder's March 2012 application for a DEA Certificate of Registration in Minnesota. Investigator Henderson is in charge of the diversion control program for the DEA in

[113] A.L.J. Ex. One at 3.
[114] Id.
[115] Id.
[116] Id.
[117] Id.

the Minneapolis/St. Paul District office.[118] After the application was received on March 8, 2012, Investigator Henderson's office began the process of reviewing the responses Dr. Holder provided in his application.[119] By June 3, 2013, Investigator Henderson had determined that it appeared Dr. Holder had provided "inconsistent and potentially false information" to the DEA, warranting the issuance of a show cause order regarding the application.[120]

Asked to provide specific instances that gave rise to his determination, Investigator Henderson noted first a discrepancy regarding the number of dosages of Adderall Dr. Holder admitted to consuming on the evening of the crash.[121] Investigator Henderson said he understood Dr. Holder acknowledged taking one unit, but when asked about this on June 3, 2013, "he told me that he could have taken on that evening between four and six dosage units, but more than likely it was five."[122]

Investigator Henderson also identified the business record reflecting the answers provided by Dr. Holder to the questions appearing on the online application Dr. Holder submitted in March 2012.[123]

Also working out of the DEA's Minneapolis/St. Paul district office,[124] Investigator McKenna was the lead investigator responsible for evaluating Dr. Holder's March 2012

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[118] Tr. at 326
[119] Id. at 326–27.
[120] Id. at 327.
[121] Id. at 328.
[122] Id.
[123] Id. at 334–35. Note: The print-out of this document has a caption stating "DEA Form 224 – Completed," and was identified by Investigator Henderson as a true copy of Dr. Holder's application. Investigator Henderson acknowledged that the document (shown as Government Exhibit 53) bears a header that reads "Page 1 of 3," but testified that to the best of his recollection, the form consists of two pages, not three, and he provided copies of both pages to Dr. Holder's counsel upon receiving a request for the same in July 2014. Tr. at 332–34.
[124] Tr. at 440.

application.[125] She explained that a registration specialist in the office initially reviewed Dr. Holder's application, then checked to see if there were any records of board orders regarding Dr. Holder's past history.[126] She said Dr. Holder did not disclose such a history, so when the specialist found evidence that the medical boards in Florida and Minnesota had taken action regarding Dr. Holder's licenses in those states, the file was forwarded to the investigator.[127] Because her testimony was internally consistent, consistent with the evidence generally, and not contradicted by any other reliable testimony or evidence, I found her testimony to be credible and gave it great weight.

The application includes Question Three, which asks "[h]as the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?"[128] In his application, Dr. Holder responded in the negative to this question.[129] Investigator McKenna then identified documents establishing that Dr. Holder's medical license had been suspended and was currently on probation in Florida, and was restricted in Minnesota.[130]

Investigator McKenna said that when assigned to review an application, her first task is to check for orders from state boards, apparently replicating the task attributed to the DEA registration specialist.[131] Doing so, Investigator McKenna found the record of disciplinary action

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[125] Id. at 442.
[126] Id. at 442–43.
[127] Id. at 443–44. Upon inquiry, Investigator McKenna also confirmed testimony by Investigator Henderson regarding the printed copy of this application, stating that the document is two pages long, not three, and that there are no questions presented to the applicant other than those shown on pages three and four of Government Exhibit Two. Tr. at 446.
[128] Gov't Ex. Two at 3.
[129] Id.
[130] Id. at 448 and Gov't Exs. 46 through 50.
[131] Tr. at 453.

taken with respect to Dr. Holder's medical licenses in both Florida and Minnesota.[132] Upon making these findings, she then sought copies of the drug monitoring program reports from Florida (i.e., the Professional Resource Network, or PRN, report), and Minnesota (the Health Professional Services Program, or HPSP, report).[133] She explained that she needed to see the contents of these reports in order to corroborate what Dr. Holder was telling her.[134] She said she specifically wanted to learn what Dr. Holder's diagnoses and prognoses were, and whether there were issues relating to his treatment that were being addressed or had been addressed in the past.[135]

According to Investigator McKenna, Dr. Holder was not forthcoming with securing these reports:

> MR. LAWSON: Okay. And if you can remember, what sort of documents were you focused on collecting before you ever spoke with Dr. Holder?
>
> MS. MCKENNA: The Board orders, of course. And then I wanted to get the law enforcement file, the police reports, any supporting documentation to get a clearer picture of what the allegations were there.
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> MR. LAWSON: Okay. Now your investigation went on for quite a long time. Is that correct?
>
> MS. MCKENNA: Yes, sir. It did.
>
> MR. LAWSON: All right. Why did it take so long?
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> MS. MCKENNA: On numerous occasions, I requested the HPSP and PRN records from Dr. Holder in order to afford him the opportunity to present his side, so to speak. On those occasions, I would get, "I'll get them for you," or I would remind him that I was still waiting for them, and I never really received much, if anything.[136]

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[132] Id. at 453–54.
[133] Id.
[134] Id.
[135] Id.
[136] Id. at 455.

Investigator McKenna said she asked for these reports during the meeting on July 19, 2012, at which time Dr. Holder told her he "would look for them." [137] He failed to produce the records, and when Investigator McKenna repeated the request during a discussion on August 25, 2012, Dr. Holder again offered to provide them.[138] When that failed, she

> [A]ttempted to subpoena the records and was instructed I would need a court order or a release from Dr. Holder. I then presented him with a release, one each for Florida, one for Minnesota, on August 13th of 2013, I believe it was, and asked him if he would consent to me receiving the records personally.
>
> MR. LAWSON: And was August 13th the date that you actually presented, did you actually go ahead and complete, fill out the release forms?
>
> MS. MCKENNA: Yes, sir. I had the release forms completed. I brought them to him at his place of business, at, Whittier Clinic, and presented them to him personally.[139]

On August 23, 2013, however, Dr. Holder informed Investigator McKenna that he would not sign the release for either set of records.[140]

In the course of her investigation, Investigator McKenna learned of "three different occasions where [Dr. Holder] either tested positive for opiates, had a diluted [urine] sample, or missed a testing date."[141] When in November 2012 she asked Dr. Holder if he completed the Florida program, Dr. Holder said that he had completed the program.[142] Investigator McKenna then testified: "I said 'no. In fact, you didn't complete the program.' And that's when he said that he withdrew from the program because it was taking too long."[143]

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[137] Id. at 464.
[138] Id. at 469–70.
[139] Id. at 455–57.
[140] Id. at 479.
[141] Id. at 471.
[142] Id. at 472.
[143] Id. at 472.

During this conversation, Dr. Holder again stated he would look for records of his participation in PRN and HPSP, but again failed to provide the requested records, a process that repeated itself when Investigator McKenna met with Dr. Holder in person on January 4, 2013.[144] At that meeting, Dr. Holder provided 82 pages of records, the most significant of which were five pages of treatment records written by Marilyn Miller, Dr. Holder's contact at HPSP.[145]

EVIDENCE OF RESPONDENT'S ACKNOWLEDGEMENT OF WRONGDOING AND REMEDIATION

Testifying on behalf of Dr. Holder, Ms. Miller said she provides case management services at the Health Professionals Services Program (HSPS) in Minnesota.[146] Due to Dr. Holder's failure to supply a release reflecting Ms. Miller's treatment records, it is unclear whether the records of her services have been fully presented in this proceeding.

Pursuant to 21 C.F.R. 1301.15,[147] the Administrator may require an applicant to submit such documents or written statements of fact relevant to the application as the Administrator deems necessary to determine whether the application should be granted. This regulation provides that "[t]he failure of the applicant to provide such documents or statements within a reasonable time after being requested to do so shall be deemed to be a waiver by the applicant of an opportunity to present such documents or facts for consideration by the Administrator in granting or denying the application."

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[144] Id. at 473.
[145] Id. at 474.
[146] Id. at 532.
[147] 21 C.F.R. § 1301.15 Additional information. The Administrator may require an applicant to submit such documents or written statements of fact relevant to the application as he/she deems necessary to determine whether the application should be granted. The failure of the applicant to provide such documents or statements within a reasonable time after being requested to do so shall be deemed to be a waiver by the applicant of an opportunity to present such documents or facts for consideration by the Administrator in granting or denying the application.

The record here establishes that Dr. Holder failed to provide a release that would permit Diversion Investigator McKenna to obtain a complete record of monitoring by HPSP, creating an instance where by operation of this regulation, Dr. Holder has waived the opportunity to present HPSP records for consideration in this application. The Government timely objected to the presentation of Ms. Miller's testimony, based on 21 C.F.R. 1301.15.[148] Finding the objection is well-taken, I limit my use of Ms. Miller's testimony. I do consider as uncontroverted Ms. Miller's description of the purpose of the Minnesota HPSP. The program, according to Ms. Miller, "is a state program that was created by the Health Licensing Boards in 1994 to monitor health professionals with illnesses that could potentially impair their ability to practice with reasonable skill and safety."[149] According to Ms. Miller, under this program (which is not managed by the state medical board), she monitors participants for "substance problems, psychiatric problems, and medical conditions."[150]

I do not consider as substantive evidence Ms. Miller's proffer of facts regarding Dr. Holder's progress in the HPSP program. Although Ms. Miller testified that a substance abuse treatment plan has been established for Dr. Holder, and that Dr. Holder complied with that plan, it is not clear from the record before me that a complete record of treatment has ever been produced for the Administrator's consideration. Ms. Miller testified that while Dr. Holder provided releases authorizing potential employers and credentialing agencies to see the full record of monitoring at HPSP, Dr. Holder did not provide a similar release that would have authorized the DEA to see these records.[151]

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[148] Tr. at 520.
[149] Id. at 523.
[150] Id.
[151] Id. at 528.

The evidence establishes that Dr. Holder requested and received from HPSP a copy of his case file as it existed on September 18, 2012,[152] but it appears this case file has not been provided to the Government and does not appear as part of the record of this proceeding. Given Dr. Holder's explicit determination to withhold from the Administrator the record of his experience at PRN in Florida and his refusal to sign a release allowing the DEA access to the full record of his experience in Minnesota, I give no weight to the balance of Ms. Miller's testimony, including her statement that Dr. Holder has met all of the conditions of monitoring at HPSP.[153]

Further, I note with concern Ms. Miller's testimony that established June 2008 as Dr. Holder's date of sobriety.[154] As the Government brought forward during its examination of Ms. Miller, it appears Ms. Miller used this as Dr. Holder's sobriety date without knowing that Dr. Holder tested positive for unprescribed opiate use while a participant in the Florida PRN program, that he submitted a diluted urine sample while in that program, and that these events arose after June 2008.[155] Accordingly, I give no weight to Ms. Miller's testimony that Dr. Holder has a continuous sobriety date of June 2008.

As of April 2013, Investigator McKenna still did not have records of treatment from PRN, and renewed her request for those and for records not yet provided from HPSP.[156] No records were forthcoming, however, so Investigator McKenna went to see Dr. Holder at his workplace, presenting him with releases allowing the release of PRN and HPSP records.[157] Dr. Holder elected not to sign the releases, telling Investigator McKenna he had given her all of the records and saying that before he approved the releases, he wanted to consult with his sister, who

[152] Id. at 535.
[153] See id. at 526–27.
[154] Id. at 532.
[155] Id. at 533.
[156] Id. at 478.
[157] Id.

is an attorney.[158] On August 23, 2013, Investigator McKenna called Dr. Holder regarding the releases. She testified that Dr. Holder said "he had already given me all of HPSP's records, that PRN's records were full of inaccuracies, and that it would be inappropriate for me to have that information and to use it at this point."[159] As a result, records of Dr. Holder's participation in and withdrawal from the court-ordered monitoring by PRN in Florida are not available for the Administrator's review.

It bears noting that on the day testimony began in this case, Dr. Holder reported that he experienced a seizure of unknown duration the day before, one that came upon him without advance warning, during which he lost consciousness for a few moments and afterwards had "a little bit of a headache and [was] a bit confused."[160] Dr. Holder explained that he could not anticipate when such a seizure would occur, although he "attribute[d] a lot of it to like extreme fatigue."[161] He said that he has an unrestricted Minnesota driver license, despite the fact that if he were driving when such a seizure occurred, there would be nothing he could do to safely pull over.[162] When asked whether the condition could be controlled by medication, Dr. Holder explained that "[i]t was recommended by a neurologist that I take medication," but Dr. Holder has elected not to follow that recommendation and currently takes no medication for this condition.[163]

Also noteworthy are the impressions created during this administrative proceeding, by the character of Dr. Holder's responses to questions put to him during the evidentiary hearing. In many respects, the material facts presented by the Government in its Order to Show Cause had in

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[158] Id. at 479.
[159] Id.
[160] Id. at 80–81.
[161] Id. at 82.
[162] Id.
[163] Id. at 83.

one form or another been stipulated to in advance of the hearing, or were not disputed when Dr. Holder was directly questioned about them. In his closing statement, Dr. Holder accurately states that "at the end of the hearing Dr. Holder . . . acknowledged that there were no factual disputes with respect to paragraph 2-6 of the Government's Notice [sic] to Show Cause."[164]

Despite having stipulated to key material facts, however, Dr. Holder frequently proved to be either unable or unwilling to respond directly to questions about the evidence that supported those facts. For example, in advance of the hearing the parties stipulated that on June 4, 2008, Respondent saw Patient S.S., a 25 year old male, at MD Now's Royal Palm Beach facility, and that he prescribed Patient S.S. 30 tablet of Percocet 10/325 and 30 tablets of 2 mg Xanax XR (extended release), later orally changed to 60 tablets Xanax (immediate release).[165]

When the Government presented copies of the prescriptions (Government Exhibit 5) to Dr. Holder, however, and asked that he identify them, Dr. Holder's answers were less than direct.

> MR. LAWSON: Dr. Holder would you just take a look at the documents at Exhibit 5? And those are three prescriptions issued to Patient SS, correct?
>
> DR. HOLDER: That's what it appears to be.
>
> MR. LAWSON: And is that your signature on those prescriptions?
>
> DR. HOLDER: That is my signature.
>
> MR. LAWSON: All right. And so you issued those prescriptions to Patient SS on June 4, 2008?
>
> DR. HOLDER: Seems like it.[166]

[164] Respondent's Written Closing Statement at 11 (citing Tr. at 611–16).
[165] A.L.J. Ex. 31 at 1, Stipulation Three.
[166] Tr. at 92–93.

Similar deflection can be found when Dr. Holder was asked about his decision to prescribe Adderall to Patient S.S. When asked whether there were any factual misstatements appearing in paragraph three in the Order to Show Cause, Dr. Holder answered in the negative.[167] That paragraph alleges on June 11, 2008 Dr. Holder issued a prescription for 60 tablets of 30 mg Adderall to Patient S.S. without conducting an examination, without making a diagnosis for any condition calling for the prescription, and without making any documentation to support the prescription.[168]

When the Government asked Dr. Holder to explain why the June 11, 2008 prescription was hand-written when others in the record were computer-generated, however, Dr. Holder offered a different account of the circumstances leading to the issuance of this prescription:

> MR. LAWSON: Okay. And can you tell me why that is a handwritten prescription versus the electronically generated prescriptions in the previous exhibit?
>
> DR. HOLDER: Yes, well what I assume what's going on here is it seems that he came to this visit, which the previous prescriptions were, and if you look, they are dated different dates as well. And then if you look at this one um, which was on 11th, meaning that we, it's not infrequent that people come in after the appointment wanting medications that they usually get and I was refilling those medicines.
>
> MR. LAWSON: Sir, are you saying that the prescription you issued on June 11th to SS was a refill of a prescription he usually gets?
>
> DR. HOLDER: Yes, I am.[169]

Dr. Holder also exhibited a marked tendency not to fully disclose information that may call into question his ability to comply with the law, doing so both in his representations to the Minnesota Board, and in his testimony before me.

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[167] Id. at 611.
[168] A.L.J. Ex. One at 2.
[169] Tr. at 95.

In the following exchange, Government's counsel brought to Dr. Holder's attention the answers appearing in Dr. Holder's application for licensure in Minnesota, with respect to criminal convictions. The application question, Question 12, provides as follows:

> Have there ever been any criminal charges filed against you? This includes charges of disorderly conduct, assault or battery, or domestic abuse, whether the charges were misdemeanor, gross misdemeanor, or felony. This also includes any offenses which have been expunged or otherwise removed from your record by executive pardon. If so, give particulars, including the date of conduct, state and local jurisdiction in which the charges were filed.[170]

In the space provided, Dr. Holder wrote "please view addendum."[171] The addendum describes charges arising from the June 13, 2008 vehicle crash, but no other criminal charges are reported.[172] When questioned about the true state of his criminal record, Dr. Holder testified as follows:

> MR. LAWSON: Okay. And Question 12 asks whether any criminal charges have been filed against you and you circled yes and said, please view addendum, right?
>
> DR. HOLDER: Yes.
>
> MR. LAWSON: And so your addendum is part of your application, correct? Because you had to give an explanation for positive answers?
>
> DR. HOLDER: Yes, it is.
>
> MR. LAWSON: And I guess going back to the last question I asked you about, did you in that addendum disclose every instance in which criminal charges had been filed against you?
>
> DR. HOLDER: I focused specifically on the incidents of June--
>
> ADMIN. JUDGE MCNEIL: You need to answer yes or no to begin that.
>
> DR. HOLDER: Okay. Yes. Well. Yes.

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[170] Gov't Ex. 34 at 6.
[171] Id.
[172] Id. at 9-10.

MR. LAWSON: So your addendum discloses every instance in your life in which criminal charges have been filed against you?

DR. HOLDER: In my life. Perhaps there were charges, maybe filed against me another time that I did not mention. So, so maybe it's no. The answer is no.

MR. LAWSON: So the answer then is that you didn't answer that question completely and truthfully on that form? That's a yes or no question, Dr. Holder.

DR. HOLDER: I was--

ADMIN. JUDGE MCNEIL: Answer the question, please. Completely and truthfully. So go to completely first. Did you answer it completely?

MR. LAWSON: Dr. Holder, did you answer, in your addendum did you completely disclose every instance in which criminal charges have been filed against you?

DR. HOLDER: Let me read the question again. What's the question that you are pointing to on the, the Minnesota Board application? Because I'm certain I was truthful.

MR. LAWSON: It is Question 12 on Page 6 of the form. And I will specifically point out to you that it says it includes charges of disorderly conduct, assault or battery, or domestic abuse; whether those charges were misdemeanor, gross misdemeanor or felony and includes charges that have been expunged.

DR. HOLDER: And also, it may not have been complete, but it was truthful.

MR. LAWSON: So you were truthful about the charges you chose to disclose?

DR. HOLDER: And the charges that I thought were actually most important.

MR. LAWSON: But you had, in fact, you've been charged with other crimes besides the one stemming from the June 13, 2008 accident, correct?

DR. HOLDER: I think disorderly conduct before.

MR. LAWSON: Right.

DR. HOLDER: But this was, the charges were dismissed.

MR. LAWSON: Right. They were dismissed, but they were charges for disorderly conduct, correct?

> DR. HOLDER: I vaguely remember, but you know, I don't know the details about that. Nothing came of that incident.
>
> ADMIN. JUDGE MCNEIL: I'll take that as a yes.[173]

I also note with concern the question of whether Dr. Holder was forthright in his communication with the medical boards in Florida and Minnesota in other respects. In describing his recollection of events immediately before and after the motor vehicle crash on June 13, 2008, Dr. Holder told me he remembered none of the circumstances of the crash.[174] He made no similar claim when describing the crash to the Minnesota Board of Medical Practice.

In his Minnesota application, dated March 18, 2011, Dr. Holder stated that he had a seizure while driving on June 13, 2008; and that "[a] collision with a sign post followed. Both the passenger and I were in seatbelts and only suffered minor injuries form [sic] airbag deployment."[175] During this hearing, however, Palm Beach Sheriff's Office Investigator Robert Stephan credibly testified that the evidence gathered at the scene of the crash established the driver of the Cadillac was not wearing a seatbelt at the time of the crash.[176] Further, passenger N.P. credibly testified that she suffered a serious cut to her leg, dislocation of her elbow, and multiple spinal injuries, and sustained in excess of $100,000 in medical expenses.[177] Dr. Holder indirectly confirmed the severity of N.P.'s injuries, testifying that his insurer, Progressive Auto, paid in excess of $100,000 to settle N.P.'s civil lawsuit against him.[178] Dr. Holder's statement to the Minnesota Board, however, made no mention of these details.[179] Instead, he attributed his injuries to being repeatedly tazed and beaten by seven police officers who responded to the scene

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[173] Tr. at 149–52.
[174] Id. at 107.
[175] Gov't Ex. 34 at 9.
[176] Tr. at 279–81, 286–91.
[177] Id. at 66–71.
[178] Id. at 147.
[179] Id.

of the crash.[180] He also minimized the injuries sustained by his passenger, reporting only that she "was treated for an elbow injury on scene," without disclosing N.P.'s hospitalization and subsequent treatment for orthopedic dislocation and spinal injuries.[181]

Beyond what appears to be Dr. Holder's tendency to minimize the injuries he and N.P. suffered as a result of this crash, there is also the unresolved inconsistency regarding his capacity to describe N.P.'s condition after the crash. During the hearing, Dr. Holder repeatedly testified that he remembered none of the circumstances of the crash,[182] at one point claiming that his knowledge of the events at the time of the crash was based on police reports, not his own independent recollection.[183] Indeed, the thrust of testimony from his treating physician, Dr. Nedd, was that the injuries Dr. Holder sustained in the crash likely impaired his ability to recall what happened at the time of the crash.[184] Dr. Holder's representations to the Florida and Minnesota medical boards, however, do not reflect the presence of any such cognitive impairment, nor do they indicate that his answers were based on his reliance on police reports; to the contrary, his answers appear to reflect descriptions based on his own knowledge and recollection.

Similarly, Dr. Holder's representations to the Minnesota Board differed significantly from what he presented during this administrative hearing with respect to his possession of Adderall at the time of the crash. As noted above, in order to demonstrate that he has accepted responsibility for engaging in the conduct attributed to him in paragraphs two through six in the Order to Show Cause, Dr. Holder "acknowledged that there were no factual disputes with respect

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[180] Id.
[181] Id.
[182] Id. at 107, 118.
[183] Id. at 118.
[184] See id. at 510–17.

to paragraph 2-6" of the Order to Show Cause.[185] In paragraph four of that Order, the Administrator alleged that Dr. Holder issued the Adderall prescription to Patient S.S. "solely in order to illegally obtain amphetamines for [his] own personal use," and not for any legitimate medical purpose.[186] On the other hand, Dr. Holder withheld from the Minnesota Board any reference to Patient S.S., nor did he mention taking Adderall on the evening of the crash, averring instead that he "did use Adderall as used for ADHD without a prescription while working long hours. I acquired from a colleague who worked in the Urgent Care where I worked."[187] During the hearing before me, however, when asked whether he had been diagnosed with ADHD, Dr. Holder answered in the negative.[188]

Also of concern was Dr. Holder's account of his use of Adderall on the day of the crash. Initially, Dr. Holder told Diversion Investigator McKenna he had taken one tablet of Adderall on the day before the crash.[189] After receiving the toxicology report from the crash (i.e., the University of Florida Diagnostic Reference Laboratory Report of Dr. Bruce A. Goldberger)[190] and reviewing Dr. Goldberger's deposition from the criminal case involving Dr. Holder, Investigator McKenna returned to the subject with Dr. Holder during an interview on August 25, 2012.[191] At that interview, Dr. Holder said "he thinks he might have taken two [Adderall doses] that night."[192] These accounts, further, are at odds with what Dr. Holder told Diversion Investigator Henderson on June 3, 2013, when "[Dr. Holder] told me that he could have taken on that evening between four and six dosage units, but more than likely it was five."[193]

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[185] Respondent's Written Closing Statement at 11; A.L.J. Ex. One at 2.
[186] Respondent's Written Closing Statement at 11; A.L.J. Ex. One at 2.
[187] Gov't Ex. 34 at 10.
[188] Tr. at 108.
[189] Id. at 464–65.
[190] Gov't Ex. 14.
[191] Tr. at 469.
[192] Id.
[193] Id. at 328.

No disclosure of such use appears in his description of the events as presented to the Minnesota Medical Board.[194] While Dr. Holder does disclose that he was charged with unlawful possession of Adderall, with fraud to acquire a controlled substance, and with driving under a "sub-therapeutic" level of Adderall in his blood, he does not acknowledge any misconduct with respect to Adderall.[195] Instead, he reported that he elected not to appear before the Florida Medical Board, asserting that he was not "physically or legally" fit to participate in such a hearing; and that as a result, after he refused to appear before the Florida Board, "they adopted the charges and incorporated the police report as their findings."[196]

During the hearing before me, Dr. Holder admitted using Adderall immediately after accompanying Patient S.S. to fill the prescription on June 12, 2008, but did so "because I wanted to stay alert."[197] When asked "Stay alert for what?" Dr. Holder responded: "Seeing patients. I wanted to be alert while I was seeing patients." When asked "[s]o does that indicate to you then that you were in fact working on June 12, 2008 if you were taking Adderall?" he responded "If I took it, then I probably was working, yes."[198] When asked to identify by name the source of Adderall other than the prescription he wrote for Patient S.S., Dr. Holder testified that he "would rather not mention his name," and then asserted the source was a medical colleague, a physician's assistant, working at MD Now whose first name is William and whose last name Dr. Holder could no longer recall.[199] He acknowledged, however, that he has never disclosed to the management at MD Now that they had an employee who was unlawfully distributing controlled substances.[200]

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[194] Gov't Ex. 34 at 9–10.
[195] Id.
[196] Id. at 10.
[197] Tr. at 109.
[198] Id. at 109–10.
[199] Id. at 114–15.
[200] Id. at 118.

When describing her interview of Dr. Holder (in the presence of Dr. Holder's attorney) during a meeting at the DEA on July 19, 2012, Diversion Investigator McKenna said that when she asked Dr. Holder about the bottle of Adderall found in his Cadillac immediately after the crash,

> [H]e said he said he had no knowledge of how the bottle got there. He suggested that law enforcement planted it. When I asked how would the police know to go to that particular individual and ask for that particular prescription, he said that the law enforcement was rifling through his cell phone and could have found his phone number in it, that he had a criminal history or criminal record.
>
> MR. LAWSON: Who had a criminal record?
>
> MS. MCKENNA: The patient on the bottle, SS.
>
> MR. LAWSON: So, he denied having any knowledge of how that bottle got in his car?
>
> MS. MCKENNA: He did deny it.[201]

In a similar manner, Dr. Holder gave what appear to be inconsistent accounts to the Minnesota Medical Board and to me during the hearing, with respect to his past use of Adderall. At the outset, Dr. Holder wanted me to know that while he agreed with the written statement submitted to the Minnesota Board, what was written there was not his own work but was instead written by his attorney.[202] Justifying his duplicity, Dr. Holder stated "like I said before, I did not write this document. I signed it. I read it and signed it. So I can't tell you exactly what, you know, I meant on this document."[203]

Dr. Holder then acknowledged that the representation regarding his past use of Adderall appearing in his sworn statement to the Minnesota Board, dated August 8, 2011 was not true.[204]

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[201] Id. at 460–61.
[202] Id. at 176.
[203] Id.
[204] Id. at 175–77 and Gov't Ex. 37 at 10–13.

There is, however, no evidence to date that Dr. Holder has ever brought this error to the attention of the Minnesota Board.

In his written statement to the Board, Dr. Holder makes reference to his past use of Adderall. Dr. Holder stated the following:

> It is true that, because of a stupid error of judgment, I did obtain improperly from a friend tablets of Adderall. I obtained Adderall **only** for the purpose of helping me stay alert during a period when I was working hard for many hours. I definitely do not have a "drug problem," and have never had a history of anything even close to that. I realize and agree that what I did in obtaining the Adderall was wrong. I had never done that before and will never do it again.[205]

When asked if he agreed that his statement that he had never used Adderall before was a lie, Dr. Holder first denied it was a lie, then reiterated that "I don't understand what this things written [sic]. I have a problem with this because I've got, I'm, like I'm mentioning, this is not written by me."[206]

Under questioning by his attorney, Dr. Holder stated he knew diversion of prescription medications would be "misusing my privilege to practice medicine and serve the community that I wish to serve," and said he would never divert medicine, under any circumstances.[207] He said he's a changed man now, living a life that is different than the one he lived in 2008. Elaborating, he stated:

> The way I've lived my life back then is very different from my life now, and I think one of the things that this whole opportunity has made me do, is really kind of surrender my will to my creator and I've always believed in, you know, Jesus Christ growing up, because that's what I learned. So as long as I've known myself, I've actually believed that Jesus was the Lord of all, etc. But I've never really surrendered my will, so being a very strong-

[205] Gov't Ex. 37 at 12 (emphasis sic).
[206] Tr. at 176–77.
[207] Id. at 185.

> willed person, I still kind of would do what I wanted to do, even though I would pray or go to church or whatever.
>
> And I think in this case, I've had to completely surrender my will and what I've found from this, is I have actually have reached a place of joy, advancement and completion. And going from the place where I lost everything, you know, with my trust and faith, has propelled me to the place where I am right now.[208]

Dr. Holder explained that he currently works as a doctor practicing urgent care at Whittier Clinic, in a "family medicine residency."[209] He lives with his wife (who attended much of the evidentiary hearing) and the couple's three-month old daughter, spending a lot of time with them and with his parents, who are part of his "support system."[210]

Pursuant to orders from the Florida Board, Dr. Holder participated in monitoring and drug testing by Professional Resource Network, or PRN.[211] According to Dr. Holder, PRN provides monitoring and testing "to make sure people are providing competent medicine."[212] The criminal charges arising from the 2008 crash were reinstated for prosecution, but ultimately those charges were dropped.[213] The Florida Medical Board, however, did not end its inquiry, but instead in June 2009 it issued a final order indefinitely suspending Dr. Holder's license to practice medicine.[214] Dr. Holder testified that after being enrolled in a court-sponsored drug monitoring program in Florida, he left the program, and has never completed it.[215]

Dr. Holder explained that in November 2010 he submitted a petition to the Florida Medical Board, seeking reinstatement of his medical license.[216] Included in that petition is the

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[208] Id. at 186.
[209] Id. at 187.
[210] Tr. at 187–88.
[211] Id. at 143–44.
[212] Id. at 144–45.
[213] Id. at 137–38.
[214] Id. at 139.
[215] Id. at 137.
[216] Id. at 146.

following description of Dr. Holder's status at the time of the petition, along with the requirements of PRN-based monitoring:

> The related criminal matter has been referred for pre-trial intervention and Respondent is currently complying with the requirements for successfully completing the Circuit Court's requirements to avoid prosecution for those criminal charges. These requirements include successful completion of the Comprehensive Alcoholism Rehabilitation Program (CARP) as ordered by the Court. This is a program providing a continuum of care to individuals affected by alcoholism, drug dependency and co-occurring disorders and PRN is monitoring Respondent's participation in the CARP.[217]

Although from this description it appears Dr. Holder participated in monitoring by PRN and the CARP program, Dr. Holder elected not to complete the course of monitoring and refused to permit access to these records upon request by DEA Diversion Investigator.[218] As a result, although he has been identified as a person affected by alcoholism, drug dependence and co-occurring disorders, Dr. Holder has effectively withheld from the Administrator records showing his treatment in Florida for these disorders.

The record reflects that the Florida Board, presumably having the benefit of PRN's full report of Dr. Holder's incomplete participation in CARP, did not grant Dr. Holder's request for an unconditional medical license.[219] Instead, it required that for one year his practice be under direct supervision by a board certified physician who was to review all of Dr. Holder's prescriptions, and that his license be subject to a five year period of probation.[220]

Also before me is testimony from Brenda Joyce McGuire, M.D., who spoke in support of Dr. Holder's application. Dr. McGuire's association with Dr. Holder began in 2011, when she and Dr. Holder were volunteers at an organization that was at the time called the African and

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[217] Id. and Gov't Ex. 30 at 12.
[218] Tr. at 472, 479.
[219] Id. at 146.
[220] Id. and Gov't Ex. 30 at 2–5.

American Friendship Association for Cooperation and Development.[221] She testified that she holds Dr. Holder "in high esteem," and that he has always "shown a lot of caring for the people that he works with, that his medical knowledge is extremely good, and that he's always displayed, you know, good character, integrity, [and] compassion."[222] She added that "Minnesota is becoming increasingly diverse, with large populations of immigrants and refugees. Dr. Holder, being of African descent, born in Africa and raised in this country, relates well culturally and even linguistically with a lot of the refugees . . . and immigrants that we have here."[223]

Dr. Holder also introduced the testimony of his mother, Wilhelmina Valerie Holder, M.D., a public health physician who currently serves as a community advocate who assists in decreasing "health disparities" and improving "health equity."[224] Dr. Holder described her son's account of the 2008 crash, stating that he "couldn't remember much, but he remembered when he was getting the seizure, and a police reached in the car and hit him on his nose a couple of times."[225] Given that this account was based on Dr. Wilhelmina Holder's recollection of what her son told her, and given the unreliable nature of Dr. Mark Holder's account of the circumstances attendant to the crash, I find I can give little weight to the testimony of Wilhelmina Holder's account of the crash or its aftermath.[226]

Also testifying on behalf of the Respondent was Cidijah Rodney-Somersall, M.D., a pediatrician with a practice in Atlanta, Georgia.[227] According to Dr. Somersall,

> Mark is a very enthusiastic person who was very passionate about, or he's very passionate about medicine and patient care. He's someone who is, has

[221] Tr. at 544.
[222] Id. at 546–47.
[223] Id. at 547.
[224] Id. at 552.
[225] Id. at 553.
[226] Id. at 553–54.
[227] Id. at 557.

> great bedside manner. He's very charming, he has a love for people, and he always appeared to provide excellent patient care.
>
> He was very good in terms of gathering a full history, just finding about the patient, not only their medical problems, but socially. And I mean, I was always impressed by him as a medical student, the kind of care that he provided. He was bright, and he was a great medical student, and seemed to be a very good healthcare professional.[228]

Also before me is the sworn statement of Jerome Potts, M.D., who is the Department Chief of Family and Community Medicine at the Whittier Clinic, Hennepin County (Minnesota) Medical Center.[229] Dr. Potts avers Dr. Holder's service as an employee at the clinic in June 2012 has been subject to close monitoring, including random toxicology screening.[230] Dr. Potts avers that he has personally closely supervised and monitored Dr. Holder, and states that Dr. Holder "met all the conditions of his employment and at no point has he demonstrated a lapse in judgment or provided substandard care to patients."[231] According to Dr. Potts, Dr. Holder

> [I]s very diligent in documenting his charts and they are in compliance with all of our policies and procedures. His interaction with other staff and peers can be described as respectful, professional, and kind. I believe that his past issues have made him a more empathetic physician and colleague. He has earned my trust and that of his peers and patients. . . . I continue to trust Dr. Holder and am confident that he will continue to deliver quality medical care that is above reproach and meets all applicable standards.[232]

It is not clear the extent to which Dr. Potts is familiar with Dr. Holder's past, as his statement was received in lieu of live testimony, and as such the Government was not able to cross examine this witness.[233] Accordingly, while I give weight to Dr. Potts' description of Dr. Holder's current professional demeanor and performance, I cannot give weight to Dr. Potts'

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[228] Id. at 559.
[229] Resp. Ex. T, admitted over Government objection, Tr. at 561–62.
[230] Resp. Ex. T at 1.
[231] Id. at 2.
[232] Id.
[233] Id. at 561–62.

report that "Dr. Holder shared details about the incident in Florida."[234] As a result, while I can and do receive Dr. Potts' statement averring Dr. Holder's successful employment at Whittier Clinic, those statements do not constitute evidence of any acknowledgement of past misconduct by Dr. Holder, nor do they serve as evidence of remediation for that past misconduct.

Dr. Holder presented live testimony of Laurie Kardon, M.D., who spoke in support of his application. Dr. Kardon worked with Dr. Holder at MD Now in 2007 and 2008, and said he had an excellent bedside manner when working there, and that "[p]atients loved him" for his ability to provide "accurate diagnoses and treatment."[235] Dr. Kardon testified:

> I trust his medical knowledge, I trust his judgment, I trust his judgment in taking care of patients and his treatment, and his follow-up with patients. I would trust him with my life and with the life of my family.
>
> As a person I knew him mostly in a professional capacity prior to his, his accident, and I visited him several times in the hospital, and with him and also got to know his family after his accident, from the hospital on forward, and am just as equally impressed with the hard work that he's done since his accident to regain, first, his life. That he survived that at all is miraculous, and just equally impressed with the work, the hard work that he has done to regain his personal and professional life.[236]

Although testifying about Dr. Holder's good reputation, Dr. Kardon acknowledged that she was unaware that Dr. Holder admitted to having diverted controlled substances through other employees at MD Now.[237] Further, her opinion is given less weight after considering the response she made to the Government's inquiry during cross-examination. Government's counsel predicated a question by stating what had been established at this point in the hearing:

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[234] Resp. Ex. T at 1.
[235] Tr. at 566–67.
[236] Id. at 568.
[237] Id. at 570.

> Mr. Lawson: I'm telling you that [Dr. Holder has] admitted to [having diverted controlled substances through other employees at MD Now] in court under oath, so you can assume it's true. . . . Does the fact that he's admitted to diverting and using controlled substances unlawfully through his employment at MD Now change your stated opinion as to how much you trust him and value his professional reputation?
>
> Dr. Kardon: It does not, because I don't think that's true.[238]

Testifying on his own behalf, Dr. Holder sought to relate his history of conflicts with law enforcement officials, including his being repeatedly being shocked by a Taser during his encounter with first responders after the crash in 2008, and raising the claim that he had been arrested for trespassing in Minnesota under conditions he felt indicated improper police conduct.[239] He also wanted to express how adversely he had been affected by the crash in 2008, fearing that he "may never be able to function again" but that, eschewing surgeries after the crash, he prayed, "and I was delivered by all of them, step by step."[240]

Dr. Holder admitted to his past use of Adderall without a prescription, and to his past use of marijuana, but did so without providing specifics and without identifying a time period for this conduct.[241] When asked whether he took responsibility for what happened in Florida, Dr. Holder again equivocated with respect to diversion of controlled substances:

> I do take responsibility for the situation that happened in Florida. And there's a lot of things that I'm very unproud of, and the thing is, is I cannot remember diverting any medications with SS. I cannot remember and I honestly cannot remember how the medications got into the car, got into my car, but I do admit completely to using Adderall without prescriptions. And like I said, there's also a lot of my life that I'm not proud of, but I think that

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[238] Id. at 569–70.
[239] Id. at 574–75; see also Gov't Ex. 37 at 10–11.
[240] Tr. at 578.
[241] Id. at 579.

> from there to now I've gone a long way, and I believe that I've displayed it through my actions.[242]

Dr. Holder also pointed to his completion of the requirements imposed by the Minnesota Medical Board, but offered no apologies for failing to complete the PRN monitoring program in Florida – other than to assert that "I really could not support myself in Florida anymore because the restrictions I had on my license."[243]

Dr. Holder said one of the restrictions still in place at the clinic in Minnesota was imposed by his employer, in that his current employer has the right to drug test him for five years, adding that he has never failed a test since beginning at this place of employment.[244] The record is silent, however, with respect to the presence of any other monitoring requirements.

Dr. Holder stated that if he had his DEA certificate of registration, "I'd be able to moonlight" and would not have the financial problems he currently is facing.[245] When asked why I should recommend the DEA grant his application, Dr. Holder stated:

> For one, I think that it's clear to me, and I want to make it clear to the Court again, that I've done some wrong things in the past and I've made some errors in the past, and I'm taking responsibility for the errors I've done. And since I've made these errors, I've worked diligently to the point where I am right now, complying with the things that I needed to comply with to get to this point.
>
> And so I deserve my DEA registration. I put the work in school, I'm a Board-Certified Family Medicine physician, and I've worked towards these things to this point.
>
> Number two, I think that the community actually needs me. I think that there's a need for family physicians and not only family physicians, but people that care for people, and I fall into that category where I care for people and I'll do the best job that I can to help people.

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[242] Id. at 590–91.
[243] Id. at 581.
[244] Id. at 588–89.
[245] Id. at 591.

> And number three, partly because of this situation as well, I am at no risk of diverting medicines, and I will be clear to say that I would never, in no circumstance would I divert medications to anybody else or myself.[246]

ANALYSIS

Four material factual premises compel the ultimate finding required in this case. First, the record now before the Administrator demonstrates that Dr. Holder has a history of noncompliance with laws regulating controlled substances renders restoring to him a DEA Certificate of Registration inconsistent with the public interest. Second, Dr. Holder's history of false representation to professional boards and law enforcement authorities calls into question whether he can be entrusted with the authority to prescribe controlled substances. Third, there is substantial evidence that Dr. Holder made a material misstatement when applying for his DEA Certificate of Registration in 2012. And fourth, while there is some evidence of Dr. Holder's efforts at remediation, that evidence does not, by at least preponderance, overcome the Government's demonstration that granting a Certificate of Registration would be inconsistent with the public interest.

Much of what has been presented by the Administrator in the Order to Show Cause is uncontroverted. Dr. Holder acknowledged that there were no factual disputes regarding the facts appearing in paragraphs two through six of the Order.[247] Independent of Respondent's admissions, the Government presented preponderant evidence establishing that Dr. Holder improperly prescribed Percocet and Xanax to Patient S.S., then used Patient S.S. in order to illegally obtain sixty Adderall tablets, then, while under the influence of marijuana and amphetamines, caused an automobile crash that seriously injured himself and his passenger.

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[246] Id. at 592–93.
[247] Respondent's Written Closing Statement at 11.

The Government further established a history of professional disciplinary action against Dr. Holder in Florida and Minnesota, throughout which Dr. Holder gave false and misleading information to the state investigators, and followed that by providing a materially false answer regarding that history when applying for a Certificate of Registration from the DEA. Throughout the proceedings before me, Dr. Holder has provided inconsistent and evasive responses to questions presented by the Government, calling into question whether even now the Administrator has a complete record of Dr. Holder's history of misconduct.

There is substantial evidence that Dr. Holder obtained the restoration of his unrestricted state medical license by providing incomplete and misleading evidence to the Minnesota Board of Medical Practice. There is also evidence that Dr. Holder unilaterally terminated his participation in a monitoring program required of him by the Florida Board of Medicine, without completing the five-year period of Board-ordered probation and without completing the steps required by that Board to ensure his rehabilitation prior to his return to practice in Florida. Similarly, evidence of rehabilitation in the program established in Minnesota is lacking, as that program was based on a less than forthright description of Dr. Holder's illegal and improper conduct in Florida.

Elements of a Prima Facie Case

This administrative action began when the DEA's Administrator, through her Deputy Administrator, issued an Order proposing to deny Dr. Holder's application for a DEA Certificate of Registration.[248] The Order alleged that granting Dr. Holder's application would be inconsistent with the public interest, as that term is used in sections 823(f) of Chapter 21 of the

[248] A.L.J. Ex. One.

United States Code.[249] Independent of this basis for denying the application, the Government also proposes to deny the application pursuant to sections 824(a)(1) and 824(a)(4) of Chapter 21 of the United States Code,[250] based on the material misrepresentation appearing in the March 7, 2012 application regarding whether Dr. Holder's professional license has ever been suspended or limited.[251] Thus, in order to deny Dr. Holder's application, the Government has the burden of establishing, by at least a preponderance of the evidence, that either (1) allowing Dr. Holder to issue prescriptions for controlled substances would be contrary to the public interest; or (2) Dr. Holder submitted an application for a Certificate of Registration that included a material misrepresentation of fact; or both.[252]

While the burden of establishing that granting a Certificate of Registration application would contravene the public interest never shifts from the Government, once the Government meets this burden, Dr. Holder has the opportunity to present evidence that he accepts responsibility for his misconduct, and has taken appropriate steps to prevent misconduct in the future.[253]

Regarding the first of these two bases for denying Respondent's application, under the registration requirements found in 21 U.S.C. § 823(f), the Administrator is expected to consider five factors in determining the public interest when presented with the actions of a physician seeking to prescribe controlled substances These factors are:

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[249] 21 U.S.C. § 823.

[250] 21 U.S.C. § 824 Denial, revocation, or suspension of registration (a) Grounds – a registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance or a list I chemical may be suspended or revoked by the Attorney General upon a finding that the registrant – (1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter; . . . [or] (4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest.

[251] A.L.J. Ex. One at 1.

[252] 21 U.S.C. § 823(f); 21 C.F.R. §1301.44(d)-(e); see also Steadman v. SEC, 450 U.S. 91, 100-01 (1981).

[253] Marc G. Medinnus, D.D.S., 78 Fed. Reg. 62683-01, 62691-93 (DEA October 22, 2013).

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (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.[254]

Any one of these factors may constitute a sufficient basis for denying an application for a Certificate of Registration.[255] Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Administrator may properly give each factor whatever weight she deems appropriate in determining whether an application should be rejected.[256] Moreover, although the Administrator is obliged to consider all five of the public interest factors, she is "not required to make findings as to all of the factors."[257] The Administrator also is not required to discuss each factor in equal detail, or even every factor in any given level of detail.[258] The balancing of the public interest factors "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 the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest."[259]

FACTOR ONE – Recommendations of the State Licensing Board

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[254] 21 U.S.C. § 823(f).
[255] Robert A. Leslie, M.D., 68 Fed. Reg. 15227-01, 15230 (DEA March 28, 2003).
[256] Morall v. DEA, 412 F.3d 165, 173-74 (D.C. Cir. 2005); JLB, Inc., d/b/a Boyd Drugs, 53 Fed. Reg. 43945-02, 43947 (DEA October 31, 1988); see also David E. Trawick, D.D.S., 53 Fed. Reg. 5326-01, 5327 (DEA February 23, 1988); see also David E. Trawick, D.D.S., 53 Fed. Reg. 5326-01, 5327 (DEA February 23, 1988).
[257] Hoxie v. DEA, 419 F.3d 477, 482 (6th Cir. 2005); see also Morall v. DEA, 412 F.3d at 173-74 (D.C. Cir. 2005).
[258] Trawick v. DEA, 861 F.2d 72, 76 (4th Cir. 1988).
[259] Jayam Krishna-Iyer, M.D., 74 Fed. Reg. 459-01, 462 (DEA January 6, 2009).

In its post-hearing brief, the Government argues that "Factors One, Two, Four and Five militate against the issuance of a DEA Registration to Respondent."[260] It then modifies this argument slightly, asserting only that when considering the evidence under Factor One, "the decisions of the Florida and Minnesota Medical Boards should be given nominal weight."[261]

I find the actions of state medical regulators in Minnesota and Florida, although not cast as "recommendation[s]," establish a basis for finding that Dr. Holder's application should be denied. Factor One considers "[t]he recommendation of the appropriate State licensing board or professional disciplinary authority."[262] Although the recommendation of the applicable state medical board is probative of Factor One, the Administrator possesses "a separate oversight responsibility with respect to the handling of controlled substances" and therefore must make an "independent determination as to whether the granting [or revocation] of [a registration] would be in the public interest."[263] In the exercise of that "separate oversight responsibility," the Administrator may regard as probative of the public interest an applicant's experience before state medical boards.

I note the legal premise, presented by the Government in its post-hearing brief, that the decisions of state medical boards regarding a licensee's ability to practice medicine in the jurisdiction of those boards "are not in any sense an official recommendation regarding this proceeding's outcome."[264] I agree. There is in this record no express recommendation directed to the DEA by any medical board, either in support of or in opposition to, granting Respondent a DEA Certificate of Registration.

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[260] Government's Proposed Findings of Fact and Conclusions of Law at 29.
[261] Id. at 34.
[262] 21 U.S.C. § 823(f).
[263] Mortimer B. Levin, D.O., 55 Fed. Reg. 8209-01, 8210 (DEA March 7, 1990).
[264] Government's Proposed Findings of Fact and Conclusions of Law at 30 (quoting Gregory D. Owens, D.D.S., 74 Fed. Reg. 36751-01, 36755 (DEA July 24, 2009)).

Instead, the parties have acknowledged by stipulation that the Florida Department of Health issued an Emergency Suspension of Respondent's license to practice medicine on January 26, 2009 and filed an Administrative Complaint against Respondent on February 13, 2009.[265] The Florida Board of Medicine issued a final Order indefinitely suspending Respondent's medical license on June 19, 2009.[266] The parties further stipulated that Respondent filed for reinstatement of his Florida medical license on November 8, 2010, and the Florida Board of Medicine reinstated Respondent's medical license pursuant to numerous restrictions, terms and conditions on December 16, 2010, but that thereafter, Respondent voluntarily surrendered his Florida medical license on March 3, 2011.[267]

Also before me is the parties' stipulation that on March 25, 2011, Respondent applied for a medical license from the Minnesota Board of Medical Practice (BMP); that by letter dated June 21, 2011, Respondent was informed that the BMP's Licensure committee intended to recommend denial of Respondent's application.[268] By letter dated August 9, 2011, Respondent's then-counsel requested reconsideration before the BMP.[269] This letter included an affidavit from respondent as well as several enclosures.[270] By letter dated September 26, 2011, the Minnesota BMP requested Respondent's personal appearance before the Licensure Committee to discuss his application to practice medicine, and after Respondent appeared before the Licensure Committee and discussed his use of controlled substances that had not been prescribed for him, on November 12, 2011, Respondent was granted a restricted, conditional license to practice in

[265] A.L.J. Ex. 31 at 2.
[266] Id.
[267] Id.
[268] Id.
[269] Id. at 3.
[270] Id.

Minnesota, and one year later Respondent was granted an unrestricted license to practice medicine in Minnesota.[271]

My concern with respect to evidence relating to the licensure actions taken by the medical boards in Florida and Minnesota rests not so much with their ultimate decisions, but with the process that led to those decisions being made. The Government is correct, in my view, in proposing that Respondent's misrepresentations to these boards call into question whether the actions taken by these regulators would be the same had they been told the same things Dr. Holder reported as true during this administrative process.

The Government's identification of the nature of these misrepresentations accurately reflects the many ways in which the two state medical boards were acting with less than a complete and accurate record due to Dr. Holder's duplicity.[272] Those misrepresentations regarding Dr. Holder's ability to recall what happened immediately preceding the June 2008 crash, his description of his history of abusing marijuana and Adderall, and his description of the nature of his injuries and those of his passenger, all threaten the integrity of the administrative process by which the Florida and Minnesota boards performed their assessments of Dr. Holder's fitness to practice medicine in those states. Accordingly, nothing in our record supports a finding that the elements of Factor One warrant a conclusion that granting Respondent's application would be consistent with the public interest.

FACTOR TWO – DISPENSING EXPERIENCE

[271] Id.
[272] See Government's Proposed Findings of Fact and Conclusions of Law at 31–33 and citations to the record therein.

With respect to Factors Two and Four, the Government in its post-hearing brief addresses both factors together.[273] I think the better practice is to examine Factors Two and Four separately. Under 21 U.S.C. § 823(f)(2) (Factor Two), the Administrator is required to consider "experience in dispensing, or conducting research with respect to controlled substances."[274]

This provision calls for an examination of a prescription writer's familiarity with the complexities associated with dispensing controlled substances under the Controlled Substances Act. Where, from the evidence, it appears a prescribing source's conduct, training, or credentials (i.e., his or her experience) creates in the Administrator's mind a substantial concern regarding the source's prescription practice, Factor Two requires the Administrator to examine such conduct, training and credentials. The purpose of such an examination is not limited to only those instances where the source violated a provision of controlled substance law. Were that the purpose of 21 U.S.C. § 823(f)(2), Factors Two and Four would be duplicative, and Factor Two would have no meaning distinct from that of Factor Four.

By Factor Two's plain language, Congress called for more than a mere consideration of violations of controlled substance laws when the Administrator engages in a review under Factor Two. In my view, evidence of deficiencies in an applicant's conduct, training, or credentials could support a finding that the public interest would not be well-served by permitting the applicant to prescribe controlled substances, even if there was no showing that the conduct amounted to a violation of laws relating to the distribution of controlled substances. Accordingly,

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[273] Id. at 34–35.

[274] In this context, "dispensing" is defined as "deliver[ing] a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to an ultimate user or research subject." 21 U.S.C.A. § 802(10).

in the analysis that follows, evidence pertaining to Factors Two and Four will be addressed separately.

The record before me includes very little evidence regarding Dr. Holder's experience dispensing controlled substances. By training, he noted experience in clinical settings here and abroad that suggest a deep understanding of the medical needs of the poor. As Dr. Kardon noted in her correspondence with the Minnesota Board of Medical Practice, Dr. Holder "is committed to the humanitarian goal of improving healthcare for the poor and underserved."[275]

Most of his reported experience to date, however, appears to have had little to do with prescribing controlled substances. After successfully completing his residency, Dr. Holder continued to gain experience in a clinical practice in fields not generally associated with dispensing controlled substances, including service as the program coordinator for African and American Friendship Association for Cooperation and Development, which involved planning and implementing curriculum for the Foreign Trained Health Care Professional – Medical English program; service as the founder of Land Pilot, Inc. in Crozierville, Liberia, developing "a conglomerate of various enterprises recognized for superior quality of services and products in Liberia" in 2009; service as founder of M.B.H. Wellness Report, which developed "a holistic approach to increase both the quantity and quality of life in a nontraditional medical setting" in 2009; service as founder of Liberian Initiative for Enrichment in Monrovia, Liberia, where he developed an institution that "conducts clinical research specifically for African American pollution globally"; service from 2009 to 2010 as chairman of the board of Bentol Development Association, "assisting in the economic, medical, and social planning for the development" of his mother's hometown in Liberia; and service from 2006 to 2008 as founder and president of

[275] Gov't Ex. 37 at 5.

Mperial Health PA in Miami, Florida, "operating healthcare consultation and providing medical services through emergency home visits, urgent care centers, and wellness training".[276]

From this record, the most significant post-graduate prescribing experience attributed to Dr. Holder is that which he obtained while working at MD Now for seven months[277] and while serving in his family medicine residency at the University of Miami from 2004 to 2007. Even here, however, while this experience includes training in critical care and emergency medicine (both of which may emphasize the use of controlled substances), the residency reflects a curriculum that was not concentrated in a practice requiring the dispensation of controlled substances, including emphases in infectious diseases, pediatrics, "wards" medicine, and women's health. Thus, while Dr. Holder's experiences as an independent contractor at MD Now and parts of his residence do suggest experience in dispensing controlled substances, the overall arc of his practice has not been one that would support a finding that his experience in dispensing controlled substances is substantial.

The record also establishes, through the testimony of Dr. Holder and Patient S.S., that Dr. Holder entered the world of drug dealers, using his experience and his association with Patient S.S. to acquire cocaine and marijuana on a regular basis. As a result of his association with Patient S.S., Dr. Holder is not only knowledgeable in the ways and means used to acquire illicit controlled substances; he is now personally experienced in those ways and means.

Coupling this character of experience with the negative features of his experience arising out of his improper prescription practice, discussed below in the analysis of Factor Four, I find the Government has presented under Factor Two preponderant evidence establishing that

[276] Id. at 29.
[277] Tr. at 120.

granting Respondent a DEA Certificate of Registration would be inconsistent with the public interest.

FACTOR THREE – CONVICTION RECORD

Under Factor Three the Administrator is to consider an applicant's conviction record under federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances.[278] Neither the Government nor Respondent has raised any claims pertaining to Factor Three, and there is no evidence that Dr. Holder has been convicted of any laws related to dispensing controlled substances. Accordingly, Factor Three does not serve as a basis for granting or denying Respondent's application for a DEA Certificate of Registration.

FACTOR FOUR – COMPLIANCE WITH APPLICABLE LAWS

Under Factor Four, the Administrator may consider evidence regarding "[c]ompliance with applicable state, federal, or local laws relating to controlled substances."[279] "A prescription for a controlled substance is unlawful unless it has been issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice."[280] Departing from the usual course of professional practice can have profound negative consequences. Here, by acknowledging the truth of those facts appearing in paragraphs two through six in the Order to Show Cause, Dr. Holder has acknowledged in his post-hearing brief that the record establishes by preponderant evidence that he failed to comply with applicable law relating to controlled

[278] 21 U.S.C. § 823(f)(3).
[279] 21 U.S.C. § 823(f)(4).
[280] Sun & Lake Pharmacy, Inc., D.B.A. The Medicine Shoppe, 76 Fed. Reg. 24523-02, 23530 (DEA May 2, 2011).

substances.[281] Upon such evidence the Government has demonstrated that granting Respondent's application would not be in the public interest, and has therefore established a legally sufficient basis for the Administrator to deny this application under Factor Four.

FACTOR FIVE – OTHER CONDUCT

In its post-hearing brief, the Government urges that the Administrator make an adverse finding under Factor Five, based on Dr. Holder's "complete and utter lack of candor" to the DEA and to state regulators.[282] Factor Five calls for the Administrator to consider the public interest in the context of "[s]uch other conduct which may threaten the public health and safety."[283] A history of substance abuse, coupled with a pattern of obstructing and misleading governmental officials when the abuse created significant problems for Dr. Holder, is evidence of conduct that may threaten the public health and safety.

In discussing Factor Five, I exclude for the moment my assessment of the evidence pertaining to the DEA application filed by Dr. Holder. Making a material misrepresentation in a DEA application is conduct that falls within the scope of 21 U.S.C. § 824(a)(1), and as such it is beyond the scope of Factor Five and will be addressed below.

The Factor Five concerns that are raised in this record arise when we examine Dr. Holder's conduct before the state medical boards, his behavior during the DEA investigation into his application, and his conduct before me during the evidentiary hearing. If I accept as true Dr. Holder's claim that because of his injuries he recalled none of the details of the 2008 automobile crash, I can only conclude Dr. Holder intentionally misled the Minnesota Medical Board when

[281] Respondent's Written Closing Statement at 11.
[282] Government's Proposed Findings of Fact and Conclusions of Law at 37.
[283] 21 U.S.C. § 823(f)(5).

he stated, under oath, that neither he nor his passenger "was seriously hurt from the accident."[284] Nothing from the records pertaining to that crash, including the police report and records created in N.P.'s lawsuit seeking damages for injuries she sustained in that crash, would have supported Dr. Holder's description of the consequences of the crash.

Similarly, his inconsistent testimony regarding his history of drug use, his professed inability to recall where he obtained illicit supplies of controlled substances, his use of deflection and non-responsive answers during the hearing, and his refusal to provide DEA Diversion Investigator McKenna complete copies of his treatment and monitoring at PRN and HPSP after repeated requests for the same, all constitute preponderant evidence of "other behavior" warranting a finding that registration would be inconsistent with the public interest under Factor Five.

MATERIAL FALSIFICATION OF A DEA REGISTRATION APPLICATION

The record establishes that when he submitted his DEA application for registration on March 7, 2012, Dr. Holder falsely represented his medical licenses had never been suspended, denied, or restricted. "Just as materially falsifying an application provides a basis for revoking an existing registration without proof of any other misconduct, see 21 U.S.C. § 824(a)(1), it also provides an independent and adequate ground for denying an application."[285] Thus, I can and do recommend denying Dr. Holder's application based on the false information he provided in his March 7, 2012 application, irrespective of the Government's claim that his registration is not consistent with the public interest.

[284] Gov't Ex. 37 at 10.
[285] The Medicine Shoppe Pharmacy, 74334-01, 74338 (DEA December 31, 2007).

In his post-hearing brief, Dr. Holder argues that the misrepresentation was not "material," and that as such there was no violation of 21 U.S.C. 824(a)(1).[286] In support, Dr. Holder asserts that the false answer "was not capable of influencing the agency. Answering the liability questions in the negative does not grant an applicant a favorable response; it leads to verification by a registration specialist. It is the findings of the registration specialist that has the capacity to influence the agency."[287]

The factual predicate for this argument is that when an application is filed with the DEA, a registration specialist employed by the DEA checks to see if the applicant's medical license has been subject to adverse action by any state medical licensing board. Dr. Holder correctly notes that in her testimony, Diversion Investigator McKenna explained that when her office receives an application for registration, a registration specialist working at the office queries the state boards to determine if there any board actions present online.[288] Because the office she works at covers Minnesota and North Dakota, the specialist used the Internet to check the records maintained by the medical boards of those two states.[289] When the specialist discovered board action in Minnesota, she was, by internal office policy, unable to proceed on her own, and instead had to forward the application to a Diversion Investigator to investigate.[290]

According to Investigator McKenna, when Dr. Holder's application was brought to her attention (after the specialist determined there was a disciplinary record regarding Dr. Holder in the records of the Minnesota Board), she too checked the Board's online records.[291] In this way, she not only found evidence of Board action in Minnesota, but those records referred to Board

[286] Respondent's Written Closing Statement at 6.
[287] Id. at 7.
[288] Tr. at 444.
[289] Id.
[290] Id.
[291] Id. at 453.

action in Florida, leading Investigator McKenna to learn about the Florida Board's suspension of Dr. Holder's license and his subsequent surrender of the same.[292]

In his argument, Dr. Holder correctly posits that the Government "has to show that the applicant provided false information in his/her application and that the false information provided is material."[293] He also correctly posits that a false statement is "'material' if it has a natural tendency to influence or was capable of influencing the decision making body to which it is addressed."[294] I reject as without merit his conclusion, however, that because a registration specialist reviews these applications, it was only the specialist who has "the capacity to influence the agency,"[295] and that Dr. Holder's false response to Question Three was therefore not material.

As the Government sufficiently points out in its post-hearing brief, "[a]nswers to the liability question[s] are always material because DEA relies on the answers to these questions to determine whether it is necessary to conduct an investigation prior to granting an application."[296] I find substantial evidence supports the factual premise presented by the Government, that Respondent's false answer to Question Three was "designed to shield Respondent's DEA application from the same troubling scrutiny that his application for a Minnesota medical license was subject to."[297] Put differently, when Dr. Holder's former attorney, Mr. Harbison, asked Investigator McKenna the rhetorical question, "why would [Dr. Holder] lie when he knew it was

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[292] Id. at 453–54.
[293] Respondent's Written Closing Statement at 6.
[294] Id. (citing The Medicine Shoppe Pharmacy, 72 Fed. Reg. 74334-01, 74338 (DEA December 31 2007)).
[295] Respondent's Written Closing Statement at 6–7.
[296] Government's Proposed Findings of Fact and Conclusions of Law at 29–30 (emphasis added sic) (quoting Theodore Neujahr, D.V.M., 65 Fed. Reg. 5680-01, 5681 (DEA February 4, 2000)).
[297] Government's Proposed Findings of Fact and Conclusions of Law at 30.

public record?", the answer is that by doing so, Dr. Holder could hope to obtain a DEA Certificate of Registration, if no one at the DEA checked to confirm the truth of his answers.[298]

The evidence further establishes that Dr. Holder's decision to answer Question Three in the negative was intentional. When given the opportunity to explain his response to this question during Investigator McKenna's meeting with him, Dr. Holder reviewed the language in Question Three, and underlined the first word, "surrendered" to indicate he answered in the negative after reading just this part of the question.[299] There is, however, no evidence suggesting he was unaware of the rest of the words in the question, nor that he sought any guidance with respect to the meaning of the words used in the question. The question is not of such complexity that a person of ordinary intelligence would have difficulty understanding each of its terms; and the circumstances attendant to filling out such an application are not so alien as to suggest persons filling out the application would not know they needed to read the entire text of each question before answering the same. From the testimony presented and the documentary evidence now before me, I find substantial preponderant evidence establishing Dr. Holder submitted an application for registration that he knew contained materially false information.

I am mindful that denial of an application may be appropriate based on an unintentional falsification, as noted in Dr. Holder's post-hearing brief.[300] Thus, if the Administrator were persuaded that the record before her does not support a finding of intentional falsification, denial of the application would still be available, provided she recognize that "intent to deceive is a relevant consideration in determining whether a registrant or applicant should possess a DEA

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[298] Tr. at 463.
[299] Id. at 463–64.
[300] Respondent's Written Closing Statement at 6 (citing Darryl J. Mohr, M.D., 77 Fed. Reg. 34998 (DEA June 12, 2012)).

registration."[301] I find this step to be superfluous, given that from the evidence before me I find Dr. Holder purposefully answered as he did, intending on obtaining his best chance at securing a DEA registration without disclosing his past disciplinary experiences.

EVIDENCE OF REMEDIATION

Where the Government has established by at least a preponderance of the evidence that granting an application for a Certificate of Registration is not in the public interest, the applicant has the ability to present evidence of remediation. Mitigating evidence relevant to these proceedings generally includes two elements: an acknowledgement of responsibility by the applicant, and evidence of corrective measures taken by the applicant.

From the evidence before me, however, I find insufficient evidence to establish the presence of remediation efforts that would mitigate adverse findings based on Factors One, Two, Four and Five. Dr. Holder testified that "I've had to completely surrender my will and what I've found from this, is I have actually have reached a place of joy, advancement and completion."[302] I have no reason to doubt this claim, but neither can I use this claim to support a recommendation in Dr. Holder's favor.

The most probative evidence of Dr. Holder's efforts to address any drug abuse problems he may have had would have come from the reports by monitors in the Florida PRN program and Minnesota's HPSP program. Even as he insists he has and had no drug abuse problem, the evidence of drug abuse associated with the 2008 crash, his abuse of marijuana and cocaine prior to the crash, and his adamant determination to deflect and minimize the adverse impact of his

[301] Respondent's Written Closing Statement at 6 (citing Darryl J. Mohr, M.D., 77 Fed. Reg. 34998-01, [35013] (DEA June 12, 2012)) (quoting Rosalind A. Cropper, M.D., 66 Fed. Reg. 41040-02, 41048 (DEA August 6, 2001)).
[302] Tr. at 187.

drug use are all both abundant and troubling. Dr. Holder has thwarted a complete review of the steps he has taken (or has failed to take) by refusing Investigator McKenna's request for releases that would allow the DEA to see the PRN and HPSP reports. We have what appears to be only part of the report maintained by HPSP, and none of the report by PRN. In the absence of such evidence, I cannot find Respondent has established by at least preponderant evidence that he has accepted responsibility for his wrong-doing and has put in place effective corrective measures that would guard against future misconduct.

FINDINGS OF FACT

1. On March 7, 2012, Respondent, Mark William Andrew Holder, M.D., submitted an application for a DEA Certificate of Registration to handle controlled substances.
2. Respondent previously held DEA Certificate of Registration BH9956232, issued on November 21, 2007, with a registered address of 221 164th Street NE, Suite 329, North Miami Beach, Florida. This registration expired by its own terms on October 31, 2009.
3. On June 4, 2008, Respondent saw Patient S.S., a 25 year old male, at the MD Now Urgent Care Centers Royal Palm Beach facility. This was Patient S.S.'s initial encounter with Respondent in Respondent's professional capacity and Patient S.S.'s first visit of any kind to MD Now. Respondent prescribed Patient S.S. Percocet and Xanax, allegedly for back pain. The records of this visit indicate that Respondent failed to document a complete medical history and physical examination and that he failed to determine either the nature or the intensity of the patient's pain and the nature of the patient's current and past treatment for pain. Patient S.S. reported to Respondent that he was currently taking

Percocet, Flexeril, and Xanax, yet the records contained no indication that Respondent inquired as to the identity of who previously treated and prescribed to the patient for his alleged back pain and anxiety issues. Respondent's brief treatment records indicate a diagnosis of "disc degeneration" despite the complete absence of any indication that Respondent reviewed any imaging studies or prior medical records to support this diagnosis.

4. Respondent's prescriptions for Percocet and Xanax issued on June 4, 2008 to Patient S.S. were issued outside the usual course of professional practice and for other than a legitimate medical purpose.
5. On June 11, 2008, Respondent issued a handwritten prescription to Patient S.S. for 60 tablets of 30 mg Adderall, a Schedule II controlled substance. The prescription indicates that Respondent issued the prescription from MD Now's Lake Worth, Florida facility, located at 4570 Lantana Road. MN Now has no medical records or any other documentation of Patient S.S.'s visit on June 11, 2008, nor is there any record of the issuance of this prescription. Respondent wrote the prescription without conducting an examination, without making a diagnosis for any condition necessitating the prescription, and without documenting the fact that Respondent had prescribed Adderall for this patient.
6. Respondent's prescription for Adderall issued on June 11, 2008 to Patient S.S. was issued outside the usual course of professional practice and for other than a legitimate medical purpose.

7. Respondent directed Patient S.S. to deliver the filled Adderall prescription back to him, for his own personal use. Patient S.S. complied with this direction, diverting the prescription to Respondent, who then exercised control over the filled prescription.
8. On June 13, 2008, at approximately 2:57 a.m., Respondent drove his Cadillac over a median, across three lanes of oncoming traffic into a street sign and concrete light pole, severely injuring himself and a passenger, N.P. The vial of Adderall Patient S.S. obtained from the prescription Respondent issued was located in Respondent's vehicle, with 41 of the 60 tablets remaining. Respondent's blood subsequently tested positive for amphetamines and marijuana, resulting in Respondent's arrest for driving under the influence of amphetamines and marijuana, driving on a suspended license, and obtaining amphetamines by fraud.
9. By an Order of Emergency Suspension dated January 26, 2009, the State of Florida Department of Health suspended Respondent's license to practice medicine in Florida. It did so after finding Respondent violated Section 458.331(1)(r), Florida Statutes, which prohibited Respondent from prescribing or administering controlled substances to himself. It also found Respondent violated Section 458.331(1)(q), Florida Statutes, which prohibited Respondent from prescribing Adderall to a patient without conducting an examination, without making a diagnosis for any condition necessitating the prescription, and without documenting that he had prescribed Adderall for the patient or providing a justification for the prescription. It also found Respondent violated Section 458.311(1)(cc), Florida Statutes, by prescribing Adderall for purposes other than those authorized by that Section, after determining that Respondent wrote an Adderall prescription for Patient S.S., who then filled the prescription and upon being reimbursed

for the cost of the prescription delivered to Respondent the filled prescription for Respondent's own use.

10. By a Stipulation and Order dated November 12, 2011, the Minnesota Board of Medical Practice issued a restricted medical license to Respondent, upon its review of a report of chemical abuse and diversion of controlled substances for Respondent's own use. Under the terms of the Stipulation and Order, Respondent was authorized to practice medicine in Minnesota only upon agreeing to (1) participate in the Health Professionals Services Program for at least one year and complying with all of the requirements of that program; (2) submit to a minimum of six unannounced biological fluid screens per quarter; (3) execute a release authorizing the Program to release a copy of Respondent's monitoring plan to the Board; (4) practice only in a setting approved in advance by the Board; and (5) obtain a supervising physician who shall provide quarterly reports to the Board.
11. On March 7, 2012, Respondent submitted the application for a DEA Certificate of Registration to handle controlled substances under Schedules 2, 2N, 3, 3N, 4 and 5, identifying the business location as 2810 Nicollet Avenue South, Minneapolis, Minnesota 55408-3160. In this application, when asked "Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?" Respondent falsely answered "No" to this question.
12. In the course of investigating the circumstances surrounding state medical board action pertaining to Respondent's medical licenses in Florida and Minnesota, DEA Diversion Investigator Virginia McKenna met with or spoke with Respondent on several occasions between July 19, 2012 and August 23, 2013. Throughout this period, Investigator

McKenna made repeated requests for Respondent to provide the DEA with copies of monitoring and treatment records reflecting action by the medical boards in Florida and Minnesota. Initially, and for a period extending more than six months, Respondent deferred complying with these requests while assuring Investigator McKenna he would comply. By April 2013, when the records still had not been produced, Investigator McKenna presented Respondent with release forms that would authorize the DEA to receive copies of these reports. Respondent refused to sign the releases, and advised Investigator McKenna that he would not permit the DEA access to the PRN report from Florida, and gave her what appears to be an incomplete set of records reflecting the report from Minnesota.

13. In meetings and conversations conducted by DEA Diversion Investigators McKenna, Jack Henderson, and Joseph Cappello, Respondent gave evasive and conflicting answers to questions regarding his history of drug abuse, his use and abuse of marijuana and Adderall, the sources supplying him with controlled substances, his ability to recall the events immediately prior to and after the June 13, 2008 crash, the nature and severity of injuries he and his passenger sustained due to the crash, his use of controlled substances while working at MD Now, and his reasons for answering registration application Question Three in the negative. He provided similarly evasive and conflicting answers to questions presented to him by the medical boards in Florida and Minnesota, particularly minimizing the severity of injuries he and his passenger sustained in the June 13, 2008 crash. Respondent continued providing evasive, inconsistent, and deflecting responses during the evidentiary hearing he requested upon his receipt of the pending DEA Order to Show Cause.

14. Evidence of remediation in this record takes the form of Respondent's successful completion of a one-year period of monitoring under the auspices of the Minnesota Health Professional Services Program; letters expressing support by family members, professional colleagues and patients; and Respondent's testimony averring that he has changed his lifestyle, gotten married, produced a daughter, and learned from his experiences. Circumstances calling into question the weight that can be attributed to this evidence include the fact that the monitoring program established by the Minnesota Board was based on Respondent's material misrepresentation of the nature of the injuries he and his passenger sustained in the June 2008 crash, and his failure to disclose the extent and nature of his history of drug abuse. Further, the record establishes that upon its inquiry into Respondent's actions relating to the June 13, 2008 automobile crash, medical regulators in Florida ordered Respondent to participate in monitoring and a five-year period of probation, which Respondent failed to comply with, surrendering his medical license in that state in order to avoid these remedial requirements. There is thus insufficient evidence of remediation to overcome the Government's prima facie case.

CONCLUSIONS OF LAW

1. When it proposes to deny a new application for a DEA Certificate of Registration pursuant to U.S.C. § 824(a)(1), the Government is required to establish by at least a preponderance of the evidence that Respondent materially falsified a DEA registration application.
2. Where preponderant evidence establishes, as is the case here, that Respondent denied having a license to practice medicine either suspended or restricted, knowing that this

was a false answer, the Government has established sufficient proof of Respondent materially falsifying a DEA registration application to warrant denial of the application.

3. When it proposes to deny a new application for a DEA Certificate of Registration pursuant to U.S.C. § 824(a)(4), the Government is required to establish by at least a preponderance of the evidence that the applicant's registration is inconsistent with the public interest.[303]

4. Pursuant to U.S.C. § 823(f), five factors must be considered when determining the public interest in this case pursuant to U.S.C. § 824(a)(4):

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

    (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.

    (3) Compliance with applicable state, federal, or local laws relating to controlled substances.

    (4) Such other conduct which may threaten the public health and safety. [304]

5. Under 21 U.S.C. § 823(f)(1) (Factor One), where the record establishes a history of Respondent's license being first suspended by the Florida Department of Health and then voluntarily surrendered for cause, based on Respondent's decision not to participate in further monitoring by the Florida Department of Health; and a history of Respondent's license being restricted by the Minnesota Medical Board and then restored based on Respondent's false and misleading statements of his history of drug abuse and the circumstances surrounding a motor vehicle crash that had precipitated the action of the

[303] 21 U.S.C. §§ 823(f) and 824(a)(4); 21 C.F.R. § 1301.44(d).
[304] 21 U.S.C. § 823(f).

Florida Department of Health, the circumstances attendant to the action of these boards constitute evidence tending to establish that Respondent's DEA registration would be inconsistent with the public interest under Factor One.

6. In order to establish a basis for denying an application for a Certificate of Registration based on the provisions of 21 U.S.C. § 823(f)(2) (Factor Two), the Government must present preponderant evidence establishing that Respondent's experience in dispensing controlled substances is of such character and quality that his registration would be inconsistent with the public interest. While there is some evidence that through the course of his education, training, and employment Respondent has acquired sufficient experience to appropriately fulfill those responsibilities attendant to persons authorized to prescribe controlled substances, the preponderant evidence of Respondent's experience in procuring controlled substances creates material questions regarding the benefit Respondent obtained from his positive experiences, where those experiences should have instilled in Respondent a greater sense of responsibility when procuring and using highly addictive controlled substances. If granted the authority to prescribe often-diverted controlled substances, Respondent's experience as demonstrated in this record would, in the event of relapse, constitute a threat to the public interest, particularly where Respondent continues to deny having drug abuse problems notwithstanding a history of abuse. While this risk is attenuated during Respondent's sustained period of stable recovery, it is sufficiently present here, given the absence of any on-going monitoring or treatment, to warrant a finding that Respondent's experience in dispensing controlled substances contradicts a finding that granting this application is consistent with the public

interest. Accordingly, the Government has met its burden of establishing that registration would be inconsistent with the public interest under Factor Two.

7. In order to establish a basis for denying an application for a Certificate of Registration based on the provisions of 21 U.S.C. § 823(f)(3) (Factor Three), the Government must present evidence of Respondent's conviction record under federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances. As this Factor is neither alleged by the Government nor suggested by the evidence, this Factor may not be considered to support the denial of Respondent's application for a DEA Certificate of Registration.

8. Under 21 U.S.C. § 823(f)(4) (Factor Four), the Administrator is to consider the Respondent's compliance with applicable state, federal, or local laws relating to controlled substances. Federal law relating to controlled substances includes the requirement that all prescriptions for controlled substances must be for a legitimate medical purpose and must be issued in the ordinary course of a professional medical practice.[305] Where the preponderant evidence establishes Respondent unlawfully prescribed Percocet and Xanax to Patient S.S. on June 4, 2008, and unlawfully obtained and self-administered Adderall on June 11, 2008, the Government has demonstrated a basis for finding that granting this application would be inconsistent with the public interest, under Factor Four.

9. Under 21 U.S.C. 823(f)(5) (Factor Five), the Administrator is to consider, "[s]uch other conduct which may threaten the public health and safety." Respondent's actions or

[305] Sun & Lake Pharmacy, 76 Fed. Reg. 24523-02, 24530 (DEA May 2, 2011) (quoting 21 C.F.R. § 1306.04(a)); George C. Aycock, M.D., 74 Fed. Reg. 17529-01, 17541 (DEA April 15, 2009).

omissions that threaten the public interest may constitute a basis for denying an application for a DEA registration under Factor Five, where the conduct is not within the scope of Factors One through Four.[306] Where by at least a preponderance of the evidence the Government establishes, as is the case here, that Respondent refused without good cause shown to execute releases granting the DEA access to monitoring reports in Minnesota and Florida; provided misleading accounts of the circumstances surrounding the June 13, 2008 motor vehicle crash in reports tendered to medical boards in Florida and Minnesota and in his accounts of the same to DEA investigators; and provided inconsistent and misleading accounts of his history of drug use to the DEA and to medical boards in Florida and Minnesota, the Government has met its burden of demonstrating that granting Respondent's application for a DEA registration would be inconsistent with the public interest under Factor Five.

10. Upon such evidence, the Government has met its burden and has made a prima facie case in support of the proposed order denying Respondent's application for a DEA Certificate of Registration.

11. Where the Government has made out its prima facie case supporting the denial of an application, Respondent has the opportunity to demonstrate by preponderant evidence that through acknowledgement and remediation, granting Respondent's application for a DEA Certificate of Registration would be consistent with the public interest.

12. Because "past performance is the best predictor of future performance,"[307] where an applicant has committed acts inconsistent with the public interest, the applicant must accept responsibility for his or her actions and demonstrate that he or she will not engage

[306] 21 U.S.C. § 823(f)(5).
[307] Medicine Shoppe–Jonesborough, 73 Fed. Reg. 364-01, 387 (DEA January 2, 2008) (quoting ALRA Labs., Inc., v. DEA, 54 F.3d 450, 452 (7th Cir. 1995)).

in future misconduct.[308] Further, admitting fault is "properly consider[ed]" by DEA to be an "important factor []" in the public interest determination.[309]

13. The record now before the Administrator establishes that Respondent has failed to timely provide the DEA with reports of his treatment or monitoring from the Florida Medical Board and PRN and from the Minnesota Board of Medical Practice and HPSP; failed to acknowledge the need to provide forthright, accurate, and complete responses to questions presented regarding his prescription practice and his history of drug abuse; and failed to account for his false statement in making this application for DEA registration. Upon such evidence, Respondent has not rebutted the Government's prima facie case. Accordingly, the Government has established cause to deny this application.

RECOMMENDATION

As the Government has pursuant to 21 U.S.C. § 824(a)(1) established by preponderant evidence that Respondent has materially falsified an application filed pursuant to subchapters I or II of Chapter 13 of Title 21, United States Code; and as the Government has pursuant to 21 U.S.C. § 824(a)(4) established by preponderant evidence that granting a DEA Certificate of Registration to Respondent would be inconsistent with the public interest, and as Respondent has failed to rebut the case presented by the Government, Respondent's application for a DEA Certificate of Registration should be **DENIED**.

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[308] Medicine Shoppe–Jonesborough, 73 Fed. Reg. at 387 (citing Samuel S. Jackson, 72 Fed. Reg. 23848-01, 23853 (DEA May 1, 2007)); John H. Kennedy, 71 Fed. Reg. 35705-01, 35709 (DEA June 21, 2006); Prince George Daniels, 60 Fed. Reg. 62884-01, 62887 (DEA December 7, 1995).

[309] Medicine Shoppe–Jonesborough, supra, 73 Fed. Reg. at 387 (quoting Hoxie v. DEA, 419 F.3d 477, 483 (6th Cir. 2005)).

Dated: October 9, 2014

s/ CHRISTOPHER B. MCNEIL

Administrative Law Judge

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