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DEPARTMENT OF JUSTICE
Drug Enforcement Administration

[Docket No. 16-26]
Thomas Horiagon, M.D.
Decision And Order

On June 9, 2016, the Deputy Assistant Administrator, of the then Office of Diversion Control, issued an Order to Show Cause to Thomas Horiagon, M.D. (Respondent), of Highlands Ranch, Colorado. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration No. BH2378025, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, on the ground that he does "not have authority to handle controlled substances in . . . Colorado, the [S]tate in which [he is] registered with the DEA." Show Cause Order, at 1 (citing 21 U.S.C. § 824(a)(3)). As the specific factual basis for the action, the Order alleged that effective March 10, 2016, the Colorado Medical Board revoked Respondent's "authority to practice medicine." *Id.*

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement of position in lieu of a hearing, the procedure for electing either option, and the consequence for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). In addition, the Show Cause Order notified Respondent of his right under 21 U.S.C. § 824(c)(2)(C) to submit a corrective action plan (hereinafter, CAP) to the Deputy Assistant Administrator and the procedure for doing so. *Id.* at 2-3.

On July 15, 2016, Respondent filed a letter with the Office of Administrative Law Judges pursuant to which he requested a hearing on the allegations of the Show Cause Order and submitted his CAP. Letter from Respondent to Hearing Clerk (July 11, 2016). In his letter, Respondent did not dispute that his Colorado medical license "was revoked on March 10, 2016."

Id. at 1. He maintained, however, that "this revocation was arbitrary and capricious, an abuse of discretion, and otherwise contrary to law" and advised "[t]he matter is now before the Colorado Court of Appeals." *Id*. Respondent also advised that he is a defendant in two criminal cases and requested "the services of a federal public defender in this hearing." *Id.*

As for his CAP, Respondent explained:

> My corrective action plan is quite simple. I hold a Wyoming medical license . . . and that license establishes my continued eligibility to hold DEA [Registration] #BH2378025. It is a simple matter for me to establish a business address in the State of Wyoming and I will do this as an alternative to proceeding with the administrative hearing process. However, by making this contingent offer, I am not waiving my right to a hearing at this time.

Id.

Upon receipt of Respondent's letter, the matter was placed on the docket of the Office of Administrative Law Judges and was assigned to ALJ Charles Wm. Dorman (hereinafter, ALJ). In an order issued the same day, the ALJ denied Respondent's request for a public defender, noting that there is "no constitutional right to appointed counsel in these proceedings." Order for Evidence of Service and Briefing Schedule for Lack of State Authority Allegations, at 1 (citing *Calvin Ramsey*, 76 FR 20034, 20035 (2011) (citing *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970))). The ALJ did, however, advise Respondent that he had the "right to be represented by an attorney at his own expense." *Id*. (citing 21 CFR 1316.50).

The ALJ also ordered the Government to file evidence to support the allegation that Respondent lacks state authority to handle controlled substances and an accompanying motion for summary disposition no later than 2 p.m. on August 5, 2016. *Id*. And in the event the

Government filed a motion for summary disposition, the ALJ ordered Respondent to file his reply by 2 p.m. on August 12, 2016.[1] *Id*. at 1-2.

On July 18, 2016, Government Counsel forwarded Respondent's CAP to the Deputy Assistant Administrator. However, on July 20, 2016, before the Deputy Assistant Administrator had ruled on Respondent's CAP (and more than two weeks before its motion for summary disposition was due), the Government moved for summary disposition. The Government supported its motion by providing a copy of the Colorado Medical Board's Final Board Order.[2] Mot. for Summ. Disp., at Appendix B. The Board's Final Order establishes that Respondent's medical license was revoked effective March 10, 2016. *Id*. at 2.

The next day, Respondent filed a brief opposing the Government's motion. Br. in Opp. to Gov. Mot. for Summ. Disp., at 1. Therein, Respondent did not dispute that his Colorado medical license has been revoked but reiterated that the "revocation was arbitrary and capricious, an abuse of discretion, and otherwise contrary to law" and the matter "is now before the Colorado Court of Appeals." *Id*. Respondent argued, however, that because the Colorado Court of Appeals has not ruled on his claims, the DEA proceeding is not ripe for adjudication. *Id*. at 1-2. He also argued that "[i]f the DEA is seeking to increase the collateral consequences of improper and illegal actions by a Colorado state agency when the underlying questions of fact and law have not been heard by a court of competent jurisdiction at the state level, then [DEA's]

[1] In the Order, the ALJ also directed the Government to file evidence establishing the date on which Respondent was served with the Show Cause Order and a motion to terminate the proceeding in the event Respondent's request was out of time. Order, at 1. In response, the Government provided an affidavit which establishes that the Show Cause Order was not delivered to Respondent until July 8, 2016. Gov. Resp. to Order, at 1; *id*. at Appendix, at 1. Thus, Respondent's hearing request was not untimely.

[2] The Government also submitted a copy of the Initial Decision issued by the state ALJ. Mot. for Summ. Disp., at Appendix B.

actions can also be claimed to be arbitrary and capricious, an abuse of discretion, and otherwise contrary to law."[3] *Id*. at 2.

Respondent also asserted that he "holds a medical license" in Wyoming and that he "has submitted a . . . corrective action plan consisting in part of a change in the [S]tate of DEA registration to Wyoming." *Id*. at 1. Respondent argued that "[t]his issue should be remanded to the DEA for consideration of [his] corrective action plan." *Id*. at 2. He further argued that if a remand was not granted, he was entitled to a full hearing "on the questions of fact and law in this case." *Id*. at 2.

On July 25, 2016, the ALJ granted the Government's motion, finding it undisputed that "Respondent does not currently have a Colorado medical license," and that Respondent conceded as much. Order Granting Summary Judgment and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision, at 3-4. The ALJ thus found that "it is undisputed that the Respondent lacks state authorization to handle controlled substances in Colorado," where he is registered. *Id*. at 3.

The ALJ further rejected Respondent's contention that the case is not ripe because he is the subject of two pending criminal cases in Colorado. *Id*. As the ALJ explained, because Respondent's medical license has been revoked, the case was not dependent "on future events that may not occur" and "present[s] a concrete case or controversy." *Id*. at 3-4 (citing *Thomas v.*

[3] Respondent also argued that the reasoning of *FTC v. Phoebe Putney Health System, Inc*., 113 S.Ct. 1003 (2013), applies to this case because his case challenging the Colorado Board's revocation of his license "concerns a claim of improper state actions to restrict the activities of a licensed professional." Opp. at 1. Respondent then argues that "[t]he applicability of the reasoning in *Phoebe Putney* to this case [the DEA case] is claimed by [him] and judicial review is requested." *Id*.

At issue in *Phoebe Putney Health System* was whether the acquisition of a hospital by a city-county hospital authority was exempt from being enjoined under section 5 of the Federal Trade Commission Action (15 U.S.C. § 45) and section 7 of the Clayton Act (15 U.S.C. § 18) because it would "substantially reduce competition in the market for acute-care hospital services" or whether the acquisition was immune from anti-trust liability under the state-action immunity. *See Parker v. Brown*, 317 U.S. 341 (1943). In short, *Phoebe Putney Health System* has nothing to do with whether Respondent's registration should be revoked.

Union Carbide Agric. Prod. Co., 473 U.S. 568, 579 (1985); *Texas v. United States*, 523 U.S. 296, 300 (1998)). The ALJ further noted that "these proceedings are independent from Colorado's criminal proceedings and any factual findings made therein" and that "'[i]t is not DEA's policy to stay proceedings . . . while registrants litigate in other forums.'" *Id.* at 4 (quoting *Newcare Home Health Servs.*, 72 FR 42126, 42127 n.2 (2007)) (other citations omitted). Finally, the ALJ rejected Respondent's argument that the Board's action in revoking his license "was arbitrary [and] capricious, an abuse of discretion and contrary to law," as being a collateral attack on the state proceedings. *Id.* As the ALJ explained, "a registrant's challenges to the validity of a state action must be litigated in the forums provided by the state." *Id.* (citing *Zhiwei Lin*, 77 FR 18862, 18864 (2012); also citing *Kristen Lee Raines*, 81 FR 14890, 14891-92 (2016)).

The ALJ also declined to consider Respondent's CAP, reasoning that he "does not have the statutory authority to evaluate it." *Id.* The ALJ further explained that "[t]he Administrator will consider the Respondent's corrective action plan." *Id.* (citing 21 U.S.C. § 824(a)(3)).

On August 3, 2016, the Deputy Assistant Administrator rejected Respondent's CAP. Letter from Deputy Assistant Administrator Louis J. Milione to Respondent. The Deputy Assistant Administrator further explained that he had "determined [that] there is no potential modification of [it] that could or would alter [his] decision." *Id.*

Neither party filed exceptions to the ALJ's decision. Thereafter, on August 23, 2016, the ALJ forwarded the recorded to me for Final Agency Action.

Having considered the record in its entirety, I adopt the ALJ's factual finding that Respondent's medical license has been revoked and his legal conclusion that he does not hold authority under Colorado law to dispense controlled substances and is therefore not entitled to

maintain his registration.[4] I also adopt the ALJ's ruling that Respondent was not entitled to appointed counsel, his ruling rejecting Respondent's claim that this proceeding is not ripe for adjudication and his ruling rejecting Respondent's challenge to the lawfulness of the State Board proceedings.

As the ALJ explained, the Controlled Substances Act requires that a practitioner possess state authority to dispense controlled substances in order to maintain his registration. R.D. at 3; *see also* 21 U.S.C. § 802(21) (defining "the term 'practitioner' [to] mean[] a . . . physician . . . or other person licensed, registered or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice"); *id*. § 823(f) ("The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.").

Because Congress has clearly mandated that a physician possess state authority in order to be deemed a practitioner under the Act, DEA has long held that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices medicine. *See Frederick Marsh Blanton, M.D.*, 43 FR 27616, 27617 (1978); *see also Hooper v. Holder*, 481 Fed. Appx. 826, 828 (4th Cir. 2012); *Calvin Ramsey*, 76 FR 20034, 20036 (2011); *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988); *see also* 21 U.S.C. § 824(a)(3). Thus, it is of no consequence that Respondent has sought judicial review of the Board's action. *See Fiaz Afsal*, 79 FR 61651, 61655 (2014) (citing *Calvin Ramsey*, 76 FR 20034, 20036 (2011) (citing *Michael*

[4] I further find that Respondent's registration does not expire until October 31, 2017. *See* Mot. for Summ. Disp., at Appendix A.

G. Dolin, 65 FR 5661, 5662 (2000))). Rather, "[u]nder the CSA, all that matters is that Respondent is no longer currently authorized to dispense controlled substances in" Colorado, the State in which he is registered. *Afsal*, 79 FR at 61655.

As for Respondent's CAP, I conclude that there are adequate grounds for denying it. Specifically, while Respondent maintains that he holds a Wyoming medical license and this "license establishes [his] continued eligibility to hold" his registration, the online records of the Wyoming Board (of which I take official notice) show that this license has been suspended.[5] Accordingly, Respondent is not eligible to be registered in Wyoming and I therefore reject his CAP. 21 U.S.C. §§ 802(21), 823(f).

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 824(a)(3) and 28 CFR 0.100(b), I order that DEA Certificate of Registration No. BH2378025 issued to Thomas Horiagon, M.D., be, and it hereby is, revoked. I further order that any pending application of Thomas Horiagon, M.D., to renew or modify this registration, be, and it hereby is, denied. This Order is effective [Insert date THIRTY DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Date: November 2, 2016

Chuck Rosenberg
Acting Administrator

[5] Respondent may refute this finding by filing a properly supported motion with my Office no later than fifteen (15) calendar days from the date of this Order. *See* 5 U.S.C. § 556(e).

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