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DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Warren B. Dailey, M.D.;
Decision and Order

On February 7, 2017, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Warren B. Dailey, M.D. (Registrant), of Houston, Texas. The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration, pursuant to 21 U.S.C. § 824(a)(3) and (5), on two grounds: (1) that he does not have authority to handle controlled substances in Texas, the State in which he is registered with the Agency; and (2) he has been excluded from participation in a program pursuant to section 1320a-7(a) of Title 42. GX 2 (Order to Show Cause), at 1.

With respect to the Agency's jurisdiction, the Show Cause Order alleged that Registrant is registered as a practitioner in schedules II through V, under Certificate of Registration No. AD9639038, at the registered address of 2305 Southmore, Houston, Texas. *Id.* The Order alleged that Registrant's registration expires by its terms on June 30, 2018. *Id.*

As to the substantive grounds for the proceeding, the Show Cause Order specifically alleged that "[o]n October 12, 2016, the Texas Medical Board issued an Order of Suspension by Operation of Law, suspending [Registrant's] Texas Medical License . . . based on [his] felony conviction on March 30, 2016 . . . for health care fraud." *Id.* The Show Cause Order then alleged that Registrant is "currently without authority to practice medicine or handle controlled substances in the State of Texas, the [S]tate in which he registered with" the Agency, thus subjecting his registration to revocation. *Id.* at (citing 21 U.S.C. § 824(a)(3); other citations omitted).

The Show Cause Order also alleged that on December 30, 2016, the Office of Inspector General, U.S. Department of Health and Human Services (HHS IG), issued a letter to Registrant "excluding [him] from participation in all Federal health care programs based on [his] felony conviction on March 30, 2016, in the U.S. District Court for the Southern District of Texas for health care fraud." *Id.* at 2. The Show Cause Order further alleged that "[t]he exclusion was effective twenty days from the date of the letter and is for a minimum period of twenty years." *Id*. The Show Cause Order then asserted that Registrant's "DEA registration is also subject to revocation based on [his] exclusion from participation in a program pursuant to section 1320a-7(a) of Title 42." *Id*. (citing 21 U.S.C. § 824(a)(5)).

The Show Cause Order notified Registrant of his right to request a hearing on the allegations, or to submit a written statement in lieu of a hearing, the procedure for electing either option, and the consequence for failing to elect either option. *Id*. (citing 21 CFR § 1301.43). The Order also notified Registrant of his right to submit a corrective action plan under 21 U.S.C. § 824(c)(2)(C). *Id*. at 3.

On February 7, 2017, the Show Cause Order was mailed to Registrant, via first class mail, addressed to him at his registered address at 2305 Southmore, Houston, Texas. GX 5. Affidavit of Service by DEA Analyst, Office of Chief Counsel). Also, on February 21, 2016, a Diversion Investigator (DI) with the Houston Division Office e-mailed the Show Cause Order to an attorney, who represented Registrant in the state board proceeding, who accepted service on his behalf. GX 4. In his e-mail, the attorney represented that he was "accepting service upon" Registrant. *Id*. (copy of email between DI and attorney accepting service on Registrant.)

On April 6, 2017 the Government forwarded a Request for Final Agency Action (RFAA) and an evidentiary record to my Office. On review, I found the Government's attempts at

service insufficient. As for the Government's attempt to serve Registrant by mail addressed to his registered address, I found this inadequate because it clearly knew that Registrant had been convicted of multiple federal felony offenses more than a year earlier and was likely incarcerated in a United States Penitentiary. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) ("[T]he State knew that appellant was not at the address to which the notice was mailed . . . since he was at that very time confined in . . . jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the . . . proceedings."); *see also Jones v. Flowers*, 547 U.S. 220, 230 (2006) (citing with approval *Robinson* and noting that its cases "require[] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provided notice in the ordinary case").

I also found the Government's service on the attorney insufficient. In holding so, I explained that the CSA states that "[b]efore taking action pursuant to [21 U.S.C. § 824(a)] . . . the Attorney General *shall serve upon the . . . registrant* an order to show cause why registration should not be . . . revoked[] or suspended." 21 U.S.C. § 824(c) (emphasis added). While I explained that the Agency has found that service on an attorney may satisfy the CSA's requirement that a Show Cause Order be "serve[d] upon the . . . registrant," I noted that the Agency has made clear that """[t]he mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service.""" *David M. Lewis*, 78 FR 36951 (2013) (quoting *Harbinson v. Commonwealth of Virginia,* 2010 WL 3655980, at *9 (E.D. Va. Aug. 11, 2010) (quoting *Davies v. Jobs & Adverts Online, Gmbh*, 94 F.Supp.2d 719, 722 (E.D. Va. 2000))). *See also United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997); *Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Ransom v. Brennan*, 437 F.2d 513,

518-19 (5th Cir. 1971). "'Rather, the party seeking to establish the agency relationship must show "that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service."'" *Harbinson*, 2010 WL 3655980, at *9 (quoting *Davies*, 94 F.Supp.2d at 722 (quoting Ziegler, 111 F.3d at 881)).

I further explained that while an attorney's authority to act as an agent for the acceptance of process "may be implied from surrounding circumstances indicating the intent of" his client, *In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004) (other citation and internal quotations omitted), "an agent's authority to act cannot be established solely from the agent's actions." *Id*. at 1084. "Rather, the authority must be established by an act of the principal." *Id*. (citing *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992)). Because the Government offered no evidence of an act by the Registrant establishing that he granted authority to the attorney to accept process on his behalf *in this proceeding*, I found that the Government had not properly served Respondent. *Focus Media*, 387 F.3d at 1084.

Thereafter, the Government reissued the Show Cause Order and on July 17, 2017, a Diversion Investigator mailed the Order by certified mail addressed to Respondent, at the United States Penitentiary in Beaumont, Texas.[1] GX 7. According to the tracking information obtained from the U.S. Postal Service, on July 20, 2017, the mailing was delivered to the Penitentiary. *Id*., *see also* GX 8. I therefore find that the Government accomplished service on July 20, 2017.

On September 20, 2017, the Government submitted a new Request for Final Agency Action. (hereinafter, cited as RFFA). Therein, the Government represents that "Registrant has not requested a hearing and has not otherwise corresponded or communicated with DEA

[1] There is no evidence in the record as to how the DI obtained Registrant's address. However, according to the Bureau of Prisons Inmate Locator (of which I take official notice), Registrant is incarcerated at USP Beaumont. *See* 5 U.S.C. § 556(e).

regarding the Reissued Order served on him, including the filing of any written statement in lieu of a hearing." RFAA, at 2.

Because more than 30 days have now passed since the date of service of the Show Cause Order and that Registrant has not submitted a request for a hearing or a written statement, I find that Registrant has waived his right to a hearing or to submit a written statement in lieu of a hearing. 21 CFR 1301.43(d). I therefore issue this Decision and Final Order based on relevant evidence contained in the record submitted by the Government. *Id*. § 1301.43(d) & (e). I make the following findings of fact. *Id.* § 1301.43(e).

FINDINGS

Registrant is the holder of DEA Certificate of Registration No. AD9639038, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 2305 Southmore, Houston, Texas. GX 1 (Certification of Registration History). He is also authorized to dispense Suboxone and Subutex as a Data-Waiver practitioner pursuant to the Drug Addiction Treatment Act of 2000 (DATA), for the purpose of treating up to 100 opiate-addicted patients. *Id.; see* 21 U.S.C. 823(g)(2). His registration does not expire until June 30, 2018. *Id*.

On October 12, 2016, the Texas Medical Board (Board) issued an Order of Suspension by Operation of Law, suspending Registrant's Texas Medical License No. F-8454, based on Registrant's felony conviction on March 30, 2016 for health care fraud in the U.S. District Court for the Southern District of Texas.[2] GX 3, at 2. The Board found that on or about March 30, 2016, Registrant was convicted of one count of conspiracy to commit healthcare fraud, two

[2] The Board's Disciplinary Panel issued the Order following a hearing on October 7, 2016, at which it considered the Board's Application for Suspension by Operation of Law. GX 3, at 1. While Registrant was provided with notice of the hearing, neither he nor his attorney appeared. *Id*.

counts of false statements related to healthcare matters, one count of conspiracy to pay and receive healthcare kickbacks, and one count of payment and receipt of healthcare kickbacks. *Id.* at 1-2 (citing 18 U.S.C. §§ 1349, 1035, 371, 2; 42 U.S.C. § 1320a-7b(b)(1) and (b)(2)).

The Government provided evidence that the Texas Medical Board website shows that Registrant's medical license remained suspended as of September 20, 2017, and according to the Board's website, his license remains suspended as of the date of this Decision and Order. GX 9. *See also* http://reg.tmb.state.tx.us/OnLineVerif/Phys_ReportVerif_new.asp. The Board's Order states that the suspension is to remain in effect until superseded by a subsequent Order of the Board. GX 3, at 2. I therefore find that Registrant does not possess authority to dispense controlled substances under the laws of Texas, the State in which he is registered with the Agency.

DISCUSSION

Pursuant to 21 U.S.C. § 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of Title 21, "upon a finding that the registrant . . . has had his State license . . . suspended [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances." With respect to a practitioner, DEA has long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a registration. *See, e.g.*, *James L. Hooper*, 76 FR 71371 (2011) (collecting cases), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); see *also Frederick Marsh Blanton*, 43 FR 27616 (1978) ("State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration.").

This rule derives from the text of two provisions of the CSA. First, Congress defined "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." 21 U.S.C. § 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that "[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." *Id.* § 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the Act, DEA has held repeatedly 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, e.g.*, *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 Frederick Marsh Blanton*, 43 FR 27616 (1978).

Because Registrant is no longer currently authorized to dispense controlled substances in Texas, the State in which he is registered with the Agency, I will order that his registration be revoked.[3] 21 U.S.C. § 824(a)(3).

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AD9639038 and Data-Waiver Identification No.

[3] The Show Cause Order also proposed revocation pursuant to 21 U.S.C. § 824(a)(5), which provides that a registration may be revoked "upon a finding that the registrant has been excluded or directed to be excluded from participation in a program pursuant to section 1320a-7(a) of Title 42." GX 2, 1-2. While the Show Cause Order alleged that the HHS IG has issued a letter to Registrant excluding him from participation in federal health care programs pursuant to 42 U.S.C. § 1320a-7(a), the Government has provided no evidence to support the allegation, and it does not raise this ground in its Request for Final Agency Action. I therefore dismiss the allegation.

XD9639038, issued to Warren B. Dailey, M.D., be, and they hereby are, revoked. Pursuant to the authority vested in me by 21 U.S.C. § 823(f), I further order that any pending application of Warren B. Dailey, M.D., to renew or modify his 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: September 27, 2017.

Chuck Rosenberg,
Acting Administrator.

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