



BILLING CODE: 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 17-35]

First Choice Surgery Center of Baton Rouge, L.L.C.; Decision and Order

On May 24, 2017, the Assistant Administrator, Diversion Control Division, issued an Order to Show Cause to First Choice Surgery Center of Baton Rouge, L.L.C (Respondent), of Baton Rouge, Louisiana. The Show Cause Order proposed the revocation of Respondent’s DEA Certificate of Registration No. FF4394209, on the ground that “the clinic does not have authority to dispense controlled substances in Louisiana, the [S]tate in which the clinic is located.” Show Cause Order, at 1 (citing 21 U.S.C. 823(f) and 824(a)(3)). The Show Cause Order also proposed revocation on the ground that Respondent’s owner, “Dr. Arnold Feldman, M.D., has been found guilty by the Louisiana State Board of Medical Examiners of misconduct related to controlled substances.” *Id.* (citing 21 U.S.C. 823(f) and 824(a)(2); 21 CFR 1306.04).

As to the jurisdictional basis for the proceeding, the Show Cause Order alleged that Respondent is “registered . . . as a hospital/clinic in [s]chedules II-V pursuant to [Registration No.] FF4394209 at 505 East Airport Drive, Baton Rouge, Louisiana.” *Id.* at 2. The Order alleged that this registration does not expire until “September 30, 2019.” *Id.*

As to the substantive grounds for the proceeding, the Show Cause Order alleged that Respondent “is without authority to dispense controlled substances in Louisiana.” *Id.* The Show Cause Order alleged that while Respondent “previously held” a Louisiana controlled substance license, “[t]his license expired on September 23, 2016 and has not been renewed.” *Id.* The Order

then asserted that “based upon [Respondent’s] lack of [s]tate authority to dispense controlled substances in . . . Louisiana,” its registration must be revoked. *Id.*

As to the allegation based on its owner’s misconduct, the Show Cause Order alleged that “[o]n August 15, 2016, the Louisiana State Board of Medical Examiners found [Respondent’s owner] guilty of violating [state law] by giving his staff pre-signed controlled substance prescriptions and/or allowing his staff to utilize a ‘Ghost writer’ to affix his signature to controlled substances prescriptions.” *Id.* The Order further alleged that its owner’s conduct violated 21 U.S.C. 841(a)(1) and 21 CFR 1306.04. *Id.*

The Show Cause Order notified Respondent of its right to request a hearing on the allegations or to submit a written statement while waiving its right to a hearing and the procedure for electing either option. *Id.* (citing 21 CFR 1301.43). In addition, the Order notified Respondent of its right to submit a corrective action plan pursuant to 21 U.S.C. 824(c)(2)(C). *Id.* at 3-4.

On June 15, 2017, Respondent, through its counsel, requested a hearing on the allegations. Letter from Respondent to Hearing Clerk, Office of Administrative Law Judges (June 15, 2017). The matter was assigned to Administrative Law Judge Charles Wm. Dorman (hereinafter, ALJ), who, on June 16, 2017, issued an order directing the Government to file evidence supporting the allegations by June 29, 2017 at 2 p.m., as well any motion for summary disposition. Briefing Schedule For Lack Of State Authority Allegations, at 1. The ALJ’s order also provided that if the Government moved for summary disposition, Respondent’s opposition was due by July 13, 2017 at 2 p.m. *Id.*

On June 20, 2017, the Government filed its Motion for Summary Disposition. In its Motion, the Government argued that Respondent is a “practitioner” under the CSA and that

because its “state authority has terminated, [it] no longer meets the statutory definition of a practitioner” and is not entitled to maintain its registration. Motion, at 3. The Government thus sought a Recommendation that Respondent’s registration be revoked. *Id.*

As support for its motion, the Government provided: 1) a copy of Respondent’s registration; 2) a letter dated May 22, 2017 from the Assistant Executive Director of the Louisiana Board of Pharmacy to a DEA Diversion Investigator (DI) stating that Respondent’s Louisiana Controlled Dangerous Substance (CDS) license expired September 23, 2016; 3) a November 16, 2016 Order of the Louisiana Board of Pharmacy indefinitely suspending the Controlled Dangerous Substance license of Arnold E. Feldman based on the suspension of his Louisiana Medical license; and 4) a declaration of the aforementioned DI that Respondent “currently has no authority to handle controlled substances in Louisiana.” Mot. for Summ. Disp., Appendices A, B, and C. The Government did not, however, seek summary disposition based on the allegation that Respondent’s owner had been found guilty by the Louisiana Board of misconduct related to controlled substances. *Compare* Mot. for Summ. Disp. *with* Show Cause Order, at 1-2.

Respondent did not file a Reply to the Government’s Motion, and on July 25, 2017, the ALJ granted the Government’s Motion. Order Granting Summary Disposition (R.D.), at 3, 6. Noting that the Government had “provided a certified letter from the Louisiana Board of Pharmacy indicating that the Respondent held Louisiana Board of Pharmacy Number CDS.043803-ASC, but that this license expired on September 23, 2016,” *id.* at 2, the ALJ found it “undisputed that the Respondent lacks state authorization to dispense controlled substances in Louisiana, where [it] is registered.” *Id.* at 5. Applying the Agency’s longstanding rule “that a practitioner must be currently authorized to dispense controlled substances by the State in which

[it] practices in order to obtain and maintain a registration,” *id.* at 4 (citation omitted), the ALJ concluded that “Respondent cannot maintain a DEA registration for any location in” Louisiana and recommended that I revoke its registration.¹ *Id.* at 5-6.

Having considered the record, I adopt the ALJ’s finding of fact that Respondent’s Louisiana CDS license has expired and his of conclusion of law that Respondent lacks state authorization to dispense controlled substances in Louisiana. I will therefore adopt the ALJ’s recommendation that I revoke Respondent’s registration. I make the following findings.

FINDINGS OF FACT

Respondent is the holder of DEA Certificate of Registration No. FF4394209, pursuant to which it is authorized to dispense controlled substances in schedules II through V as a Hospital/Clinic, at the registered address of: First Choice Surgery Center of Baton Rouge, L.L.C., 505 East Airport Drive, Baton Rouge, Louisiana. Mot. for Summ. Disp., Appendix A. This registration does not expire until September 30, 2019. *Id.* Respondent is owned by Arnold E. Feldman, M.D. Resp.’s Hrng. Req, at 1.

Respondent also previously held Louisiana Controlled Dangerous Substance License No.043803-ASC. *Id.*, at Appendix B. However, Respondent allowed this license to expire on September 23, 2016. *Id.*

Accordingly, I find that Respondent currently lacks authority to dispense controlled substances under the laws of the State of Louisiana.

DISCUSSION

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke

¹ With respect to the allegation that Respondent’s owner had been found guilty of misconduct by the Louisiana Board of Medical Examiners, the ALJ noted that [t]he Government did not provide any argument or evidence in its Motion.” R.D. 6 n.1. However, as the ALJ observed, “Respondent’s lack of state authority to dispense controlled substances is a sufficient independent ground to recommend the revocation of [its] registration.” *Id.*

a registration issued under section 823 of the Controlled Substances Act (CSA), “upon a finding that the registrant . . . has had [its] 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, which includes a hospital or clinic, *see* 21 U.S.C. 802(21), 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 practitioner’s registration. *See, e.g., James L. Hooper*, 76 FR 71371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton*, 43 FR 27616 (1978).

This rule derives from the text of two other provisions of the CSA, section 802(21), which defines the term “practitioner,” and section 823(f), which sets forth the registration requirements for practitioners. Notably, in section 802(21), Congress defined “the term ‘practitioner’ [to] mean[] a . . . physician . . . *hospital*, 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) (emphasis added). The text of this provision makes clear that a hospital is not a practitioner within the meaning of the CSA if it is not “licensed, registered or otherwise permitted, by the jurisdiction in which [it] practices . . . to dispense [or] administer . . . a controlled substance in the course of professional practice.” *Id.*

To the same effect, Congress, in setting the requirements for obtaining a practitioner’s registration, 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 [it] practices.” 21 U.S.C. 823(f). Based on these provisions, the Agency held nearly forty years ago

that “[s]tate authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance *and maintenance* of a Federal controlled substances registration.” *Blanton*, 43 FR at 27617 (revoking physician’s registration based on one-year suspension of his state license) (emphasis added).

Having allowed its Louisiana CDS license to expire, Respondent is no longer authorized to dispense controlled substances in the State.² Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the Act, and Respondent is no longer authorized to dispense controlled substances under the laws of Louisiana, the State in which it is registered, I adopt the ALJ’s recommended order and will order that its registration be revoked. *See, e.g., Hooper*, 76 FR at 71371-72; *Sheran Arden Yeates*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988); *Blanton*, 43 FR at 27616.

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 No. FF4394209 issued to First Choice Surgery Center of Baton Rouge, L.L.C., be, and it hereby is, revoked. This ORDER is effective **immediately**.³

Dated: November 13, 2017.

Robert W. Patterson,

Acting Administrator.

² Subsequent to the ALJ’s issuance of his Recommended Decision, Respondent has not filed a motion supported by any evidence that its CDS license has been reinstated with either the ALJ or my Office.

³ As found above, Respondent is owned by Dr. Arnold E. Feldman. For the same reasons which led the former Acting Administrator to revoke Dr. Feldman’s Louisiana registration with an immediate effective date, *see Arnold E. Feldman*, 82 FR 39614, 39618 & n.8 (2017), I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

[FR Doc. 2017-25288 Filed: 11/21/2017 8:45 am; Publication Date: 11/22/2017]