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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Frederick M. Silvers, M.D.; Decision and Order

On January 12, 2018, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause to Frederick M. Silvers, M.D., (hereinafter, Registrant), of Los Angeles, California. Order to Show Cause (hereinafter, OSC), at 1. The OSC proposed the revocation of Registrant’s Certificate of Registration No. AS6936201. It alleged that Registrant is without “authority to handle controlled substances in the state of California, the state in which [Registrant is] registered with the DEA.” *Id.* (citing 21 U.S.C. 823(f) and 824(a)(3)).¹

Specifically, the OSC alleged that the Medical Board of California (hereinafter, Board) issued a Default Decision and Order (hereinafter, Order) on May 15, 2017, revoking Registrant’s license to practice medicine effective June 14, 2017. *Id.* at 2. The OSC further alleged that, because the Board revoked Registrant’s medical license, Registrant lacks the authority to handle controlled substances in the state of California and is no longer a practitioner within the meaning of the Controlled Substances Act. *Id.*

The OSC notified Registrant of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 4 (citing 21 CFR

¹ The OSC also alleged that Registrant’s continued registration is inconsistent with the public interest because Registrant “issued prescriptions for controlled substances in violation of federal and state law.” OSC, at 2. The Government, however, has only requested Final Agency Action on the ground that Registrant is not presently authorized to handle controlled substances in the state of California. RFAA, at 2.

1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 4-5 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In its Request for Final Agency Action (hereinafter, RFAA), the Government detailed its multiple attempts to serve Registrant with the OSC. In a Declaration dated December 5, 2019, a DEA Diversion Investigator (hereinafter, DI) assigned to the Los Angeles Field Division detailed her attempts to personally serve the OSC on Registrant. RFAA Exhibit (hereinafter, RFAAX) 3. On January 18, 2018, DI attempted to serve Registrant at his residence located at 14 Oakmont Dr., Los Angeles, California, 90049 and at his registered address at 10921 Wilshire Blvd, Suite #514, Los Angeles, CA 90049. *Id.* at 1. DI found the home address and registered address to be vacant. *Id.* at 1-2, App. A (photo of “Space Available” sign at registered address). DI further related that she called the phone number associated with Registrant’s registered address and “learned that the telephone number was inactive.” *Id.* at 2.

The Government also submitted a Declaration from another DI (hereinafter DI2), assigned to the Los Angeles Field Division, who stated that on February 27, 2018, she mailed copies of the OSC, via US Postal Service first class mail, to what she declared was the Registrant’s “last known residence, located at 10075 Ojai Santa Paula Road, Ojai, California 93023” and to the address of his “last known attorney.” RFAAX 4, at 1-2.² DI2 stated that neither mailings were returned as undeliverable. *Id.* at 2. DI2 also emailed a copy of the OSC to Registrant’s email address and did not receive an email response indicating an error or that it was undeliverable. *Id.* at 2, App. B (copy of February 28, 2018 email sent to Registrant). DI2 stated

² The “last known attorney” was an individual who represented Registrant in a matter before the Medical Board of California on June 14, 2017. *See* RFAAX 4, App. A, at 1. The Government has offered no evidence that service to this attorney was adequate to provide notice to Registrant in this matter; however, the Government also did not rely on this service alone, but made attempts to serve Registrant through a variety of available means as described herein.

that the Agency has not received any correspondence from either Registrant or the attorney to whom she mailed the OSC. *Id.* at 2.

The Government forwarded its RFAA, along with the evidentiary record, to this office on January 8, 2020. In its RFAA, the Government contends that although it was unable to personally serve Registrant with the OSC, its mailings and emails were reasonably calculated to give Registrant actual notice of the OSC and satisfied due process. RFAA, at 3-4. The Government requests a final order revoking Registrant's Certificate of Registration on the basis of his lack of state authority to dispense controlled substances. *Id.* at 6.

Based on the DIs' Declarations, the Government's written representations, and my review of the record, I find that the Government's attempts to serve Registrant were legally sufficient. Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006). "[I]t requires only that the Government's effort be reasonably calculated to apprise a party of the pendency of the action." *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (internal quotations omitted). In this case, the Government attempted to personally serve Registrant at both his registered address and his residence, both of which were locations where the Government reasonably believed Registrant would be located. The Government further served him by first class mail at his last known residence, and by the email address Respondent provided to the Agency. Neither the first class mailings nor the emailed OSC were returned as undeliverable. "[T]he Due Process Clause does not require . . . heroic efforts by the Government" to find Registrant. *Id.* I find, therefore, that under the circumstances, the Government's efforts to notify Registrant of the OSC were reasonable and satisfied due process. *See Mikhayl Soliman, M.D.*, 81 Fed. Reg. 47,826, 47,827 (2016) (use of email to serve applicant satisfied due process because service was made to an email address he had previously provided

to the Agency and the Government did not receive back either an error or undeliverable message) (collecting cases)).

I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.46.

FINDINGS OF FACT

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. AS6936201 at the registered address of 10921 Wilshire Boulevard #514, PO Box 491610, Los Angeles, California 90049. RFAAX 2. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expired on February 29, 2020.³ *Id.*

The Status of Registrant's State License

On May 15, 2017, the Medical Board of California issued a Default Decision and Order (hereinafter, Order) revoking Registrant's license to practice medicine in the state of California. RFAAX 4, App. A, at 21. The Board's Order was issued pursuant to a complaint filed against

³ The fact that a Registrant allows his registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.*, 84 Fed. Reg. 68,474 (2019).

Registrant on July 30, 2015, which alleged violations of the California Business and Professions Code, including Gross Negligence and General Unprofessional Conduct. *Id.* at 2-12.⁴ The Order found the allegations in the complaint to be true. *Id.* at 15. According to the Order, Registrant, with respect to his care and treatment of two patients, acted with gross negligence in his “prescribing practices, failure to verify patients’ medical records and prescription history, and illegible treatment records.” *Id.* at 16. Specifically, the Board found that in prescribing Adderall (amphetamine and dextroamphetamine), a schedule II controlled substance, to the two patients, who both had histories of substance abuse, Registrant acted in “extreme departure from the standard of care.” *Id.* at 17-19. The Board also found that Registrant’s treatment records for the two patients were so lacking that they also “reflect[ed] an extreme departure from the standard of care” and violated California Business and Professions Code § 2266 (“The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct.”). *Id.* The Board further found that Registrant engaged in unprofessional conduct when he made inappropriate sexual remarks to both patients, which represented an “extreme departure from the standard of care” and violated California Business and Professions Code § 726 (“The commission of any act or sexual abuse, misconduct, or relations with a patient . . . constitutes unprofessional conduct and grounds for disciplinary action . . .”). *Id.* at 20.

The Board’s Order revoking Registrant’s license became effective on June 14, 2017. *Id.* at 21. On the same date, the Board issued an Order Denying Petition for Reconsideration in Registrant’s matter. *Id.* at 1.

⁴ The Order stated that Registrant had requested a hearing on the complaint but failed to appear at the hearing. Accordingly, the Medical Board found Registrant had waived his right to a hearing and was in default pursuant to California Government Code section 11520. RFAAX 4, App. A, at 14-15.

According to the online records of the California Department of Consumer Affairs, of which I take official notice, Registrant's license remains revoked.⁵

<https://search.dca.ca.gov/results> (last visited July 21, 2020). California's online records show that Registrant's medical license remains revoked and that Registrant is not authorized in California to prescribe controlled substances. *Id.*

Accordingly, I find that Registrant currently is neither licensed to engage in the practice of medicine nor registered to dispense controlled substances in California, the state in which Registrant is registered with the DEA.

DISCUSSION

Loss of State Authority in California

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 the CSA "upon a finding that the registrant . . . has had his State license or registration 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, the DEA has also 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, M.D.*, 76 Fed. Reg. 71,371 (2011), *pet. for rev. denied*,

⁵ Under the Administrative Procedure Act, an agency "may take official notice of facts at any stage in a proceeding – even in the final decision." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by e-mail (dea.addo.attorneys@dea.usdoj.gov).

481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.*, 43 Fed. Reg. 27,616, 27,617 (1978).

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.” 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the 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. *See, e.g., James L. Hooper*, 76 Fed. Reg. at 71,371-72; *Sheran Arden Yeates, M.D.*, 71 Fed. Reg. 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.*, 58 Fed. Reg. 51,104, 51,105 (1993); *Bobby Watts, M.D.*, 53 Fed. Reg. 11,919, 11,920 (1988); *Frederick Marsh Blanton*, 43 Fed. Reg. at 27,617.

According to California statute, “[n]o person other than a physician . . . shall write or issue a prescription.” CAL. HEALTH & SAFETY CODE § 11150 (West 2020). Further, “physician,” as defined by California statute, is a person who is “licensed to practice” in California. *Id.* at § 11024.

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in California. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in California. Thus, because Registrant lacks

authority to practice medicine in California and, therefore, is not authorized to handle controlled substances in California, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

ORDER

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AS6936201 issued to Frederick M. Silvers, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Frederick M. Silvers, M.D. to renew or modify this registration, as well as any pending application of Frederick M. Silvers, M.D. for registration in California. This Order is effective [Insert Date Thirty Days From the Date of Publication in the Federal Register].

Timothy J. Shea,
Acting Administrator.

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