Conclusion

The investigative record shows that Respondent materially falsified his July 2008 application and that he repeatedly prescribed controlled substances in violation of both Oklahoma and Federal law. The record thus establishes two independent and adequate grounds for revoking Respondent's registration and denying his application to modify his registration. Accordingly, Respondent's registration will be revoked and his application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, AJ6783535, issued to Gilbert Eugene Johnson, M.D., be, and it hereby is, revoked. I further order that the pending application of Gilbert Eugene Johnson, M.D., to modify his registration, be, and it hereby is, denied. This Order is effective November 26, 2010.

Dated: October 14, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–27028 Filed 10–25–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Lincoln Pharmacy; Revocation of Registration

On March 26, 2010, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration (Order) to Lincoln Pharmacy (Respondent), of Edison, New Jersey. The Order proposed the revocation of Respondent's DEA Certificate of Registration, BL4082222, and the denial of any pending applications to renew or modify its registration, on the ground that Respondent's "continued registration is inconsistent with the public interest." Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Order alleged that Respondent "routinely filled fraudulent prescriptions for highly addictive and abused controlled substances" and therefore violated 21 U.S.C. 841(a)(1) and 21 CFR 1306.04. *Id.* More specifically, the Order alleged that Respondent had filled six fraudulent prescriptions for Roxicodone and oxycodone, which are schedule II controlled substances, in exchange for cash on multiple occasions to wit: (1) On January 14, 2010, it filled three prescriptions totaling 540 dosage units of Roxicodone (30 mg.) for $975 in cash; (2) on January 21, 2010, it filled one prescription totaling 120 dosage units of oxycodone (30 mg.) for $215 in cash; and (3) on January 28, 2010, it filled two prescriptions totaling 360 tablets of oxycodone for $650 in cash. *Id.* at 1–2.

Based on the above, I concluded that Respondent's "continued registration during the pendency of these proceedings would constitute an imminent danger to the public health and safety." Id. at 2. I therefore exercised my authority under 21 U.S.C. 824(d) and immediately suspended Respondent's registration. *Id.*

On April 6, 2010, the Order, which also notified Respondent of its right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedures for doing so, and the consequence of failing to do so, was served on it. *Id.* at 2–3 (citing 21 CFR 1301.43(a), (c), (d) & (e)). Since that time, neither Respondent, nor anyone purporting to represent it, has either requested a hearing or submitted a written statement in lieu of a hearing. Thirty days now having passed since the Order was served on Respondent, I conclude that Respondent has waived its right to a hearing. *See* 21 CFR 1301.43(b) & (d). I therefore issue this Decision and Final Order based on the evidence contained in the investigative record submitted by the Government. *Id.* 1301.43(e). I make the following findings.

Findings

Respondent is a retail pharmacy located at 52 Lincoln Highway, Edison, New Jersey, which is owned and operated by Mr. Vincent Hsia, a registered pharmacist. Respondent is the holder of Certificate of Registration, BL4082222, which authorizes it to dispense controlled substances in schedules II through V as a retail pharmacy. Respondent's registration does not expire until March 31, 2012.

On January 14, 2010, at shortly after 7 p.m., a cooperating source (CS) went to Respondent and presented three prescriptions to Mr. Hsia. Each of the prescriptions was for 180 tablets of Roxicodone (oxycodone) 30 mg., contained dosing instructions, stated "chronic intractable pain," and was signed. While it is unclear whether the prescriptions the CS presented contained a patient name, the evidence which includes three cash-register receipts, the vials and the drugs, shows that at approximately 7:17 through 7:22 p.m., Hsia delivered the three vials, each containing 180 tablets of Roxicodone 30 mg. (for a total of 540 tablets), to the CS and charged him $325 in cash for each vial for a total of $975. The prescriptions listed the patients as Chris DiMarco of Clark, NJ; Rudy Lore, also purportedly of Clark; and Paul Smith of Rahway, NJ.

On January 21, 2010, at 7:45 p.m., the CS returned to Respondent and presented a prescription for 180 tablets of oxycodone 30 mg. This prescription listed the patient as Michael Williams of Newark, NJ. According to the transcript of a recording of the CS's conversation with Mr. Hsia, at one point the CS asked: "Quick questions. Since I'm moving [expletive deleted] moving these things really fast, is there any way you could write for more than 180? There isn't, right?" Hsia replied: "I don't really even like filling for 180." The CS then mentioned that an associate had told him that "you could get 240 all the time or somethin[g]." Hsia replied: "I can't even give you 180. I have to give you 120. Cause it doesn't say chronic intractable pain." Hsia subsequently distributed 120 tablets of oxycodone 30 mg. to the CS.

On January 27, 2010, the CS called Hsia to ask him what phrase needed to be on the prescription to justify dispensing the larger quantity. Hsia told him "chronic intractable pain." The following day, the CS returned to Respondent and presented two more prescriptions for 180 tablets of oxycodone 30 mg. which appear to have included the notation of "chronic intractable pain." One of the prescriptions listed the patient as Paul Fusatola of Belleville, NJ; the other as Rachel Billis of Nutley, NJ. The CS paid $325 in cash for each prescription and Hsia distributed two vials, each containing 180 tablets of oxycodone 30 mg., to the CS.

Discussion

Section 304(a) of the Controlled Substances Act provides that "[a] registration * * * to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(4). In determining the public interest in the case of a practitioner, the Act directs that the Attorney General consider the following factors:

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

(2) The applicant's experience in dispensing * * * 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.

Id. § 823(f).

"[T]hese factors are * * * considered in the disjunctive." Robert A. Leslie, M.D., 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registration should be revoked and/or an application should be denied. Id. Moreover, it is well settled that I am "not required to make findings as to all of the factors." Hoxie v. DEA, 419 F.3d 477, 482 (6th Cir. 2005); see also Morall v. DEA, 412 F.3d 165, 173–74 (D.C. Cir. 2005). However, the Government has the burden of proof. 21 CFR 1301.44(d) & (e).

Having considered all of the factors, I conclude that the evidence pertinent to factors two and four makes out a *prima facie* showing that Respondent "has committed such acts as would render [its] registration * * * inconsistent with the public interest." *21 U.S.C. 824(a)(4).* Accordingly, Respondent's registration will be revoked and any pending applications will be denied.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Relating to Controlled Substances

Under a longstanding DEA regulation, 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 his professional practice." *21 CFR 1306.04(a).* The regulation further provides that while "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, * * * a *corresponding responsibility rests with the pharmacist who fills the prescription*." *Id.* (emphasis added). Continuing, the regulation states that "the person knowingly filling such a purported prescription, as well as the person issuing it, [is] subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Id.*

DEA has consistently interpreted this provision as prohibiting a pharmacist from filling a prescription for a controlled substance when he either "knows or has reason to know that the prescription was not written for a legitimate medical purpose." *Medic-Aid Pharmacy, 55 FR 30043, 30044 (1990); see also Frank's Corner Pharmacy, 60 FR 17574, 17576 (1995); Ralph J. Bertolino, 55 FR 4729, 4730 (1990); United States v. Seelig, 622 F.2d 207, 213 (6th Cir. 1980). This Agency has further held that "[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.*" *Bertolino, 55 FR at 4730 (citations omitted).*[1]

The evidence here shows that on multiple occasions, Respondent violated Federal law by dispensing prescriptions for oxycodone 30 mg., a schedule II controlled substance (*see 21 CFR 1308.12(b)),* which Mr. Hsia, its owner and pharmacist in charge, knew were not "issued for a legitimate medical purpose" by a "practitioner acting in the usual course of his professional practice." *Id. 1306.04(a); see also 21 U.S.C. 841(a)(1)* ("Except as authorized by this subchapter, it shall be unlawful for any persons knowingly or intentionally * * * to distribute[] or dispense * * * a controlled substance.").

More specifically, the evidence shows that on January 14, 2010, a CS simultaneously presented three prescriptions, each for 180 tablets of Roxicodone (oxycodone) 30 mg., to Hsia. Hsia then proceeded to fill the prescriptions and distributed the drugs to the CS from whom he received $975 in cash. Hsia clearly knew that the prescriptions were unlawful as the CS presented all three prescriptions (all of which for the same drug and quantity) at the same time and Hsia used three different patient names (Chris DeMarco, Rudy Lore and Paul Smith) on the prescription labels so as to hide the fact (in the event he was inspected) that he had distributed the drugs to a single person. In short, Hsia knowingly engaged in a drug deal. 21 U.S.C. § 841(a)(1).

The evidence further shows that on January 21, 2010, Hsia again unlawfully distributed 120 tablets of oxycodone 30 mg. to the CS in exchange for $215 in cash. Moreover, at the time the CS presented the prescription (which was in the name of Michael Williams) to Hsia, the CS told Hsia that he was re-selling the drugs, explaining that they were "moving these things really fast" and asked if he could get more than 180 tablets. While on this occasion Hsia only distributed 120 tablets to the CS (apparently because the prescription did not state "chronic intractable pain"), he clearly knew that the CS was seeking the drugs for an illegal purpose and not to treat a legitimate medical condition. Hsia thus again violated 21 U.S.C. § 841(a)(1).

Finally, on January 28, 2010, the CS presented two more prescriptions to Hsia; the prescriptions listed two different persons (Paul Fusatola and Rachel Billis) as the patients. Each prescription was for 180 tablets of oxycodone 30 mg. and indicated that it was for "chronic intractable pain." Hsia again distributed both prescriptions to the CS from whom he received $650 in cash, knowing that the CS was seeking the drugs for an illegal purpose. Hsia thus committed two additional violations of the CSA by unlawfully distributing controlled substances in violation of 21 U.S.C. § 841(a)(1).

As the forgoing demonstrates, Respondent's owner Mr. Hsia has used its registration to engage in blatant drug dealing. I therefore hold that Respondent has committed multiple acts which render its registration "inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, Respondent's registration will be revoked and any pending application will be denied. For the same reasons that I immediately suspended Respondent's registration, I conclude that public interest requires that this Order be effective immediately.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I hereby order that DEA Certificate of Registration, BL4082222, issued to Lincoln Pharmacy, be, and it hereby is, revoked. I further order that any pending application of Lincoln Pharmacy for renewal or modification of its registration be, and it hereby is, denied. This Order is effective immediately.

Dated: October 15, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–27026 Filed 10–25–10; 8:45 am]

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[1] As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 *U.S. 243, 274 (2006) (citing United States* v. *Moore, 423 U.S. 122, 135 (1975)).*