

four), and such other conduct which may threaten public health and safety (factor five), establishes that he has committed acts which render his continued registration “inconsistent with the public interest.” 21 U.S.C. 824(a)(4). This finding provides reason alone to revoke Registrant’s registrations and to deny any pending applications to renew or modify his registrations.

#### *The Loss of State Authority Ground*

Under the CSA, a practitioner must possess authority to dispense controlled substances under the laws of the State in which he engages in his professional practice in order to obtain and maintain a DEA registration. See 21 U.S.C. 802(21) (defining the term “practitioner” as a person “licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices \* \* \* to distribute, dispense \* \* \* [or] administer \* \* \* a controlled substance”), *id.* § 823(f) (“The Attorney General shall register practitioners \* \* \* to dispense \* \* \* controlled substances \* \* \* if the applicant is authorized to dispense \* \* \* controlled substances under the laws of the State in which he practices.”). As these provisions make plain, possessing authority under State law to handle controlled substances is an essential condition for holding a DEA registration. See *John B. Freitas*, 74 FR 17524, 17525 (2009); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988).

DEA has therefore held repeatedly that the CSA requires the revocation of a registration issued to a practitioner whose State authority has been suspended or revoked. *David W. Wang*, 72 FR 54297, 54298 (2007); *Sheran Arden Yeates*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988). See also *id.* § 824(a)(3) (a “registration pursuant to section 823 of this title to \* \* \* dispense a controlled substance \* \* \* may be suspended or revoked by the Attorney General upon a finding that the registrant \* \* \* has had his State license suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the \* \* \* dispensing of controlled substances”). DEA has further held that revocation is warranted even where a practitioner’s State authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State’s action. See *Robert Wayne Mosier*, 75 FR 49950 (2010) (“revocation is warranted \* \* \* even in those instances where a practitioner’s State license has only

been suspended, and there is the possibility of reinstatement”); *accord Bourne Pharmacy*, 72 FR 18273, 18274 (2007).

As found above, on May 5, 2010, the Florida Surgeon General immediately suspended Registrant’s State medical license. Registrant is therefore without authority to dispense controlled substances in the State where he holds his DEA registrations. Registrant’s loss of his State authority thus provides an additional basis for revoking his registrations. Accordingly, his registrations will be revoked and any pending application will be denied.

#### **Order**

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificates of Registration BB2972140, XB2972140, and FB1490349, issued to Stephen B. Brown, M.D., be, and they hereby are, revoked. I further order that any pending application of Stephen B. Brown, M.D., to renew or modify such registrations, be, and it hereby is, denied. This order is effective immediately.<sup>3</sup>

Dated: October 15, 2010.

**Michele M. Leonhart**,

*Deputy Administrator.*

[FR Doc. 2010–27031 Filed 10–25–10; 8:45 am]

**BILLING CODE 4410–09–P**

## **DEPARTMENT OF JUSTICE**

### **Drug Enforcement Administration**

#### **Gilbert Eugene Johnson, M.D.; Revocation of Registration**

On November 20, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Gilbert Eugene Johnson, M.D. (Respondent), of Idabel, Oklahoma. The Show Cause Order proposed the revocation of Respondent’s DEA Certificate of Registration, AJ6783535, as a practitioner, and the denial of any pending applications to renew or modify his registration, on the ground that Respondent’s “continued registration is inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).” Show Cause Order at 1.

<sup>3</sup> For the same reason that I ordered the immediate suspension of Registrant’s DEA registrations, I conclude that the public interest requires that this Order shall be effective immediately.

The Show Cause Order alleged that the Oklahoma State Board of Medical Licensure had found that: (1) Respondent “prescribed or administered a drug (*i.e.*, meperidine, a schedule II controlled substance, and hydrocodone, a schedule III controlled substance) or treatment without sufficient examination or the establishment of a valid physician patient relationship”; (2) Respondent “engaged in indiscriminate or excessive prescribing, dispensing or administering of controlled or narcotic drugs”; and (3) Respondent “prescribed, dispensed or administered controlled substances or narcotic drugs in excess of the amount considered good medical practice or prescribed, dispensed or administered controlled substances or narcotic drugs without medical need.” *Id.* at 1–2.

Next, the Show Cause Order alleged that on June 23, 2008, based on the Oklahoma Board’s action, the Medical Board of California “ordered the revocation of [Respondent’s] license to practice medicine in that state, effective July 23, 2008.” *Id.* at 2. Finally, the Order alleged that on July 7, 2008, Respondent “falsified” his application for renewal of his DEA registration “by answering ‘no’ to the question concerning whether [Respondent] had ever had a state professional license revoked or placed on probation or whether any such action was pending.” *Id.*

On December 16, 2008, the Show Cause Order was served on Respondent by certified mail to him at the address which he had recently given the Agency as his new registered location on his application to modify his registration. On January 29, 2009, Respondent’s counsel filed a request for a hearing and the matter was placed on the docket of the Agency’s Administrative Law Judges (ALJs).

Thereafter, the ALJ requested that the parties address whether Respondent had timely requested a hearing. See Corrected Order Cancelling Hearing and Terminating Proceedings, at 1. Following receipt of the parties’ submissions, the ALJ found that Respondent’s request was not timely because it was not filed within 30 days of service of the Show Cause Order as required by 21 CFR 1301.43(a). *Id.* at 2. Because Respondent had not “provide[d] a basis upon which to find good cause,” the ALJ held that his failure to file a timely request constituted a waiver of his right to a hearing. *Id.* (citing 21 CFR 1301.43(d) and *Brinton D. Glisson*, 72 FR 54296 (2007)). Accordingly, the ALJ canceled the scheduled hearing, terminated the proceedings, and directed that the

matter be forwarded to me for final agency action pursuant to 21 CFR 1301.43(d) and 1301.46.

Thereafter, the Government forwarded the investigative record to me for final agency action. Having considered the record, I agree with the ALJ's finding that Respondent has waived his right to a hearing because he failed to timely file his request and has not offered good cause for his failure to do so. I further find that Respondent materially falsified his July 2008 application and that he has committed acts which render his registration inconsistent with the public interest. 21 U.S.C. 823(f) & 824(a)(1) & (4). Accordingly, Respondent's registration will be revoked and his pending application to modify his registration will be denied. I make the following findings.

### Findings

Respondent previously held DEA registration, AJ6783535. While this registration expired on December 31, 2007, on July 9, 2008, Respondent submitted a renewal application and the registration was reinstated with an expiration date of December 31, 2010. Moreover, on December 11, 2008, Respondent requested to change the address of his registered location. I therefore find that Respondent has a registration and that his application to modify his registration is pending before the Agency.

On March 22, 2007, Respondent and the Oklahoma Board of State Medical Licensure and Supervision (Oklahoma Board) entered into an Order Accepting Voluntary Submittal to Jurisdiction (hereinafter, Order). Therein, Respondent pled guilty to the allegations in a Complaint and Citation which the Oklahoma Board had filed on January 27, 2007.

In the Order, the Oklahoma Board found that Respondent treated another physician, DWW, from around January 2004 through July 2006. During this period, Respondent issued "two (2) prescriptions for Meperidine, a Schedule II controlled dangerous substance \* \* \* six (6) prescriptions for Testosterone and Hydrocodone, both Schedule III controlled dangerous substances \* \* \* and twelve (12) prescriptions for Alprazolam, Soma, and But/Apap/Caf, Schedule IV controlled dangerous substances."<sup>1</sup> Order at 2, *Oklahoma ex rel. Bd. of Medical Licensure & Supervision v. Johnson* (Okla. Bd. of Med. Lic. & Super. Mar. 22,

2007). Respondent issued these prescriptions without "perform[ing] any physical examination on DWW" and without establishing either "a valid physician patient relationship" or "a legitimate medical need for the medical treatment." *Id.* In addition, he "failed to maintain complete and accurate records of all controlled dangerous drugs prescribed." *Id.* When questioned by an Oklahoma Board investigator, Respondent admitted that he did not keep a patient record on DWW. *Id.*

The Oklahoma Board also found that Respondent treated JWW, DWW's wife, from around November 2004 through February 2005. *Id. at 3.* Respondent issued to JWW, "one (1) prescription for Demerol, a Schedule II controlled dangerous substance[,] \* \* \* one (1) prescription for Histinex HC, a Schedule III controlled dangerous substance, and six (6) prescriptions for Alprazolam and But/Apap/Caf, Schedule IV controlled dangerous substances." *Id.* As in the case of DWW, Respondent issued these prescriptions to JWW without "perform[ing] any physical examination" and without establishing "a valid physician patient relationship" or "a legitimate medical need for the medical treatment." *Id.* Again, Respondent failed to "maintain complete and accurate records of all controlled dangerous substances prescribed" and admitted to an Oklahoma Board investigator that he did not see JWW "as a patient." *Id.*

The Oklahoma Board further found that on two occasions, Respondent issued prescriptions to JOW, one of his employees, for "Diazepam, a Schedule IV controlled dangerous substance"; the Board also found that on another occasion, he issued prescriptions for "Fiorinal w/Codeine and Coughtuss, Schedule III controlled dangerous substances." *Id. at 3.* As to these prescriptions, the Board found that "he failed to perform any physical examination on JOW prior to prescribing the controlled dangerous drugs in her name, that he did not establish a valid physician patient relationship prior to prescribing the medications, that he did not establish a legitimate medical need for the medical treatment, and that he failed to maintain complete and accurate records of all controlled dangerous drugs prescribed." *Id.* Furthermore, the Board found that Respondent instructed JOW to fill the diazepam prescriptions at City Drug and then return them to him for "office use." *Id.*

The Oklahoma Board then found Respondent guilty of "unprofessional conduct" based on his violations of numerous provisions of state law and

regulations. *Id. at 4.* The Board found, *inter alia*, that he: (1) "[p]rescribed or administered a drug or treatment without sufficient examination and the establishment of a valid physician patient relationship," in violation of 59 Okla. Stat. § 509(12); (2) "[e]ngaged in indiscriminate or excessive prescribing \* \* \* of controlled or narcotic drugs," in violation of Okla. Admin. Code 435:10-7-4(1); (3) "[v]iolated \* \* \* state or federal law or regulation relating to controlled substances," in violation of Okla. Admin. Code 435:10-7-4(27); (4) "[p]rescribed \* \* \* controlled substances or narcotic drugs in excess of the amount considered good medical practice or prescribed \* \* \* controlled substances or narcotic drugs without medical need in accordance with published standards," in violation of 59 Okla. Stat. § 509(16) and Okla. Admin. Code 435:10-7-4(2); (5) "[w]rote a false or fictitious prescription for any drugs or narcotics declared by the laws of [Oklahoma] to be controlled or narcotic drugs," in violation of 59 Okla. Stat. § 509(11); and (6) "[p]urchased or prescribed any regulated substance in Schedule I through V, as defined by the Uniform Controlled Dangerous Substances Act, for the physician's personal use," in violation of Okla. Admin. Code 435:10-7-4(5). *Id. at 4-5.*

Based on its findings, the Oklahoma Board reprimanded Respondent. The Board also placed Respondent's medical license on probation for one year, beginning March 22, 2007, subject to certain conditions including that he could not call in any controlled-substance prescriptions, that he complete board-approved courses in controlled substance prescribing and recordkeeping, and that he maintain duplicate, serially-numbered prescriptions of controlled substances, which are readily retrievable and which must be provided on request to the Board's investigators. *Id. at 7.*

On June 23, 2008, the Medical Board of California (California Board) adopted a Default Decision and Order in a proceeding against Respondent's California license. *See* Decision at 1, *In re Gilbert E. Johnson, M.D.* (Med. Bd. Cal. 2008). In the Default decision, the Board found that Respondent had been served with the accusation on September 25, 2007, and that his attorney had filed a response. *Default Decision and Order at 1.* The Board also noted that Respondent and his attorney had been served with a Notice of Hearing, which informed him of the scheduled date of the hearing, but that neither Respondent, nor his attorney, had appeared. *Id.*

<sup>1</sup> Neither Soma (carisoprodol) nor But/Apap/Caf is a controlled substance under Federal law. However, the other drugs noted in the Board's order are controlled under Federal law.

Based on the findings of the Oklahoma Board, the California Board concluded that Respondent had committed unprofessional conduct by, *inter alia*, prescribing controlled substances “to several individuals without a prior physical examination, without a valid physician-patient relationship, without establishing a medical need for the treatment, and without maintaining complete and accurate records.” *Id.* at 2–3. The California Board further found that Respondent had committed unprofessional conduct when he issued the controlled substance prescriptions in the name of his employee, “without a prior physical examination or medical indications, and without maintaining an adequate medical record, and directed the employee to fill the prescriptions and then return the drugs to respondent.” *Id.* at 3. The Board then revoked Respondent’s California medical license, effective July 23, 2008. Decision at 1.

On July 7, 2008, Respondent completed and signed his renewal application for his DEA registration.<sup>2</sup> In section 4 of the application, Respondent was required to answer four “liability” questions. The third of these asked: “Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?” (emphasis added). Respondent answered “No.”

#### Discussion

Section 304(a)(1) of the Controlled Substances Act (CSA) provides that a registration “may be suspended or revoked by the Attorney General upon a finding that the registrant \* \* \* has materially falsified any application pursuant to or required by this subchapter.” 21 U.S.C. 824(a)(1). Section 304(a)(4) also 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). With respect to a practitioner, the CSA requires that the following factors be considered in making the public interest determination:

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

(2) The [registrant’s] experience in dispensing \* \* \* controlled substances.

(3) The [registrant’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. 21 U.S.C. 823(f).

“[T]hese factors \* \* \* are considered in the disjunctive.” *Robert A. Leslie*, 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application to modify a registration. *Id.* Moreover, I am “not required to make findings as to all of the factors.” *Morall v. DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005); see also *Volkman v. DEA*, 567 F.3d 215, 222 (6th Cir. 2009).

Having considered the evidence, I conclude that the record provides two independent grounds to evoke Respondent’s registration and to deny his pending application to modify his registration. First, Respondent materially falsified his July 2008 application when he answered “no” to the question whether he had ever had a state licensed sanctioned or if any such action was pending. Second, based on the Oklahoma Board’s findings regarding his prescribing of controlled substances, I conclude that Respondent has committed acts which render his registration inconsistent with the public interest.

#### The Material Falsification Allegation

As found above, on his July 7, 2008 application, Respondent provided a “no” answer to the question: “Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?” Respondent’s answer was false for two reasons: (1) The Oklahoma Board had previously placed him on probation, and (2) the California Board had initiated a proceeding against him and had adopted the Default Decision, although the revocation of his license was not yet “effective.”

Respondent knew that his statement was false with respect to both proceedings. As to his failure to disclose the Oklahoma proceeding, Respondent appeared in person before the Board and signed the Order Accepting Voluntary Submittal to Jurisdiction which he had entered into with the Board. He thus

knew that the Oklahoma Board had placed him on probation.

As for his failure to disclose the California proceeding, while at the time he submitted his application, the revocation of his state license had yet to go into effect, the Default Decision specifically noted that Respondent had been served with the accusation, that his attorney had filed a response to it, and that the State had received signed certified mail receipts establishing that both he and his attorney had received the Notice of Hearing. Thus, Respondent clearly knew that the Medical Board of California had brought an action against him which was then “pending.”

It is likewise clear that Respondent’s failure to disclose both proceedings was a materially false statement under the CSA. A false statement is material if it “has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed.” *Kungys v. United States*, 485 U.S. 759, 770 (1988) (int. quotation and other citations omitted). While the evidence must be “clear, unequivocal, and convincing,” the “ultimate finding of materiality turns on a substantive interpretation of the law.” *Id.* at 772 (int. quotations and citations omitted). See also *Craig H. Bammer*, 73 FR 34327, 34328 (2008). However, “[i]t makes no difference that a specific falsification did not exert influence so long as it had the *capacity to do so.*” *United States v. Alemany Rivera*, 781 F.2d 229, 234 (1st Cir. 1985).

Respondent’s false statement was material because, under the public interest standard, the Agency is required to consider, *inter alia*, an applicant’s experience in dispensing controlled substances and his compliance with applicable state and federal laws related to controlled substances. See 21 U.S.C. 823(f)(2) & (4). As found above, both Boards’ actions were based on Respondent’s prescribing of various controlled substances including meperidine (a schedule II controlled substance), testosterone and hydrocodone (schedule III controlled substances), and diazepam and alprazolam (schedule IV controlled substances) without establishing a valid physician-patient relationship and without a legitimate medical purpose. In addition, Respondent issued fraudulent diazepam prescriptions in the name of his employee in order to obtain the drugs for his own use (whether he personally used them or sold them is legally irrelevant). Not only did these prescribing violate Oklahoma law (and provide grounds for discipline under California law), as explained more fully below, they also violated the

<sup>2</sup> The form is stamped with the filing date of July 9, 2008.

prescription requirement of Federal law. See 21 CFR 1306.04(a) (“A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”). See also 21 U.S.C. 841(a)(1) (prohibiting knowing or intentional distribution/dispensing of a controlled substance “[e]xcept as authorized by” the CSA); 21 U.S.C. 843(a)(3) (“It shall be unlawful for any person knowingly or intentionally \* \* \* to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge[.]”).

Because both the Oklahoma and California Board proceedings were based on his unlawful prescribing of controlled substances, his failure to disclose the proceedings on his application clearly had the capacity to influence (and did influence) the Agency’s decision to grant his July 2008 application. I therefore hold that Respondent’s failure to disclose the Oklahoma and California proceedings was a material falsification of his application; this conclusion provides reason alone to revoke his registration and to deny his application to modify his registration. See 21 U.S.C. 824(a)(1).

#### The Public Interest Allegations

##### *Factors Two and Four—Respondent’s Experience in Dispensing Controlled Substances and Compliance With State and Federal Laws Related to Controlled Substances*

As noted above, the Oklahoma Board found that, on multiple occasions, Respondent prescribed various controlled substances in schedules II through IV including Demerol (meperidine), hydrocodone (including both Histinex and CoughTuss), testosterone, Fiorinal with codeine, and alprazolam, to persons he had not physically examined prior to issuing the prescriptions. The Board further found that Respondent did not establish a valid physician-patient relationship with these persons, that he did not establish that these persons had a legitimate medical need for the controlled substances, and that he failed to maintain complete and accurate records of the controlled substances he prescribed. The Board also found that Respondent had issued diazepam prescriptions in the name of his employee (again without establishing a valid doctor-patient relationship and a legitimate medical need for the prescription) and directed the employee to fill the prescription and bring it back to the office.

The Oklahoma Board further found that in issuing these prescriptions Respondent violated various provisions of state law including, *inter alia*, prohibitions against prescribing “without sufficient examination and the establishment of a valid physician patient relationship,” 59 Okla. Stat. § 509(12); “[e]ngag[ing] in indiscriminate or excessive prescribing \* \* \* of controlled substances,” Okla. Admin Code 435:10–7–4(1); prescribing a controlled substance “without medical need in accordance with published standards,” 59 Okla. Stat. § 509(16); writing false prescriptions for controlled substances, *id.* § 509(11); and prescribing controlled substances for his “personal use.” Okla. Admin. Code 435:10–7–4(5).

Both the Oklahoma Board’s factual findings and its legal conclusions that Respondent violated state law are entitled to preclusive effect in this proceeding. See *University of Tennessee v. Elliot*, 478 U.S. 788, 797–98 (1986) (“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*”) (int. quotations and citations omitted). I therefore adopt the Board’s findings that Respondent violated Oklahoma law and regulations with respect to his prescribing to DWW, JWW, and JOW, of those drugs which are controlled under Federal law.

I further hold that Respondent repeatedly violated Federal law when he prescribed controlled substances to these individuals. As noted above, under a longstanding Federal regulation, “[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 CFR 1306.04(a).

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, 143 (1975)).

Under the CSA, “it is fundamental that a practitioner must establish a bona fide doctor-patient relationship in order to act ‘in the usual course of \* \* \* professional practice’ and to issue a prescription for a ‘legitimate medical purpose,’” as required by 21 CFR

1306.04(a). *Patrick W. Stodola*, 74 FR 20727, 20731 (2009) (citing *Moore*, 423 U.S. at 141–43. The CSA generally looks to state law to determine “whether a doctor and patient have established a bona fide patient relationship.” *Id.*; see also *Kamir Garcés-Mejias*, 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.*, 72 FR 50397, 50407 (2007).

The Oklahoma Board found that Respondent did not establish a “valid physician patient relationship” with JWW, DWW and JOW, and that he did not establish that these individuals had a legitimate medical need for the prescriptions. Accordingly, I hold that in prescribing to these persons, Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose and therefore violated Federal law as well. See 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a). I further hold that Respondent violated Federal law when he acquired diazepam by issuing fraudulent prescriptions to JOW and directed the latter to fill the prescriptions and bring them back to the office. See 21 U.S.C. § 843(a)(3).

As the forgoing demonstrates, Respondent’s experience in dispensing controlled substance and his record of compliance with applicable laws is characterized by his numerous violations of both State and Federal drug laws.<sup>3</sup> I therefore hold that Respondent has committed acts which render his registration “inconsistent with the public interest.” *Id.* § 824(a)(4). This conclusion provides an independent ground (apart from his material falsification) to revoke his registration and to deny his application to modify his registration.

<sup>3</sup> While the Oklahoma Board placed Respondent on probation, it made no recommendation in this matter (factor one). Moreover, even were I to deem the Board’s decision to continue Respondent’s medical license as a recommendation, the Board’s decision is not dispositive. While holding authority under state law is a necessary prerequisite to obtaining a DEA registration, see 21 U.S.C. 823(f), DEA has long held that “the Controlled Substances Act requires that the Administrator \* \* \* make an independent determination as to whether the granting of controlled substances privileges would be in the public interest.” *Mortimer Levin*, 57 FR 8680 (1992). Of course, the California Board revoked Respondent’s California license based on the same conduct.

It is also acknowledged that Respondent has not been convicted of either a State or Federal offense related to the distribution or dispensing of controlled substances (factor three). However, the absence of a criminal conviction is not dispositive of the public interest inquiry. See, e.g., *Jayam Krishna-Iyer*, 74 FR 459, 461 (2009); *Edmund Chein*, 72 FR 6580, 6593 n.22 (2007).

In light of the extensive evidence under factors two and four, I conclude that there is no need to make findings under factor five.

## 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 Roxycodone 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 Roxycodone (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 Roxycodone (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 Roxycodone 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.