account for the other 460 tablets he obtained during this period. The inconsistency between the amounts he obtained and his testimony supports the conclusion that Respondent lied about his rate of usage and likely did so to portray himself as being only an alcoholic and not a drug abuser.[18]

Thus, while Respondent produced extensive evidence of his rehabilitation from alcohol abuse, there is ample reason to be skeptical of his claim that he is not a drug abuser and that he has learned from his mistakes. Moreover, even assuming the good faith of those who have treated (and/or evaluated) him, and that the treatment he received for his alcoholism would be efficacious in treating prescription drug abuse notwithstanding his apparent unwillingness to acknowledge the extent of his alprazolam misuse, it is nonetheless clear that Respondent has a serious aversion to telling the truth. I therefore hold that Respondent has failed to accept responsibility for his misconduct and has failed to rebut the Government's *prima facie* case.

In his Exceptions, Respondent contends that he "cannot eradicate his past criminal history" and that the ALJ's recommendation that his application be denied "is tantamount to a permanent revocation * * * especially since the DEA considered most of the same information" in my 2007 order which denied his previous application. Exceptions, at 14. Respondent also contends that because the issues litigated in "the 1992 hearing before DEA are *res judicata* [they] should not be considered in any determination in this matter." *Id.* at 6. Finally, he contends that he has been adequately punished for his past misconduct and that the proper focus should have been "whether the circumstances in existence at the time of the prior denial in July 20, 2007 have sufficiently changed to warrant the issuance of Respondent's DEA registration." Exceptions, at 6–12.

Contrary to Respondent's view, Congress expressly directed the Agency to consider an "applicant's experience in dispensing * * * controlled substances." 21 U.S.C. 823(f). Respondent's previous incidents of presenting fraudulent prescriptions are thus properly considered in this proceeding. Moreover, while it is true that Respondent "cannot eradicate his past criminal history," he could have testified truthfully in this proceeding and accepted responsibility for his misconduct.[19] *See Robert Leslie,* 68 FR 15227 (2003) (denying application based on physician's continued unwillingness to accept responsibility for criminal conduct he engaged in seventeen years earlier). I am therefore wholly unpersuaded by Respondent's contention that the circumstances have sufficiently changed to warrant granting his application.

Respondent cites *Azen* v. *DEA,* 76 F.3d 384 (tablet) (9th Cir. 1996), an unpublished decision, as support for his contention that in light of his evidence of rehabilitation, it would be "unduly harsh" to deny his application. Putting aside that the Ninth Circuit upheld the Agency's decision to revoke Dr. Azen's registration, Respondent ignores that in 1993, the Agency previously gave him a second chance to demonstrate that he could be entrusted with a registration, yet he again breached this trust. Respondent also ignores under the Agency's rules, he had a way back to regaining his registration. That he could not testify truthfully about either the 1989 episode or his more recent criminal behavior and abuse of alprazolam makes clear that, notwithstanding his rehabilitation efforts, he cannot be entrusted with a new registration.[20] Accordingly, Respondent's application will be denied.

[18] To make clear, in light of the inconsistency between the amount of alprazolam Respondent obtained and his claimed rate of usage, I reject the ALJ's conclusion "that Respondent's abuse of alprazolam was limited to his manner of acquiring it." ALJ at 36.

[19] In arguing that he has been adequately punished for his past misconduct, Respondent misapprehends the nature of this proceeding. This is a remedial proceeding aimed at protecting the public interest. *See, e.g., Samuel S. Jackson,* 72 FR at 23853 (citing *Leo R. Miller,* 53 FR 21931, 21932 (1988)). My decision to deny Respondent's application is not based on a determination that he needs to be punished but on the fact that his unwillingness to accept responsibility and testify truthfully establishes that he cannot be entrusted with a registration notwithstanding his efforts at rehabilitation.

Respondent also argues that "it has been over three years since [he] engaged in any conduct that would suggest that it would be against the public interest to issue" him a new registration. Exceptions at 15. This argument ignores that Respondent's testimony at the proceeding is itself conduct which demonstrates that granting his application would be inconsistent with the public interest. In addition, that three years have passed without further incident is hardly impressive given that he has been without a registration during this period, thus denying him of the means to issue more fraudulent prescriptions.

[20] I find it unnecessary to give any weight to the 2005 incident in which Respondent represented to a Chicago law firm that he had an active and unrestricted medical license when his licensed had been suspended. *See* GX 8. Between his presentation of the two fraudulent prescriptions in 1989, his false statement to the police following his arrest, his false testimony in the 1991 proceeding, and the more recent incidents of his calling in numerous fraudulent prescriptions, there is more than ample evidence to question his credibility.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as by 28 CFR 0.100(b) and 0.104, I hereby order that the application of Alan H. Olefsky, M.D., be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8543 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–7]

Thomas E. Mitchell, M.D.; Dismissal of Proceeding

On September 11, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Thomas E. Mitchell, M.D. (Respondent), of Santa Ana, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration and the denial of any pending applications to renew or modify his registration on the ground that, because of an action brought by the Medical Board of California (MBC), he lacks authority to dispense controlled substances in the State in which he is registered. Show Cause Order at 1.

On October 13, 2009, Respondent's counsel filed a letter in which he requested an extension of time (of 60 days no less) to respond to the Show Cause Order. Letter from Robert H. McNeill, Jr., to Hearing Clerk (Oct. 9, 2009). Therein, Respondent's counsel stated that Respondent was currently awaiting trial on two felony counts of violating California's tax laws. *Id.* Respondent's counsel further stated that "[t]he resolution of the criminal case will significantly affect Dr. Mitchell's decision of whether to request a hearing on the Order to Show Cause." *Id.*

Deeming this letter to be a request for a hearing, on October 22, 2009, the ALJ issued an order directing that the Government file its pre-hearing statement on or before January 6, 2010, and that Respondent file his pre-hearing statement on February 8, 2010. Order for Prehearing Statements at 1–2. Thereafter, on November 2, 2009, the Government moved for summary disposition on the ground that, on December 18, 2008, the MBC had suspended Respondent's Physician's and Surgeon's Certificate for failing to

comply with a condition imposed by the Board's previous order. Mot. for Summ. Disp., at 1–2. Citing agency precedent, the Government argued that because Respondent lacks authority to dispense controlled substances in California, he is not authorized to hold a DEA registration in the State and his registration should be revoked. *Id.* As support for the motion, the Government attached the various MBC orders, as well as a printout of Respondent's registration status, which indicated that his registration was to expire on January 31, 2010. Mot. for Summ. Disp., at Exs. 1–4.

On November 16, 2009, Respondent filed an opposition to the motion. Respondent's Opposition at 4. Therein, Respondent argued that the MBC's order "is not reasonable and is fraught with procedural misconduct, misrepresentations and the subsequent illegitimate denial of due process." *Id.*

On November 25, 2009, following a further round of briefing by both parties on an issue of no material consequence,[1] the ALJ issued her Recommended Decision. Therein, she found that it was undisputed that Respondent lacks authority to dispense controlled substances in California and that under the Controlled Substances Act, DEA therefore lacks authority to continue his registration. ALJ Dec. at 5. The ALJ thus granted the Government's motion and recommended that Respondent's registration be revoked. *Id*

Neither party filed exceptions to the ALJ's Decision. On January 8, 2010, the ALJ forwarded the record to my Office for final agency action. Upon receipt of the record, it was determined that while Respondent's registration was to expire on January 31, 2010, he had yet to file a renewal application. A subsequent query of the Agency's registration records confirmed that Respondent allowed his registration to expire and did not file a renewal application.

Under DEA precedent, "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel,* 63 FR 67132, 67133 (1998). Moreover, in the absence of an application (whether timely filed or not), there is nothing to act upon. Accordingly, because Respondent has allowed his registration to expire and has not filed any application, this case is now moot and will be dismissed.[2]

[1] Specifically, that Respondent had previously held a West Virginia medical license.

[2] While the Show Cause Order will be dismissed, under 21 U.S.C. 823(f), Respondent is not entitled to be registered until he is again "authorized to dispense * * * controlled substances under the laws of the State in which he practices."

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 21 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to Thomas E. Mitchell, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8531 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–8]

Robert Charles Ley, D.O. ; Dismissal of Proceeding

On September 28, 2009, I, the then Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration ("Order") to Robert Charles Ley, D.O. (Respondent), of Kihei, Hawaii. Order to Show Cause at 1. The Order, which also sought the revocation of Respondent's registration and the denial of any pending applications to renew his registration, alleged, *inter alia,* that Respondent had issued numerous prescriptions for controlled substances to undercover police officers which lacked a legitimate medical purpose and therefore violated Federal law. *Id.* at 2.

On October 2, 2009, Respondent was served with the Order, and on October 7, 2009, he requested a hearing on the allegations. The matter was then assigned to an Agency Administrative Law Judge (ALJ), who proceeded to conduct pre-hearing procedures.

On November 4, 2009, the Government moved for summary disposition on the ground that the State of Hawaii had suspended Respondent's state controlled substances registration and that he was therefore no longer entitled to hold a registration under the Controlled Substances Act. *See* 21 U.S.C. 823(f) and 824(a)(3). Finding that there were no material facts in dispute, the ALJ granted the motion, recommended that I revoke Respondent's registration and deny any pending applications, and forwarded the record to me for final agency action. Order Granting Summary Disposition and Recommended Decision, at 6.

On January 12, 2010, the State of Hawaii re-instated Respondent's state registration. As a consequence, the Government was no longer entitled to a Final Order adopting the ALJ's Recommended Decision. Accordingly, on March 2, 2010, the Government moved to remand the case for further proceedings. Motion to Remand Case for Further Proceedings, at 1.

Respondent did not, however, file an application to renew his registration which was due to expire on March 31, 2010. Respondent's registration therefore expired on March 31, 2010.

Accordingly, on May 5, 2010, the Government moved to terminate the proceeding on the ground that this case is now moot. Motion to Terminate Administrative Proceedings, at 2. On May 26, 2010, I therefore ordered that Respondent file a response to the Government's motion; I further ordered that if Respondent contended that the matter was not moot, he should specifically address what collateral consequence attach as a result of the issuance of the immediate suspension, whether he intends to remain in professional practice, and why he failed to file a renewal application. *See* Order at 1–2 (May 26, 2010).

On June 25, 2010, Respondent filed his response. *See* Respondent's Memorandum In Response to Motion to Terminate Administrative Proceedings. Therein, Respondent "maintain[s] that the summary suspension of his DEA registration * * * was improper and unjustified, [but] due to physical conditions beyond his control, [he] is no longer in a position to pursue his administrative remedies." *Id.* at 1. Respondent therefore "does not object to the termination" of the proceeding. *Id.*

DEA has previously held that "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel,* 63 FR 67132 (1998). While DEA has recognized a limited exception to the mootness rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of an immediate suspension, *see William R. Lockridge,* 71 FR 77791, 77797 (2006), Respondent has not identified any collateral consequence caused by the order. Indeed, Respondent does not object to the termination of this proceeding. Accordingly, this proceeding is now moot and the Government's motion to terminate the proceeding will be granted.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 28 CFR