DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jon Karl Dively, D.D.S.; Denial of Application

On December 14, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Jon Karl Dively, D.D.S. (Respondent), of Macomb, Illinois. The Show Cause Order proposed the denial of Respondent's pending application for a DEA Certificate of Registration as a practitioner, on the ground that he had committed acts which would render his registration ''inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f)).

The Show Cause Order specifically alleged that Respondent, while holding a DEA registration (which he had since surrendered), had ''prescribed large amounts of hydrocodone, a schedule III controlled substance, to [his] wife, on many occasions,'' and did so ''with knowledge that she was addicted to'' the drug. *Id.* The Show Cause Order alleged that ''[t]he prescriptions were not written in the usual course of medical practice,'' and thus violated Federal law and DEA regulations. *Id.*

The Show Cause Order further alleged that ''[f]rom at least mid-2003 to May 2005,'' Respondent had ''abused hydrocodone.'' *Id.* Relatedly, the Show Cause Order alleged that Respondent had admitted to DEA investigators that he was ''taking regularly Oxycontin and oxycodone,'' notwithstanding that he was being treated for drug and alcohol abuse. *Id.* at 1–2. The Show Cause Order also alleged that during a December 6, 2005 interview with DEA investigators, Respondent appeared to be impaired but denied using controlled substances and refused to take a drug test. *Id.* at 2. Relatedly, the Show Cause Order alleged that in January 2006, DEA received a letter from an individual affiliated with Rush Behavioral Health, which indicated that Respondent ''needed counseling, close supervision of [his] medications, verified attendance at Alcoholic Anonymous and monitoring by a physician's monitoring program.'' *Id.*

On December 27, 2006, the Show Cause Order was served on Respondent by certified mail as evidenced by the signed return-receipt card. Thereafter, on January 16, 2007, Respondent submitted a letter in which he expressly waived his right to a hearing. Respondent did, however, offer a response to each of the allegations of the Show Cause Order. *See* Ltr of Resp. to Hearing Clerk (dated Jan. 3, 2007).

Based on Respondent's letter, I find that he has waived his right to a hearing. *See* 21 CFR 1301.43(c). However, in accordance with 21 CFR 1301.43(c), Respondent's letter is made a part of the record and will ''be considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to matters of fact asserted therein.'' *Id.* Having considered the entire record, I issue this Decision and Final Order and make the following findings.

Findings

On December 28, 2005, Respondent, an Illinois licensed dentist, applied for a DEA registration to handle controlled substances in schedules II through V. Respondent had surrendered his DEA registration on December 6, 2005, upon the conclusion of an interview with a DEA Special Agent (SA), a DEA Diversion Investigator (DI), and an Inspector from the Illinois Department of Financial and Professional Regulation.

Respondent first came to the attention of this Agency on September 26, 2005, when the state Inspector notified a DI that he had received information indicating that Respondent was prescribing schedule III controlled substances containing hydrocodone to his wife. 21 CFR 1308.13(e). Upon receipt of this information, the DI determined that several pharmacies had filled the prescriptions including DrugStore.com (whose prescriptions are filled by Rite Aid Pharmacy), Osco Drug, and Hy-Vee Pharmacy. The DI then contacted each entity and requested that it provide a list of the prescriptions it had filled which had been issued by Respondent.

Subsequently, Rite Aid provided a spreadsheet listing thirty-seven controlled-substance prescriptions it filled which Respondent had issued in his wife's name. The prescriptions covered the period beginning on October 29, 2003, and ending on January 24, 2005. Osco Drug also provided a list of Respondent's controlled-substance prescriptions which it filled. This list included seven prescriptions which Respondent issued between September 21 and December 26, 2003.

Thereafter, on December 6, 2005, DEA and State investigators visited Respondent and interviewed him. When asked about the prescriptions he had written for his wife, Respondent asserted that he had done so because she had herniated cervical discs. Respondent acknowledged, however, that he issued the prescriptions outside of the course of his professional practice as a dentist; he then admitted that he had supplied his wife because she was addicted to hydrocodone. Respondent further asserted that he had stopped writing the prescriptions six months earlier.

Moreover, during the interview, Respondent's speech was slow and slurred, his thought process was disjointed, and he appeared to have trouble completing his thoughts. When the investigators expressed to Respondent their concern that he was then impaired, Respondent denied that this was so. The State Inspector then suggested that Respondent obtain a drug test to prove that he was not impaired.

Respondent then told investigators that he had herniated lumbar discs and had been prescribed fentanyl patches, Ultracet, and Lidoderm for the condition by his prior physician. He further related that his new physician, whom he met at an Alcoholic Anonymous meeting, was prescribing Oxycontin for him. Respondent then agreed to voluntarily surrender his DEA registration.

Two days later, Respondent telephoned the DI and left a voice mail message. In the message, Respondent questioned the need for a drug test, as well as why the DI could not have allowed Respondent to continue with his registration and watch him ''like a hawk.'' In the message, Respondent's speech was still slow and slurred.

On January 9, 2006, Respondent again contacted the DI asking how long it would take to regain his DEA registration. In that conversation, Respondent asked the DI whether he had received a letter from Rush Behavioral Health, a Chicago-based clinic which treats drug and alcohol addiction. The DI related to Respondent that he had not received the letter.

On January 17, 2006, the DI received a letter from an Intake Coordinator at Rush. According to the investigative report, in the letter, the Intake Coordinator noted that she had evaluated Respondent and had found that from mid-2003 through May 2005, Respondent had written Vicodin prescriptions in his wife's name for his personal use.[1] According to the report, the Intake Coordinator noted that Respondent ''seem[ed] impaired,'' and ''very anxious.'' The letter added,

[1] The letter was not submitted into the record. Rather, its contents were summarized in an investigative report. The report does not, however, establish what the Intake Coordinator's qualifications and duties are, the date she evaluated Respondent, and what the basis for this finding was.

however, that ''this could have been from this high dosage'' of Provigil. The letter added that Respondent needed counseling, close supervision of his medications, accountable attendance at AA, and monitoring by a physician's monitoring program to get his controlled-substance prescribing authority back.

On February 6, 2006, Respondent again called the DI and asked whether he had received the letter from Rush. Respondent also told the DI that he was seeing a new psychiatrist. Finally, Respondent stated that while his wife's physician had attempted to get her off of narcotics, it just made matters worse. Respondent added that his wife had quit ''cold turkey'' and that ''it was rough.''

In his letter responding to the Show Cause Order, Respondent admitted that he had prescribed large amounts of schedule III drugs containing hydrocodone to his wife knowing that she was addicted to the drug, and that the prescriptions were not issued in the usual course of his professional practice. Resp. Ltr. at 2. Respondent denied, however, that he had abused hydrocodone between mid-2003 and May 2005. *Id.* He also denied that he was under treatment for drug and alcohol abuse during this period. *Id.* Respondent also asserted that he had been sober for twenty-five years. *Id.*

Respondent further admitted that he appeared to be impaired during the December 6, 2005 interview. *Id.* Respondent asserted, however, that this was because of his use of Provigil pursuant to a prescription. *Id.* Respondent further admitted that during the interview, he denied abusing controlled substances and refused to take a drug test. *Id.* Respondent asserted, however, that ''on December 7, 2005, I did submit to a drug analysis of urine.'' *Id.* Finally, Respondent admitted that during the interview, he had admitted that he ''was regularly taking Oxycontin and Oxycodone for a back injury'' as prescribed by his physician. *Id.* Respondent further stated that he could neither admit nor deny the allegation regarding the letter from Rush Behavioral Health because he had not seen the letter.

The record also contains a copy of a consent order which Respondent entered into with the Illinois Department of Financial and Professional Regulation. The consent order noted that ''[t]he Department alleges that Respondent engaged in improper medication prescribing practice.'' Consent Order at 1. Respondent pled no contest and agreed to various sanctions including the suspension of his dental license for two weeks followed by twenty-four months of probation. During the probation, Respondent is required to submit to monthly alcohol-drug testing on twenty-four hours notice, to complete ten hours of continuing education in jurisprudence, and to file quarterly reports with the State regarding his activities. Respondent was also fined $1,000.

Discussion

Section 303(f) provides that ''[t]he Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, the Act requires the consideration of 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.

''[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 an application for a registration should be denied. *Id.* Moreover, 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).

While I have considered all of the factors, I conclude that the Government has made out a *prima facie* case under Factors Two and Four to deny Respondent's application based on his prescribing of controlled substances to his wife. While I am mindful that the State has allowed Respondent to maintain his dental license, Respondent has not presented sufficient evidence to establish that he should be entrusted with a new DEA registration. I therefore conclude that Respondent's application should be denied.

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

Under DEA regulations, ''[a] prescription for a controlled substance * * * must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice* * *. An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [the CSA] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' 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.'' *Gonzales* v. *Oregon,* 126 S.Ct. 904, 925 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 (1975)).

The record in this case establishes that Respondent issued numerous prescriptions for controlled substances in the name of his wife. While Respondent initially maintained that he wrote the prescriptions because his wife had herniated cervical discs, Respondent subsequently admitted that in doing so, he acted outside of the course of his professional practice as a dentist. Respondent later admitted that he had written the prescriptions because his wife was addicted to hydrocodone. Respondent thus violated Federal law.

The Government also alleged that Respondent was personally abusing controlled substances. More specifically, the Government alleged that Respondent was impaired during the December 2005 interview and that he had admitted to taking Oxycontin and oxycodone ''despite the fact that [he was] under treatment for addiction.'' Show Cause Order at 2.

It is true that the evidence indicates that Respondent slurred his speech during the interview (and in phone calls thereafter) and that he had trouble completing his thoughts. The Government, however, has not proved that Respondent's symptoms were caused by his abuse of a controlled substance or that either of the controlled substances he was then taking was not lawfully prescribed to him to treat a legitimate medical condition. Indeed, the letter from the Intake Coordinator at Rush supported Respondent's contention that his symptoms could have been caused by the Provigil, and the Government produced no evidence establishing that this drug was not lawfully prescribed to him, or that he was taking in excess of the dosage prescribed by his physician.

Nor did the Government offer any evidence rebutting Respondent's contention that the Oxycontin that he

admitted to ''regularly taking'' had been lawfully prescribed to him. Finally, while the Government alleged in the Show Cause Order that Respondent had refused to take a drug test upon being challenged to do so by the State inspector, Respondent asserts that he did so.

Here again, the Government offered no evidence to rebut Respondent's contention. Indeed, the Government produced no evidence showing that it demanded that Respondent produce the test results and that he failed to do so. I therefore conclude that the allegations that Respondent was personally abusing controlled substances at the time of the December 2005 interview and thereafter are not proved by substantial evidence.[2]

While I reject the allegations of personal abuse, Respondent's numerous violations of Federal law in prescribing controlled substances to his wife make out a *prima facie* case for the denial of his application. Where the Government has made out a *prima facie* case, the burden shifts to the applicant to show why granting the application would nonetheless be in the public interest. *See Gregory D. Owens,* 67 FR 50461, 50464 (2002).

As this Agency has repeatedly held, a proceeding under section 303 '' 'is a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused * * * their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be entrusted with the responsibility carried by such a registration.' '' *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). In short, Respondent must prove by a preponderance of the evidence that he can be entrusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not re-occur.

While Respondent admitted in response to Show Cause Order that he violated Federal law by prescribing controlled substances to his wife, he has offered no evidence to establish that he will not engage in similar acts in the future.[3] Respondent has therefore failed to rebut the Government's *prima facie* showing that granting him a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, Respondent's application will be denied.

[2] There is also some evidence suggesting that Respondent admitted to the Intake Coordinator at Rush that some of the prescriptions he wrote for his wife were for his personal use. This conduct would also violate Federal law. *See* 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.''). The letter which reports these admissions was not included in the record. Moreover, this evidence does not establish that Respondent was abusing controlled substances at the time of the December 2005 interview and thereafter.

[3] I acknowledge that the State has allowed Respondent to retain his dental license and placed him on probation. The consent order, however, merely recites that ''[t]he Department alleges that Respondent engaged in improper medication prescribing practice,'' and does not contain the specific allegations that were made against Respondent. Consent Order at 1. It is thus not even clear what evidence the State had obtained and, in any event, there are a number of reasons why the State may have decided to settle the case. I thus decline to defer to the State's decision. *See John Kennedy,* 71 FR 35708 (2006) (declining to defer to State board's restoration of medical license; a ''state license is a necessary, but not [a] sufficient condition for [a DEA] registration'').

Order

Pursuant to the authority vested in me by 21 U.S.C. § 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the application of Jon K. Dively, D.D.S., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This order is effective January 30, 2008.

Dated: December 13, 2007.

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–24]

The Lawsons, Inc., t/a The Medicine Shoppe Pharmacy; Denial of Application

On March 4, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to The Lawsons, Inc., t/a The Medicine Shoppe Pharmacy (Respondent) of Cheverly, Maryland. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a pharmacy on various grounds.

More specifically, the Show Cause Order alleged that in October 1999, the Prince George's County, Maryland, Police Department received information that Ms. Tina M. Hart-Lawson, Respondent's chief pharmacist, was filling fraudulent prescriptions. Show Cause Order at 1. The Show Cause Order further alleged that on multiple occasions between November 11, 1999, and February 9, 2000, two undercover officers had presented fraudulent prescriptions for Percocet, a schedule II controlled substance, and Vicodin, a schedule III controlled substance, to Ms. Lawson, who filled the prescriptions without first verifying them. *Id.* at 1–3. The Show Cause Order alleged that all of the prescriptions presented by the undercover officers ''had indicia of fraud'' and ''were written in the name of a fictitious doctor and DEA registration,'' and that Ms. Lawson did not report any of the fraudulent prescriptions to the police. *Id.* at 3.

The Show Cause Order also alleged that on February 4, 2000, Ms. Lawson told one of the undercover officers that she knew that the prescriptions presented by the officer two days earlier were forged, but then proceeded to partially fill one of them anyway. *Id.* at 2. The Show Cause Order alleged that Ms. Lawson had told the undercover officer that a local police officer was present when the undercover officer presented the prescriptions and had asked Ms. Lawson about them. *Id.* at 2–3. Ms. Lawson allegedly told the undercover officer that because she did not want the latter ''to get in trouble,'' she told the local police officer that the undercover officer ''was a cancer patient.'' *Id.* at 3.

Next, the Show Cause Order alleged that on February 9, 2000, the other undercover officer presented a fraudulent prescription for Percocet. *Id.* The Show Cause Order alleged that Ms. Lawson filled the prescription, and after being paid for it, told the undercover officer that she ''knew the prescription was fraudulent,'' but ''would not call the police'' because the undercover officer was ''a sister.'' *Id.* The Show Cause Order further alleged that Ms. Lawson was subsequently arrested, and on March 8, 2002, pled guilty to having unlawfully distributed oxycodone in violation of 21 U.S.C. 841(a)(1). *Id.*

Finally, the Show Cause Order alleged that on September 13, 2003, Samuel L. Lawson, M.D., filed an application on behalf of Respondent for a new DEA registration. *Id.* The Show Cause Order alleged that in support of its application, Respondent had attached a signed statement of Ms. Lawson which contained several material falsehoods and omissions. *Id.* at 3–4. The Show Cause Order thus concluded by alleging that because Ms. Lawson ''has a felony conviction and made false statements in the Medicine Shoppe's application, granting a DEA registration to [Respondent] would not be consistent with the public interest.'' *Id.* at 4.

Respondent, through its counsel, requested a hearing. The matter was