

Recommended Decision

I grant the Government's Motion for Summary Disposition and recommend that Respondent's DEA registration be revoked and any pending applications denied.

Dated: July 30, 2010.

Timothy D. Wing,

Administrative Law Judge.

[FR Doc. 2011-29721 Filed 11-16-11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11-3]

Silviu Ziscovici, M.D.; Decision and Order

On December 10, 2010, Administrative Law Judge (ALJ) Timothy D. Wing, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

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 Certificate of Registration, BZ4692756, issued to Silviu Ziscovici, M.D., be, and it hereby is, revoked. I further order that any pending application of Silviu Ziscovici, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.¹

Dated: November 8, 2011.

Michele M. Leonhart,

Administrator.

Christine M. Menendez, Esq., for the Government

Peter D. Greenspun, Esq., for the Respondent

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to determine whether

Respondent's Certificate of Registration (COR) with the Drug Enforcement Administration (DEA) should be revoked and any pending applications for renewal or modification of that registration denied. Without this registration, Respondent Silviu Ziscovici, M.D. (Respondent), would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances.

I. Procedural Posture

On September 15, 2010, the Deputy Administrator, DEA, issued an Order to Show Cause and Immediate Suspension (OSC/IS) of DEA COR BZ4692756, dated September 15, 2010, and served on Respondent on September 22, 2010. The OSC/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BZ4692756 pursuant to 21 U.S.C. 824(a)(4), and deny any pending applications for renewal or modification, on the grounds that Respondent's continued registration would be inconsistent with the public interest under 21 U.S.C. 823(f). On October 18, 2010, Respondent, through counsel, in a letter dated October 15, 2010, timely requested a hearing with the DEA Office of Administrative Law Judges (OALJ).

I issued an Order for Prehearing Statements on October 19, 2010. The parties filed prehearing statements, and on November 23, 2010, I issued a Prehearing Ruling.

On December 2, 2010, the Government filed a Motion for Summary Disposition, with a copy served on Respondent via facsimile on December 2, 2010, and another copy sent via U.S. mail. On December 2, 2010, I issued an order staying the proceedings until the resolution of the Government's motion. Pursuant to the November 23, 2010 Order for Prehearing Statements, Respondent had until "4:00 p.m. EST three business days after the date of service of [the Government's] motion[] to file a response * * * In the absence of good cause, failure to file a written response to the moving party's motion will be deemed a waiver of objection." (Prehearing Ruling at 6.)

As of December 10, 2010, six business days after service of the Government's motion for summary disposition, Respondent had not filed a response. Respondent is therefore deemed to waive any objection to the Government's motion. This waiver of objection does not mean that I will

automatically grant the relief requested by the Government. Instead, I will carefully consider the merits of the Government's positions, taking into consideration Respondent's lack of objection, but only granting whatever relief may be warranted by the law and the facts.

II. The Parties' Contentions

A. The Government

In support of its motion for summary disposition, the Government asserts that on December 1, 2010, the Maryland State Board of Physicians² issued an order immediately suspending Respondent's Maryland medical license, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Maryland, the jurisdiction in which he maintains his DEA registration. The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Deputy Administrator that Respondent's COR be revoked and any pending application for renewal or modification be denied. In support of its motion, the Government cites agency precedent and attaches the "Order for Summary Suspension of License to Practice Medicine" issued by the Maryland State Board of Physicians, marked for identification as Exhibit A.

B. Respondent

As noted above, Respondent did not respond to the Government's Motion for Summary Disposition or seek an extension within the deadline for response and is therefore deemed to waive objection.

III. Discussion

At issue is whether Respondent may maintain his DEA COR given that Maryland has suspended his state license to practice medicine.

Under 21 U.S.C. 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this agency has consistently held that a person may not hold a DEA registration if he is without appropriate authority under the laws of the state in which he does business. *See Scott Sandarg, D.M.D.*, 74 FR 17,528 (DEA 2009); *David W. Wang, M.D.*, 72 FR 54,297 (DEA 2007); *Sheran*

¹ For the same reasons that led me to order that Respondent's registration be immediately suspended, I conclude that the public interest necessitates that this Order be effective immediately. *See* 21 CFR 1316.67.

² The Government refers to the Maryland medical licensing body as the "Maryland Board of Medicine" (Mot. Summ. Disp. at 1.) Government Exhibit A, however, suggests the correct name is the Maryland State Board of Physicians. (Gov't Ex. A at 1.)

Arden Yeates, M.D., 71 FR 39,130 (DEA 2006); Dominick A. Ricci, M.D., 58 FR 51,104 (DEA 1993); Bobby Watts M.D., 53 Fed. Reg. 11,919 (DEA 1988).

Summary disposition in a DEA suspension case is warranted even if the period of suspension of a respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because "revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement." *Stuart A. Bergman, M.D.*, 70 FR 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.*, 70 FR 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. *See Layfe Robert Anthony, M.D.*, 67 FR 35,582 (DEA 2002); *Michael G. Dolin, M.D.*, 65 FR 5661 (DEA 2000); *see also Philip E. Kirk, M.D.*, 48 FR 32,887 (DEA 1983), *aff'd sub nom. Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984). *Accord Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent does not contest, that Respondent's Maryland medical license is presently suspended. This allegation is confirmed by Government Exhibit A. I therefore find there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in Maryland. Because "DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices," *Sheran Arden Yeates, M.D.*, 71 FR 39,130, 39,131 (DEA 2006), I conclude that summary disposition is appropriate. It is therefore

Ordered that the hearing in this case, scheduled to commence on February 7, 2011, is hereby *canceled*.

Recommended Decision

I grant the Government's motion for summary disposition and recommend that Respondent's DEA COR BZ4692756 be revoked and any pending applications denied.

Dated: December 10, 2010.

Timothy D. Wing,

Administrative Law Judge.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11-66]

James L. Hooper, M.D.; Decision and Order

On August 9, 2011, Chief Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached recommended decision. On August 25, 2011, the Respondent filed Exceptions to the ALJ's decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, and Respondent's Exceptions, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended order.¹

In his Exceptions, Respondent contends "that the proper decision is suspension" of his DEA Registration to be effective co-extensively with the one-year suspension of his state license to practice medicine. Exceptions at 1. He argues that because his state license has been suspended for a definite period after which it will be "automatic[ally] reinstated[d]," his case is unlike those cases relied on by the Government and ALJ because they involved state suspensions which were of an indefinite or indeterminate duration. *Id.*

According to Respondent, the Agency's decision in *Anne Lazar Thorn, M.D.*, 62 FR 12847 (1997), stands for the proposition that the Agency's consistent practice of revoking registrations based on a loss of state authority "rests on the indefinite nature of a State suspension." Exceptions at 1-2. Respondent quotes the following passage from *Thorn*:

[T]he Acting Deputy Administrator recognizes that he has discretionary authority to either revoke or suspend a DEA registration. However, given the indefinite nature of the suspension of Respondent's state license to practice medicine, the Acting Deputy Administrator agrees with [the ALJ] that revocation is appropriate in this case.

Id. at 2 (quoting 62 FR at 12848).

Notwithstanding the implication of the above passage, no decision of this Agency has held that a suspension (rather than a revocation) is warranted where a State has imposed a suspension of a fixed or certain duration. To the

contrary, in the case of practitioners, DEA has long and consistently interpreted the CSA as mandating the possession of authority under state law to handle controlled substance as a fundamental condition for obtaining and maintaining a registration. *See, e.g., Leonard F. Faymore*, 48 FR 32886, 32887 (1983) (collecting cases). As the *Thorn* decision further explained:

DEA has consistently interpreted the Controlled Substances Act to preclude a practitioner from holding a DEA registration if the practitioner is without authority to handle controlled substances in the state in which he/she practices. This prerequisite has been consistently upheld.

* * * * *

The Acting Deputy Administrator finds that the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather it is whether the Respondent is currently authorized to handle controlled substances in the state. In the instant case, it is undisputed that Respondent is not currently authorized to handle controlled substances in the [state in which she practices medicine]. Therefore, * * * Respondent is not currently entitled to a DEA registration.

62 FR at 128438 (citing and quoting 21 U.S.C. 823(f) and 802(21) and collecting cases). Accordingly, in *Thorn*, the Agency rejected the Respondent's contention that her registration should be suspended rather than revoked.

Respondent nonetheless argues that "[r]evocation is not mandated for a [state license] suspension for a time certain," and that "[i]n such circumstances, suspension of the [DEA registration] is the more appropriate remedy." Exceptions at 3. Respondent returns to the *Thorn* language that "[t]he Acting Deputy Administrator recognizes that he has the discretionary authority to either revoke or suspend a DEA registration," and argues that "[t]here are reason[s] the statutory framework (21 U.S.C. 824(a)) provides for both suspension and revocation. The [ALJ's] Recommended Decision reads the suspension option out of the statute." *Id.*

It is acknowledged that the opening sentence of section 824(a) provides that a registration "may be suspended or revoked by the Attorney General" upon the Attorney General's finding that one of the five grounds set forth exist. 21 U.S.C. 824(a). However, Respondent does not elaborate on the "reason[s]" Congress granted the Agency authority to suspend or revoke and how they apply in the context of a proceeding brought under section 824(a)(3). In any event, this general grant of authority in imposing a sanction must be reconciled with the CSA's specific provisions which mandate that a practitioner hold

¹ All citations to the ALJ's recommended decision are to the slip opinion as issued by the ALJ.