

Dated: April 5, 2018.
Charles Wm. Dorman,
U.S. Administrative Law Judge.

[FR Doc. 2021-06583 Filed 3-30-21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Eric R. Shibley, M.D.; Decision and Order

On October 16, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Eric R. Shibley, M.D. (hereinafter, Registrant) of Seattle, Washington. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FN1977290. It alleged that Registrant is without "authority to handle controlled substances in the State of Washington, the state in which [Registrant is] registered with the DEA." *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that the Washington Medical Commission issued an Ex Parte Order of Summary Suspension on August 17, 2020. *Id.* at 1. This Order, according to the OSC, summarily suspended Registrant's state Physician and Surgeon License because of Registrant's "improper prescribing of controlled substances." *Id.* at 1–2. The OSC concluded that because Registrant's medical license was suspended, Registrant lacks the authority to handle controlled substances in the State of Washington. *Id.* at 2.

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. OSC, at 2–3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

A DEA Diversion Investigator (hereinafter, DI) served the OSC on Registrant's legal counsel on October 19, 2020. Request for Final Agency Action, dated December 31, 2020 (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 9 (DI's Declaration). By email dated November 2, 2020, Registrant's counsel informed the DI that "he forwarded a copy of the [OSC] to [Registrant]" and that Registrant "did not plan to contest the matters raised in the [OSC]." *Id.* at

2; see also RFAAX 5 (Email chain—DEA and Registrant's counsel), at 1.

The Government forwarded its RFAA, along with the evidentiary record, to this office on December 31, 2020. In its RFAA, the Government represented that "more than 30-days have passed since Registrant received the [OSC]; however, Registrant has not submitted to DEA a request for hearing." ¹ RFAA, at 2. The Government requested an issuance of an agency final order that "(1) holds that Registrant has waived his opportunity for a hearing, and otherwise failed to respond to the OTSC; and (2) revokes Registrant's DEA COR pursuant to 21 U.S.C. 802(21), 823(f) and 824(a)(3)." *Id.* at 2.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant by November 2, 2020. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FN1977290 at the registered address of 4700 36th Avenue SW, Seattle, Washington 98126. RFAAX 1, at 1. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.*

The Status of Registrant's State License

On August 17, 2020, the State of Washington Department of Health Washington Medical Commission (hereinafter, Commission) issued an Ex Parte Order of Summary Suspension (hereinafter, Order of Summary Suspension) suspending Registrant's

license to practice as a physician and surgeon in Washington State. RFAAX 3, at 1. According to the Order of Summary Suspension, Registrant prescribed controlled substances on multiple occasions from January 2, 2020, to July 1, 2020, while under an Order of Summary Restriction issued by the Commission. *Id.* at 2.

The Order of Summary Restriction issued on January 2, 2020, "demonstrated Respondent's substandard care of patients with regard to his prescribing of controlled substances posed an immediate risk to patients and the public welfare." *Id.* at 2. The Order of Summary Suspension concluded that "[b]ecause [Registrant] has continued to prescribe controlled substances in direct violation of the Commission's Order, he remains an imminent threat to public safety." *Id.*

The Order of Summary Suspension ordered the summary suspension of Registrant's license to practice as a physician and surgeon "pending further disciplinary proceedings by the Commission." *Id.* at 3.

According to Washington's online records, of which I take official notice, Registrant's license is still summarily suspended.² Washington State Department of Health Provider Credential Search, <https://fortress.wa.gov/doh/providercredentialsearch/> (last visited date of signature of this Order). Washington's online records show that Registrant's medical license remains revoked. *Id.*

Accordingly, I find that Registrant currently is neither licensed to engage in the practice of medicine nor registered to dispense controlled substances in Washington, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued

² Under the Administrative Procedure Act, an agency "may take official notice of facts at any stage in a proceeding—even in the final decision." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at dea.addo.attorneys@dea.usdoj.gov.

¹ The Government also represents that the Registrant has not "otherwise filed a response with the agency following the issuance of the OTSC." RFAA, at 2.

under section 823 of the Controlled Substances Act (hereinafter, CSA) “upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.” With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner’s registration. *See, e.g., James L. Hooper, M.D.*, 76 FR 71,371 (2011), *pet. for rev. denied*, 481 F. App’x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.*, 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term “practitioner” to mean “a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner’s registration, Congress directed that “[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner’s registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper*, 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.*, 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.*, 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton*, 43 FR at 27,617.

According to Washington statute, “A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner’s profession.” Wash. Rev. Code § 69.50.308(j) (West, Westlaw current with effective legislation through Chapter 5 of the 2021 Regular Session of the Washington Legislature). Additionally, a “‘prescription’ means

an order for controlled substances issued by a practitioner duly authorized by law or rule in the state of Washington to prescribe controlled substances within the scope of his or her professional practice for a legitimate medical purpose.” Wash. Rev. Code § 69.50.101(nn) (West, Westlaw current with effective legislation through Chapter 5 of the 2021 Regular Session of the Washington Legislature). Further, “practitioner,” as defined by Washington statute, includes, “[a] physician under chapter 18.71 RCW.” *Id.* at 69.50.101(mm)(1).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Washington. As already discussed, a physician must be a licensed practitioner to dispense or prescribe a controlled substance in Washington. Thus, because Registrant lacks authority to practice medicine in Washington and, therefore, is not authorized to handle controlled substances in Washington, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant’s DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FN1977290 issued to Eric R. Shibley. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Eric R. Shibley to renew or modify this registration, as well as any other application of Eric R. Shibley, for additional registration in Washington. This Order is effective April 30, 2021.

D. Christopher Evans,

Acting Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 21–4]

Roozbeh Badii, M.D.; Decision and Order

On October 15, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Roozbeh Badii, M.D. (hereinafter, Respondent) of McLean, Virginia. OSC, at 1. The OSC proposed the revocation of

Respondent’s Certificate of Registration No. FB0526307. It alleged that Respondent is without “authority to handle controlled substances in the State of Virginia, the state in which [Respondent is] registered with the DEA.” *Id.* at 2. (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that the Virginia Department of Health Professions (hereinafter, VDHP) issued an Order of Mandatory Suspension on May 12, 2020. OSC, at 2. This Order, according to the OSC, immediately suspended Respondent’s Virginia state medical license. *Id.* “The VDHP ruling was issued following its finding, *inter alia*, of a prior ruling by the Maryland State Board of Physicians suspending [Respondent’s] medical license in that state.” *Id.*

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. OSC, at 3. (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated November 19, 2020, Respondent timely requested a hearing.¹ Hearing Request, at 1. According to the Hearing Request, Respondent’s Virginia medical license was suspended because the board of medicine in the state of Maryland believed that Dr. Badii practiced medicine while being impaired psychologically and the state of Virginia, “simply rubber stamped the findings of the state of Maryland.” *Id.* Respondent’s Hearing Request also claimed that “other states do not consider him currently impaired in any capacity,” and that Respondent wanted the opportunity to “prove that he is mentally healthy and no current threat to his patients.” Hearing Request, at 1 and 2.

The Office of Administrative Law Judges put the matter on the docket and assigned it to Chief Administrative Law Judge John J. Mulrooney II (hereinafter, the Chief ALJ). The Chief ALJ issued an Order and Briefing Schedule dated November 23, 2020. The Government timely complied with the Briefing Schedule by filing a Motion for Summary Disposition (hereinafter, MSD) on December 2, 2020. Order

¹ The Hearing Request was filed on November 20, 2020. Order and Briefing Schedule, dated November 23, 2020, at 1. I find that the Government’s service of the OSC on October 26, 2020, was adequate and that the Hearing Request was timely filed on November 20, 2020. *See also* Recommended Decision, at n.1.