practicing addiction psychiatry. Judge Randall also found it significant that Respondent cooperated with law enforcement by fully disclosing his unlawful conduct, by providing information against others, and by assisting in undercover buys.

Therefore, the Deputy Administrator agrees with Judge Randall that it would not be in the public interest to deny Respondent's application. However given the egregiousness of Respondent's past behavior, Judge Randall recommended that restrictions be imposed on Respondent's registration that would ''add a measure of protection to the public interest, while affording [Respondent] the opportunity to demonstrate his ability and willingness to handle controlled substances responsibly in his medical practice.'' Judge Randall recommended that Respondent's application for registration be granted subject to the following restrictions:

(1) The Respondent must resubmit a registration application reflecting his ''Proposed Business Address'' as required by regulation;

(2) The Respondent be granted a Certificate of Registration only for Schedules III, IV and V;

(3) By not later than two years after the date of the final order, the Respondent shall submit to the local DEA office evidence of successful completion, after August of 1999, of formal training in the proper handling or prescribing of controlled substances. Such training should be provided by an accredited institution at the Respondent's own expense;

(4) For three years after the effective date of the final order in this case, the Respondent shall submit, on a quarterly basis, a log of all of the controlled substances he has prescribed, administered or dispensed during the previous quarter, to the Special Agent in Charge of the nearest DEA office, or his or her designee. The log should include: the patient's name; the date that the controlled substance was prescribed, administered or dispensed; and the name, dosage and quantity of the controlled substance prescribed, administered or dispensed. If no controlled substances are prescribed, administered or dispensed during a given quarter, the Respondent shall indicate that fact in writing, in lieu of submission of the log. Review of such a log should provide adequate assurances for his future responsible conduct as a registrant.

The Deputy Administrator agrees with Judge Randall that Respondent's application for registration should be granted and that it is appropriate to impose restrictions on such registration. However, the Deputy Administrator finds it unnecessary to require Respondent to resubmit an application listing his proper business address. At the hearing in this matter, Respondent requested that his application be modified to reflect the address of his current place of employment. The Deputy Administrator finds that this request is sufficient to modify his application and a new application for registration is not required. However, if Respondent's place of employment has changed from that represented at the hearing, a new written request for modification of the address on his application must be submitted.

In addition, the Deputy Administrator disagrees with Judge Randall's recommendation that Respondent be given two years to present evidence of successful completion of formal training in the proper handling or prescribing of controlled substances. Given the nature of Respondent's past conduct, the Deputy Administrator finds that it is in the public interest for such training to be completed within one year of being issued his DEA registration.

Finally, the Deputy Administrator believes that it is prudent to require Respondent to continue his affiliation with the PHP for three years regardless of whether such affiliation is required by the Board.

Therefore, the Deputy Administrator concludes that Respondent should be granted a DEA Certificate of Registration in Schedules III, IV and V subject to the following restrictions:

(1) By not later than one year after the Certificate of Registration is issued, Respondent shall submit to the DEA office in Nashville, Tennessee evidence of successful completion, after August of 1999, of formal training in the proper handling or prescribing of controlled substances. Such training should be provided by an accredited institution at the Respondent's own expense.

(2) For three years after the issuance of the Certificate of Registration, Respondent shall submit, on a quarterly basis, a log of all of the controlled substances he has prescribed, administered, or dispensed during the previous quarter, to the Resident Agent in Charge of the DEA office in Nashville, Tennessee, or his or her designee. The log should include: The patient's name; the date that the controlled substance was prescribed, administered or dispensed; and the name, dosage and quantity of the controlled substance prescribed, administered, or dispensed. If no controlled substances are prescribed, administered or dispensed during a given quarter, the Respondent shall indicate that fact in writing, in lieu of submission of the log.

(3) Respondent shall continue his affiliation with the Tennessee Medical Foundation's Physicians' Health Program for at least three years from the issuance of the Certificate of Registration, regardless of whether such affiliation is required by the Tennessee Board of Medical Examiners.

Accordingly, the Deputy administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for registration submitted by Michael Alan Patterson, M.D., be, and it hereby is, granted subject to the above described restrictions. This order is effective upon the issuance of the DEA Certificate of Registration, but no later than March 6, 2000, and is the final agency action for appellate purposes pursuant to 21 U.S.C. 877.

Dated: January 18, 2000.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 00–2541 Filed 2–3–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 96–41]

Paul W. Saxton, D.O.; Denial of Application for Fees and Expenses Under the Equal Access to Justice Act

On July 15, 1996, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Paul W. Saxton, D.O. (Respondent), proposing to revoke his DEA Certificate of Registration AS9420059, and to deny any pending application for renewal of such registration. The Order to Show Cause alleged that Respondent's continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 823(f) and 824(a)(4).

Following a lengthy hearing and post-hearing filings, Administrative Law Judge Gail A. Randall issued her Recommended Rulings, Findings of Fact, Conclusions of Law and Decision on October 6, 1998, recommending that no adverse action be taken against Respondent's DEA registration. On November 5, 1998, Respondent's counsel filed an Application for Attorney's Fees and Expenses (Application), under the Equal Access to Justice Act, 28 U.S.C. 2412.

On November 19, 1998, Judge Randall transmitted the record, including Respondent's Application, to the then-Acting Deputy Administrator for final agency action. After a careful review of the entire record, the Deputy Administrator issued his final order in this matter on May 3, 1999, adopting, in full, the Administrative Law Judge's findings of fact and conclusions of law, and continuing Respondent's registration without taking any adverse action. See Paul W. Saxton, D.O., 64 FR 25073 (May 10, 1999). In his final order, the Deputy Administrator denied Respondent's application for attorney's fees finding that Respondent's Application was premature because ''such a request may only be filed after a party has prevailed in an action brought by DEA.'' *Id.* at 25074.

On May 18, 1999, after issuance of the final order, Respondent's counsel filed a letter requesting to renew his Application filed on November 5, 1998, since the agency's final order had now been entered. On June 17, 1999, the Government filed an Answer in Opposition to Respondent's Application for Attorneys' Fees and Expenses Under the Equal Access to Justice Act. Judge Randall then provided Respondent an opportunity to respond to the Government's submission, and on July 19, 1999, Respondent filed a Response to the Government's Answer.

On September 22, 1999, Judge Randall issued her Supplemental Decision: Recommended Decision, Findings and Conclusions of the Administrative Law Judge Concerning the Respondent's Application for Fees and Expenses Under the Equal Access to Justice Act (Supplemental Decision), recommending that Respondent's Application be denied. Neither party filed exceptions to Judge Randall's Supplemental Decision and on October 25, 1999, the record concerning Respondent's Application was forwarded to the Deputy Administrator.

Pursuant to 28 CFR 24.307, the ''decision of the adjudicative officer will be reviewed to the extent permitted by law by the Department in accordance with the Department's procedures for the type of proceeding involved. The Department will issue the final decision on the application.'' ''Department'' is defined as ''the relevant departmental component which is conducting the adversary adjudication (*e.g.,* Drug Enforcement Administration * * *.)'' See 28 CFR 24.102. Therefore, the Deputy Administrator hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. This final order replaces and supersedes the final order issued on December 22, 1999. The Deputy Administrator adopts, in full, the Supplemental Decision: Recommended Decision, Findings and Conclusions of the Administrative Law Judge Concerning the Respondent's Application for Fees and Expenses Under the Equal Access to Justice Act. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that a party may file a claim for attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pursuant to 5 U.S.C. 504(a)(1), which incorporates the EAJA into the Administrative Procedure Act, an agency that conducts adversary adjudications shall award fees and expenses if: (1) The claimant is a prevailing party in the underlying action; (2) the position of the Government was not substantially justified; and (3) there were no special circumstances that would make an award against the Government unjust. An administrative hearing to revoke a DEA Certificate of Registration to dispense controlled substances is considered an ''adversary adjudication'' covered by the EAJA. See 28 CFR 24.103(a)(1).

The Deputy Administrator concludes that Respondent is a prevailing party and has therefore met the initial qualifying threshold for an award of fees and expenses under the EAJA. A ''prevailing party'' is one who can be found to have essentially succeeded on the claims for relief. See *Brown* v. *Secretary of Health and Human Servs.* 747 F.2d 878, 883 (3rd Cir. 1984). In the underlying matter upon which this Application is based, Respondent contended that his continued registration would not be inconsistent with the public interest, and that his DEA registration should not be revoked. The Deputy Administrator agreed with Respondent and ordered that no adverse action be taken against Respondent's DEA registration. See Saxton, 64 FR at 25080. Therefore, the Deputy Administrator concludes that Respondent has succeeded on his claims for relief.

In addition, for a claimant to be considered a prevailing party eligible for an award of attorney's fees and other expenses the claimant must be an individual whose net worth does not exceed $2,000,000 at the time the adversary adjudication was initiated. See 5 U.S.C. 504(b)(1)(B). In his Application, Respondent asserts that he has a net worth of less than $2,000,000. The Government does not dispute Respondent's assertion. Therefore, the Deputy Administrator concludes that Respondent has met the initial threshold that he is a prevailing party eligible for attorney's fees and other expenses under the EAJA.

Next, it must be determined whether the position of the Government was substantially justified. A presumption exists that a prevailing party may recover an EAJA award, unless the position of the Government was substantially justified. See 28 U.S.C. 2412(d)(1)(A); 28 CFR 24.106(a). Once alleged by the claimant that the position of the Government was not substantially justified, the burden of proof shifts to the Government to demonstrate by a preponderance of the evidence that its position was substantially justified and that attorney's fees and other expenses should not be awarded. See *United States* v. *One Parcel of Real Property,* 960 F.2d 200, 208 (1st Cir. 1992).

The ''position of the United States'' is defined as being that position ''in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based.'' 28 U.S.C. 2412(d)(2)(D). Although ''position'' encompasses the Government's prelitigation conduct and subsequent litigation position, only one determination of substantial justification to the entire matter should be made. See *Commissioner, INS* v. *Jean,* 496 U.S. 154, 160–62 (1990) (''While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.'') Therefore, the Deputy Administrator concludes that the Government's position as a whole must be considered in determining whether there was substantial justification for that position.

The test for substantial justification is whether a reasonable person would find that the Government's position was reasonable in both fact and law. See *Derickson Co.* v. *NLRB,* 774 F.2d 229, 232 (8th Cir. 1985); *Enerhaul, Inc.* v. *NLRB,* 710 F.2d 748, 750, reh'g denied, 718 F.2d 1115 (11th Cir. 1983); *see also* H.R. Conf. Rep. No. 96–1434 at 22 (1980). To meet its burden of demonstrating the substantial justification for its position, the Government must make a ''strong showing'' and must demonstrate that it ''had a reasonable basis for the facts alleged, that it had a reasonable basis in law for the theories it advanced, and that the former supported the latter.'' One Parcel of Real Property, 960 F.2d at

208 (quoting *Sierra Club* v. *Secretary of the Army,* 820 R.2d 513, 517 (1st Cir. 1987)).

Also, it is noteworthy that pursuant to 28 CFR 24.105(c), ''[n]o presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.'' See also, Griffon v. *Department of Health and Human Servs.,* 832 F.2d 51, 52 (5th Cir. 1987). As Judge Randall noted, ''the government may demonstrate that its position was substantially justified, even though it was a losing one.''

In this case, the Deputy Administrator agrees with Judge Randall's conclusion that ''an evaluation of the record as a whole supports the position that the Government was substantially justified in initiating and pursuing the underlying cause of action.'' As noted by Judge Randall, ''the final order recognized, '[w]ithout a doubt, the Government had legitimate concerns as a result of its initial investigation of the Respondent and his prescribing practices' '' See Saxton, 64 FR at 25079.

Judge Randall concluded that both the Government and Respondent incorrectly reargued the evidence regarding each of the five public interest factors in asserting whether the Government's position was substantially justified. The test is not whether each individual litigated claim was substantially justified, but rather oversell, whether the Government's litigation and prelitigation position was substantially justified. See Jean, 496 U.S. at 160–62. As further support, the Government's ''position,'' in the singular, suggests that only one finding concerning substantial justification need by made. See *id.* at 159. After evaluating the record in this matter, Judge Randall concluded ''that in the eyes of a reasonable person, the Government's position was reasonable both in fact and in law.''

The state agency responsible for regulating health-care professionals had received complaints over the years regarding Respondent's prescribing practices. An initial evaluation of patient profiles showed that Respondent's prescribing practices exceeded the recognized prescribing standards established by the Physician's Desk Reference (PDR). While the PDR does not establish binding standards on physicians, exceeding those standards is a sufficient indicator that further investigation into the physician's prescribing is warranted. See *Saxton,* 64 FR at 25078; *see also Margaret E. Sarver, M.D.,* 61 FR 57896, 57900 (1996). An expert in pain management reviewed Respondent's prescribing patterns and patient charts for the Government and found ''consistent patterns supporting the contention that [Respondent] has been inappropriately and excessively prescribing controlled substances, particularly opioids.'' See *Saxton,* 64 FR at 25074. Also, Respondent failed to inventory his controlled substances properly and failed to retain the required records needed to ensure accountability for the controlled substances maintained and dispensed in his medical practice. See *id.* at 25079. Failure to maintain proper records has previously been a basis for revocation of a DEA Certificate of Registration. See *Farmacia Ortiz,* 61 FR 726, 727–728 (1996); *Harlan J. Borcherding, D.O.,* 60 FR 28796, 28798 (1995). Finally, at the time the Government initiated its action against Respondent, it had evidence that Respondent had prescribed anabolic steroids for muscle enhancement in violation of state and Federal law. See *Saxton,* 64 FR at 25074, 25079.

Thus, the Deputy Administrator finds that the Government was substantially justified in pursuing the revocation of Respondent's DEA Certificate of Registration. Respondent ultimately prevailed because of the evidence that he presented at the hearing.

Respondent presented evidence that the medical community was in disagreement over the use of controlled substances in the treatment of chronic pain patients. Respondent's two experts testified that Respondent's method of pain management was a medically recognized form of chronic pain treatment. See *id.* at 25075. As Judge Randall stated, ''[t]he Respondent prevailed only after exploring and presenting evidence on the split in the medical community concerning the prescribing of controlled substances for chronic pain. The Respondent's witnesses were found to be more persuasive than those of the Government; yet, this does not mean that the Government was not substantially justified in its position or its case presentation.''

As to Respondent's recordkeeping violations, the Deputy Administrator concluded that revocation was not warranted not because the Government failed to prove its case, but because Respondent presented significant evidence of rehabilitation and remedial training. See *id.* at 25079. Judge Randall noted that ''this evidence does not eradicate the Respondent's prior wrongdoing, on which the Government's position was based; rather, this evidence of remedial action merely added weight in favor of the Respondent and enabled the Deputy Administrator, in his discretionary authority, to find for the Respondent.''

Regarding Respondent's illegal prescribing of anabolic steroids, the Deputy Administrator agrees with Judge Randall that ''Respondent ultimately prevailed, not because the Government failed to prove its case, but because the Deputy Administrator, in his discretionary authority, found persuasive the Respondent's rehabilitation evidence that he had ceased his unlawful prescribing of anabolic steroids.''

Therefore, Judge Randall found that ''the Government's actions in preparing and pursuing the revocation of the Respondent's DEA Certificate of Registration were substantially justified.'' The Deputy Administrator agrees. While Respondent ultimately prevailed in the underlying matter, the Government's position was reasonable and therefore substantially justified.

The Deputy Administrator finds that neither party alleged that special circumstances exist that would make an award of attorney's fees and other expenses under the EAJA unjust.

Judge Randall noted that the parties argued about the appropriate amount of attorney's fees to be awarded. However, Judge Randall found it unnecessary to decide this issue since she found that the Government's position was substantially justified and therefore recommended that no fees be awarded.

The Deputy Administrator agrees. While Respondent ultimately prevailed and his registration was not revoked, the Government's position was substantially justified. Therefore, Respondent's application for attorney's fees and other expenses must be denied.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 28 U.S.C. 2412, 5 U.S.C. 504, and 28 CFR 24.307, 0.100(b) and 0.104 hereby orders that the Application for Fees and Expenses under the Equal Access to Justice Act submitted by Paul W. Saxton, D.O., be, and it hereby is, denied. This final order is considered the final agency action for purposes of appellate review pursuant to 5 U.S.C. 504(c)(2) and 21 U.S.C. 877.

Dated: January 18, 2000.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 00–2535 Filed 2–3–00; 8:45 am]

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