and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: July 15, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–29]

Laurence T. McKinney; Revocation of Registration

On February 5, 2008, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Laurence T. McKinney, M.D. (Respondent), of Philadelphia, Pennsylvania. The Order immediately suspended and proposed the revocation of Respondent's DEA Certificate of Registration, BM7201267, as a practitioner, on the grounds that his continued registration was ''inconsistent with the public interest'' and ''constitute[d] an imminent danger to public health and safety.'' Show Cause Order at 1 (citing 21 U.S.C. 824(a)(4) & 824(d)).

More specifically, the Show Cause Order alleged that Respondent was ''one of the largest prescribers of schedule II controlled substances in the Philadelphia area[,]'' and that ''[f]rom October 5, 2004 to November 30, 2007 [had written] 3,101 prescriptions for schedule II narcotics.'' *Id.* Next, the Show Cause Order alleged that Respondent sold prescriptions for narcotics for $100 per prescription, that he had issued prescriptions to undercover law enforcement officers on five separate dates between December 14, 2007, and January 30, 2008, that he had either failed to perform a physical examination or had conducted only a ''cursory physical examination'' on the Officers, and that he had also written a prescription for one of the undercover Officer's fictitious wife. *Id.* at 1–2. The Show Cause Order further alleged that these ''prescriptions were not issued for a legitimate medical purpose or in the normal course of professional practice'' and thus violated both Federal and state laws and regulations. *Id.* at 2 (citing 21 U.S.C. 841(a); 21 CFR 1306.04(a)).

Based on the above, I also made the preliminary finding that Respondent had ''deliberately diverted controlled substances'' and that his ''continued registration during the pendency of these proceedings would constitute an imminent danger to the public health or safety because of the substantial likelihood that [he would] continue to divert controlled substances.'' *Id.* at 2. I therefore also ordered the immediate suspension of Respondent's registration. *Id.*

On February 15, 2008, Respondent, through his counsel, requested a hearing on the allegations. ALJ Ex. 2. The matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. Following pre-hearing procedures, a hearing was held on April 7, 2008 in Arlington, Virginia, at which both parties introduced testimonial and documentary evidence.[1] Upon conclusion of the hearing, both parties submitted briefs containing their proposed findings, conclusions of law and argument.

On May 5, 2008, the ALJ issued her recommended decision (ALJ). In her decision, the ALJ specifically rejected Respondent's testimony regarding his prescribing to the undercover patients finding that he was not credible. ALJ at 29. With respect to factor two (Respondent's experience in dispensing controlled substances), the ALJ concluded that ''the record establishes * * * that Respondent issued prescriptions to the undercover Officers for controlled substances without any meaningful physical examination or gathering sufficient information from the patients to arrive at a reasoned diagnosis or * * * to determine whether they had any condition at all warranting treatment with the drugs he prescribed to them.'' *Id.* at 29–30. The ALJ thus found ''that all the prescriptions Respondent issued to the undercover officers were not issued for a legitimate medical purpose.'' *Id.* at 30.

The ALJ further noted that various patient files introduced into evidence by the Government demonstrated that Respondent had not provided ''individualized attention'' to other patients. *Id.* Relatedly, while noting that Respondent had ''introduced into evidence patient files containing considerably more detailed information than those the Government offered,'' the ALJ reasoned that even if these files showed that Respondent had ''legitimately treated'' some patients, the files predated November 26, 2007, the date on which the Philadelphia Police Department had received a complaint about Respondent and did not ''diminish the weight of the evidence that he improperly prescribed controlled substances after it.'' *Id.*

With respect to factor four (Respondent's compliance with applicable laws), the ALJ concluded that Respondent had failed to comply with Pennsylvania law because he had issued prescriptions for controlled substances without doing proper physical examinations, taking adequate medical histories, documenting the patient's symptoms, his diagnosis and treatment recommendations, and that he had failed to counsel his patients regarding how the drugs should be taken, the appropriate dosage, and their side effects. *Id.* at 31. The ALJ thus concluded that ''Respondent violated applicable Pennsylvania law and also violated 21 CFR 1306.04, and thereby 21 U.S.C. 829(b).'' *Id.*

With respect to factor five (other conduct), the ALJ rejected Respondent's contention that he had prescribed pursuant to a good-faith belief that the undercover patients were in pain. *Id.* More specifically, the ALJ expressed her disbelief ''that Respondent did not know that the undercover Officers were not in pain but were trying to obtain controlled substances for other than a legitimate medical reason.'' *Id.* at 31. The ALJ further found that Respondent had ''refus[ed] to acknowledge his wrongdoing,'' and that there was ''little hope'' that ''he will act more responsibly in the future.'' *Id.*[2]

Based on her findings with respect to three of the factors, the ALJ concluded ''that Respondent is unwilling or unable to accept the responsibilities inherent in a DEA registration.'' *Id.* at 32. The ALJ thus recommended the revocation of Respondent's registration and the denial of any pending applications. *Id.*

Respondent filed exceptions to the ALJ's recommended decision. In this filing, Respondent raised thirty-three exceptions to the ALJ's decision.[3]

[1] The Government also introduced recordings of several undercover visits.

[2] The ALJ also found that Respondent had retained his state medical license and that this factor supported a finding ''that his continued registration would be in the public interest.'' ALJ at 29. The ALJ explained, however, that this factor was not dispositive because ''state licensure is a necessary but not sufficient condition for DEA registration.'' *Id.* The ALJ further found that while Respondent had been convicted of a felony, his offense did not involve an offense related to controlled substances. *Id.* at 30–31. The ALJ thus found that this factor supported his continued registration although it too was not dispositive.

[3] Respondent's Exceptions did not, however, comply with DEA's regulation which requires

Thereafter, the record was forwarded to me for final agency action.

Having considered the record as a whole, as well as Respondent's exceptions, I hereby issue this Decision and Final Order. While I do not adopt the ALJ's factual findings in their entirety, I adopt the ALJ's ultimate conclusions of law with respect to each of the statutory factors and her recommended sanction. I make the following findings of fact.

Findings

Respondent is a medical doctor who treats injury and trauma patients, as well as weight loss patients, at a clinic he operates in Philadelphia, Pennsylvania. Tr. 19–21. While Respondent previously held board certification in obstetrics and gynecology, he is no longer ''board certified in anything.'' *Id.* at 21.

In February 1998, Respondent pled guilty in Federal Court to two counts of mail fraud based on fraudulent billing practices. *Id.* at 48. Respondent was sentenced to a term of imprisonment of twelve months and one day which he served at the Federal Correctional Institution at Loretto, Pennsylvania, and in a halfway house.[4] *Id.* at 48–49; 266–67.

Respondent currently holds DEA Certificate of Registration, BM7201267, which before I suspended it, authorized him to handle controlled substances in schedules II through V as a practitioner at his registered location of 7514 Frankford Avenue, Philadelphia, Pa. GX 1, at 1. Respondent's registration does not expire until January 31, 2010. *Id.*

On November 26, 2007, the Philadelphia Police Department received a citizen's complaint which alleged that Respondent was prescribing controlled substances such as Xanax (alprazolam), and Percocet, a drug which contains oxycodone and acetaminophen.[5] GX 48. More specifically, the caller alleged that ''all the neighborhood kids know about'' Respondent, that all one had to do to get an appointment was to call his office and possibly tell him that ''you were referred by a neighbor,'' that ''the Doctor will tell you to come in and tell you to bring $100,'' and that ''[t]ell the doctor you have some type of aliment [sic] and he will write you a prescription for Xanax, Percocet, Oxycodone etc.'' *Id.*

Upon receipt of this tip, the Philadelphia Police Department's Intensive Drug Investigation Squad (IDIS) contacted DEA's Philadelphia Diversion Group, which had also received complaints about Respondent from local pharmacists. Tr. 154. As part of their investigation, the decision was made to have several IDIS members attempt to obtain prescriptions from Respondent. *Id.* at 83–84.

The First Undercover Visit

On December 6, 2007, an undercover Officer using the name of Nicole Hodge went to Respondent's office. *Id.* at 130. The Officer paid Respondent $100 in cash and told him that she had not been in an accident and did not have an injury but wanted a prescription for Percocet. *Id.* Respondent attempted to get the Officer to talk about an injury but she refused to. *Id.* Respondent refused to issue the prescription and told her to leave his office. *Id.* at 131. Respondent subsequently noted in Nicole Hodge's patient file that ''Pt. lied, Ask for Percocet. Patient is not injured.'' GX 23.

The Second Undercover Visit

On December 14, 2007, another IDIS Officer, who used the named Anthony Wilson, visited Respondent. After paying $100 in cash, Respondent asked the Officer whether he had been in an accident.[6] Tr. 86. The Officer stated that he had been. *Id.* Respondent then asked the Officer some unspecified question about pain; the latter answered that he ''hurt all over.'' *Id.* at 86–87. Moreover, the evidence includes a medical history form on which the Officer indicated as his complaint: ''Hurt All Over,'' that the location of his condition was ''all over,'' and that its severity was ''bad pain.'' GX 22, at 7.

According to the DEA Special Agent who debriefed the Officer, the latter did not exhibit any signs of injury and Respondent did not ask him to rate his pain level on a scale of one to ten. Tr. 87. The Officer reported that Respondent's physical examination was limited to touching him lightly on the shoulder and back; moreover, Respondent did not listen to his heart and lungs, and no one took his blood pressure. *Id.* at 88.

Respondent did not order any diagnostic tests such as an x-ray or mri. *Id.* at 198. Respondent nonetheless diagnosed the Officer as having back and neck contusions and prescribed to him 90 Percocet (10 mg.), 60 Xanax (1 mg.), and 60 Cataflam, a non-controlled substance. *Id.* at 89; GX 16. The prescription indicated that the Percocet should be taken every eight hours as needed for pain and that the Xanax should be taken every twelve hours as need for muscle spasms or anxiety. GX 16, at 2. Respondent did not, however, counsel the Officer regarding the dosing and frequency of taking the drugs, the drug's potential side effects and its interactions with other drugs. Tr. at 92.

Another form in the patient file indicates that the Officer's blood pressure was 120/82, as well as a height and weight. GX 22, at 5. Under the heading of ''history of pertinent facts,'' the form appears to state: ''Passenger in MVA driver side'' and ''$^{8}/_{10}$ pain scale.'' *Id.* Finally, another form entitled ''ROM—AMA Guides'' has a notation of ''+2'' in the blocks for ''Cervical Spine,'' ''Dorsal Spine'' and Lumbar/Sacral.'' *Id.* at 6.

While Respondent testified that either he or a nurse had taken the Officer's blood pressure, Tr. 312–13, the ALJ specifically credited the testimony of the DEA agent[7] regarding the various undercover visits and rejected Respondent's testimony pertaining to them. More specifically, the ALJ found that ''Respondent did not impress [her] as credible and appeared to try to tailor his testimony to suit his own purposes, particularly with respect to his insistence that he complied with Pennsylvania's requirements for prescribing controlled substances.'' ALJ at 29. I adopt the ALJ's credibility findings noting that she was in the best position to observe the demeanor of the respective witnesses. I therefore find that neither Respondent nor a nurse took the Officer's blood pressure during the visit. I further find that the history form for this visit contains no notation in the blocks for the patient's ''heart'' and ''lungs'' (nor in any of the other blocks save one in which findings pertaining to various bodily functions are recorded). I therefore further find that Respondent did not listen to Respondent's heart or lungs on this date.

The Third Undercover Visit

On January 3, 2008, the Officer returned to Respondent's office and again presented himself as Anthony Wilson and paid $100 for the visit. Tr.

citation to evidence of record which supports the exception. 21 CFR 1316.66(a).

[4] In March 2000, the State of Pennsylvania suspended Respondent's medical license for a period of four years based on his mail fraud convictions. Tr. 267. The State, however, stayed the suspension after nine months. *Id.* Shortly thereafter, Respondent was granted a new DEA registration. GX 1, at 2.

[5] Oxycodone is a schedule II controlled substance and derivative of opium. 21 CFR 1308.12(b)(1). Xanax is the brand name of alprazolam, a schedule IV controlled substance. *See id.* § 1308.14(c).

[6] According to the record, Respondent would instruct his ''patients'' when they called for an appointment that they should have cash. Tr. 92.

[7] As the ALJ explained, the Agent, in contrast to Respondent, ''appeared to be straightforward and candid.'' ALJ at 29.

97, 103. The same DEA Special Agent conducted surveillance of the visit. ALJ at 12.

Apparently while the Officer was in the waiting room, Respondent started calling out the names of patients. When Respondent called the Officer's undercover name, he asked him whether he was there for physical therapy. GX 3, at 2. At some point, the Officer was taken back to an exam room and was told by Respondent to take off his jacket. *Id.* The Officer stated to Respondent: ''last time you said I had neck and back contusions.'' *Id.* Respondent told the Officer to have a seat and asked him his first name. *Id.* The Officer answered: ''Anthony.'' *Id.*

Following an unintelligible statement of Respondent, the Officer offered to come back for physical therapy. *Id.* After Respondent was interrupted by several phone calls, the Officer offered to come back on Sunday for therapy and Respondent agreed. *Id.* The Officer then stated that the ''the first time I was here you didn't have therapy,'' and asked whether he had ''to fill out the paperwork again, or did she find my file?'' *Id.* Respondent answered: ''No that's all right, I saw it the other day, that's alright.'' *Id.* The Officer then asked whether if ''when I have the therapy and the medicine it's the same price or is it?'' *Id.* Respondent answered that it was the ''[s]ame price if you come in for just the prescription its 100 dollars, if you come in for the prescription and exam and therapy its 100 dollars, if you come in for just therapy its 100 dollars, o.k.'' *Id.*

During the visit, Respondent gave the Officer prescriptions for 90 Percocet (10/325 mg.) and 60 Xanax (1 mg.). *Id.* at 3; GX 17. While Respondent asked the Officer how he had been doing, Respondent limited his physical exam to pressing on the Officer's back and shoulder and did not listen to the Officer's heart and lungs or take his blood pressure. Tr. 99–100. Moreover, while it was less than three weeks since the Officer's previous visit (at which Respondent had also given him prescriptions for 90 Percocet and 60 Xanax, each of which should have lasted thirty days), Respondent did not question him about why he needed new prescriptions so soon. *Id.* at 102. Furthermore, once again, Respondent did not counsel the Officer about the two drugs. *Id.* Finally, the patient file for ''Anthony Wilson'' contains no documentation of this visit. *See* GX 22.

The Fourth and Fifth Undercover Visits

On January 18, at approximately 4:10 p.m., the Officer returned to Respondent's office and was accompanied by another Officer who used the name of Richard Johnson. Tr. 104. Respondent called for Johnson first, and asked him if it was his first visit. GX 5, at 1. Although the Officer had not previously been to Respondent's office, the Officer responded: ''No, I was here December 14th.'' [8] *Id.* Respondent then collected $100 from the Officer. *Id.*

About twenty minutes later, Respondent again asked the Officer his name. Upon being told ''Richard Johnson,'' Respondent asked the Officer: ''You said you been here before * * * you do construction right?'' *Id.* The Officer answered: ''Yes, sir.'' *Id.* After discussing the Officer's age and taking a phone call, Respondent asked the Officer: ''How you been doing since you [were] put on pain medication?'' *Id.* at 2. The Officer answered: ''pretty good.'' *Id.* When Respondent asked: ''Did it work real well?''; the Officer answered: ''Yes.''

Respondent next asked: ''you['ve] been taking the yellow ones three times a day?'' *Id.*[9] The Officer answered: ''Yes.'' *Id.* Respondent then stated: ''I had you on the blue ones at night''; the Officer commented: ''Yeah, at night.'' *Id.* Respondent then asked the Officer to ''stand up,'' and stated: ''7:05 p.m. Ok, what I'm going to do is refill your medication * * * we can finally get you out of here.'' *Id.* After taking a phone call, and commenting about people stealing pens from his office, Respondent noted that it was ''7:08 p.m.'' and stated: ''60 of the Xanax, 90 of the Percocet.'' *Id.* As evidenced by the actual prescriptions, Respondent prescribed 90 Percocet (10/325), which was to be taken every eight hours, and 60 Xanax 1 mg., which was to be taken every 12 hours. GX 18, at 2.

Respondent's physical exam was limited to tapping the Officer lightly on the back and shoulder. Tr. 112 Moreover, Respondent did not order any diagnostic tests. *Id.* at 113. During a subsequent search of Respondent's office, no patient file was found for Richard Johnson. *Id.* at 215.

Approximately 45 minutes later, Respondent saw the other Officer (Anthony Wilson) who was waiting in an exam room. GX 5, at 4. Respondent asked him ''how are you doing?,'' to which the Officer responded: ''I'll pay you now.'' [10] *Id.* About a minute later, Respondent entered the exam room and stated: ''I am going crazy right now, turn around this way.'' *Id.* In response, the Officer stated: ''I know it's been a long day.'' *Id.*

Respondent replied: ''You have no idea.'' *Id.* Respondent then stated: ''stand up facing me, try to bend down knees and touch your toes, come back up, alright, have a seat, look[s] like your doing a little better.'' *Id.* The Officer replied: ''Yes sir, yes sir.'' *Id.*

Respondent then stated: ''Last time I gave you Percocet 10's and Xanax right?'' *Id.* The Officer responded: ''Yes sir.'' *Id.* Respondent then stated: ''So that seems it gotta be working.'' *Id.* The Officer agreed, and added that ''the last time I didn't have any problems cashing the [unintelligible].'' *Id.* Respondent then stated ''script.'' *Id.* The Officer again commented to the effect that he had not had any problems filling his prescriptions. *Id.* at 5.[11] Respondent did not ask Wilson why he had returned only fifteen days after the previous visit. *See generally* GX 5, at 4–5.

During the visit, Respondent issued the Officer additional prescriptions for 90 Percocet (10/325 mg.) and 60 Xanax (1 mg.). GX 18, at 1. The prescriptions called for the Percocet to be taken every eight hours and for the Xanax to be taken every twelve hours. *Id.*

The Sixth and Seventh Undercover Visits

On the night of January 22, 2008, at 8:07 p.m., the Officer who had previously presented herself as Nicole Hodge went back to Respondent's office. Tr. 131. The Officer was accompanied by another Officer, who used the name ''John Rio,'' and apparently posed as her boyfriend. *See* GX 6, at 1.[12]

Shortly after her arrival, Respondent called her name and asked: ''Why are you here dear?'' GX 6, at 1. The Officer stated that she had been in an accident two days earlier. *Id.* Respondent asked: ''Nicole the last time you were here you

[8] The DEA Agent testified that Respondent attempted to find the Officer's patient file. Tr. 110–11.

[9] I take official notice of the Product Identification Guide found in the *Physician's Desk Reference* (2005). According to the Guide, Percocet 10/325 mg. tablets are yellow, *id.* at 311, and Xanax 1 mg. tablets are blue. *Id.* at 330. Based on this and the prescriptions Respondent wrote, I conclude that Respondent's references to the yellows ones and the blue ones were references to Percocet and Xanax respectively. In accordance with the Administrative Procedure Act and DEA regulations, Respondent is entitled to an opportunity to refute the facts which I have taken official notice by filing a motion for reconsideration within fifteen days of service of this Order, which shall begin on the date of mailing. *See* 5 U.S.C. 556(e); 21 CFR 1316.59(e).

[10] It is unclear whether Respondent had actually entered the exam room at this point or just stuck his head in it.

[11] Most of the remaining conversation between Respondent and the Officer centered on the Officer's problems with his ex-wife, although at one point the Officer stated: ''You said lower back and neck,'' and Respondent agreed. GX 5, at 5.

[12] According to GX 6, the Officers entered Respondent's office together. GX 6, at 1. It is unclear, however, whether they arrived in the same vehicle.

didn't have an injury remember?'' *Id.* The Officer answered: ''I know.'' *Id.* Respondent then asked the Officer whether she swore that she was injured this time. *Id.* The Officer answered that she had been ''out with my boyfriend and got hit by a car the other day.'' *Id.* The Officer then explained that ''I ran out before him * * * he pisses me off a lot.'' *Id.* Respondent laughed and asked: ''Well I'm sure you don't have anything to do with that at all, right?'' *Id.* The Officer then asked the Officer posing as her boyfriend: ''Did you push me in front of that car?''; the latter answered: ''No.'' *Id.*

Respondent then told ''John Rio'' to have a seat in an exam room and asked him: ''You been here before right?'' *Id.* The Officer answered ''Yeah,'' *Id.* although he had not been. Tr. 123. The female Officer then stated: ''I can hear you.'' GX 6, at 1. Respondent replied: ''I'm sure you can hear us, that's the point, we want you to hear us''; the female Officer responded: ''Oh.'' *Id.*

Respondent then asked the male Officer if he was having back pain. *Id.* The Officer answered affirmatively. *Id.* at 2. After some extraneous comments about his ex-wife, either Respondent or an assistant hooked the male Officer up to a physical therapy machine, recommended twenty minutes of treatment and started the machine. Tr. 126. The Officer then complained that the treatment ''hurts too much, man.'' GX 6, at 2. Respondent then told an assistant to ''cut it back to the minimum level''; the assistant acknowledged Respondent's order. *Id.* Several minutes later, the Officer disconnected himself from the machine and told Respondent's staff that he was doing so. Tr. 126–27. The record does not, however, establish whether Respondent was advised that the Officer had disconnected the machine.[13] *Id.* at 127.

At some point during the visit, Respondent issued to the Officer prescriptions for 90 Percocet (5/325 mg.); 30 Xanax (1 mg); and for Flexeril, a non-controlled muscle relaxant. GX 19, at 1–2. During the visit, while Respondent put two fingers on the Officer's back, he did not check the Officer's heart or lungs. Tr. 125. Nor did he counsel the Officer regarding the controlled substances he prescribed. *Id.* at 128–29. Moreover, during the subsequent search of Respondent's office, the authorities did not find a patient file for the Officer. *Id.* at 125. In his testimony, Respondent asserted that he maintained a file on the Officer and that this visit was probably the Officer's third visit with him. *Id.* at 313. I find, however, that it was the first visit.

Respondent then turned his attention to the female Officer and asked her if she had been driving. GX 6, at 2. The Officer answered: ''No, we were walking.'' *Id.* Respondent then asked her if she had gone to the hospital; Respondent answered: ''No.''

Respondent then asked her: ''What areas are hurting?'' *Id.* The video indicates that the Officer answered that her knee, left hip, and lower back were. GX 14. Next, Respondent asked her to numerically rank her pain level with one ''being no pain and ten being the worst possible pain.'' GX 6, at 2. The Officer stated that her pain level was ''a six.'' *Id.* Respondent then told her to ''let me take your pulse.'' *Id.*[14]

Following this, Respondent told the Officer: ''turn towards me, no turn, turn back and back up, back up, back up, that's good * * * within your comfort zone, if I ask you to do anything that causes severe pain don't do it.'' *Id.* The Officer acknowledged this by stating: ''OK.'' *Id.* at 3.

Respondent then directed the Officer to ''Put your head back, down to your chest, back to normal position, ok head to the side, the other side, back to normal position, rotate, to the right, back to normal position, bring your shoulders up.'' *Id.* The Officer then stated: ''like that hurts, down the center of my back.'' *Id.* Continuing, Respondent stated to the Officer: ''Side, other side, back to the normal position, backward and now touch your toes, turn around, relax your arms,'' and asked if there was ''no pain where [he was] pressing.'' *Id.* In response, the Officer answered: ''naw.'' *Id.*

Next, Respondent told the Officer to ''bring [your] right leg up as high as you can.'' *Id.* The Officer laughed. Respondent then told the Officer to ''bring [your] left leg up as high as you can.'' *Id.* He then told the Officer to ''have a seat up here''; the Officer responded: ''OK.'' *Id.*

Continuing, Respondent instructed the Officer to ''hold your hands together for me, relax, unpress them,'' and remarked ''that's tender.'' *Id.* Next, he told the Officer to ''lay on your back, cross your legs, raise your legs up,'' and then asked ''where's the pain?'' *Id.* The Officer answered: ''my lower back.'' Respondent then told the Officer to ''sit up,'' and asked her several questions regarding whether she had filed a report with her insurance company, and whether she was planning any legal action. *Id.*

Respondent then left the room to get another form. *Id.* When he returned, Respondent explained to the Officer that she had mild sprains of her neck, middle lower back, left hip and both knees. *Id.* He further noted that her injuries would take four to six weeks to heal and asked if she was paying cash for her prescription. *Id.* After the Officer stated ''Yep,'' Respondent told her that he was going to prescribe a drug that was a mild anti-inflammatory and pain medication, as well as a mild muscle relaxant to help her sleep. *Id.* With respect to the first drug, Respondent told the officer to ''only take one twice a day.'' *Id.* Respondent also told the Officer to take the muscle relaxant ''every 12 hours if you have [a] muscle spasm,'' and to ice her knees three times a day for fifteen minutes. *Id.* at 4. Respondent further told the Officer to come back ''in a few weeks'' and that she could come back without making an appointment. *Id.* Respondent prescribed sixty tablets of Vicoprofen, a schedule III controlled substance which contains hydrocodone and ibuprofen, and Soma (carisoprodol), a non-controlled substance. GX 19, at 3.

The Eighth and Ninth Undercover Visits

On January 30, 2008, at 6:45 p.m., the Officers who had previously posed as Anthony Wilson and Richard Johnson returned to Respondent's office. GX 7, at 1. At 7:49 p.m., Respondent asked: ''Who's for prescription refills?'' GX 7, at 1. The Officer posing as Anthony Wilson answered: ''Right here.'' *Id.*

Seven minutes later, the Officer told Respondent that the ''last time I have my wife with me, but she couldn't make it today, can I pick up her script for her?'' *Id.* Respondent replied: ''your wife, yeah, you can do that one time.'' *Id.* The Officer then stated: ''thank you, that's for her and that's for me.'' *Id.* Respondent then said: ''OK, you gotta tell me who the wife is.'' *Id.* The Officer stated that his wife's name was ''Shania Wilson.'' [15] *Id.* Respondent subsequently gave the Officer prescriptions issued in the name of T. Wilson for 60 Xanax (1 mg.), and 90 Percocet (5/325 mg.). *See* GX 20, at 1–2; GX 7, at 2.[16]

Shortly thereafter, Respondent asked the Officer: ''Which Percocet are you getting—either yellow or the greens

[13] The ALJ further found that during the visit, Respondent did not take a medical history or order any diagnostic tests. Tr. 126.

[14] In his testimony, Respondent maintained that he listened to the Officer's heart and lungs and that a nurse took her blood pressure. Tr. 310, 312, 334.

[15] As was the Officer's undercover identity, Shania Wilson was also a fictitious name.

[16] While Shania Wilson was not a real person, the DEA Agent testified that he believed that Respondent had a patient with the name that Respondent used on the prescriptions. Tr. 144, 229. To protect her privacy, her first name will not be used.

ones?'' GX 7, at 2. The Officer answered: ''the yellow.'' *Id.* Respondent then gave the Officer prescriptions issued in the name of Anthony Wilson for 60 Xanax (1 mg.) and 90 Percocet (10/325 mg.). *Id.*

Respondent also issued to the Officer posing as Richard Johnson prescriptions for 90 Percocet (10/325 mg.) and 60 Xanax (1 mg.). GX 20, at 3. During these visits, Respondent did not perform any type of examination on either of the Officers and did not even discuss with them their conditions. Tr. 144–45.

Regarding his issuance of the prescription to the first Officer's fictitious wife, Respondent testified that he told the Officer that he normally did not do this but that the Officer had stated that his wife ''was in such severe pain that she couldn't get out of bed, and she really needed a refill.'' *Id.* at 317. Respondent further asserted that the Officer had given him the name ''T ------,'' so he ''pulled her chart,'' and ''verified that,'' and ''wrote the prescription.'' *Id.* at 318. Respondent further maintained that he based his decision on when Ms. Wilson ''had her last refill.'' *Id.* Respondent, however, produced no evidence from this patient's chart establishing that he had previously diagnosed her with a condition that warranted the prescribing of Percocet and Xanax. Moreover, the only evidence on this issue indicated that the real Ms. Wilson had last been prescribed Percocet more than four months earlier. *See* GX 45, at 95.

The ALJ specifically found incredible Respondent's testimony regard his filling of the prescription for the fictional Ms. Wilson. ALJ at 18. While Respondent may have pulled a chart for the real Ms. Wilson, *see* GX 7, at 2 (Officer stating ''that's my wife there''); neither the transcript nor the video contain any evidence that the Officer had represented that his wife was in such severe pain that she could not get out of bed. Accordingly, I adopt the ALJ's credibility finding to the extent she rejected Respondent's testimony that the Officer represented that his wife was in severe pain and could not get out of bed and his testimony that he based his decision on when Ms. Wilson had her last refill.[17]

Respondent also testified regarding his having issued prescriptions before previous prescriptions which were for a thirty-day supply should have run out. As found above, Respondent issued prescriptions for both 60 Xanax and 90 Percocet to the Officer who posed as Anthony Wilson on December 14, 2007, and on January 3, 18, and 30, 2008. Moreover, Respondent issued prescriptions for Xanax and Percocet to Richard Johnson on both January 18 and 30, 2008.

Regarding these prescriptions, Respondent testified that ''[i]n one case the person indicated that they were going to be away during that particular week, and [asked] could they get their prescriptions a week early.'' Tr. 318–19. Respondent further explained that with respect to the other patient, ''it was a matter of not being able to locate that individual's chart, and because I couldn't locate the chart, at that particular time, which was I think the 18th of January or so, I took him at his word and good faith.'' *Id.* at 319.

Continuing, Respondent testified: ''I asked him, I said, 'Are you sure that it has been 30 days since you had your last prescription?' And he said, 'Yes, it was.' So, then, I wrote out his prescription.'' *Id.* Respondent also maintained that ''what happened was that [the] copy that was made did not get back into his chart, so when he came back on the 30th, it looked as though * * * he was * * * last here on around the 30th of December, so he was issued another prescription.'' *Id.*

Respondent further attempted to justify his issuance of early prescriptions by contending that there were ''safeguards'' in place against the early filling of his prescriptions. *Id.* More specifically, Respondent testified that if the patient ''either takes it to the same pharmacy or tries to use his insurance, they will notify me that the prescription has been filled less than 30 days, and then I can reject it.'' *Id.*

It is unclear whether the ALJ credited Respondent's testimony regarding his issuance of the early prescriptions to Anthony Wilson and Richard Johnson. *See* ALJ at 17–18.[18] In any event, as ultimate factfinder, I reject Respondent's testimony. Respondent's testimony was vague in that he did not identify which of the two undercover Officers had stated that he was going to be away and needed the new prescription/early refill.[19] Moreover, there is no credible evidence to support Respondent's claim that either Officer (Anthony Wilson or Richard Johnson) had ever represented that they were going to be away when their prescriptions ran out. As for Respondent's assertion that he asked the other patient whether it had been thirty days since the last prescription, there is likewise no credible evidence of his having done so.

I also reject Respondent's testimony regarding the safeguards to protect against the early filling of prescriptions. As for his contention that an insurance company would notify him if a patient attempted an early refill, notably the undercover officers did not use insurance, but rather, paid cash for their visits. As for Respondent's contention that the pharmacy would notify him that a patient was attempting an early refill, this would be true only if the patient used the same pharmacy. Drug abusers typically know better than to take an early refill to the same pharmacy (unless the pharmacy is in cahoots with the prescriber).

Other Evidence

Both parties also submitted into evidence additional patient records. The Government introduced sixteen patient files; nearly all of the patients received prescriptions for Percocet and Xanax. *See* GXs 24–39. Moreover, some of the files lack documentation of a physical exam and/or a medical history. *See* GX 25 (J.L.); GX 26 (E.L.); GX 27 (J.L.); GX 31 (A.L.); GX 32 (B.L.); GX 33 (O.G.); GX 34 (B.G.); GX 35 (J.L.); GX 36 (M.K.); GX 38 (R.K.); GX 39 (M.G.).

Respondent submitted four patient files into evidence. Notably, and in contrast to the patient files cited above, three of these files contain extensive documentation of the findings of an initial physical exam, Respondent's assessment/diagnosis, and his treatment recommendations. *See* RX 13A, at 670–72; RX 13B, at 764; RX 13D, at 4740–42. Moreover, each of the files contains documentation of the physical exams performed, the assessments made, and treatment recommendations given on followup visits. *See* RX 13A, at 677–78, 681–82, 694; 702, 703; RX 13B, at 774, 781, 788, 814; RX 13C, at 4024, 4035; RX 13D, at 4727–28, 4731, 4746, 4753, 4754, 4757, 4759–61, 4762, 4775.

Respondent also introduced into evidence copies of four different notices he had posted in his office. Two of these warned his patients that it was a felony offense to obtain prescription drugs by fraud or ''for other than prescribed reasons,'' as well as to resell them. RXs 1 & 2. Another notice listed numerous excuses used by drug-abusing patients to obtain early refills and which Respondent deemed to be ''unacceptable.'' RX 3.

In the fourth of the notices, Respondent stated that it had recently come to his attention that several of his

[17] In his testimony, Respondent did not identify when he had last seen the patient or the medical condition which justified the prescribing of Percocet and Xanax.

[18] In contrast to the testimony regarding Respondent's issuance of a prescription to Ms. Wilson which she specifically rejected, the ALJ did not expressly address whether she found this testimony credible. ALJ at 17–18.

[19] Under Federal law, a prescription for a schedule II controlled substance cannot be refilled. 21 U.S.C. § 829(a).

patients were ''faking their illnesses, injuring themselves intentionally an [sic] lying to [him] for the purpose of obtained controlled III prescriptions (I.E. Perococet [sic]) and controlled II prescriptions (Xanax).'' RX 4. Respondent further asserted that ''I am sickened by you individuals,'' and that ''I am not a 'dirty doctor.' '' *Id.* Respondent then maintained that he was going to discharge ''[a]ll patient [sic] referred by the individual who have not been in auto accidents who are not treating three times per week.'' *Id.* Respondent further stated that he would ''no longer prescribe Controlled III [and] Controlled II medications to anyone,'' and while he would continue to treat all of his legitimate patients, he would so ''without Controlled II or III medications.'' *Id.*[20]

Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to ''dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

(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 a registration should be revoked.'' *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).

Having considered all of the statutory factors, I conclude that on balance, the evidence pertaining to Respondent's experience in dispensing controlled substances (factor two) and his record of compliance with applicable laws related to the prescribing of controlled substances (factor four) establish that his continued registration would be ''inconsistent with the public interest.''[21] 21 U.S.C. 823(f). Moreover, while I do not find that all of the prescriptions he issued were illegal under Federal law, I agree with the ALJ's finding under factor five that Respondent has failed acknowledge his wrongdoing and therefore cannot be entrusted with a registration.

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

Under DEA regulations, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''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 [21 U.S.C. § 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id. See also* 21 U.S.C. 802(10) (defining the term ''dispense'' as meaning ''to deliver a controlled substance to an ultimate user * * * pursuant to *the lawful order of * * * a practitioner*, including the prescribing and administering of a controlled substance'') (emphasis added).

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. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) (citing *Moore*, 423 U.S. 122, 135 (1975)).[22]

Consistent with the standards of Federal law, Pennsylvania law prohibits ''[t]he * * * prescription of any controlled substance by any practitioner * * * unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession.'' 35 Pa. Stat. § 780–113(a)(14). Moreover, under the Pennsylvania Administrative Code, a practitioner must meet certain ''minimum standards''[23] before prescribing a controlled substance including taking an initial medical history and conducting ''an initial physical examination * * * unless emergency circumstances justify otherwise.''[24] 49 Pa. Code § 16.92(a)(1). Furthermore, ''[t]he physical examination shall include an evaluation of the heart, lungs, blood pressure and *body functions that relate to the patient's specific complaint.*'' *Id.* (emphasis added).

This regulation also requires that a physician provide ''[a]ppropriate counseling * * * to the patient regarding the condition diagnosed and the controlled substance prescribed.'' *Id.* § 16.92(a)(3). Furthermore, ''[u]nless the patient is in an inpatient care setting, the patient shall be specifically counseled about dosage levels, instructions for use, frequency and duration of use and possible side effects.'' *Id.*

Finally, the regulation requires that the physician record ''certain information * * * in the patient's medical record on each occasion when a controlled substance is prescribed,'' which ''shall include the name of the controlled substance, its strength, the

[20] Respondent also introduced into evidence copies of various prescriptions which he maintained had been written by patients who had stolen his prescription pads. *See* RXs 5–10.

[21] I acknowledge that there is no evidence that the Pennsylvania Board has taken action against Respondent's medical license (factor one). There is also no evidence that Respondent has been convicted of an offense related to controlled substances under Federal or State law (factor three).

[22] It is fundamental that a practitioner must establish a bonafide doctor-patient relationship in order to be acting ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' 21 CFR 1306.04(a); *see also United States* v. *Moore*, 423 U.S. 122, 142–43 (1975). The CSA, however, generally looks to state law to determine whether a doctor and patient have established a bonafide doctor-patient relationship. *See Kamir Garces-Mejias*, 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.*, 72 FR 50397, 50407–08 (2007); *Dispensing and Purchasing Controlled Substances Over the Internet*, 66 FR 21181, 21182–83 (2001).

[23] The regulation further states that it ''establishes minimum standards for the prescription, administration and dispensation of controlled substances by persons licensed to practice medicine and surgery in'' Pennsylvania. 49 Pa. Code § 16.92(b).

[24] Respondent does not contend that any of the undercover patients presented a medical emergency.

quantity and the date it was prescribed.'' *Id.* § 16.92(a)(4). The regulation further mandates that ''[o]n the initial occasion when a controlled substance is prescribed * * * to a patient, the medical record shall * * * include a specification of the symptoms observed and reported, the diagnosis of the condition for which the controlled substance is being given and the directions given to the patient for the use of the controlled substance.'' *Id.*

Applying these standards, I do not find that the Government has proved that each of the prescriptions issued to the undercover officers violated Federal law. The evidence nonetheless establishes that on several occasions, Respondent issued prescriptions to the undercover officers for Percocet and Xanax—both of which are highly abused drugs—that did not comply with Federal law. I further find—based on the lack of any supporting documentation of a physical exam in various files—that Respondent issued numerous other prescriptions for controlled substances in violation of Pennsylvania's regulation.

The Visits of Nicole Hodge

At the outset, I note that Respondent did not commit any illegal acts when he was first approached by ''Nicole Hodge.'' Rather, when the Officer asked for Percocet and made clear that she was not injured, Respondent told her to leave his office, and did not issue her any prescription.

Respondent's interaction with ''Nicole Hodge'' during the second visit is more problematic. The evidence shows that Respondent specifically questioned her about what areas were hurting and asked her to rank her pain level. The Officer unambiguously presented a medical complaint by stating that her ''lower back'' was hurting and that her pain level was ''six'' on a scale of one to ten. Respondent then put the Officer through several different range-of-motion tests. Moreover, Respondent took her pulse. Finally, Respondent diagnosed her injuries, explained his diagnosis and treatment recommendations, and provided the Officer with instructions on how to take the medicines he prescribed.

The ALJ did not credit Respondent's testimony that he listened to the Officer's heart and lungs and had a nurse take her blood pressure. Tr. 310 & 312. Moreover, there is no documentation in the patient file that he did so. *See* GX 23, at 7. That being said, as the Supreme Court explained in *Gonzalez*, ''the [CSA] and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.'' 546 U.S. at 270.

Likewise, numerous court decisions make plain that the offense of unlawful distribution requires proof that the practitioner's conduct went ''beyond the bounds of any legitimate medical practice, including that which would constitute civil negligence.'' *United States* v. *McIver*, 470 F.3d 550, 559 (4th Cir. 2006); *see also United States* v. *Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006) (''[T]he *Moore* Court based its decision not merely on the fact that the doctor had committed malpractice, or even intentional malpractice, but rather on the fact that his actions completely betrayed any semblance of legitimate medical treatment.''). As the Fourth Circuit has further explained, ''the scope of unlawful conduct under § 841(a)(1) [requires proof that a physician] used his authority to prescribe controlled substances * * * not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or some other illegitimate purposes, such as his own personal profit.'' 470 F.3d at 559 (int. quotations and citation omitted).

Accordingly, while Respondent's failure to listen to the Officer's heart and lungs and take her blood pressure violated Pennsylvania's regulation, the totality of the evidence surrounding this visit does not establish that he, in issuing the Vicoprofen prescription to Ms. Hodge, lacked a legitimate medical purpose and acted outside of the course of professional practice. The Officer presented a medical complaint, identified specific areas of her body as the cause of her pain, and complained of a relatively high pain level. Moreover, at no point did the Officer convey to Respondent that she was not in pain. Notwithstanding that Respondent failed to perform several steps required by Pennsylvania law, the physical exam he conducted cannot be characterized as deficient or cursory in the absence of expert testimony establishing as much.

At most, the evidence suggests that Respondent committed malpractice. It does not, however, support the conclusion that Respondent used his prescription writing authority to engage in illicit drug dealing when he issued the Vicoprofen prescription to Ms. Hodge.[25] *See McIver,* 470 F.3d at 559.

[25] The Government does not cite to any decision in which the Pennsylvania Courts or Medical Board have held that a physician's failure to comply with this regulation in all respects establishes a violation of the Pennsylvania Controlled Substances Act.

The Visits of Anthony Wilson

At his first visit, Anthony Wilson presented as his medical complaint that he ''Hurt All Over,'' that the location of his condition was ''all over,'' and its severity was ''bad pain.'' While Respondent did not ask the Officer to rate his pain level on a numerical scale, the Government offered no evidence to show that a practitioner must do so when the patient has already indicated that he has ''bad pain.''

The evidence further establishes that Respondent's physical exam was limited to touching him lightly on the shoulder and back, that Respondent did not listen to his heart and lungs, and that neither Respondent nor anyone else took his blood pressure. Based on this physical exam, and without ordering any diagnostic testing, Respondent diagnosed the Officer as having back and neck contusions and issued him prescriptions for 90 Percocet (10 mg.), 60 Xanax (1 mg.), as well as Cataflam, a non-controlled drug.[26] Respondent did not, however, counsel the patient regarding the taking of the drugs. At a minimum, Respondent's conduct violated Pennsylvania's Administrative Regulation pertaining to the prescribing of controlled substances.[27]

On January 3, 2008—less than three weeks later—the Officer returned. While Respondent asked the Officer how he was doing and pressed on his back and

[26] Based on the dosing instructions, both the Percocet and Xanax should have lasted thirty days.

[27] Respondent's conduct creates a strong suspicion that his prescribing exceeded the course of professional practice as this term is used in Federal law and was also not ''in accordance with treatment principles accepted by a responsible segment of the medical profession'' as required by Pennsylvania law. 35 P.S. § 780–113(a)(14). But while the Government cited several cases which upheld the convictions of physicians who engaged in similar conduct to Respondent, in all but one of the cases there was expert testimony establishing that the physician's conduct exceeded the bounds of professional practice. *See United States* v. *Bek,* 493 F.3d 790, 799–800 (7th Cir. 790); *McIver,* 470 F.3d at 556; *Feingold,* 454 F.3d at 1005; *United States* v. *Alerre,* 430 F.3d 681, 686 (4th Cir. 2005).

Moreover, in the only case cited by the Government in which there was no expert testimony, the undercover officer made clear that he was seeking Percocet to party and would share the drugs with others. *United States* v. *Celio,* 230 Fed. Appx. 818, 822 (10th Cir. 2007). By contrast, in this case, with the exception of the first visit of Nicole Hodge, the undercover officers frequently complained of pain and made no statements which indicated that they were seeking the drugs for non-medical purposes.

The Government also cites a state case to contend that ''expert testimony is not always necessary to determine whether a practitioner may be convicted under'' the Pennsylvania statute. Gov. Prop. Findings at 11 n.2 (citing *Commonwealth* v. *Manuel,* 844 A.2d 1 (Pa. Super. Ct. 2004). Notwithstanding the court's statement in *Manuel,* there, the State presented expert testimony as to the appropriateness of the physician's prescribing practices. *See* 844 A.2d at 11.

shoulder, he proceeded to issue him more prescriptions for 90 Percocet and 60 Xanax even though the prescription he had previously issued should not have been exhausted. Respondent did not ask the Officer why he needed his prescription refilled ten days early. Furthermore, the Respondent did not document the prescribing in the Officer's patient file as required by the Pennsylvania regulation.

On January 18, 2008—only fifteen days after the previous visit—the Officer saw Respondent again. Respondent asked the Officer how we was doing, and performed a physical exam which was limited to having the Officer attempt to bend his knees and try to touch his toes. While Respondent asked whether he had previously given the Officer Percocet 10s and Xanax, once again he did not question the Officer as to why he had returned when the second prescription should have lasted another fifteen days. Respondent nonetheless gave the Officer another prescription for 90 Percocet (10/325) and 60 Xanax (1 mg.).

On January 30, 2008—which was only twelve days since the previous visit—the Officer returned to Respondent's clinic for a fourth time. Approximately one hour after his arrival, Respondent appeared in the waiting area and asked: ''Who's for prescription refills?,'' to which the Officer said: ''right here.''

A few minutes later, the Officer told Respondent that the ''last time I have my wife with me, but she couldn't make it today, can I pick up her script for her?'' Respondent replied that the Officer could ''do that one time.'' The Officer subsequently told Respondent that his wife's name was ''Shania Wilson.'' Subsequently, Respondent issued prescriptions to Anthony Wilson for 90 Percocet (10/325 mg.) and 60 Xanax (1 mg.). He also issued prescriptions for a T. Wilson for 90 Percocet (5/325 mg.) and 60 Xanax (1 mg.), which he gave to the Officer.

Notably, Respondent did not even ask the Officer how he was doing and issued the prescriptions to him without even the pretense of conducting a physical exam. Indeed, the only question he asked the Officer was which color Percocet tablet he was getting, thus giving the ''patient'' the right to decide what strength of drug he wanted. Moreover, it was the third time in less than a month that the Officer had sought prescriptions for these drugs well before the previously issued prescriptions should have run out. Yet again, Respondent did not question the Officer as to why he had returned so soon.

Given these circumstances, expert testimony is not required to conclude that in issuing these prescriptions, Respondent exceeded the bounds of professional practice and that the prescriptions lacked a legitimate medical purpose because Respondent failed to take any steps to determine whether there was a continuing medical need for the prescriptions. See 21 CFR 1306.04. Beyond that, he issued the prescriptions notwithstanding that even a cursory review of the Officer's file would have indicated that he had issued prescriptions to the Officer only twelve days earlier. Likewise, the decision as to what strength of drug a patient should take is the physician's responsibility and is not the province of the patient. In short, Respondent's issuance of the prescriptions on this date does not remotely resemble the legitimate practice of medicine or even the negligent practice of legitimate medicine. Rather, it is out-and-out drug pushing.

Likewise, expert testimony is not required to conclude that Respondent lacked a legitimate medical purpose and exceeded the bounds of professional practice in issuing the prescriptions for the Officer's fictitious wife. Notably, the Officer had repeatedly sought and obtained new prescriptions well before previous prescriptions would have run out and had thus demonstrated a clear and obvious pattern of drug-seeking behavior. Moreover, Respondent issued the prescriptions to a patient who was not physically present and thus could neither be questioned as to whether she had a medical condition that required controlled substances nor physically examined. And he did so notwithstanding that the Officer made no representation that his ''wife'' had a medical need for the prescriptions.

Furthermore, Respondent did not even attempt to contact ''her'' to determine whether there was a medical justification for the prescriptions. Cf. 49 Pa. Code § 16.92(a)(5) (authorizing the issuance of a ''a prudent, short-term prescription'' based on ''an emergency phone call by a known patient''). Finally, both the Percocet and Xanax prescriptions were for a thirty-day supply and appear to be well beyond what Pennsylvania authorizes on an emergency basis.[28]

I thus conclude that Respondent exceeded the bound of professional practice in issuing the prescriptions to Ms. Wilson and that these prescriptions were not supported by a legitimate medical purpose. 21 CFR 1306.04. In short, Respondent's issuance of these prescriptions was not simply the negligent practice of medicine but rather drug pushing.

The Visits of Richard Johnson

On January 18, 2008, another undercover officer, who used the name Richard Johnson, visited Respondent. When asked by Respondent whether it was his first visit, the Officer represented that he had previously seen Respondent on December 14th although he had not. Later, and apparently while in the exam room, Respondent asked the Officer how he had been doing since he was put on pain medication; the Officer answered ''pretty good.'' Respondent asked a followup question as to whether the medication worked well; the Officer answered ''yes.''

The evidence establishes that Respondent performed a limited physical examination by lightly tapping the Officer on the back and shoulder. Moreover, Respondent acknowledged that he had been taking the yellow ones (a reference to Percocet) and the blue ones (a reference to Xanax). Respondent then stated that he was going to refill the Officer's prescriptions and issued him prescriptions for 90 Percocet and 60 Xanax. During the subsequent search of Respondent's office, no file was found for Richard Johnson.

While it is clear that the Officer misrepresented his status as a prior patient, there is no evidence establishing that Respondent knew this to be false. Moreover, the Government produced no evidence regarding the proper course of professional practice when a patient represents that he has recently been treated and the physician cannot find the patient's medical records. At most then, the evidence establishes that Respondent violated Pennsylvania's regulation because he failed to document the issuance of the prescriptions.[29] *See* 49 Pa. Code § 16.92(a)(4).

Twelve days later, Richard Johnson returned to Respondent's office. Respondent issued him prescriptions for 90 Percocet (10/325 mg.) and 60 Xanax (1mg.) without even asking him about

[28] Even if the Officer pointed to the patient file for a real Ms. Wilson, the fact remains that the Officer did not identify any medical reason for why his ''wife'' needed a prescription. Moreover, Respondent made no attempt to contact Ms. Wilson to determine whether she had a continuing medical need for the prescription and whether the requirements were met for issuing an emergency prescription under Pennsylvania's regulation.

[29] While the Pennsylvania regulation clearly requires that a practitioner perform a physical examination (or that one has been performed by another practitioner within the ''immediately preceding 30 days,'' 49 Pa. Code § 16.92(a)(1)), before commencing treatment with a controlled substance, the Government produced no evidence establishing that a physical examination is required at every follow-up visit at which a controlled substance is prescribed.

his condition. Moreover, Respondent did not ask the Officer as to why he needed new prescriptions after only twelve days. Given the circumstances of this visit, it is clear that there was no legitimate medical purpose for the prescriptions and that Respondent exceeded the bounds of professional practice in issuing them. *See* 21 CFR 1306.04(a). As was the case with the prescriptions issued to the Officer on January 18, Respondent did not document the prescriptions and violated the Pennsylvania regulation for this reason as well. 49 Pa. Code § 16.92(a)(4).

The Visit of John Rio

On the night that ''Nicole Hodge'' made her second visit, an Officer posing as ''John Rio'' accompanied her. Although the Officer had not previously been to Respondent's office, he told Respondent that he had been. Moreover, when asked by Respondent if he had back pain, the Officer answered affirmatively. Respondent then recommended that the Officer receive twenty minutes of physical therapy and either Respondent or an assistant proceeded to set up the machine and started the treatment. After the Officer complained that the treatment hurt too much, Respondent told an assistant to cut back the level of the treatment. While the Officer subsequently disconnected the machine and told Respondent's staff that he was doing so, there is no evidence that Respondent was advised of this. During the visit, Respondent gave the Officer prescriptions for 90 Percocet, 30 Xanax, and a muscle relaxant which is not controlled. Moreover, during the subsequent search of Respondent's office, the authorities did not find a patient file for him.

As was the case with the first visit of ''Richard Johnson,'' the evidence does not establish that Respondent violated Federal law in issuing the prescriptions. Here again, there is no evidence as to the proper course of professional practice when a patient represents that he has previously been treated by a physician. At most, the evidence establishes a violation of the Pennsylvania regulation requiring that each issuance of a controlled-substance prescription be documented in the patient's medical record. *See* 49 Pa. Code § 16.92(a)(4).

Other Violations

As found above, the record includes numerous patient files which show that Respondent prescribed controlled substances and yet lack any documentation that he (or another physician [30]) took a medical history, performed a physical examination and diagnosed a medical condition which warranted the various prescribings. Indeed, the documentation contained in these files is charitably described as threadbare and stands in stark contrast to the level of thoroughness and detail found in the four patient files which Respondent submitted as evidence of the appropriateness of his recordkeeping practices. *Compare, e.g.*, GXs 25–27, 31–36, 38–39, *with* RXs 13A–D; *see also* Tr. 302–306 (Respondent's testimony that RXs 13A–D were ''representative of how [he] maintained a patient file''). At a minimum, this evidence establishes numerous additional instances in which Respondent violated the Pennsylvania regulation.

In any event, while the Government's proof does not establish that each of Respondent's prescribings to the undercover officers violated the prescription requirement of Federal law and were thus unlawful distributions under 21 U.S.C. 841(a), it has shown that several of them did. *See* 21 CFR 1306.04(a).[31] Moreover, the record clearly establishes that Respondent repeatedly failed to properly document the necessity for prescribing controlled substances to numerous patients and to properly counsel his patients regarding the taking of the drugs. *See* 49 Pa. Code § 16.92(a). I thus conclude that Respondent's experience in dispensing controlled substances and his record of compliance with applicable laws and regulations amply demonstrates that his continued registration ''is inconsistent with the public interest.'' 21 U.S.C. 823(f).

Factor Five—Such Other Factors

Under Agency precedent, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe-Jonesborough,* 73 FR 363, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). Moreover, because ''past performance is the best predictor of future performance, *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for its actions and demonstrate that it will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

The record supports the conclusion that Respondent has not accepted responsibility for his misconduct. As found above, Respondent's testimony regarding both his issuance of the prescriptions for the Officer's fictitious wife and the early prescriptions was not credible. Moreover, Respondent's testimony that ''it was never my intent to give more medication'' than a thirty-day supply, Tr. 322–23, is belied by his failure to ever ask the two Officers (on their subsequent visits) why they had returned so soon and were in need of additional drugs.

Indeed, when Anthony Wilson returned for the fourth and final time, Respondent did not even ask him about his condition. Respondent nonetheless failed to offer any explanation as to why he issued him two more prescriptions (and did so only twelve days after having issued other prescriptions).

[30] *See* 49 Pa. Code § 16.92(a)(1).

[31] I have also considered the evidence regarding the first undercover visit during which the Officer told Respondent that she was not injured and brazenly asked for a prescription for Percocet. While I acknowledge that Respondent threw the Officer out of his office, the mitigating character of this evidence is outweighed by the incidents in which Respondent wrote prescriptions without inquiring as to why the Officers were prematurely seeking new prescriptions, the incident in which Respondent provided the Officers with the prescriptions without even inquiring as to whether there was a continuing medical need for them, and the issuance of the prescriptions to the Officer's fictitious wife. Indeed, it may well be that Respondent believed the first incident to be a set-up or that he would only issue prescriptions to those who claimed to be injured as alleged by the caller who reported him to the police.

I further conclude that the various signs Respondent posted in his office are entitled to no weight in determining whether he is a responsible dispenser of controlled substances. *See* Resp. Ex. 2 (''Obtaining controlled prescriptions (Percocet and or Xanax) by deception (faking injuries or lying about pain) is a Class B Felony.''); Resp. Ex. 4 (noting that patients were intentionally lying to Respondent ''about the nature of their injuries for the purpose of obtaining'' Percocet and Xanax). Indeed, it is strange that Respondent would expressly refer to Percocet and Xanax in the notices as if these are the only drugs available to treat pain and other medical conditions. I further note that with the exception of Ms. Hodge, each of the Officers was prescribed the same drugs—Percocet and Xanax.

As for RX 3, which catalogued a list of ''unacceptable excuses'' used by persons seeking early refills, and stated that patients should ''not ask [him] for anymore medication until it is your time to get refilled,'' Respondent did not ask either of the undercover officers who sought new prescriptions prematurely why they were doing so. This suggests that notwithstanding this document, Respondent's policy was ''don't ask, don't tell.''

Respondent likewise offered no explanation as to why he failed to properly document his prescribings to the various undercover officers or counsel his patients regarding the proper taking of the drugs.

Because Respondent has failed to acknowledge his wrongdoing, he has not rebutted the Government's *prima facie* case. I therefore conclude that his continued registration would be ''inconsistent with the public interest,'' 21 U.S.C. 823(f), and that his registration should be revoked.[32]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, *I hereby order* that DEA Certificate of Registration, BM7201267, issued to Laurence T. McKinney, M.D., be, and it hereby is revoked. *I further order* that any pending application to renew or modify the registration be, and it hereby is, denied. This Order is effective August 25, 2008.

Dated: July 17, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–16948 Filed 7–23–08; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

Time and Date: 10 a.m., Thursday, July 24, 2008.

Place: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

Status: Open.

Matters To Be Considered:

1. Request from Horizon One Federal Credit Union to Convert to a Community Charter.
2. Quarterly Insurance Fund Report.
3. Reprogramming of NCUA's Operating Budget for 2008.
4. Proposed Rule: Parts 702 and 704 of NCUA's Rules and Regulations, Prompt Corrective Action; Amended Definition of Post-Merger Net Worth.
5. Final Interpretive Ruling and Policy Statement (IRPS) 08–1, Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act.
6. Request for Board Authorization to Seek Approval for a New Agency Seal.

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Secretary of the Board.

[FR Doc. E8–16810 Filed 7–23–08; 8:45 am]

BILLING CODE 7535–01–M

NATIONAL SCIENCE FOUNDATION

Notice of permit applications received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received under the Antarctic Conservation Act of 1978, Pub. L. 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by August 25, 2008. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. *Applicant:* Permit Application No. 2009–015. Ron Naveen, President, Oceanities, Inc., P.O. Box 15259, Chevy Chase, MD 20825.

Activity for Which Permit Is Requested: Take and enter Antarctic Specially Protected Areas. The applicant plans to enter various sites, including ASPA 128—Western Short of Admiralty Bay and ASPA 149—Cape Shirreff, to conduct surveys and census of fauna and flora as a continuation of the Antarctic Site Inventory Project. Access to the sites will be by zodiac or helicopter from various cruise ships and/or the HMS ENDURANCE.

Location: Antarctic Peninsula, ASPA 128—Western Short of Admiralty Bay and ASPA 149—Cape Shirreff.

Dates: September 1, 2008 to August 31, 2013.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. E8–16877 Filed 7–23–08; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Salary Council

AGENCY: Office of Personnel Management.

ACTION: Notice of meetings.

SUMMARY: The Federal Salary Council will meet on September 5 and September 30, 2008, at the times and location shown below. The Council is an advisory body composed of representatives of Federal employee organizations and experts in the fields of labor relations and pay policy. The Council makes recommendations to the President's Pay Agent (the Secretary of Labor and the Directors of the Office of Management and Budget and the Office of Personnel Management) about the locality pay program for General Schedule employees under section 5304 of title 5, United States Code. The Council's recommendations cover the establishment or modification of locality pay areas, the coverage of salary surveys, the process of comparing Federal and non-Federal rates of pay, and the level of comparability payments that should be paid.

The September 5 meeting will be devoted to reviewing information and hearing testimony about existing locality pay area boundaries and the establishment of new locality pay areas. The Council will conduct its other business including reviewing the results of pay comparisons and formulating its recommendations to the President's Pay

[32] Respondent argues that the ALJ erred in recommending revocation rather than a lesser sanction. DEA has, however, repeatedly held that revocation is the appropriate sanction in cases in which it has been shown that a practitioner has used his prescription-writing authority to deal drugs. *See, e.g., Randi M. Germaine,* 72 FR 51665 (2007); *Peter A. Ahles,* 71 FR 50097 (2006). Moreover, as explained above, Respondent has offered no evidence that he acknowledges his misconduct.