

substances under the laws of the State in which he practices medicine. *See, e.g., Calvin Ramsey*, 76 FR 20034, 20036 (2011); *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988); *see also Frederick Marsh Blanton*, 43 FR 27616 (1978).

Because Registrant is no longer currently authorized to dispense controlled substances in Texas, the State in which he is registered with the Agency, I will order that his registration be revoked.<sup>3</sup> 21 U.S.C. 824(a)(3).

#### Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AD9639038 and Data-Waiver Identification No. XD9639038, issued to Warren B. Dailey, M.D., be, and they hereby are, revoked. Pursuant to the authority vested in me by 21 U.S.C. 823(f), I further order that any pending application of Warren B. Dailey, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective November 6, 2017.

Dated: September 27, 2017.

**Chuck Rosenberg,**

*Acting Administrator.*

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 17-24]

#### William J. O'Brien, III, D.O.; Decision and Order

On March 13, 2017, the Assistant Administrator, Diversion Control Division, issued an Order to Show Cause to William J. O'Brien, III, D.O. (Respondent), formerly of Levittown, Pennsylvania. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(2), on the ground that he "ha[s]

been convicted of a felony relating to controlled substances." Show Cause Order, at 1.

As to the Agency's jurisdiction, the Show Cause Order alleged that Respondent is registered as a practitioner in schedules II through V, under Registration No. BO3937781, at the address of 49 Rolling Lane, Levittown, Pa. *Id.* The Order also alleged that Respondent's registration expires on December 31, 2017. *Id.*

As to the substantive grounds for the proceeding, the Show Cause Order alleged that "[o]n June 28, 2016, [Respondent was] convicted by a Federal jury of . . . two counts of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 846; 110 counts of distribution of controlled substances (oxycodone, methadone and amphetamine, all [s]chedule II controlled substances), seven counts of distribution of controlled substances (alprazolam, a [s]chedule IV controlled substances, in violation of 21 U.S.C. 841(a)(1); and one count of distribution of controlled substances resulting in death, in violation of 21 U.S.C. 841(a)(1). *Id.* at 1-2. The Show Cause Order also alleged that on October 5, 2016, the judgment was entered against him. *Id.* at 2. The Order then asserted that a "[c]onviction of a felony related to controlled substances warrants revocation of [his] registration pursuant to 21 U.S.C. 824(a)(2)." *Id.*

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedure for electing either option, and the consequence of failing to elect either option. *Id.* The Show Cause Order also notified Respondent of his right to submit a Corrective Action Plan pursuant to 21 U.S.C. 824(c)(2)(C). *Id.* at 2-3.

On March 21, 2017, the Government served the Show Cause Order on Respondent. Notice of Service of Order to Show Cause, at 1. On April 25, 2017, Respondent's hearing request was received by the Office of Administrative Law Judges (OALJ) and assigned to ALJ Charles Wm. Dorman. Hearing Request, at 1.

On May 1, 2017, the ALJ issued an Order for Prehearing Statements. Noting that Respondent's hearing request was received on April 25, 2017 and that DEA's regulation requires that a hearing request be received "within 30 days after the date of receipt of the" Show Cause Order to be deemed timely, the ALJ ordered the Government to "submit evidence showing when it served the"

Order and to file any motion seeking to terminate the proceeding "based on the timeliness of the . . . hearing request." Order for Prehearing Statements, at 1. The ALJ directed the Government to comply with this portion of his order by May 8, 2017. *Id.* The ALJ's Order also directed both parties to file a prehearing statement setting forth their proposed witnesses, a summary of their proposed testimony, and the documentary evidence they intended to introduce. *Id.* at 1-2.

On May 5, 2017, the Government submitted a pleading addressing the timeliness of Respondent's hearing request. Therein, the Government noted that the envelope used by Respondent to mail the hearing request was stamped by the Agency's mailroom as having been received on April 13, 2017. Notice of Service of Order to Show Cause, at 1. The Government therefore did not move to terminate the proceeding based on the timeliness of Respondent's hearing request. *Id.* at 1-2.

Also, on May 5, 2017, the Government moved for summary disposition on two grounds. Mot. for Summ. Disp., at 1. First, the Government noted that subsequent to the issuance of the Show Cause Order, the State of Pennsylvania suspended Respondent's license to practice osteopathic medicine and surgery, and therefore, he has no authority to handle controlled substances in the State in which he is registered. *Id.* at 2-4. As support for this contention, the Government submitted a copy of the State Board of Osteopathic Medicine's Final Order of Automatic Suspension (April 12, 2017). GX 2. The Government argued that because Respondent does not have state authority to dispense controlled substances in Pennsylvania, he "is not authorized to possess a DEA registration in that [S]tate," and therefore, his registration should be revoked. Mot. at 3.

The Government also sought summary disposition on the ground that it is undisputed that Respondent has been convicted of a controlled substance felony. The Government argued that Respondent has been convicted of two counts of conspiracy to distribute controlled substances, 110 counts of unlawful distribution of schedule II controlled substances, seven counts of unlawful distribution of other controlled substances, and one count of distribution of controlled substances resulting in death. *Id.* at 4 (citing 21 U.S.C. 841(a)(1) and 846). As support for this contention, the Government submitted a copy of the Amended Judgment in a Criminal Case which was entered by the United States District

<sup>3</sup> The Show Cause Order also proposed revocation pursuant to 21 U.S.C. 824(a)(5), which provides that a registration may be revoked "upon a finding that the registrant has been excluded or directed to be excluded from participation in a program pursuant to section 1320a-7(a) of Title 42." GX 2, 1-2. While the Show Cause Order alleged that the HHS IG has issued a letter to Registrant excluding him from participation in federal health care programs pursuant to 42 U.S.C. 1320a-7(a), the Government has provided no evidence to support the allegation, and it does not raise this ground in its Request for Final Agency Action. I therefore dismiss the allegation.

Court for the Eastern District of Pennsylvania on October 12, 2016. GX 3. The Government further argued that Respondent's "[c]onviction of a felony relating to controlled substances subjects [his] registration to revocation pursuant to 21 U.S.C. 824(a)(2)." Mot. at 5.

Following receipt of the Government's motion, on May 8, 2017, the ALJ issued an Order for Respondent's Reply; the Order directed that Respondent submit his reply by May 19, 2017. Order for Respondent's Reply, at 1. On May 18, 2017, Respondent filed a reply.

In his Reply, Respondent stated that "[t]he Commonwealth of Pennsylvania granted a continuance of my case until Sept. 18, 2017." Reply to Govt.'s Mot. for Summ. Disp., at 1. Respondent further argued that "[p]ersuant [sic] to 21 U.S.C. 824(a)(2)[,] the judgement [sic] of my conviction IS NOT FINAL UNTIL AFTER THE DIRECT APPEAL HAS BEEN HEARD." *Id.* As support for his contention, Respondent cited *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203 (1943), a case holding that a motion for a district court to amend or make additional findings under Rule 52(b) of the Federal Rules of Civil Procedure deprives a judgment of finality while the motion is pending. Respondent thus argues that it is "the established rule that if a motion for a new trial, or in this case reversal due to [a] structural defect, the mere making or pendency of the motion destroys the finality of the judgment." Reply to Govt.'s Mot. for Summ. Disp., at 2. Respondent also sought a continuance of the proceeding for 120 days. *Id.*

Upon review, the ALJ granted the Government's motion on both grounds. As for the loss of state authority ground, the ALJ correctly applied the Agency's settled rule that "in order to maintain a DEA registration, a registrant must be currently authorized to handle controlled substances in the jurisdiction in which [he] is registered." Order Denying Resp.'s Continuance Request [and] Granting Summary Disposition, at 4. Finding that "the Board's Order establishes that the Respondent does not currently have a medical license" and that "it is undisputed that the Respondent lacks state authorization to handle controlled substances in Pennsylvania, where [he] is registered," the ALJ concluded that "[t]his issue alone is sufficient to warrant revocation of" his registration. *Id.* at 6.

As for Respondent's numerous convictions, the ALJ rejected Respondent's contention that "the judgment of any conviction is not final until after the direct appeal has been heard," finding his arguments

"unpersuasive and contrary to DEA precedent." *Id.* The ALJ further explained that 21 U.S.C. 824(a)(2) "does not include any language requiring a Respondent to have exhausted all appellate review in order for the conviction to qualify under this provision." *Id.* Finding it undisputed that "Respondent has been convicted of a felony related to controlled substances," the ALJ also granted summary disposition on this ground. *Id.* at 7. & n.3 (citing *Richard Jay Blackburn*, 82 FR 18669 (2017) (holding that Government was entitled to summary disposition on allegation that physician materially falsified an application based on its offering of reliable and probative evidence to support allegation when respondent failed to "respond to the Government's motion").<sup>1</sup>

Neither party filed exceptions to the ALJ's Summary Disposition Order. On July 11, 2017, the ALJ forwarded the record to my Office for Final Agency Action. Having considered the record in its entirety, I adopt the ALJ's factual findings and legal conclusions with respect to both grounds, as well as his recommended order. I make the following findings.

#### Findings of Fact

Respondent is an Osteopathic Physician licensed by the Commonwealth of Pennsylvania State Board of Osteopathic Medicine. GX 2, at 1 (Final Order of Automatic Suspension). Respondent is also the holder of DEA Certificate of Registration No. BO3937781, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 49 Rolling Lane, Levittown, Pa. GX 1 (Registration Certificate). Respondent also holds DATA-Waiver Identification No. XO3937781, pursuant to which he is authorized to dispense narcotic controlled substances in schedules III through V, to up to 30 patients, for the purpose of providing maintenance or detoxification treatment. *Id.* Respondent's registration and DATA-Waiver number do not expire until December 31, 2017. *Id.*

On October 12, 2016, the United States District Court issued an amended judgment finding Respondent guilty of two counts of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 846; 110 counts of distribution of controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); seven counts of distribution of controlled

substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(E); and one count of distribution of controlled substances resulting in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). GX 3, at 1–2 (Amended Judgment In a Criminal Case, *United States v. O'Brien*, No. DPAE2:15CR000021–001 (E.D. Pa., Oct. 12, 2016)). The court sentenced Respondent to a total term of imprisonment of 360 months. *Id.* at 3.

Based on Respondent's convictions, on March 3, 2017, the Board issued him a Notice and Order of Automatic Suspension which was to become effective on March 23, 2017 unless Respondent requested a hearing. GX 2, at 1 (Final Order of Automatic Suspension). On April 12, 2017, the Board issued a Final Order of Automatic Suspension of his osteopathic license. *Id.*

#### Discussion

##### *Loss of State Authority Ground*

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of Title 21, "upon a finding that the registrant . . . has had his State license . . . suspended [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances." With respect to a practitioner, DEA has long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a registration. *See, e.g., James L. Hooper*, 76 FR 71371 (2011) (collecting cases), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *see also Frederick Marsh Blanton*, 43 FR 27616 (1978) ("State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration").

This rule derives from the text of two provisions of the CSA. First, Congress defined "the term 'practitioner' [to] mean[] a . . . physician . . . or other person licensed, registered or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice." 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that "[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . .

<sup>1</sup> The ALJ also denied Respondent's request for a continuance. R.D. 8.

controlled substances under the laws of the State in which he practices.” *Id.* § 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the Act, DEA has held repeatedly that revocation of a practitioner’s registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices medicine. *See, e.g., Calvin Ramsey*, 76 FR 20034, 20036 (2011); *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988); *see also Frederick Marsh Blanton*, 43 FR 27616 (1978).

Based on the Board’s Final Order of Automatic Suspension, it is undisputed that Respondent is no longer currently authorized to dispense controlled substances in Pennsylvania, the State in which he is registered with the Agency. Respondent is therefore not entitled to maintain his registration. This provides reason alone to revoke his registration and to deny any pending application for registration in Pennsylvania.<sup>2</sup>

#### *Respondent’s Criminal Convictions*

Pursuant to 21 U.S.C. 824(a)(2), the Attorney General may also suspend or revoke a registration issued under section 823 of Title 21, “upon a finding that the registrant . . . has been convicted of a felony under this subchapter” (the Controlled Substances Act). Here too, it is undisputed that Respondent has been convicted of more than 100 different felony violations of the CSA, including two of counts of conspiracy to distribute controlled substances, 21 U.S.C. 846; 117 counts of distribution of controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and (b)(1)(E); and one count of distribution of controlled substances resulting in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). While Respondent asserts that his convictions are not final because his case is on direct appeal, the District Court has entered the judgment and Respondent, who is currently incarcerated in a United States Penitentiary, points to no order by the Court vacating the judgment.<sup>3</sup> Accordingly, I find that

<sup>2</sup> While this ground was not cited in the Show Cause Order, the Government provided constitutionally adequate notice that it was also seeking revocation on this basis when it served Respondent with its Motion for Summary Disposition and Respondent had a meaningful opportunity to put forward evidence and contest the issue. *See Hatem Ataya*, 81 FR 8221, 8244–45 (2016).

<sup>3</sup> As for Respondent’s reliance on *Leishman v. Associated Wholesale Electric Co.*, that case

Respondent “has been convicted of a felony under this subchapter,” thus subjecting his registration to sanction. 21 U.S.C. 824(a)(2).

In contrast to a practitioner’s loss of his state authority, this finding does not mandate the revocation of his registration on this ground and the Agency has held that a conviction is not a *per se* bar to registration (as is the loss of state authority). *See Jeffery M. Freese*, 76 FR 60873 n.1 (2011) (citing *The Lawsons*, 72 FR 74334, 74338 (2007)); *Michael S. Moore*, 76 FR 45867 (2011). Here, however, Respondent’s criminal conduct, which involves 120 felony convictions for unlawful distribution, including for unlawful distribution resulting in death, is so obviously egregious that revocation is warranted. *See Masters Pharmaceutical, Inc., v. DEA*, 861 F.3d 206, 226 (D.C. Cir. 2017) (recognizing Agency’s authority to revoke a registration based on extensive and egregious misconduct even if registrant had accepted responsibility); *see also Hatem Attaya*, 81 FR 8221, 8244 (2016) (“[W]hile proceedings under 21 U.S.C. 823 and 824 are remedial in nature, there are cases in which, notwithstanding a finding that a registrant has credibly accepted responsibility, the misconduct is so egregious and extensive that the protection of the public interest nonetheless warrants the revocation of a registration or the denial of an application.”) (citation omitted).

While ordinarily a respondent who has been convicted of a felony subject to section 824(a)(2) is entitled to present a case as to why his registration should not be revoked (or his application denied), I nonetheless conclude that the ALJ properly granted summary disposition in this matter because there is no issue of any disputed material fact. Here, even ignoring the manifest egregiousness of Respondent’s criminal conduct, he has put forward no evidence to show why he can be entrusted with a registration nor raised any contention that he acknowledges his misconduct and has undertaken remedial measures.<sup>4</sup> *See Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (other citations omitted). *Cf.* 10B Charles Allen Wright, *et al., Federal Practice and Procedure Civ.* § 2727.2 (4th ed. April 2017 update) (“If the

involved a motion for amended findings under Rule 52 of the Federal Rules of Civil Procedure and has no relevance to this matter.

<sup>4</sup> To the contrary, in his various filings, Respondent maintains that various agents “misl[e]d the grand jury to get the original indictment” and that “no warrants were issued for 19 videotaped visits.” Resp.’s Hrg. Req., at 1.

summary-judgment movant makes out a prima facie case that would entitle him to a judgment as a matter of law if uncontroverted at trial, summary judgment will be granted unless the opposing party offers some competent evidence that could be presented at trial showing that there is a genuine dispute as to a material fact.”). And finally, as the evidence shows that Respondent is only one year into a 30-year term of imprisonment, he has clearly discontinued (even if involuntarily) his professional practice. *Cf.* 21 CFR 1301.52 (“the registration of any person . . . shall terminate . . . if and when such person . . . discontinues business or professional practice”). Thus, even if his state license had not been suspended, his continued registration would violate DEA’s longstanding policy barring shelf registrations. *See, e.g., Performance Construction, Inc.*, 67 FR 9993 (2002). Accordingly, I conclude that the ALJ properly granted summary disposition on this ground. I further conclude that Respondent’s multiple felony convictions for violating the CSA provide an additional and independent basis for revoking his registration and denying any pending application.

#### **Order**

Pursuant to the authority vested in me by 21 U.S.C. 824(a) and 28 CFR 0.100(b), I order that DEA Certificate of Registration No. BO3937781 and DATA-Waiver Identification No. XO3937781 issued to William J. O’Brien, III, D.O., be, and they hereby are, revoked. I further order that any application of William J. O’Brien, III, D.O. to renew or modify this registration, or for any other DEA registration, be, and it hereby is, denied. This Order is effective immediately.<sup>5</sup>

Dated: September 28, 2017.

**Chuck Rosenberg,**

*Acting Administrator.*

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## **DEPARTMENT OF JUSTICE**

### **Foreign Claims Settlement Commission**

**[F.C.S.C. Meeting and Hearing Notice No. 9–17]**

#### **Sunshine Act Meeting**

The Foreign Claims Settlement Commission, pursuant to its regulations

<sup>5</sup> Based on Respondent’s numerous convictions, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.