DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98–9]

Robert A. Leslie, M.D.; Denial of Application

On December 23, 1997, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Robert A. Leslie, M.D., (Respondent) of Irvine, California, notifying him of an opportunity to show cause as to why DEA should not deny his application for registration as a practitioner under 21 U.S.C. 823(f), for reason that such registration would be inconsistent with the public interest.

By letter dated January 12, 1998, Respondent, acting pro se, requested a hearing on the issues raised by the order to show cause. Following prehearing procedures, a hearing was held in Los Angeles, California on April 22, 1998, before Administrative Law Judge Gail A. Randall. At the hearing the Government called a witness to testify and Respondent testified on his own behalf. Both parties introduced documentary evidence. After the hearing, the Government submitted proposed findings of fact, conclusions of law and argument and Respondent submitted a document entitled ''Legal Issues''. On October 9, 1998, Judge Randall issued her Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision, recommending that Respondent's application for a DEA Certificate of Registration be granted subject to the requirement that he maintain a log of his controlled substance handling for three years. Both the Government and Respondent timely filed exceptions to Judge Randall's Recommended Rulings, Findings of Fact, Conclusions of Law and Decision. Thereafter, on November 24, 1998, Judge Randall transmitted the record of these proceedings to the then-Acting Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts the findings of fact and conclusions of law of the Administrative Law Judge, but does not adopt Judge Randall's recommended ruling.

The Deputy Administrator finds that Respondent previously possessed DEA Certificate of Registration AL0033136. On June 21, 1989, an Order to Show Cause was issued proposing to revoke that Certificate of Registration. Initially Respondent requested a hearing, but subsequently withdrew the request and a final order was issued by the then-Acting Administrator revoking Respondent's registration, effective August 17, 1990. See 55 FR 29,278 (July 18, 1990).

In February 1992, Respondent submitted an application for a new DEA Certificate of Registration. An Order to Show Cause was issued on May 13, 1993, proposing to deny this application. Following a hearing before Administrative Law Judge Mary Ellen Bittner, the then-Deputy Administrator adopted Judge Bittner's recommended ruling and denied Respondent's application for registration effective March 15, 1995. See 60 FR 14,004 (March 15, 1995).

In the prior proceeding, the then-Deputy Administrator found that on October 9, 1986, Respondent was found guilty, following a jury trial, of eight counts of unlawfully prescribing, administering, furnishing or dispensing controlled substances between July 1985 and January 1986. These convictions were affirmed by the Superior Court of the State of California for the County of Los Angeles. Thereafter, effective March 23, 1990, the California Board of Medical Quality Assurance (Board) revoked Respondent's medical license, stayed the revocation, suspended his license to practice medicine for 90 days, and placed him on probation for five years. The Board's decision was subsequently affirmed by the California Court of Appeals with the Court finding that Respondent's appeal was frivolous because it was merely a collateral attack on his convictions and fining Respondent $10,000. The Court stated that Respondent must ''accept responsibility for his actions.''

The then-Deputy Administrator found that at the prior hearing, Respondent attacked his criminal convictions. Judge Bittner and then-Deputy Administrator found that Respondent's convictions were *res judiciata* and therefore Respondent was precluded from relitigating the matter. In his final order, the then-Deputy Administrator noted that:

> The administrative law judge found that during the administrative hearing, although Respondent was free to offer new evidence that he would never again engage in the type of conduct that resulted in his conviction, he failed to do so. The administrative law judge also found that while Respondent offered evidence and expended time arguing the invalidity of his criminal convictions, he offered no evidence of remorse for his prior conduct, that he has taken rehabilitative steps, or that he recognized the severity of his actions. The administrative law judge concluded that Respondent is either unwilling or unable to discharge the responsibilities inherent in a DEA registration, and therefore, recommended that his application for DEA registration be denied. *Id.*

Respondent filed a Petition for Review of this final order with the United States Court of Appeals for the Ninth Circuit. On August 5, 1996, the court denied Respondent's petition.

On December 13, 1996, Respondent submitted an application for a new DEA registration. That application is the subject of these proceedings. The Deputy Administrator concluded that the then-Deputy Administrator's final order published on March 15, 1995, regarding Respondent is *res judicata* for purposes of this proceeding. *See Stanley Alan Azen, M.D.*, 61 FR 57,893 (1996) (where the findings in a previous revocation proceeding were held to be *res judicata* in a subsequent administrative proceeding.) The then-Deputy Administrator's determination of the facts relating to the previous denial of Respondent's application for registration is conclusive. Accordingly, the Deputy Administrator adopts the March 15, 1995 final order in its entirety. The Deputy Administrator concluded that the critical consideration in this proceeding is whether the circumstances, which existed at the time of the prior proceeding, have changed sufficiently to support a conclusion that Respondent's registration would be in the public interest.

The Deputy Administrator finds that as of the date of the hearing, Respondent was practicing medicine at three different clinics in California, and there were no restrictions on his medical license. In 1998, Respondent was awarded a fellowship in the American Contemporary Society of Medicine and Surgery. In the three years preceding the hearing, Respondent had been nominated for ''Who's Who,'' ''Who's Who in the West,'' ''Who's Who in Europe,'' and ''Who's Who in the Midwest,'' for outstanding achievement.

Respondent testified that he only needs to use controlled substances in his practice on rare occasions. Respondent further testified that he is ''very conservative in [his] approach to (prescribing)'' and ''he ha(s) a dislike for controlled substances.'' However, he also testified that it is difficult for him to find employment without a DEA registration.

When given the opportunity to explain his past behavior, Respondent continued to blame others for his criminal convictions. Specifically Respondent alleged that his then-employer ran ''a crooked operation,''

and Respondent's name had been forged on prescriptions. He contended that his convictions were affirmed on appeal due to ineffective counsel, and a Government witness ''perjured'' himself during DEA's 1993 administrative hearing.

The Government argued that Respondent's application should be denied based upon the prior Board action, the underlying facts that led to Respondent's conviction, Respondent's conviction, and Respondent's continued denial of any wrongdoing which demonstrates a potential threat to the public health and safety. The Government asserted that there has been no change in Respondent's attitude since the 1993 hearing; that he fails to recognize the severity of his past conduct or to express remorse or plans for rehabilitation; that he continues to argue the errors of his prior judicial proceedings; and as a result, he continues to avoid taking responsibility for his own culpable behavior.

Respondent argued that he should be granted a DEA registration because his criminal convictions should not be relied upon since they were defective. He further asserted that a narcotics registration in California is a vested right. Respondent contended that if granted a DEA registration, he would be more conservative in his prescribing practices.

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA Certificate of Registration if he determines that the granting of a registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered in determining the public interest:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to 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.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. *See Henry J. Schwartz, Jr., M.D.,* 54 FR 16,422 (1989).

Regarding factor one, in 1990 the Board revoked Respondent's medical license, stayed the revocation, but suspended his license for 90 days and then placed it on probation for five years. However, it is undisputed that Respondent's California medical license is currently unrestricted. But state licensure is a necessary but not sufficient condition for registration, and therefore this factor is not dispositive.

Factors two and four, Respondent's experience in dispensing controlled substances and compliance with applicable controlled substance laws are relevant in determining whether Respondent's registration would be inconsistent with the public interest. Between July 1985 and January 1986, Respondent prescribed or dispensed controlled substances to undercover operatives who were not under treatment for a pathology or condition other than addiction to a controlled substance. Although Respondent has continued to argue that he has done nothing wrong, a jury convicted him of eight counts of unlawfully prescribing controlled substances, and this judgment was affirmed on appeal. Therefore, the Deputy Administrator concludes that Respondent clearly improperly handled controlled substances in the past and failed to comply with laws relating to controlled substances.

Respondent has not handled controlled substances since his DEA registration was revoked in 1990. He now uses the non-controlled substance Nubain for the treatment of pain.

As to factor three, Respondent was convicted of eight misdemeanor counts of illegally prescribing or dispensing controlled substances. These convictions were affirmed on appeal. While Respondent continues to profess his innocence and to try to introduce evidence to challenge the validity of the convictions, the convictions cannot be relitigated in this forum. Therefore, this factor is relevant in determining the public interest since Respondent has been convicted of controlled substance related offenses.

Regarding factor five, the Deputy Administrator concurs with Judge Randall's finding that it is ''disturbing that the Respondent continues to argue about his prior criminal convictions, despite Judge Bittner's and a prior Acting (sic) Deputy Administrator's previous comments concerning the importance of rehabilitation evidence. The Respondent continues to blame others for his misconduct and refuses to accept responsibility for his actions.''

After reviewing the record, Judge Randall concluded that this is a difficult case however she recommended that Respondent's application be granted subject to the requirement that he maintain a log of his controlled substance handling for three years. In making this recommendation, Judge Randall found it significant that Respondent was forthcoming on his application for registration regarding his convictions and the prior DEA action; that he has continued to make valuable contributions to the medical profession; that he has continued to participate in continuing medical education; that there are no restrictions on his California medical license; that Respondent has become more conservative in this approach to prescribing controlled substances; that Respondent's convictions were 12 years ago and there are no new allegations of Respondent improperly handling controlled substances; and that Respondent has been actively practicing medicine at three different clinics and there have been no complaints or adverse actions taken against his medical license. Judge Randall recommended that Respondent be granted a restricted registration in order to give him the opportunity to demonstrate his ability to effectively handle controlled substances while providing a measure of protection to the public.

Respondent filed exceptions to Judge Randall's recommended ruling. Instead of challenging aspects of the judge's decision, Respondent continued to challenge the validity of his convictions and the previous denial of his application for a DEA Certificate of Registration. As previously stated these decisions are *res judicata* and as a result, the Deputy Administrator finds no merit to Respondent's exceptions.

In its exceptions, the Government disagreed with several mitigating factors considered by Judge Randall. First, the Government argued that the fact that Respondent disclosed his convictions and the prior DEA actions on his application should not be considered a mitigating factor. The Government pointed out that Respondent answered truthfully on his previous application and that application was nonetheless denied. The Deputy Administrator agrees with the Government. An applicant is required to fully disclose any convictions and/or prior action by DEA or the state on applications for registration. The fact that Respondent did so does not demonstrate that he can now be trusted to responsibly handle controlled substances.

Second, the Government took exception to Judge Randall's finding that Respondent has continued to make valuable contributions to the medical profession. The Government argued ''that a factor is not material in deciding whether a DEA registration application should be granted.'' The Deputy Administrator concludes that it is appropriate to consider what a registrant/applicant has done professionally since his/her misconduct. However in this case, the Deputy Administrator finds it significant that Respondent has continued to make valuable contributions to the medical profession despite not being able to handle controlled substances. The Deputy Administrator concludes that this factor does not support granting Respondent a DEA registration, since it appears that Respondent can make such contributions without a DEA registration.

Next the Government disagreed with Judge Randall's reliance on Respondent's assertion that he has become more conservative in his handling of controlled substances as a mitigating factor. The Government contended that Respondent's assertion is ''not necessarily credible in light of Respondent's adamant denial of the conduct underlying his criminal convictions.'' The Government further contended that Respondent has not handled controlled substances since his DEA registration was revoked. The Deputy Administrator agrees with the Government. Since Respondent has not handled controlled substances since 1990, there is no evidence that Respondent is more conservative in his handling of such substances, and in light of his failure to accept responsibility for his past actions, the Deputy Administrator is not convinced that Respondent will be more conservative in the future.

Further the Government took exception to Judge Randall's reliance on the fact that Respondent's convictions occurred 12 years ago and no new allegations of improper handling of controlled substances or adverse actions against Respondent's medical license were introduced in this matter. The Government argued that no such allegations were made in the previous proceeding regarding Respondent's last application for registration and that application was denied. The Deputy Administrator notes that Respondent has not been authorized to handle controlled substances since 1990 so presumably he has not had the opportunity to mishandle controlled substances.

The Deputy Administrator agrees with Judge Randall that passage of time alone is not dispositive, however it is a factor to be considered. *See Norman Alpert, M.D.*, 58 FR 67,420. But, the Deputy Administrator also notes that DEA has previously held that ''(t)he paramount issue is not how much time has elapsed since (the Respondent's) unlawful conduct, but rather, whether during that time (the) Respondent has learned from past mistakes and has demonstrated that he would handle controlled substances properly if entrusted with DEA registration.'' *See John Porter Richard, D.O.*, 61 FR 13,878 (1996), *Leonardo* v. *Lopez, M.D.*, 54 FR 36,915 (1989). In this case, it is clear from Respondent's continued denials of wrongdoing that he has not learned from his past mistakes and other than saying that he is more conservative now, he has not demonstrated that he would handle controlled substances properly in the future.

The Deputy Administrator disagrees with Judge Randall's recommended ruling that granting Respondent a restricted registration would be appropriate. Other than the passage of time, the circumstances which existed at the time of the prior proceeding have not changed sufficient to warrant issuing Respondent a DEA registration. Respondent continues to fail to acknowledge wrongdoing or accept responsibility for his actions. Therefore, the Deputy Administrator is not convinced that Respondent has been rehabilitated and would properly handle controlled substances in the future, even on a restricted basis. As a result, the Deputy Administrator concludes that Respondent's registration with DEA would be inconsistent with the public interest at this time.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for registration, executed by Robert A. Leslie, M.D., be, and it hereby is, denied. This order is effective June 14, 1999.

Dated: May 6, 1999.

Donnie R. Marshall,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA–172N]

Special Surveillance List of Chemicals, Products, Materials and Equipment Used in the Clandestine Production of Controlled Substances or Listed Chemicals

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final notice.

SUMMARY: On October 3, 1996, the Comprehensive Methamphetamine Control Act of 1996 (MCA) was signed into law. The MCA makes it unlawful for any person to distribute a laboratory supply to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical, with reckless disregard for the illegal uses to which such laboratory supply will be put. Individuals who violate this provision are subject to a civil penalty of not more than $25,000; businesses which violate this provision are subject to a civil penalty of not more than $250,000. The term ''laboratory supply'' is defined as ''a listed chemical or any chemical, substance, or item on a special surveillance list published by the Attorney General, which contains chemicals, products, materials, or equipment used in the manufacture of controlled substances and listed chemicals.'' This final notice contains the list of ''laboratory supplies'' which constitutes the Special Surveillance List that was required to be published by the Attorney General pursuant to Title 21, United States Code, Section 842(a).

EFFECTIVE DATE: May 13, 1999.

FOR FURTHER INFORMATION CONTACT: Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, D.C. 20537, Telephone (202) 307–7183.

SUPPLEMENTARY INFORMATION: On October 3, 1996, the Comprehensive Methamphetamine Control Act of 1996 (MCA) was signed into law. The MCA broadens controls on listed chemicals used in the production of methamphetamine and other controlled substances, increases penalties for the trafficking and manufacturing of methamphetamine and listed chemicals, and expands regulatory controls to include the distribution of lawfully marketed drug products which contain the listed chemicals ephedrine, pseudoephedrine and phenylpropanolamine. The MCA also