terminate the investigation in its entirety based on the consent order stipulations, proposed consent orders, and settlement agreements attached to the motion. In the motion, the parties stated that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation.

On June 14, 2013, the Commission investigative attorney (''IA'') filed a response in conditional support of the joint motion, provided that the parties modify the proposed consent orders to specify the activities authorized by the settlement agreements between the parties. On June 21, 2013, complainants and respondents jointly moved for leave to file a reply to the IA's response to the joint motion. On June 24, 2013, the IA indicated to the ALJ that given the changes made to the consent orders submitted with the parties' reply, the IA does not oppose the joint motion to terminate.

On July 1, 2013, the ALJ issued the subject ID granting the joint motion. The ALJ found that there is good cause for terminating the investigation, and that he is not aware of any extraordinary circumstances that would preclude granting the motion. The ALJ further found that entry of the proposed consent orders and termination of the investigation is in the public interest. On July 9, 2013, the ALJ issued a corrected version of the subject ID to include the revised versions of the consent orders. No petitions for review were filed.

The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: July 19, 2013.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2013–17847 Filed 7–24–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On July 18, 2013 the Department of Justice filed a Complaint and simultaneously lodged a proposed Consent Decree (''Decree'') with the United States District Court for the District of Colorado in the lawsuit entitled *United States* v. *Williams Four Corners LLC,* Civil Action No. 13-cv-1923. In its Complaint the United States seeks civil penalties and injunctive relief against Williams Four Corners, LLC (''Williams'') for violations of the permit issued pursuant to Part C of Subchapter I of the CAA, 42 U.S.C. 7475 (Prevention of Significant Deterioration or ''PSD'') and the regulations promulgated thereunder at 40 CFR 52.21, and the federal operating permit program set forth at Title V of the CAA, 42 U.S.C. 7661–7661f (''Title V'') and the regulations promulgated thereunder at 40 CFR part 71, at a facility known as PLA–9 Central Deliver Point, also known as PLA–9 CDP (the ''PLA–9 Facility''). The PLA–9 Facility is located approximately 18 miles southwest of Durango, Colorado, and within the exterior boundaries of the Southern Ute Indian Reservation. The PLA–9 Facility is now shut down. The Decree requires Williams pay a $63,000 civil penalty to settle the alleged violations. Should Williams restart any operations at PLA–9 within the next two years, the Decree requires Williams comply with the requirements of the PSD Permit applicable to any emitting units that may be restarted or replaced.

The publication of this notice opens a period for public comment. Comments should be addressed to the Acting Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Williams Four Corners, LLC,* D.J. Ref. No. DOJ # 90–5–2–1–10120. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ–ENRD, PO Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $7.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–17874 Filed 7–24–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–52]

George R. Smith, M.D.; Decision and Order

On February 5, 2013, Administrative Law Judge (ALJ) Gail A. Randall issued the attached Recommended Decision. Therein, the ALJ recommended that I deny Respondent's pending application for a DEA Certificate of Registration as a practitioner. Respondent did not file exceptions to the Recommended Decision.

Having reviewed the entire record, I have decided to adopt the ALJ's Recommended Decision in its entirety. Accordingly, Respondent's application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of George R. Smith, M.D., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective immediately.

Dated: July 16, 2013.

Michele M. Leonhart,

Administrator.

Krista Tongring, Esq., for the Government
Louis Leichter, Esq. and *Andre D'Souza, Esq.,* for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

I. Introduction

Gail A. Randall, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* to determine whether the Drug Enforcement Administration (''DEA'' or ''Government'') should deny a physician's application for a DEA Certificate of Registration pursuant to 21 U.S.C. 823(f) (2006). Without such registration, the physician, George R. Smith, M.D. (''Respondent'' or ''Dr. Smith''), would be unable to lawfully

prescribe, dispense or otherwise handle controlled substances in the course of his medical practice.

II. Procedural Background

The Deputy Assistant Administrator, Drug Enforcement Administration, issued an Order to Show Cause (''Order'') dated June 5, 2012, proposing to deny the application of George R. Smith, M.D. for a DEA Certificate of Registration pursuant to 21 U.S.C. 823(f) (2006), because Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(f). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1 at 1]. The Order stated that on November 18, 2011, Respondent applied for a DEA registration as a practitioner in Schedules II–V at 4721 Bob White Road, Gilmer, Texas 75645. [*Id.*]. Additionally, the Order stated that Respondent had twice previously surrendered his DEA registrations for cause. [*Id.*]. Respondent first voluntarily surrendered his DEA registration, DEA number BS2388381, on March 6, 2002. [*Id.*]. Respondent then voluntarily surrendered his second DEA registration, DEA number FS0339817, on April 27, 2011. [*Id.*].

The Order alleged that between November 1998 and June 2001, Respondent issued prescriptions for large quantities of hydrocodone, a Schedule III controlled substance, to his family members for his own personal use for other than legitimate medical purposes. [*Id.*]. In relation to this allegation, the Order asserted that during this time period, Respondent obtained and filled prescriptions for hydrocodone from at least ten different doctors for his own personal use for other than legitimate medical purposes. [*Id.*]. Additionally, the Order asserted that between June 2001 and August 2001, Respondent issued prescriptions for hydrocodone and alprazolam to third-party non-patients in order for Respondent to obtain these controlled substances for his own personal use for other than legitimate medical purposes. [*Id.*]. As a result of issuing these unlawful prescriptions for controlled substances, Respondent pled guilty to one count of obtaining controlled substances by fraud, in violation of 21 U.S.C. § 843(a)(3), a felony, on November 26, 2001, before the United States District Court for the Eastern District of Texas. [*Id.* at 2].

Lastly, the Order alleged that Respondent had prescribed Schedule III and IV controlled substances between January 2010 and January 2011 in violation of his medical license, his Texas controlled substance registration, and his DEA registration. [*Id.*]. In regards to this allegation, the Order stated that Respondent only had authority to prescribe Schedule V controlled substances because in March 2007 Respondent had applied for a DEA registration as a practitioner and was subsequently issued a DEA registration, DEA number FS0339817, for Schedule V controlled substances only. [*Id.*]. The Deputy Assistant Administrator then gave Respondent the opportunity to show cause as to why his registration application should not be denied on the basis of those allegations. [*Id.*].

On July 3, 2012, Respondent, through counsel, timely filed a request for a hearing in the above-captioned matter. [ALJ Exh. 2].

On December 3, 2012, a Protective Order was issued to protect patient names and patient files used in this proceeding. [ALJ Exh. 8].

After authorized delays, a hearing was held in Austin, Texas on December 12, 2012 through December 13, 2012, with the Government and Respondent each represented by counsel. [ALJ Exh. 3–4, 6–7]. At the hearing, counsel for the Government called one witness to testify and introduced documentary evidence. [Transcript (''Tr.'') Volume I–II]. Counsel for the Respondent called two witnesses to testify, including the Respondent, and introduced documentary evidence. [*Id.*].

After the hearing, the Government and the Respondent submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Govt. Brief'' and ''Resp. Brief'').

III. Issue

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should deny the application of George R. Smith, M.D., for a DEA Certificate of Registration as a practitioner, pursuant to 21 U.S.C. § 823(f) (2006), because to grant Dr. Smith's application would be inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f). [ALJ Exh. 3; Tr. 5].

IV. Findings of Fact

A. Stipulated Facts

The parties have stipulated to the following facts:

1. Respondent holds Texas Medical license H–8411 (expiration February 28, 2013),[1] and Texas Department of Public Safety Controlled Substances Registration (Texas DPS Registration) Certificate 60184908 (expiration November 30, 2012) [2] which allows Respondent to issue prescriptions for controlled substances listed in Schedules II–V.

2. On March 4, 1995, the Texas State Board of Medical Examiners (Medical Board) suspended Respondent's medical license because Respondent had developed a drug addiction due to the self-administration of hydrocodone and codeine. The suspension was stayed and Respondent was placed on probation for five (5) years.

3. Respondent's probation was terminated on October 24, 1998.

4. On October 24, 2001, Respondent's medical license was temporarily suspended because his ''continuation in the practice of medicine would constitute a continuing threat to public welfare.''

5. On November 26, 2001, before the United States District Court for the Eastern District of Texas, Respondent pleaded guilty to one count of obtaining a controlled substance by fraud, a felony. Respondent was sentenced to a three (3) year term of probation on March 21, 2002.

6. On March 6, 2002, Respondent voluntarily surrendered his DEA Certificate of Registration Number BS2388381 for cause.

7. By order dated May 17, 2002, the Medical Board revoked Respondent's medical license. The revocation was stayed, Respondent was placed on probation for ten (10) years, and Respondent was required to surrender his DEA (surrendered prior to the order) and Texas controlled substance registrations.

8. By Medical Board Order dated June 2, 2006, Respondent was permitted to apply to the DEA and the Texas DPS for Certificates of Registration for Schedule V controlled substances only. Respondent was further limited to prescribing Schedule V controlled substances to hospital admission patients only.

[1] On January 31, 2013, the parties filed Joint Stipulations of Fact No. 2 with the Court. Therein, the parties stipulated ''[a]fter the conclusion of the Hearing on the Merits Respondent submitted a renewal request to the Texas Medical Board (''TMB'') for his Texas Medical License H–8411 which was set to expire at the end of February 2013. The TMB renewed Respondent's medical license for the ordinary term of two years. Respondent's Texas Medical License is now current through February 28, 2015.''

[2] On January 31, 2013, the parties filed Joint Stipulations of Fact No. 2 with the Court. Therein, the parties stipulated ''[p]rior to the Hearing on the Merits the Respondent submitted a request to the Texas Department of Public Safety (''DPS'') to renew his Texas Controlled Substances Registration. The DPS renewed Respondent's DPS Controlled Substances Registration for the ordinary term of one year. Respondent's DPS Registration is now current through November 30, 2013.''

9. In March 2007, Respondent applied for a DEA Registration for Schedule V controlled substances, which was approved, and DEA Registration Number FS0339817 was issued.

10. DEA Registration Number FS0339817 was renewed in February 2010.

11. Respondent applied to the Medical Board four times for modification of his Board order to allow him to apply for unrestricted DEA and DPS registrations. He made such applications on August 18, 2007; November 2, 2008; March 14, 2010; and November 17, 2010.

12. On April 27, 2011, Respondent voluntarily surrendered DEA Registration Number FS0339817 for cause after it was discovered that he was issuing prescriptions for Schedule III and IV controlled substances to non-hospital admission patients.

13. By Medical Board Order dated August 26, 2011, Respondent was permitted to apply to the DEA and the Texas DPS for unrestricted controlled substance registrations so that he may prescribe Schedule II, III, IV, and V controlled substances.

14. Respondent remains under a Medical Board order that requires random drug screens, drug screens upon request of any of Respondent's healthcare providers, treatment for addiction by a physician, and attendance at AA meetings. Any positive drug screen or refusal to submit to testing is grounds for immediate suspension of Respondent's medical license.

15. The August 26, 2010 [3] Medical Order remains in effect until May 17, 2017, and is not eligible for early termination.

16. In September 2011, the Texas DPS issued Respondent a Texas Controlled Substances Registration in all schedules.

17. On November 18, 2011, Respondent applied for an unrestricted DEA Certificate of Registration.[4]

[ALJ Exh. 5; Tr. 6].

B. Respondent's History

1. Respondent's Education and Training

Respondent received a Bachelor of Science degree from East Texas State University, majoring in Molecular Biology. [Tr. 77–78]. Upon graduating from college, Respondent attended the University of Texas Southwestern Medical School, where he later graduated in the top 10% of his class. [Tr. 78–79]. After completing medical school, Respondent completed a four year post-graduate residency program in internal medicine at Presbyterian Hospital of Dallas. [Tr. 79–81]. In his final year of residency training, Respondent was elected the Chief Resident and during his year as Chief Resident he served as a critical care medicine trainee. [Tr. 80–82]. After completing his residency training, the Respondent was offered a critical care fellowship at Parkland Hospital in Dallas, Texas but, the Respondent declined this opportunity. [Tr. 82–83].

In 1994, the Respondent entered private practice after the completion of his residency training. [Tr. 82, 84]. The Respondent began practicing with an internist in Mount Pleasant, Texas. [*Id.*]. In addition to seeing patients at his own office, the Respondent served as the critical care unit director at Titus Regional Medical Center. [Tr. 84]. Respondent practiced with the internist and served as the critical care unit director at Titus Regional Medical Center for a period of 6–7 years. [*Id.*].

In 2000, the Respondent became Board Certified in Internal Medicine.[5] [Tr. 89]. Following his time in private practice and working as the critical care unit director at Titus Regional Medical Center, Respondent conducted pilot exams for American Airlines for a period of 6–8 months. [Tr. 113]. After this position was eliminated, the Respondent began working for a county hospital in Mineral Wells, Texas as the hospitalist. [*Id.*]. Next, the Respondent conducted routine pre-employment physicals for a company before becoming employed at Hugman-Kent Clinic, in Gladewater, Texas, in 2006.[6] [Tr. 113–115]. Respondent continues to practice at Hugman-Kent Clinic. [Tr. 114–115]. Approximately 85% of the Respondent's patients are Medicare patients. [Tr. 115]. The median age of the Respondent's patients is about 60–65 years old. [Tr. 119]. A significant number of the Respondent's patients have co-morbidities that require complex medical management. [Tr. 116–117].

2. Respondent's Addiction to Controlled Substances

In 1993, the Respondent developed an addiction to hydrocodone after he had injured his back from working on his car. [Tr. 85, 185; Govt. Exh. 3 at 2]. Respondent began self-administering hydrocodone after previously obtaining hydrocodone from physicians and from samples. [Tr. 86–87; Govt. Exh. 3 at 2]. As a result of his addiction, while Respondent was working at Presbyterian Hospital of Dallas in April of 1993, his clinical privileges were suspended after Respondent exhibited behavioral changes and failed to respond to telephone calls and his beeper. [Tr. 87; Govt. Exh. 3 at 2]. The Respondent subsequently entered treatment for his addiction to hydrocodone and was placed under the care of Dr. Michael Healy, an addiction specialist. [Tr. 87–88].

After practicing medicine for only two and one half years, the Respondent entered into an Agreed Order with the Texas State Board of Medical Examiners (''the Board'' or ''the Texas Medical Board'') on March 4, 1995, in which his Texas medical license was suspended as a result of his addiction to hydrocodone; however, the Texas Medical Board stayed the suspension of Respondent's medical license and placed him on probation for a term of five years. [Govt. Exh. 3; Tr. 85]. As a result of the 1995 Agreed Order, restrictions were placed on the Respondent's ability to practice medicine. [Govt. Exh. 3; Tr. 88–89]. The Respondent was required to abstain from the consumption of alcohol and drugs unless prescribed by another physician for a legitimate purpose, submit to drug testing at the request of the Board, and continue under the care of Dr. Michael Healy. [*Id.*].

The Respondent subsequently sought termination of the March 4, 1995 Agreed Order. [Tr. 90; Govt. Exh. 4]. However, on September 20, 1997, the Texas Medical Board denied Respondent's request to terminate the 1995 Agreed Order due to the nature of the violation and the fact that less than three of the five year probation term had been served. [*Id.*]. But, on October 24, 1998, the Texas Medical Board did terminate the March 4, 1995 Agreed Order. [Govt. Exh. 5; Tr. 90].

However, the Respondent started abusing controlled substances again in 1999, approximately one year after the Texas Medical Board had terminated the 1995 Agreed Order. [Tr. 185]. Around November of 1999, the Respondent suffered two compression fractures. [Tr. 92]. The Respondent then began taking hydrocodone for pain. [*Id.*]. Respondent

[3] It appears that both counsel are referring to the August 26, 2011 Medical Order. *See* Government Exhibit (''Govt. Exh.'') 11 and Respondent Exhibit (''Resp. Exh.'') 1.

[4] The November 18, 2011 application is the subject of this administrative hearing.

[5] Respondent is no longer Board Certified in Internal Medicine because his certification expired December 31, 2010. He is not permitted to sit for recertification because he is currently under an Agreed Order with the Texas Medical Board. [Tr. 111–112, 217; Govt. Exh. 11; Resp. Exh. 1].

[6] The reasoning for Respondent's constant movement from job to job will be discussed below. However, such job hopping was due in large part to his addiction problems and the restrictions placed on his medical license by the Texas Medical Board.

initially began obtaining hydrocodone from physicians and then later started writing prescriptions for it himself. [*Id.*]. In addition to abusing hydrocodone, Respondent prescribed hydrocodone to family members and Respondent would consume the hydrocodone that he prescribed to family members a majority of the time. [Tr. 93, 185; Govt. Exh. 6]. Respondent also approached nurses and employees of the Titus Regional Medical Center, where he was working in 2001, and asked them to fill controlled substance prescriptions for him. [Govt. Exh. 6 at 2]. As a result of his addiction problems, the Titus Regional Medical Center suspended Respondent's hospital privileges. [Tr. 93; Govt. Exh. 6 at 3].

On October 24, 2001, the Texas Medical Board entered a Temporary Suspension Order, which temporarily suspended the Respondent's Texas medical license as a result of his return to addiction. [Govt. Exh. 6]. Following the 2001 Temporary Suspension, the Board entered an Agreed Order on May 17, 2002. [Govt. Exh. 7; Resp. Exh. 4]. The Order revoked the Respondent's Texas medical license; however, the Board stayed the revocation and placed the Respondent on probation for a term of ten years. [Govt. Exh. 7 at 4; Resp. Exh. 4 at 4]. The 2002 Agreed Order required the Respondent to abstain from the consumption of alcohol and controlled substances unless prescribed by a physician for a legitimate purpose, to report any prescription of controlled substances to the Board, to give a copy of the Agreed Order to all treating physicians, to submit to drug testing at the request of the Board, to remain under the care of Dr. Michael Healy,[7] to attend Alcoholics Anonymous (''AA'') meetings, to surrender all controlled substances registrations,[8] and to limit his medical practice to a group or institutional setting approved by the Board. [Govt. Exh. 7; Resp. Exh. 4]. Should the Respondent test positive for drug use, then his medical license could be automatically revoked without the need for further hearings. [Tr. 103; Govt. Exh. 7]. The agreement also prohibited the Respondent from applying for a controlled substances registration absent Board approval. [Govt. Exh. 7]. Further, the Respondent was only allowed to file a request to modify this order once a year thereafter. [*Id.*].

Respondent subsequently sought treatment for his relapse in addiction. [Tr. 94]. Respondent went to Baylor, in Dallas, where he underwent a three-month treatment program for his addiction. [*Id.*]. Respondent has been required to submit to over 600 drug tests as a result of the 2002 Agreed Order and has never failed to appear for a drug test nor has the Respondent tested positive.[9] [Tr. 103–108]. As a result of the Respondent's treatment and willingness to stay sober, the Respondent reports a sobriety date of October 22, 2001.[10] [Tr. 96; Govt. Exh. 7; Resp. Exh. 4]. Respondent admits that his return to addiction and his prescribing to family members, self-administration, and solicitation of colleagues was an abuse of the authority of his Texas medical license, his Texas DPS registration, and his DEA registration. [Tr. 92]. The 2002 Agreed Order was subsequently modified on October 10, 2003 and June 2, 2006. [Govt. Exh. 8 and 10; Resp. Exh. 3 and 2].

The October 10, 2003 Modified Agreed Order permitted the Respondent to practice in a setting where there is at least one other physician located in the place that services are being rendered, rather than the previous requirement under the 2002 Order, which restricted Respondent's practice to a group or institutional setting. [Govt. Exh. 8 at 9; Govt. Exh. 3 at 9]. In addition, the 2003 Modified Agreed Order required the Respondent to take and pass the Special Purpose Examination (SPEX). [*Id.* at 10]. The Respondent again sought modification of the 2002 Agreed Order; however, his modification request was denied by the Board on December 10, 2004. [Govt. Exh. 9]. But, on June 2, 2006, the Board issued an Order Granting Modification to the 2002 Agreed Order, in which Respondent was authorized to reapply for a Texas DPS registration and a DEA registration in Schedule V controlled substances only. [Govt. Exh. 10 at 2; Resp. Exh. 2 at 2]. Additionally, the 2006 Order Granting Modification restricted the Respondent's prescribing authority to hospital admission patients only. [*Id.*].

After the entry of the Medical Board's orders, the Respondent was terminated from multiple third-party payer insurance plans. [Tr. 112]. With the loss of his DEA registration, the Respondent experienced even more third-party payer loss, leaving him with mostly cash-only patients or Medicare patients. [*Id.*]. Subsequently, the Respondent moved from job to job as work became available. [Tr. 113].

The Respondent continues to see a psychiatrist once a month. [Tr. 109]. He currently has no mental health diagnosis that would impair his abilities as a physician. [*Id.*].

C. Respondent Prescribing Controlled Substances Outside the Scope of His Registration

Pursuant to the 2002 Agreed Order and the subsequent 2003 and 2006 modifications to the Agreed Order, the Respondent re-applied for DPS and DEA registrations for only Schedule V controlled substances in March 2007. [Govt. Exh. 10; Resp. Exh. 2; ALJ Exh. 5]. He obtained these registrations. [*Id.*]. But, under the June 2, 2006 Order Granting Modification, the Respondent's prescribing authority was restricted to hospital patients only. [*Id.*].

In late 2009, Respondent began prescribing Schedules III and IV controlled substances to his patients at the Hugman-Kent Clinic. [Tr. 139]. Respondent continued prescribing outside the scope of his Texas DPS and DEA registrations up until he was visited by Diversion Investigator (''DI'') Thomas McLaughlin [11] on April 6, 2011. [Tr. 23, 139]. Yet, the Respondent credibly testified that he prescribed these controlled substances to adequately treat his patients. [Tr. 130, 135].

DI McLaughlin first began investigating the Respondent after he received information from Sandra Atkins, a DEA registration technician, that Respondent was writing Schedule III and IV prescriptions when he was only authorized to write Schedule V prescriptions. [Tr. 10–11]. DI McLaughlin requested information from the Texas Prescription Monitoring

[7] After the retirement of Dr. Michael Healy, the Respondent has been under the care of Dr. Jonathon Lockhart and continues to see Dr. Lockhart once a month per the 2002 Agreed Order. [Tr. 109].

[8] Respondent voluntarily surrendered his Texas DPS and DEA registrations prior to the date of the 2002 Agreed Order. [Tr. 110].

[9] The drug testing that Respondent must submit to as a result of his 2002 Agreed Order and subsequent modifications to this Agreed Order are intense. Respondent must call an automated mechanism every morning in order to determine if he must give a specimen on that particular day. If Respondent is required to give a specimen on a particular day, then he must report to give the specimen before the early afternoon. Respondent has never failed to call or failed to provide a specimen over the eleven year period that he has been required to submit to this drug testing. The Respondent pays the costs for the drug tests. [Tr. 103–108, 314–316].

[10] The Government does not challenge this sobriety date. [Tr. 313–314].

[11] DI McLaughlin is employed by the DEA at the Tyler Resident Office of the Dallas Field Division. [Tr. 8]. DI McLaughlin has been a Diversion Investigator for over 15 years. [Tr. 9]. Prior to being employed with DEA, DI McLaughlin served as a Correctional Officer for the Illinois Department of Corrections, served as an Investigator with the City of Chicago, and served a total of 21 years in the Air Force. [*Id.*]. As part of his training in being a Diversion Investigator, DI McLaughlin has attended the basic diversion investigator course in Quantico, Virginia, and has received continuing training throughout his tenure as a Diversion Investigator. [Tr. 9–10].

Program (''PMP'')[12] from the time period of January 2010 through January 2011, and discovered through the report that Respondent prescribed 1,532 prescriptions in Schedules III, IV, and V to 335 patients. [Tr. 14–18; Govt. Exh. 2]. These prescriptions were issued to non-hospital admission patients. [Tr. 22]. Of the 1,532 prescriptions issued during this time period, over 1,400 were for Schedule III and IV controlled substances. [Tr. 18–19; Govt. Exh. 2]. DI McLaughlin also requested copies of original prescriptions from the pharmacies that filled Respondent's issued prescriptions. [Tr. 20–22; Govt. Exh. 2, 12]. He noted that there were no discrepancies between the Prescription Monitoring Program Data and the prescription slips that he received. [*Id.*].

The Respondent contends that he has no record of 47 patients named in the Prescription Monitoring Program Data Report as being treated by him at the Hugman-Kent Clinic. [Tr. 173–178; Resp. Exh. 15]. However, only 41 of these contested names were listed on the Prescription Monitoring Program Data. [Resp. Exh. 15; Govt. Exh. 2; Tr. 59]. These 41 people were prescribed a total of 155 prescriptions. [Govt. Exh. 2; Tr. 59]. Therefore, rather than the Respondent prescribing 1,532 total prescriptions during the time of January 2010 through January 2011, he issued 1,377 prescriptions. [Govt. Exh. 2]. Although Respondent did not prescribe to 41 of those listed on the Prescription Monitoring Program Data Report, the Respondent did prescribe to the remaining 294 people and prescribed 1,071 prescriptions for Schedule III and IV controlled substances. [*Id.*].

Finding Respondent's testimony to be credible, it is probable that someone had in fact abused Respondent's DEA registration because neither the Respondent nor the Clinic have any records of these 41 patients being prescribed controlled substances.[13] [Tr. 173–178; Resp. Exh. 15]. However, Respondent acknowledges that his actions were still wrong and that he did prescribe outside the scope of his Texas DPS and DEA registrations. [Tr. 23, 59, 139, 174]. Regardless of the controversy concerning the 41 patients, he ceased prescribing Schedule III and IV controlled substances after a visit by DI McLaughlin in April of 2011. [Tr. 139].

Although, Respondent admitted his fault, he repeatedly gave justifications for his actions; these included: prescribing for the patient's best interest and patient care; and continuing prescriptions for patients of a retiring doctor out of the Hugman-Kent Clinic.[14] [Tr. 134–139, 168–172, 204, 206; Resp. Exh. 13]. The Respondent later admitted on cross-examination that he would have had fewer patients if he did not prescribe Schedule III and IV controlled substances, and the Clinic could therefore have lowered his salary. [Tr. 191]. Additionally, the Respondent admitted that there are hundreds of physicians located in Longview, Texas, which is about 20 miles away from the Respondent's place of business. [Tr. 202, 39–40]. Finally, there were other physicians in Gladewater, Texas, who had unrestricted DEA registrations at the time the Respondent was prescribing outside the scope of his registration. [Tr. 39–40]. Yet the Respondent credibly testified that other physicians working at the Hugman-Kent Clinic were not comfortable writing controlled substance prescriptions for the Respondent's patients because ''they didn't know the patients.'' [Tr. 138].

As a result of the Respondent's unauthorized prescribing of Schedule III and IV controlled substances, he voluntarily surrendered his DEA registration on April 27, 2011. [ALJ Exh. 5]. The Respondent also violated his modified 2002 Agreed Order.[15] [Govt. Exh. 11 at 4; Resp. Exh. 1 at 4]. Also, the Respondent had been reporting to his compliance officer that he was in full compliance with the 2002 Agreed Order, when in fact he admitted at the hearing that he had not been in compliance. [Resp. Exh. 5–6; Tr. 186–192].

On August 26, 2011, the Respondent again entered into an Agreed Order with the Texas Medical Board. [Govt. Exh. 11; Resp. Exh. 1; Tr. 162–165]. Pursuant to the 2011 Agreed Order, which was issued after the Respondent took part in an Informal Settlement and Show Cause Proceeding (''ISC'')[16] on July 28, 2011, the Respondent is to remain under the terms of the 2002 Agreed Order, as modified, without the right to seek an early termination. [Tr. 308; Govt. Exh. 11 at 5; Resp. Exh. 1 at 5]. The Board modified the 2002 Agreed Order to authorize the Respondent to reapply to the DEA and the Texas DPS to obtain registrations in Schedule II, III, IV, and V controlled substances. [*Id.*]. But, the decision to grant or deny the Respondent's application remains ''a matter for appropriate determination by the DEA and DPS.'' [Govt. Exh. 11 at 5–6; Resp. Exh. 1 at 5–6]. In addition, the Respondent was ordered to pay an administrative penalty of $10,000, which he has paid. [Tr. 164; Govt. Exh. 11 at 6; Resp. Exh. 1 at 6]. Thus, after the Respondent had been found to be in violation of both his Texas DPS and DEA registrations and his 2002 Agreed Order, the Respondent was permitted to reapply for unrestricted registrations, and he obtained an unrestricted Texas DPS registration in Schedules II through V in September 2011. [ALJ Exh. 5]. Now, in spite of his violations, the Respondent seeks a DEA registration for Schedules II through V. [ALJ Exh. 5; Govt. Exh. 1].

D. Respondent's Felony Convictions

1. 2001 Felony Conviction

As a result of Respondent's addiction to hydrocodone and his self-administration of hydrocodone, he pled guilty to one count of obtaining a controlled substance by fraud, a felony, on November 26, 2001, before the United States District Court for the Eastern District of Texas. [ALJ Exh. 5; Tr. 99]. Respondent was then sentenced to a three year term of probation on March 21, 2002. [ALJ Exh. 5].

[12] Under Texas law all pharmacies must submit prescription information on controlled substances to the PMP when the prescriptions are filled. The information includes the date, the drug, the practitioner's name and DPS registration numbers. [Tr. 12].

[13] There was some testimony that implicated an employee of the Hugman-Kent Clinic, who was functioning as a nurse, had illegally used Respondent's prescriptive authority to help others obtain controlled substances. [Tr. 174–178]. But, there is no concrete evidence that this unidentified nurse had in fact used Respondent's prescriptive authority to help 41 people obtain controlled substances under the guise of Respondent's Texas DPS and DEA registrations. [*Id.*]. However, this unidentified nurse was later fired from the Clinic after it had been discovered that she had taken samples from the Clinic. [Tr. 177].

Further, the Respondent asserted in his Prehearing Statement that some of the patients attributed to him may actually be patients of other Dr. George Smiths in Texas. However, this assertion was not pursued by the Respondent during the hearing. [*But see* Tr. 41–44; Govt. Exh. 14–17].

[14] Respondent offered justifications as to why he prescribed Schedules III and IV controlled substances to five patients under his care. The Respondent found there was a medical need for each of the patients to be prescribed controlled substances. Yet, Respondent did not have the authority to prescribe these controlled substances to these patients. However, there is no dispute concerning the medical necessity for these prescriptions. [Resp. Exh. 13; Tr. 140–161].

[15] The Respondent had been requesting modification of his 2002 Agreed Order through letters that he sent to the Texas Medical Board on four separate occasions. Yet each time that he requested modification, he was not in compliance with the 2002 Agreed Order. [Resp. Exh. 7–10; Tr. 188–192]. In fact, at the March 2011 modification hearing that the Respondent had with the Texas Medical Board, he represented that he was in compliance with the 2002 Agreed Order but, he was not. [Tr. 192].

[16] The record contains testimony concerning the ISC process. [Tr. 308–311]. Since there is no dispute concerning this due process procedure, I do not explain this Medical Board process here.

2. 2012 Felony Conviction

As a result of the Respondent's admitting that he prescribed Schedule III and IV controlled substances, when he was only authorized to prescribe Schedule V controlled substances, he pled guilty to violating 21 U.S.C. 842(a)(1) and (c)(2)(B) (2006) for illegal dispensing before the United States District Court for the Eastern District of Texas, Tyler Division on September 5, 2012. [Govt. Exh. 13; Tr. 36–38, 167–168]. Respondent has not yet been sentenced for this conviction; however, the sentencing recommendation is a probationary term and a fine. [Tr. 38, 168].

E. Respondent's Remedial Actions

Respondent has taken remedial actions to help ensure that the terms of his medical license agreement would not be violated. [Tr. 178–179]. Because Respondent claims that there may have been some instances where his DEA registration was abused by others, although he fully admits to prescribing outside the scope of his registration, he intends to take the following actions to ensure others do not abuse his medical license and/or a future DEA registration: use the Prescription Access Texas Program to monitor patients' prescriptions; implement a better screening process prior to hiring employees at the Clinic; use only hard copy prescriptions, rather than calling in prescriptions to pharmacies; and notify local pharmacies regarding his use of hard copy prescriptions. [Tr. 178–179]. The Respondent admitted that he could have implemented these remedial measures when he first gained employment at Hugman-Kent Clinic but, he did not. [Tr. 192–193].

Currently any patient who calls for an appointment is told that the Respondent is unable to prescribe controlled substances. [Tr. 180, 219]. The Respondent also credibly testified that he would expect his DEA registration would contain conditions, such as the keeping of a log book. [Tr. 205, 214–215]. The Respondent testified that he would not violate his DEA registration again. [Tr. 207–208]. The last time the Respondent prescribed controlled substances in Schedules III and IV to a patient was in the Spring of 2011. [Tr. 219].

The Respondent also provided testimony as to why having a DEA registration would be beneficial to his patients. [Tr. 166, 218]. He would be able to participate in more third-party payer plans, and he could take steps to obtain hospital privileges to better treat his patients. [*Id.*].

V. Statement of Law and Discussion

A. The Position of the Parties

1. Government's Position

The Government asserts that the Respondent's application for a DEA Certificate of Registration should be denied. [Govt. Brief at 18]. Specifically, the Government argues that granting the Respondent's application is inconsistent with the public interest, under 21 U.S.C. 823(f) (2006), because the Respondent has previously failed to be a responsible registrant, has violated the Controlled Substances Act, has two felony convictions, and has failed to take responsibility for his actions. [*Id.*].

The Government argues that the recommendation of the Texas Medical Board, which allows the Respondent to reapply for a DEA registration in Schedule II through V controlled substances, should be given ''nominal weight.'' [*Id.* at 12–13]. In support of its argument, the Government contends that the Respondent has ''been the subject of Texas Medical Board orders from 1995 through 1998 and again from 2001 through the present day based on Respondent's misconduct involving controlled substances.'' [*Id.* at 12].

In addition, the Government argues that the Respondent's experience in dispensing controlled substances, his conviction record, and his compliance with federal and state laws relating to controlled substances ''all strongly weigh in favor of the denial of Respondent's application'' for a DEA Certificate of Registration. [*Id.* at 13]. The Government argues that Respondent has had his Texas medical license revoked (although stayed) twice due to his addiction to hydrocodone and his prescribing hydrocodone to his family members. [*Id.* at 13–14]. Additionally, the Government argues that the Respondent has had two felony convictions related to controlled substances, one for issuing fraudulent prescriptions and another for prescribing controlled substances outside the scope of his prescriptive authority. He has twice surrendered his DEA registrations. [*Id.*]. The Government also argues that Respondent violated federal and local law on several occasions when he prescribed Schedule III and IV controlled substances to his non-hospital patients. [*Id.* at 14].

Lastly, the Government argues that the Respondent's application for a DEA registration is inconsistent with the public interest because Respondent has failed to be a compliant registrant in the past and will likely fail to be a compliant registrant in the future. [*Id.* at 15]. The Government also argues that the Respondent has failed to take full responsibility for his actions. [*Id.* at 16]. The Government additionally argues that the Respondent's excuses for his failure to be a compliant registrant, i.e. the need of the community and his patients, is not a viable argument and does not support the granting of Respondent's application for a DEA registration. [*Id.* at 17]. In conclusion, the Government asserts that ''Respondent failed in his responsibilities as a DEA registrant, not once but two times. Both failures involved Respondent's knowing and willful violations of the Controlled Substances Act and resulted in criminal convictions.'' [*Id.* at 18]. For these reasons, the Government concludes that the Respondent's application should be denied.

2. Respondent's Position

The Respondent asserts that his application for a DEA registration should be granted because granting his registration is consistent with the public interest.[17] [Resp. Brief at 13]. First, Dr. Smith argues that the Texas Medical Board has recommended that he be able to apply for an unrestricted DEA registration, in spite of his past disciplinary history with the Texas Medical Board. [*Id.* at 13–14]. Additionally, the Respondent notes that he has already obtained an unrestricted Texas DPS registration for controlled substances that weighs in favor of the DEA granting his registration. [*Id.* at 14].

The Respondent next argues that he has sufficient knowledge and experience in dispensing controlled substances. [*Id.*]. Respondent claims that he has ''a good working knowledge of complex medical management.'' [*Id.*].

Although the Respondent acknowledges that he has had two felony convictions and has not complied with state, federal, or local laws relating to controlled substances, he asserts that he has rehabilitated himself and thus, these factors do not warrant the denial of his DEA registration application. [*Id.* at 14–16]. Specifically, the Respondent asserts that he has been sober since October of 2001, and has submitted to over 600 drug tests, in which he has never tested positive. [*Id.* at 15]. Additionally, the Respondent argues that, although he prescribed outside the scope of his

[17] Although the Respondent contends that granting his application for a DEA registration is in the public interest, he recognizes that restrictions could be placed on his registration, such as maintaining a log book and agreeing to inspections without the need for an administrative warrant. [Resp. Brief at 13].

registration, he did so because it was in the best interest of his patients and he never ''non-therapeutically prescribed drugs since his 2002 arrest.'' [*Id.*]. Moreover, Respondent asserts that since his noncompliance was discovered in 2011, he has been in full compliance with his Texas Medical Board Orders, his Texas DPS registration and his DEA registration. [*Id.* at 15–16].

Lastly, the Respondent argues that a DEA registration in Schedules II through V will not threaten the public health and safety because he is committed to remaining sober and complying with all laws. [*Id.* at 16–18]. Dr. Smith asserts that he has taken responsibility for his past wrongdoing and if he were to receive a DEA registration, he would understand and comply with any stipulations that were included with his DEA registration. [*Id.* at 17–18]. Moreover, Dr. Smith argues that granting his DEA registration application is in fact in the public's best interest because he will be better equipped to handle his patients and the community will be effected in a positive way. [*Id.* at 17]. Therefore, Dr. Smith requests that his DEA registration application be granted with any provisions the Court deems fit. [*Id.* at 18].

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. 823(f) (2006), the Deputy Administrator may deny an application for a DEA Certificate of Registration if he determines that such registration would be inconsistent with the public interest.[18] In determining the public interest, the following factors are considered:

(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. 21 U.S.C. § 823(f) (2006).

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether an application should be denied. *See Robert A. Leslie, M.D.,* 68 Fed. Reg. 15,227, 15,230 (DEA 2003). Moreover, the Deputy Administrator is ''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 (DC Cir. 2005).

The Government bears the ultimate burden of proving that the requirements for registration are not satisfied. 21 CFR 1301.44(d) (2012). However, where the Government has made out a *prima facie* case that Respondent's application would be ''inconsistent with the public interest,'' the burden of production shifts to the applicant to ''present[] sufficient mitigating evidence'' to show why he can be trusted with a new registration. *See Medicine Shoppe—Jonesborough,* 73 FR 364, 387 (DEA 2008). To this point, the Agency has repeatedly held that the ''registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct. *Id.; see also Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (DEA 2007). In short, after the Government makes its *prima facie* case, the Respondent must produce sufficient evidence that he can be trusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not reoccur. Yet, the DEA has consistently held the view that ''past performance is the best predictor of future performance.'' *Alra Laboratories,* 59 FR 50,620 (DEA 1994), *aff'd Alra Laboratories, Inc.* v. *DEA,* 54 F.3d 450, 451 (7th Cir 1995).

1. Factor One: Recommendation of Appropriate State Licensing Board

Although the recommendation of the applicable state licensing board is probative to this factor, the Agency possesses ''a separate oversight responsibility with respect to the handling of controlled substances'' and therefore, must make an ''independent determination as to whether the granting of [a registration] would be in the public interest.'' *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8,209, 8,210 (DEA 1990); *see also Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 461 (DEA 2009). It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Leslie,* 68 Fed. Reg. at 15,230; *John H. Kennedy, M.D.,* 71 FR 35,705, 35,708 (DEA 2006). Even the reinstatement of a state medical license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Levin,* 55 FR at 8,210. The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within a state government. *Edmund Chein, M.D.,* 72 Fed. Reg. 6,580, 6,590 (DEA 2007), *aff'd Chein* v. *DEA,* 533 F.3d 828 (DC Cir. 2008). So while not dispositive, state board recommendations are relevant to the issue of granting a DEA registration. *See Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,755 (DEA 2009); *Martha Hernandez, M.D.,* 62 FR 61,145, 61,147 (DEA 1997).

The Respondent has been the subject of numerous orders from the Texas Medical Board throughout his medical career. [Govt. Exh. 3–11; Resp. Exh. 1–4]. The disciplinary proceedings regarding the Respondent with the Texas Medical Board span over a decade. [*Id.*]. The Respondent initially had his Texas medical license suspended in 1995 after it was discovered that the Respondent had become addicted to hydrocodone and codeine. [Govt. Exh. 3]. Then again, in October of 2001, the Respondent's medical license was suspended after the Texas Medical Board discovered that the Respondent had relapsed in his drug addiction. [Govt. Exh. 6]. Thereafter, on May 17, 2002, the Texas Medical Board revoked Respondent's Texas medical license in light of his abuse of controlled substances and his prescribing controlled substances to his family members for his own personal use; however, the revocation was stayed and the Respondent was placed on a term of probation for ten years. [Govt. Exh. 7; Resp. Exh. 4]. In addition to the stay of revocation and the term of probation, the Respondent was required to surrender his DEA Certificate of Registration and his Texas DPS controlled substance registration. [*Id.*].

However, in 2006, the Texas Medical Board allowed the Respondent to seek a modification of the May 17, 2002 Order, and the Respondent was subsequently permitted to apply to the DEA and the Texas DPS for controlled substance registrations in Schedule V only. [Govt. Exh. 10; Resp. Exh. 2]. Additionally, the June 2, 2006 Order mandated that, if Respondent were to receive authority to prescribe Schedule V controlled substances, then his prescribing authority would be restricted to hospital admission patients only. [*Id.*].

In spite of the Respondent's past history, the most recent Texas Medical Board Order, dated August 26, 2011, permits Respondent to reapply to the DEA and the Texas DPS for controlled substance registrations in Schedules II through V. [Govt. Exh. 11; Resp. Exh. 1].

[18] The Deputy Administrator has the authority to make such a determination pursuant to 28 C.F.R. §§ 0.100(b), 0.104 (2012).

However, the 2011 Order notes that, although the Board will allow the Respondent to reapply for these registrations, the decision of whether to grant or deny the Respondent's application is reserved for the issuing agency. [*Id.*].

Therefore, while the Respondent's Texas medical license is not currently suspended or revoked, the Respondent is currently the subject of the 2011 Agreed Order, by which the Respondent must abide. [*Id.*]. Although the Respondent's medical license has been the subject of numerous disciplinary actions by the Texas Medical Board, I find that the current recommendation of the Texas Medical Board permits the Respondent to apply for a DEA registration in Schedules II through V. [*Id.*]. However, the Texas Medical Board did not directly recommend that the Respondent's DEA application for registration should be granted. [*Id.*]. In fact, the Texas Medical Board recognizes that the decision of whether to grant or deny the Respondent's DEA application is entirely reserved to the DEA. [*Id.*]. Thus, I find that the decision of the Texas Medical Board neither weighs in favor of granting nor denying the Respondent's application for a DEA Certificate of Registration in Schedules II through V.

2. Factors Two and Four: Applicant's Experience With Controlled Substances and Applicant's Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

Respondent's experience with controlled substances and his compliance with applicable laws related to the handling of controlled substances are relevant to determining the public interest in this case. ''Pursuant to 21 U.S.C. 822(b), '[p]ersons registered by the Attorney General under this subchapter to . . . dispense controlled substances . . . are authorized to possess . . . or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.' '' *Leonard E. Reaves, III, M.D.,* 63 FR 44,471, 44,473 (DEA 1998) (registration revoked after physician was prescribing outside the scope of his DEA registration). Additionally, except as authorized, ''it shall be unlawful for any person knowingly or intentionally to . . . dispense, or possess with intent to . . . dispense a controlled substance.'' 21 U.S.C. 841(a)(1) (2006); *see* 21 U.S.C. 802(10) ('''dispense' means to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner, including the prescribing . . . of a controlled substance''); *see also* 21 CFR 1301.13(a) (providing that ''[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person.'').

In this case, the Respondent's experience with controlled substances has been troubled for a majority of his career. [Govt. Exh. 3–11; Resp. Exh. 1–4]. Respondent has struggled with addiction to controlled substances; although, now the Respondent is sober and has been sober for eleven years. [Tr. 96, 122]. Additionally, the Respondent prescribed controlled substances to his family members without maintaining proper records and a majority of those prescriptions Respondent obtained for his own addiction purposes. [Tr. 93].

Respondent also prescribed Schedule III and IV controlled substances in violation of his 2002 Agreed Order, modified in 2006, and Texas DPS and DEA registrations. [Govt. Exh. 10; Resp. Exh. 2]. Specifically, the Respondent was only authorized by his DEA registration to prescribe Schedule V controlled substances, and by his modified Agreed Order, to prescribe such substances to hospital admitted patients. Yet, the Respondent prescribed 1,071 Schedule III and IV controlled substances to non-hospital admitted patients over the course of one year. [Govt. Exh. 2, 10; Resp. Exh. 2]. In fact, the Respondent had been prescribing outside the scope of his registration since 2009 and only stopped doing so in April of 2011, after DI McLaughlin visited the Respondent at the Clinic and informed him that he could not prescribe Schedule III and IV controlled substances when his DEA registration was restricted to Schedule V controlled substances. [Tr. 23, 139].

The Respondent blatantly disregarded the restrictions that had been placed on his authority to prescribe controlled substances. Although the Respondent claims that he would not abuse his registration in the future, in light of his past behavior his claim cannot be trusted. His history and experience with controlled substances throughout his medical career is not indicative of a compliant registrant. Thus, I find that these factors weigh against the granting of Respondent's application for a DEA Certificate of Registration.

3. Factor Three: Applicant's Conviction Record Relating to Controlled Substances

Pursuant to 21 U.S.C. 823(f)(3) (2006), the Deputy Administrator may deny a pending application for a DEA Certificate of Registration upon a finding that the applicant has been convicted of a felony related to controlled substances under state or federal law. *See Barry H. Brooks, M.D.,* 66 FR 18,305, 18,307 (DEA 2001); *John S. Noell, M.D.,* 56 FR 12,038, 12,039 (DEA 1991); *Thomas G. Easter II, M.D.,* 69 FR 5,579, 5,580 (DEA 2004).

In this case, the record contains ample evidence that Respondent has been convicted of two felony offenses related to the dispensing of controlled substances. [ALJ Exh. 5; Govt. Exh. 13]. Respondent has a 2001 felony conviction for obtaining a controlled substance by fraud in violation of 21 U.S.C. 843(a)(3). [ALJ Exh. 5]. In addition, the Respondent has a 2011 felony conviction for issuing prescriptions for Schedule III and IV controlled substances in violation of his restricted Schedule V DEA registration, thus violating 21 U.S.C. 842(a)(1) and (c)(2)(B). [Govt. Exh. 13]. Therefore, I find that this factor weighs against the granting of Respondent's application for a DEA Certificate of Registration.

4. Factor Five: Such Other Conduct Which May Threaten the Public Health and Safety

Under Factor Five, the Deputy Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5) (2006). This factor encompasses ''conduct which creates a probable or possible threat (and not only an actual [threat]) to public health and safety.'' *Jacobo Dreszer, M.D.,* 76 FR 19,386, 19,401 FN2 (DEA 2011). The Agency has long held that a practitioner's self-abuse of controlled substances constitutes ''conduct which may threaten public health and safety.'' 21 U.S.C. § 823(f)(5) (2006); *see also Tony T. Bui, M.D.,* 75 Fed. Reg. 49,979, 49,990 (DEA 2010); *Kenneth Wayne Green, Jr., M.D.,* 59 FR 51,453 (DEA 1994); *David E. Trawick, D.D.S.,* 53 Fed. Reg. 5,326 (DEA 1988). Additionally, the DEA has consistently held that ''[c]andor during DEA investigations, regardless of the severity of the violations alleged, is considered by the DEA to be an important factor when assessing whether a . . . registration is consistent with the public interest'' and noting that a registrant's ''lack of candor and failure to take responsibility for his past legal troubles . . . provide substantial evidence that his registration is inconsistent with the public interest.'' *Jeri Hassman, M.D.,* 75 FR 8,194, 8,236 (DEA 2010); *see also Prince George Daniels DDS,* 60 FR 62,884, 62,887 (DEA 1995); *see also Ronald Lynch, M.D.,* 75 FR 78,745, 78,749 (DEA 2010)

(Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility). Furthermore, the Agency is not required to ''consider community impact evidence in exercising its authority.. . .'' *Linda Sue Cheek, M.D.,* 76 FR 66,972, 66,973 (DEA 2011); *see also Steven M. Abbadessa, D.O.,* 74 FR 10,077, 10,078 (DEA 2009) (the hardship imposed because Respondent lacks a registration is not a relevant consideration under the Controlled Substances Act).

Here, Respondent self-abused and prescribed significant quantities of controlled substances to his family members, from approximately 1993 through October 22, 2001, which he reports as his sobriety date. [Govt. Exh. 3–10]. Such unlawful ingestion and prescribing of controlled substances clearly places the public health and safety in jeopardy. This unlawful conduct led to the temporary suspension of Respondent's Texas medical license, a felony conviction, the surrender of Respondent's DEA registration, and revocation of Respondent's Texas medical license.[19] [Govt. Exh. 3, 6–7; ALJ Exh. 5; Resp. Exh. 4].

Yet, I find that Respondent has successfully addressed his addiction problem and returned to the practice of medicine by regaining his medical license in 2002. [Govt. Exh. 7; Resp. Exh. 4]. At the hearing, Respondent proffered substantial and detailed evidence regarding his impressive recovery program, including numerous negative drug screens he has taken over the past eleven years. [Tr. 103–108]. As the Deputy Administrator has previously determined, ''[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 a DEA registration.'' *Leonardo V. Lopez, M.D.,* 54 FR 36,915 (DEA 1989). Even though it has been previously found that time, alone, is not dispositive in such situations, it is certainly an appropriate factor to be considered. *See Robert G. Hallermeier, M.D.,* 62 FR 26,818 (DEA 1997) (four years); *John Porter Richards, D.O.,* 61 FR 13,878 (DEA 1996) (ten years); *Norman Alpert, M.D.,* 58 FR 67,420, 67,421 (DEA 1993) (seven years).

[19] Although the Respondent's medical license was temporarily suspended and later revoked, both of these actions were stayed and the Respondent was placed on probation each time. *See* Govt. Exh. 3, 6, 7 and Resp. Exh. 4.

In Respondent's case, the fact that he has been sober for over eleven years and continues to abide by all terms and conditions imposed upon him regarding his sobriety shows that Respondent intends to remain sober. In addition, there has been no evidence that the Respondent has suffered any sort of relapse to addiction since his reported sobriety date of October 22, 2001. Therefore, the public interest is not being threatened by the Respondent's previous addiction to hydrocodone, because it does not appear that the Respondent will return to this conduct.

However, although the Respondent attempted to take responsibility for his unlawful prescribing of Schedules III and IV controlled substances by admitting that his actions were wrong, he continuously provided justifications for his actions in an effort to persuade the Court that his violations of his DEA registration were justified under the circumstances. [Tr. 134–139, 168–172, 204, 206; Resp. Exh. 13]. Moreover, Respondent repeatedly provided the Court with reasons as to why it was not feasible for him to refer his patients to another doctor who could prescribe the necessary scheduled controlled substance, or to simply refuse to prescribe outside of his DEA and Texas DPS registrations. [*Id.*]. I find that Respondent's misplaced justifications amount to a failure to take full responsibility for his actions.

Moreover, although the Respondent attempts to justify the need for his DEA registration because it would be in his patient's and the community's best interest, this reasoning has failed in determining whether the Respondent's application should be granted. Community impact evidence has been found irrelevant in DEA precedent. *Linda Sue Cheek, M.D.,* 76 FR at 66,973; *see also Steven M. Abbadessa, D.O.,* 74 FR at 10,078.

As to candor, the record demonstrates that the Respondent falsely reported his compliance with the Agreed Order when he was in fact noncompliant. Specifically, the Respondent reported that he was abiding by his restricted prescribing authority, when he was actually prescribing outside the scope of that authority. Such lack of candor to government officials weighs against the Respondent's application being granted. [Resp. Exh. 5, 6].

In sum, Respondent has conclusively demonstrated his strong recovery from his previous addiction and his successful maintenance of his sobriety for the past eleven years. Therefore, I find that Respondent's history of substance abuse does not weigh against the granting of Respondent's application for a DEA Certificate of Registration.

The Respondent has admitted his wrongdoing in prescribing outside his authority. However, each time Respondent admitted that his past conduct was a violation, he attempted to offer justifications for his conduct in an effort to minimize his wrongdoing. Therefore, I find that Respondent's half-hearted attempt to take responsibility for these actions weighs against the granting of Respondent's application for a DEA Certificate of Registration.

C. Conclusion and Recommendation

I conclude that the Government has proven, by a preponderance of the evidence, that Respondent's application for a DEA registration in Schedules II through V should be denied. Respondent has previously been granted numerous opportunities to act as a responsible DEA registrant and has failed each time. I do not see any conditions that could be placed on Respondent's registration now that would ensure that Respondent would be a responsible DEA registrant, especially considering that Respondent was afforded the opportunity to hold a DEA registration for Schedule V controlled substances after his substance abuse and felony conviction, and yet, Respondent violated his registration.

Moreover, had the Respondent not been caught violating his prescriptive authority, it is likely that Respondent would have continued prescribing outside the scope of his registration. Although Respondent now claims that he would be a compliant registrant, if he were to receive a DEA registration, I find reason to doubt this claim. Respondent has been noncompliant, yet has represented himself as compliant on several occasions to Board representatives.

In this case, the Respondent has shown that his ability to properly handle controlled substances and abide by the law has been tainted. I find that Respondent has not taken full responsibility for his mistakes. Therefore, I find that granting Respondent's application for a DEA Certificate of Registration is against the public interest, and I recommend that his application be denied.

Date: February 5, 2013.

Gail A. Randall,

Administrative Law Judge.

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