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On April 21, 1993, PowerOpen filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 22, 1993 (58 Fed. Reg. 33954).

The last notification was filed with the Department on July 12, 1993. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 18, 1993 (58 Fed. Reg. 43911).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 93-30395 Filed 12-13-93; 8:45 am]

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Drug Enforcement Administration [Docket No. 92-20]

Carmel Ben-Eliezer, M.D.; Denial of Application

On November 21, 1991, the Deputy Administrator of the Office of Diversion Control, Drug Enforcement Administration (DEA), issued to Carmel Ben-Eliezer, M.D. (Respondent), of Glenshaw, Pennsylvania, an Order to Show Cause proposing to deny Respondent's application for registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged that Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).

Respondent, through counsel, filed a request for a hearing on the issues raised in the Order to Show Cause and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held beginning on May 5, 1992, in Arlington, Virginia.

On June 2, 1993, Judge Bittner issued her opinion and recommended ruling, findings of fact, conclusions of law and decision, recommending that Respondent's application for a DEA Certificate of Registration be denied. Neither party filed exceptions to Judge Bittner's opinion and on July 14, 1993, Judge Bittner transmitted the entire record of the proceedings to the Administrator.

The Administrator has carefully considered the record and adopts the opinion and recommended ruling of the administrative law judge in its entirety. Pursuant to 21 CFR 1316.67, the Administrator hereby issues his final order in this matter.

Respondent previously possessed DEA Certificate of Registration, AB7911046. On February 2, 1987, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration issued an Order to Show Cause proposing to revoke that Certificate of Registration alleging that the continued registration of Respondent would be inconsistent with the public interest. Following a hearing by then-Administrative Law Judge Francis L. Young, the Administrator revoked Respondent's DEA registration effective October 18, 1988. See *Carmel Ben-Eliezer, M.D.*, 53 FR 39540 (1988). The Administrator concluded that Respondent abused his registration by issuing prescriptions for controlled substances to a female patient not for purposes of medical treatment, but for purposes of obtaining sexual favors from

this patient. He also found that Respondent made fraudulent Medicaid claims, and was convicted on State charges based on these claims.

Initially, during the hearing in this matter, the administrative law judge concluded that *res judicata* did not apply but upon reconsideration, in her opinion, changed her ruling and concluded that the Administrator's previous decision is *res judicata* for purposes of this proceeding. As a result, the administrative law judge did not consider any testimony or exhibits offered by Respondent which sought to challenge the Administrator's initial findings. The administrative law judge, however, attached all such testimony and exhibits as rejected exhibits, when she transmitted the entire record to the Administrator. The Administrator's determination of the facts relating to the previous revocation of the Respondent's DEA registration is conclusive, and accordingly, the Administrator hereby adopts the above-referenced final order in its entirety.

The Government contends, *inter alia*, that Respondent has neither admitted his past violations nor been candid about the circumstances surrounding such violations and, therefore, his application should be denied. In addition to arguing that the underlying facts of the first order were not true, Respondent argues that his subsequent academic achievements and his intention to increase his vigilance in regard to prescribing controlled substances demonstrate that he may now be entrusted with a DEA registration.

The administrative law judge found that Respondent's testimony, even if admissible, was not credible. During an undercover visit by the patient to Respondent's office, Respondent admitted the illicit acts. During the hearing, however, he maintained that such admissions were out of context and untrue. Respondent's attempt to refute this recorded conversation was equivocal and disingenuous.

The Administrator may deny an application for a DEA Certificate of Registration if he determines that the registration would be inconsistent with the public interest. Pursuant to 21 U.S.C. 823(f), "(i)n determining the public interest, the following factors will be 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."

In determining whether a registrant's registration would be inconsistent with the public interest, the Administrator is not required to make findings with respect to each of the factors listed above. Instead, the Administrator has the discretion to give each factor the weight he deems appropriate, depending upon the facts and circumstances of each case. See David E. Trawick, D.D.S., 53 FR 5326 (1988).

In this proceeding factors two, four and five apply. Respondent has had a DEA registration revoked in the past. Respondent issued controlled substance prescriptions in exchange for sexual favors and was convicted for Medicaid fraud. Carmel Ben-Eliezer, 53 FR 39540, 39541 (1988). Moreover, during the hearing in the present proceeding, Respondent admitted no wrongdoing and consequently, did not express any remorse for his past actions. Although Respondent testified about the embarrassment and suffering that these proceedings have caused himself and his family and about his continuing academic achievements, such factors are not relevant to the issues of remorse for the conduct in question and whether Respondent can be entrusted with a DEA registration. Therefore, the Administrator concludes that Respondent's application for a DEA Certificate of Registration must be denied.

Accordingly, the 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), hereby orders that the application executed by Carmel Ben-Eliezer, M.D., on November 16, 1990, for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This order is effective December 14, 1993.

Dated: December 8, 1993.

Stephen H. Greene,

Acting Administrator of Drug Enforcement.

[FR Doc. 93-30445 Filed 12-13-93; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 92-28]

Kuen H. Chen, M.D.; Denial of Application for Registration

On December 13, 1991, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement

Administration (DEA), issued an Order to Show Cause to Kuen H. Chen, M.D., (Respondent), of West Orange, New Jersey proposing to revoke his DEA Certificate of Registration, and deny any pending applications for registration as a practitioner. The statutory basis for seeking the revocation of the registration was that Respondent's registration would be inconsistent with the public interest, as set forth in 21 U.S.C. 823(f) and 824(a)(4).

The Order to Show Cause alleged as grounds that: (1) On February 15, 1985, the State of New Jersey, Department of Law and Public Safety, Division of Consumer Affairs, Board of Medical Examiners suspended Respondent's license to practice medicine for three years effective April 13, 1984; (2) in May 1985, since Respondent had no underlying state authority to handle controlled substances, he voluntarily agreed to surrender his DEA Certificate of Registration, AC7253622; (3) Respondent did not renew his State of New Jersey controlled dangerous substances (CDS) registration between 1983 and May 1990; (4) in September 1985, the State of New York revoked Respondent's license to practice medicine in that State; and (5) in March 1990, Respondent submitted a DEA Application for Registration as a practitioner in which he materially falsified a response to a question.

Respondent filed, pro se, a request for hearing on the issues raised by the Order to Show Cause, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was scheduled for April 23, 1992, in Arlington, Virginia. The Respondent failed to appear at the scheduled hearing and the Government presented its case. At the hearing, the Government asserted that the Respondent possessed no current DEA registration. As a result, the issue was amended to reflect that the Respondent was not currently registered with the DEA, but that his pending application for registration was at issue.

Subsequently, the Respondent filed a letter requesting that the hearing be rescheduled on account of his non-receipt of the ruling scheduling the original hearing date. The hearing was reopened in Arlington, Virginia on June 15, 1992, for the purpose of taking testimony on behalf of the Respondent.

On June 17, 1993, the administrative law judge issued her opinion and recommended ruling, findings of fact, conclusions of law and decision in this matter. Judge Bittner concluded that the Respondent's registration would not be in the public interest at this time and

recommended that his application for DEA registration be denied. No exceptions were filed by either party. On August 16, 1993, the administrative law judge transmitted the record to the Administrator.

The Acting Administrator has carefully considered the entire record in this matter 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 administrative law judge found that in November 1983, the Attorney General of New Jersey filed a three count complaint against the Respondent alleging that he had been permanently excluded from Medicaid programs by the New York State Department of Social Services, had been permanently excluded from Federal Medicare programs, and had submitted numerous claims to the New Jersey Medicaid program for services he did not provide. The Attorney General of New Jersey moved the State Board of Medical Examiners (New Jersey Board) for a summary decision on the first two counts.

In April 1984, the New Jersey Board issued a Partial Summary Decision and Order, in which it found that the State of New York had determined, after a full hearing, that Respondent had on numerous occasions prescribed or ordered unnecessary or improper medication, failed to properly evaluate, monitor or examine patients, and repeatedly and consistently failed to maintain adequate patient records. The New Jersey Board also found that in a Federal Medicare proceeding, an administrative law judge found that Respondent rendered unnecessary medical services, maintained incomplete and inappropriate records, improperly managed patients, prescribed inappropriate, addictive and expensive medication, did not meet professionally recognized standards of health care, and failed substantially to comply with his obligations in a substantial number of cases.

As a result, the New Jersey Board concluded that the Respondent's conduct constituted "repeated acts of negligence" and consequently suspended Respondent's license to practice medicine. In February 1985, the New Jersey Board issued a Consent Order incorporating the prior Order and dismissed the third count upon Respondent's agreement to maintain patient records in accordance with acceptable medical standards. The New Jersey Board suspended his medical license for three years, with one year on active suspension and the last two years

on probation. Respondent's New Jersey medical license was reinstated in 1990.

The administrative law judge found that Respondent testified that he had surrendered a previous DEA registration on March 30, 1985, because he had no State medical license at that time, and that he had his medical license revoked or suspended both in New Jersey and, at some unspecified time, in New York.

The administrative law judge found that the Respondent filed an application for DEA registration in March 1990. Through an administrative error, the DEA inadvertently granted a registration. Subsequently, upon investigation of this application, the DEA determined that the Respondent was not authorized to handle controlled substances in New Jersey, the State in which he sought registration; and that the Respondent had answered "NO" in response to question 4(b) which states:

Has the applicant ever been convicted of a crime in connection with controlled substances under State or Federal law, or ever surrendered or had a Federal controlled substance registration revoked, suspended, restricted or denied, or ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?

In July 1990, the Respondent, upon DEA's request, surrendered his most recent registration. The DEA then resubmitted his application, which became the subject of the current Order to Show Cause.

The administrative law judge found that Respondent materially falsified his 1990 application for DEA registration by failing to disclose the surrender of his previous DEA registration and the actions of New York and New Jersey against his medical licenses. Judge Bittner rejected the Respondent's contention that his action was a simple "mistake" and concluded that Respondent's failure to disclose the truth of disciplinary proceedings against him withheld from DEA significant information germane to his fitness for the authority he sought in a DEA registration. The administrative law judge further found that his cavalier attitude toward the importance of accurately executing the application suggests a lack of concern for the responsibilities inherent in a DEA registration.

Pursuant to 21 U.S.C. 823(f), "[i]n determining the public interest, the following factors will be considered:

(1) The recommendation of the appropriate State licensing board or 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 or safety."

It is well established that these factors are to be considered in the disjunctive, i.e., the Administrator may properly rely on any one or a combination of factors, and give each factor the weight he deems appropriate. Henry J. Schwarz, Jr., M.D., Docket No. 88-42, 54 FR 16422 (1989).

The administrative law judge found that the first, second, fourth and fifth factors were relevant to this case. The first factor is relevant in light of actions by New Jersey and New York against the Respondent's medical licenses; the second is relevant in light of the findings made in Respondent's exclusion from Medicare and Medicaid programs; the fourth and fifth factors are relevant with respect to the statements made by Respondent on his DEA application; and the fifth factor is further relevant with respect to findings made in proceedings that resulted in Respondent's exclusion from Medicare and Medicaid programs.

Furthermore, in addition to the public interest factors, 21 U.S.C. 824(a) provides four other bases that the Administrator may consider when suspending or revoking a DEA registration. The Administrator may revoke or suspend a DEA Certificate of Registration under 21 U.S.C. 824(a), upon a finding that the registrant:

(1) Has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) Has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State relating to any substance defined in this subchapter as a controlled substance;

(3) Has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation, or denial of registration recommended by competent State authority;

(4) Has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section;

(5) Has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320A-7(a) of title 42.

The agency has consistently held that the Administrator may also apply these bases to the denial of a registration, since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next. Serling Drug Co. and Detroit Prescription Wholesaler, Inc., 40 FR 11918 (1975).

The administrative law judge has concluded here that the reference in 21 U.S.C. 823(f)(5) to "other conduct which may threaten the public health and safety" would as a matter of statutory interpretation logically encompass the bases listed in 21 U.S.C. 824(a).

The administrative law judge further concluded that in light of the Respondent's exclusion from Medicare and Medicaid, and the falsification of his 1990 DEA application for registration that there are lawful bases for denial of his application under 21 U.S.C. 824(a)(1) and 824(a)(5).

The Acting Administrator adopts the opinion and recommended ruling, findings of fact, conclusions of law and decision of the administrative law judge in its entirety. The Acting Administrator finds that the Respondent's registration would be inconsistent with the public interest at this time, and that his pending application for registration must be denied.

Accordingly, the Acting 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), hereby orders that the application for a DEA Certificate of Registration of Kuen H. Chen, M.D., be, and it hereby is, denied. This order is effective December 14, 1993.

Dated: December 8, 1993.
Stephen H. Greene,
Acting Administrator of Drug Enforcement.
[FR Doc. 93-30446 Filed 12-13-93; 8:45 am]
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[Docket No. 93-38]

Leonard C. Harris, M.D.; Revocation of Registration

On March 18, 1993, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Leonard C. Harris, M.D., (Respondent), Roxbury Corrections Center, 18701 Roxbury Road, Hagerstown, Maryland 21746. The Order to Show Cause sought to

revoke Respondent's DEA Certificate of Registration, BH2460171, and deny any pending applications for registration pursuant to 21 U.S.C. 824(a)(3). The Order to Show Cause alleged that such action was proper in light of the fact that Respondent's medical license issued by the State of Maryland had been suspended and he therefore was no longer authorized by the State of Maryland to handle controlled substances.

On April 7, 1993, Respondent filed a request for a hearing on the matter. The matter was placed on the docket of Administrative Law Judge Mary Ellen Bittner. On May 6, 1993, the Government filed a motion for summary disposition. In support of its motion, the Government filed a copy of the Final Order of Summary Suspension issued by the State of Maryland Board of Physician Quality Assurance and dated December 29, 1992, suspending Respondent's medical license. On July 23, 1993, the administrative law judge issued an opinion and recommended decision granting the Government's motion for summary disposition and recommending that Respondent's DEA Certificate of Registration be revoked. No exceptions were filed and on August 25, 1993, the administrative law judge transmitted the record to the Administrator. The Acting Administrator has carefully considered the record and hereby enters his final order pursuant to 21 CFR 1316.67.

The Acting Administrator adopts the opinion and recommended decision of the administrative law judge in its entirety. It is well established that the Drug Enforcement Administration cannot register a practitioner who is not duly authorized to handle controlled substances in the state in which he does business. See 21 U.S.C. 823(f). The Drug Enforcement Administration has consistently held that practitioners who lack state authorization to handle controlled substances cannot be registered with the Drug Enforcement Administration. See Ramon Pla, M.D., 51 FR 41168 (1986); George S. Heath, M.D., 51 FR 26610 (1986); Dale D. Shahan, D.D.S., 51 FR 23481 (1986). Consequently, the Acting Administrator concludes that Respondent's DEA Certificate of Registration should be revoked based on lack of state authorization.

Accordingly, the Acting 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), hereby orders that DEA Certificate of Registration, BH2460171, issued to Leonard C. Harris, M.D., be, and it

hereby is, revoked, and that any pending applications for registration be, and they hereby are, denied. This order is effective December 14, 1993.

Dated: December 8, 1993.

Stephen H. Greene,

Acting Administrator of Drug Enforcement.

[FR Doc. 93-30447 Filed 12-13-93; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 92-38]

Nelson A. Smith, D.D.S.; Denial of Application

On February 3, 1992, the Deputy Assistant Administrator of the Office of Diversion Control, Drug Enforcement Administration (DEA), issued to Nelson A. Smith, D.D.S. (Respondent), of Oklahoma City, Oklahoma, an Order to Show Cause proposing to deny Respondent's application for registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged that Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).

Respondent, through counsel, filed a request for a hearing on the issues raised in the Order to Show Cause and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held beginning on September 1, 1992, in Oklahoma City, Oklahoma.

On August 23, 1993, Judge Bittner issued her opinion and recommended ruling, findings of fact, conclusions of law and decision, recommending that Respondent's application for a DEA Certificate of Registration be denied. Respondent attempted to file exceptions pursuant to 21 CFR 1316.66, but such exceptions were untimely filed and therefore were not considered in rendering this decision. On September 24, 1993, Judge Bittner transmitted the entire record of the proceedings to the Administrator.

The Acting Administrator has carefully considered the record and adopts the opinion and recommended ruling of the administrative law judge in its entirety. Pursuant to 21 CFR 1316.67, the Acting Administrator hereby issues his final order in this matter.

The Acting Administrator finds that Respondent has been a practicing dentist since 1971. In July 1988, Respondent issued a prescription for Ionamin, a Schedule IV controlled substance, which is used primarily as a short term supplement for diet control, to his former girlfriend. Although Respondent had a dental patient chart

for this person, there was nothing in the chart to justify this prescription. Although Respondent testified at the hearing that this prescription was issued because his former girlfriend was suffering from bulimia, the former girlfriend explained to DEA Investigators that she never suffered from this disorder.

Subsequently, this individual agreed to act in an undercover capacity for DEA and visited Respondent's office on February 17, 1989. During this visit Respondent issued her a prescription for Ionamin and a prescription for Halcion, a Schedule IV controlled substance. She obtained these prescriptions from Respondent by simply telling him that she wanted diet pills and that a friend of hers needed some drugs to "come off cocaine."

On February 23, 1989, an undercover state agent, posing as a friend of the Respondent's former girlfriend, visited Respondent's office and on request obtained prescriptions for Tylox, a Schedule II controlled substance, and Ionamin from Respondent. During this same visit, Respondent's former girlfriend was also present and Respondent issued her a prescription for Valium, a Schedule IV controlled substance. Respondent cautioned the undercover agent and former girlfriend to have the prescriptions filled at different pharmacies and cautioned them not to use pharmacies in the western part of the state since there were ongoing undercover investigations in that area. He also explained that he would have to create patient chart entries for these prescriptions.

On March 17, 1989, the undercover agent and former girlfriend arranged another visit with Respondent, who insisted that they not meet in his office, but at a bar. During this meeting, Respondent issued his former girlfriend prescriptions for Percocet, a Schedule II controlled substance, and Ionamin. He also wrote a prescription for Fiorinal with codeine #3, a Schedule III controlled substance, for the undercover agent. During this encounter, Respondent explained that a Schedule II prescription could be written for a maximum of 30 dosage units without "raising a red flag." He also commented that he could manipulate his former girlfriend's chart to reflect that the prescriptions were legitimate. On April 20, 1989, Respondent admitted to the undercover agent that dentists are not technically supposed to prescribe diet pills but that he had done so in the past and had not been caught.

During the hearing, Respondent admitted that some of the controlled substance prescriptions that he issued to