



**BILLING CODE: 4410-09-P**

**DEPARTMENT OF JUSTICE  
Drug Enforcement Administration**

**[Docket No. 17-6]  
Richard Jay Blackburn, D.O.  
Decision and Order**

On September 27, 2016, the Assistant Administrator, Diversion Control Division, issued an Order to Show Cause to Richard Jay Blackburn, D.O. (Respondent), of Ravenwood, West Virginia. Show Cause Order, at 1. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner on two grounds. First, the Order alleged that Respondent does not possess authority to dispense controlled substances in West Virginia, the State in which he has applied for a DEA registration. *Id.* (citing 21 U.S.C. 824(a)(3)). Second, the Order alleged that Respondent materially falsified his application for a DEA registration. *Id.* (citing 21 U.S.C. 824(a)(1)).

As for the jurisdictional basis of the proceeding, the Show Cause Order alleged that Respondent had previously held Certificate of Registration BB5953686 for schedule II through V controlled substances, at the address of Equinox LLC, d/b/a Medex PLC, 705 Washington St., Ravenwood, West Virginia, that this registration expired on July 31, 2016, and that Respondent did not file a timely renewal application. *Id.* The Order then alleged that on August 31, 2016, Respondent submitted an application to renew the above registration, and that as the registration had expired and could not be renewed, his application is "being treated" as an "application for a new DEA registration." *Id.* at 2.

As to the loss of state authority grounds for denial, the Show Cause Order alleged that on October 20, 2014, the West Virginia Board of Osteopathic Medicine filed a complaint alleging that Respondent had "engaged in dishonorable, unethical or unprofessional conduct of a

character likely to deceive, defraud or harm the public by pre-signing prescriptions and allowing [office] employees to complete the rest of the information in violation of 24 C.S.R. 1.18.1.cc.”

*Id.* The Order then alleged that on June 1, 2016, Respondent surrendered his osteopath’s license “[t]o avoid a hearing on the merits of” the Board’s complaint. *Id.* The Order thus alleged that “[o]n June 15, 2016, the Board accept [his] surrender, ordering [his] medical license null and void,” and that “[a]s a result, [Respondent] currently lack[s] authority to handle controlled substances in West Virginia, the [S]tate in which [he is] registered with . . . DEA.” *Id.* (citing 21 U.S.C. 802(21) and 824(a)(3)).

As to the material falsification grounds, the Show Cause Order alleged that the application stated that: “You MUST be currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle controlled substances in the schedules for which you are applying under the laws of the state or jurisdiction in which you are operating or propose to operate.” *Id.* The Order alleged that on his application, Respondent represented that he “currently possessed medical license number ‘34.006104,’ issued by the [S]tate of West Virginia,” when this license number was not issued by West Virginia but was “issued by the [S]tate of Ohio,” and that his representation that this license “was issued by a West Virginia authority was a materially false representation.” *Id.* (citing 21 U.S.C. 824(a)(1) and 843(a)(4)(A)).

The Show Cause Order then alleged that Respondent provided additional false information on his application “by claiming that [his] West Virginia state license was valid until July 1, 2017, when in fact [this] license was ordered null and void on June 15, 2016.” *Id.* at 3 (citations omitted). The Order further alleged that Respondent provided still more false information when he provided a “No” answer to the application’s question: “Has the applicant

ever surrendered (for cause) or had a state professional license or controlled substance registration revoked[,] suspended, denied, restricted, or placed on probation, or is any such action pending?” *Id.* The Order alleged that this information was false because he had surrendered his medical license for cause on June 1, 2016. *Id.* (citations omitted).<sup>1</sup>

On October 19, 2016, the Show Cause Order was served on Respondent, and on October 31, 2016, Respondent requested a hearing on the allegations. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to ALJ Charles Wm. Dorman. Thereafter, the ALJ ordered the Government to file evidence supporting the allegation that Respondent lacks state authority and its accompanying motion no later than 2 p.m. on November 28, 2016. Briefing Schedule for Lack of State Authority Allegations, at 1. In the same order, the ALJ directed that if the Government moved for summary disposition, Respondent’s reply was due by 2 p.m. on December 9, 2016.<sup>2</sup> *Id.*

On November 28, 2016, the Government filed a “Motion for Partial Summary Disposition.” Therein, the Government sought summary disposition on both the issues of whether “Respondent lacks state authority in West Virginia” and whether he “materially falsified his [a]pplication.” Motion for Partial Summ. Disp., at 1. The Government also requested the “opportunity to reply to any dispute regarding the material facts at issue.” *Id.*

---

<sup>1</sup> The Show Cause Order also notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedure for electing either option, and the consequence of failing to elect either option. Show Cause Order at 3-4. In addition, the Show Cause Order notified Respondent of his right to submit a Corrective Action Plan, *see* 21 U.S.C. 824(c)(2)(C), and the procedure for doing so.

<sup>2</sup> In the same order, the ALJ, noting that the Government had not filed a certificate of service, directed the Government to provide evidence as to when the Show Cause Order was served. As the Government represented that service was not accomplished until October 19, 2016, Respondent’s hearing request was timely. *See* Gov. Notice of Service of Order to Show Cause, at 1. In its filing, the Government also noted that while it would comply with the ALJ’s Order with respect to the loss of state authority allegations, it was requesting a hearing “on those allegations unrelated to Respondent’s lack of state authority” because “the OSC contains allegations that are not amenable to resolution via summary disposition.” *Id.*

As support for granting its motion on the lack of state authority ground, the Government attached a copy of the October 20, 2014 Complaint issued by the West Virginia Board of Osteopathic Medicine to Respondent, which made the allegation referenced in the Show Cause Order. Attachment 1 to Motion for Partial Summ. Disp., at 1. As further support for its motion, the Government attached a copy of a letter from the attorney who represented Respondent in the West Virginia Board matter addressed to Ms. Jennifer K. Akers, Assistant Attorney General, West Virginia Board of Osteopathic Medicine. Attachment 2, at 1. The letter, which makes reference to the Board's complaint, states that Respondent "hereby surrenders his license to practice medicine in the [S]tate of West Virginia" and expresses his counsel's "understanding that the hearing on June 9<sup>th</sup> will be cancelled." *Id.* Of further note, the letter indicates that a copy was provided to Respondent.

The Government also attached the Board's "Order Accepting Surrender of License." Attachment 3, at 1. The Order states that "[o]n June 6, 2016, [it] considered the above styled complaint and Respondent's offer via letter dated June 1, 2016, to surrender his license to practice osteopathic medicine *in lieu of further proceedings before the Board, including the June 9, 2016, administrative hearing.*" *Id.* (emphasis added). The Order also states that "after consideration of the facts and circumstances and the representation of Respondent, the Board does hereby **ACCEPT** the Respondent's voluntary surrender of his license to practice osteopathic medicine in the [S]tate of West Virginia." *Id.* The Order, which is dated June 15, 2016, further states that "[i]t is further **ORDERED** that the license number 1455 previously issued by the Board to [Respondent] is and shall henceforth be **NULL** and **VOID.**" *Id.*

Finally, the Government attached a printout dated November 23, 2016 from the Board's License Verification webpage. Attachment 4, at 1-2. The printout lists the status of

Respondent's license as "[e]xpired" with an expiration date of June 15, 2016; it also lists Respondent's state controlled substance license number as having an expiration date of June 30, 2016.<sup>3</sup> *Id.* at 1.

In its motion, the Government argued that "there is no dispute that Respondent lacks state authority to handle controlled substances in West Virginia." Motion for Partial Summ. Disp., at 6. It cited multiple authorities in support of its contention that Respondent's application should be denied because he does not have authority to dispense controlled substances in West Virginia, the State in which he applied for registration. *Id.* at 4-6 (citations omitted).

As noted above, the Government also sought summary disposition on the allegation that Respondent materially falsified his application. *Id.* The Government argued that there is no dispute that Respondent "answered 'No' to the [application] question of whether he had ever surrendered (for cause) a state medical license," contending that "[t]his answer is clearly false." *Id.* The Government also argued that there is no dispute that "surrender was 'for cause'" as "the surrender letter explicitly requested confirmation that a state medical board hearing on the allegations against [him] would be cancelled." *Id.* at 6. And the Government maintained that Respondent's false answer was material as it was "capable of affecting the decision of whether to grant [the] application." *Id.* at 7 (citing *Mikhayl Soliman*, 81 FR 47826, 47829 (2016)); *see also id.* (citing *Kungys v. United States*, 485 U.S. 759, 770 (1988) (other citation omitted); *United States v. Wells*, 5198 U.S. 482, 489 (1997) (quoting *Kungys*, 485 U.S. at 770)).

Respondent did not file a reply to the Government's motion. Order Granting Summ. Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision

---

<sup>3</sup> As additional exhibits, the Government included a copy of Respondent's expired DEA registration, Appendix A, a Certification of Registration History, Appendix C, and a Declaration from a DEA Special Agent (S/A), who was the lead Special Agent, and who attested to the authenticity of the various documents submitted as Attachments 1-4. Appendix B, at 1-2.

(R.D.), at 2-3. The ALJ thus deemed the Government’s motion as unopposed. *Id.* at 3. Finding it “undisputed that the Respondent lacks state authorization to handle controlled substances in West Virginia, the [S]tate in which [he] seeks to be registered with the” Agency, the ALJ applied the Agency’s longstanding rule that “in order to maintain a DEA registration, a registrant must possess state authority to dispense controlled substances,” and granted the Government’s motion with respect to this ground. *Id.* at 3-4.

The ALJ, however, declined to grant the Government’s motion as to the material falsification ground. *See id.* at 4 n.3. The basis of the ALJ’s declination was that in “[i]n his Request for Hearing, the Respondent specifically asserted that ‘any irregularities in his application were done by mistake.’” *Id.* (quoting Resp. Hearing Req., at 2). The ALJ explained that “[b]ecause the Respondent specifically denied the material falsification allegation, I decline to make any determination concerning the Government’s allegation that the Respondent materially falsified his current . . . application.” *Id.*

The Government took exception to the ALJ’s declination to rule on the material falsification allegation. *See Gov. Exceptions to Order Granting Summary Disposition Motion.* It argues that “[i]t is indisputable that Respondent surrendered his state medical license as a consequence of the” complaint brought against him by the West Virginia Board. *Id.* at 4. It then argues that it is undisputed that Respondent answered “No” to the application question: “Has the applicant ever surrendered (for cause) or had a professional license or controlled substance registration suspended, denied, restricted, or placed on probation, or is any such action pending?” *Id.* at 4-5. And the Government argues that there is no dispute that Respondent’s answer was false. *Id.* at 5.

Continuing, the Government argues that while the evidence shows that Respondent's West Virginia license number was 1455, Respondent listed on the application that he held State License Number 34.006104, and that the State of issuance was West Virginia. *Id.* It then argues that "when Respondent filed his Application, he was without any authority in West Virginia to handle controlled substances, meaning that any number he provided to DEA purporting to indicate he was authorized to practice medicine in West Virginia would be a material falsification" of his application. *Id.* at 6.

The Government further argues that the ALJ erred because his "Briefing Order directed the Government to address the lack of state authority allegations without opportunity to be heard on its material falsification allegations," noting that it "also included evidence in its Motion for Partial Summary Disposition on Respondent's material falsification." *Id.* The Government argues that the ALJ "did not consider evidence on Respondent's material falsification, nor did [he] address the Government's request for findings as to those facts" and that it "is entitled to be heard on its allegations of misconduct." *Id.* at 6-7. The Government then argues that "although the ALJ[] did not address this evidence or consider it as grounds for denying Respondent's application, [I] should make findings that Respondent materially falsified his Application and those findings should be the primary basis for any denial of Respondent's Application." *Id.* at 7. The Government thus requests that I either "issue a final order finding that Respondent provided materially false information in his [a]pplication" and cite this as a basis for denying his application, or remand the matter "to the ALJ to make findings and give the Government [the] opportunity to be heard on the" material falsification allegations. *Id.* at 10.

Having considered the entire record, including the ALJ's Recommended Decision, I adopt the ALJ's finding that "Respondent lacks state authorization to handle controlled

substances in West Virginia, the [S]tate in which the Respondent seeks to be registered with the DEA.” R.D. 3. I further adopt the ALJ’s recommendation that I deny his application for this reason. *Id.* As for the Government’s Exceptions, notwithstanding that it initially took the position that the material falsification allegations “are not amenable to resolution via summary disposition,” for reasons explained below, I agree with the Government that it was entitled to summary disposition on this ground as well. I make the following factual findings.

### **FINDINGS OF FACT**

Respondent is an osteopathic physician who previously held License No. 1455 issued by the West Virginia Board of Osteopathic Medicine. Gov. Mot. for Partial Summ. Disp., at Attachment 1. However, on October 20, 2014, the Board issued Respondent a complaint alleging that he “engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public by pre-signing prescriptions and allowing employees in his office to complete the rest of the information in violation of 24 C.S.R. 1.18.1cc.” *Id.*

On June 1, 2016, Respondent’s counsel wrote to an Assistant Attorney General for the Board by which Respondent “surrender[ed] his license to practice medicine in the [S]tate of West Virginia.” Attachment 2. Respondent’s counsel further noted that “[i]t is my understanding that the hearing on June 9<sup>th</sup> will be cancelled.” *Id.* Respondent’s counsel sent a copy of his letter to Respondent. *Id.*

On June 6, 2016, the Board considered the complaint it had issued to Respondent and his “offer via letter dated June 1, 2016, to surrender his license to practice osteopathic medicine in lieu of further proceedings before the Board, including the June 9, 2016 administrative hearing.” Attachment 3. By Order entered on June 15, 2016, the Board accepted “the Respondent’s

voluntary surrender of his license to practice osteopathic medicine in the [S]tate of West Virginia” and ordered that his license “shall henceforth be null and void.” *Id.* Respondent’s license remains in this status as of the date of this Decision and Order. Attachment 4.

Respondent previously held DEA Certificate of Registration No. BB5953686, pursuant to which he was authorized to dispense controlled substances in schedules II through V, at the registered location of Equinox, LLC, d/b/a Medex, PLLC, 705 Washington St., Ravenswood, West Virginia. Appendix A. This registration expired on July 31, 2016. *Id.*

On August 31, 2016, Respondent applied for a practitioner’s registration seeking authority to dispense controlled substances in schedules II through V, at the same address as where he was previously registered. In section four of the application, Respondent was asked: “Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying under the laws of the state or jurisdiction in which you are operating or proposing to operate?” Appendix C, at 3. This question then required Respondent to provide his “State License No.,” the State, and the “Expire Date” of his license. *Id.* Respondent answered these questions, listing “34.006104” as his license number, “WV” or West Virginia as the State, and “07-01-2017” as the expiration date of his license. *Id.* I find that each of these answers was false, as Respondent no longer held a West Virginia license as of the date he applied for registration and was no longer then “currently authorized to prescribe . . . dispenser, or otherwise handle . . . controlled substances” in West Virginia.

On the application, Respondent was also required to answer four questions. Question Three asked: “Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on

probation, or is any such action pending?” *Id.* Respondent answered: “N” for no. I find that this answer was false.

## **DISCUSSION**

Section 303(f) of the Controlled Substances Act provides that “[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances in schedules II, III, IV, or V, . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the States in which he practices.” Section 303(f) further provides that “[t]he Attorney General may deny an application for such registration . . . if the Attorney General determines that the issuance of such registration would be inconsistent with the public interest.” 21 U.S.C. 823(f). In making the public interest determination, the CSA requires the consideration of the following factors:

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The Applicant’s experience in dispensing . . . controlled substances.
- (3) The Applicant’s conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety.

*Id.*

“These factors are . . . considered in the disjunctive.” *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I “may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether . . . an application for registration [should be] denied.” *Id.* Moreover, while I am required to consider each of the factors, I “need not make explicit findings as to each one.” *MacKay v. DEA*, 664 F.3d 808, 816

(10th Cir. 2011) (quoting *Volkman*, 567 F.3d 215, 222 (6th Cir. 2009) (quoting *Hoxie*, 419 F.3d 477, 482 (6th Cir. 2005))).<sup>4</sup>

Also, pursuant to section 304(a)(1), the Attorney General is authorized to suspend or revoke a registration “upon a finding that the registrant . . . has materially falsified any application filed pursuant to or required by this subchapter.” 21 U.S.C. 824(a)(1). And consistent with the implicit authority to deny an application for a practitioner’s registration if the applicant is not “authorized to dispense . . . controlled substances under the laws of the State in which he practices,” section 304(a)(3) explicitly authorizes the Attorney General to suspend or revoke a registration “upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority and is longer authorized by State law to engage in the . . . distribution or dispensing of controlled substances.” *Id.* § 824(a)(3).

It is well established that the various grounds for revocation or suspension of an existing registration that Congress enumerated in section 304(a), 21 U.S.C. 824(a), are also properly considered in deciding whether to grant or deny an application under section 303. *See The Lawsons, Inc.*, 72 FR 74334, 74337 (2007); *Anthony D. Funches*, 64 FR 14267, 14268 (1999); *Alan R. Shankman*, 63 FR 45260 (1998); *Kuen H. Chen*, 58 FR 65401, 65402 (1993). Thus, both the allegation that Respondent materially falsified his application and the allegation that he is not authorized to dispense controlled substances in West Virginia, the State in which he seeks registration, are properly considered in this proceeding and each provides an independent and

---

<sup>4</sup>“In short, this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.” *Jayam Krishna-Iyer*, 74 FR 459, 462 (2009).

adequate ground for denying an application. *See Samuel S. Jackson*, 72 FR 23848, 23852 (2007); *The Lawsons*, 72 FR at 74338; *cf. Bobby Watts, M.D.*, 58 FR 46995 (1993).

The Government has “[t]he burden of proving that the requirements for . . . registration . . . are not satisfied.” 21 CFR 1301.44(d). Having considered the record including the ALJ’s R.D., and the Government’s Exceptions, I conclude that the Government was entitled to summary disposition on both grounds. Because Respondent did not file an opposition to the Government’s motion with respect to either ground, nor a response to the Government’s Exceptions, I conclude that Respondent has waived his right to present evidence refuting both the Government’s *prima facie* showing on the material falsification ground as well as on the issue of remediation.<sup>5</sup> Therefore, I deny his application.

#### **Respondent’s Lack of State Authority**

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in “the jurisdiction in which he practices” in order to obtain and maintain a DEA registration. This rule derives from two provisions of the CSA. *See* 21 U.S.C. 802(21) (“[t]he term ‘practitioner’ means a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice”). *See also id.* § 823(f) (“The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.”).

Thus, DEA has long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner’s registration. *See, e.g.,*

---

<sup>5</sup> Because the CSA requires that a practitioner possess state authority in order to be registered as a practitioner, where the Government’s case is based solely on a practitioner’s lack of state authority, evidence of remediation is irrelevant.

*Frederick Marsh Blanton*, 43 FR 27616, 27617 (1978) (“State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration.”); *see also James L. Hooper*, 76 FR 71371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); 21 U.S.C. 824(a)(3).

Here, it is undisputed that Respondent surrendered his West Virginia osteopathic license and is thus no longer authorized to dispense controlled substances in the State in which he has applied for registration. Accordingly, Respondent does not meet the CSA’s essential prerequisite for obtaining a practitioner’s registration. This provides reason alone to deny his application. *See* 21 U.S.C. 823(f), 824(a)(3), 802(21).

### **The Material Falsification**

As explained above, the ALJ declined to rule on the Government’s motion for summary disposition with respect to the material falsification allegation, reasoning that in his hearing request, Respondent’s counsel “asserted that ‘any irregularities in his application were done by mistake.’” R.D. 4 n.3 (quoting Resp. Hrng. Req., at 2). I disagree with the ALJ that this assertion, which was unsupported by any evidence, is sufficient to create a triable issue of fact and conclude that the Government was entitled to summary disposition on this issue as well.

As I explained in *Rezik A. Saqer*, 81 FR 22122 (2016), “numerous courts, including the Supreme Court, have held that even when a statute directs an agency to provide a party with a hearing, the agency can nonetheless resolve the matter on summary disposition when there are no material facts in dispute.” *Id.* at 22124 (citing *Veg-Mix, Inc. v. Department of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987)). As the D.C. Circuit explained in *Veg-Mix*, “[c]ommon sense suggests the futility of hearings where there is no factual dispute of substance.” 832 F.2d at 607. *See also NLRB v. International Ass’n of Bridge, Structural and Ornamental Ironworkers*,

549 F.2d 634, 639 (9th Cir. 1977) (“It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory, even though a pertinent statute prescribes a hearing.”) (quoting *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971)).

As found above, the evidence shows that Respondent surrendered his state license in response to the complaint filed by the State Board and to avoid going to a hearing on the allegations. Thus, Respondent clearly surrendered his license “for cause” within the meaning of the application question which asked if he had “ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?” Cf. *JM Pharmacy Group, Inc., d/b/a Farmacia Nueva and Best Pharma Corp.*, 80 FR 28667, 28668-69 (2015) (holding that pharmacy surrendered its registration “for cause” when its principal did so in response to allegations of misconduct and was advised that if he did not surrender, the Agency would “initiate proceedings to revoke” its registration); 21 CFR 1301.76(a) (prohibiting a registrant from employing “any person . . . who, at any time, . . . has surrendered a DEA registration for cause” and defining “the term ‘for cause’ [to] mean[] a surrender in lieu of, or as a consequence of, any federal or state administrative . . . action resulting from an investigation of the individual’s handling of controlled substances”).

The evidence also shows that within three months of his having surrendered his state license, Respondent provided a “No” answer to question three on his DEA application, which asked if he had “ever surrendered (for cause)” his state professional license. By itself, Respondent’s provision of this answer constitutes a material falsification of his application

because it was capable of affecting or influencing the Agency's decision as to whether to grant his application. *Kungys v. United States*, 485 U.S. 759, 770 (1988) (other citation omitted); *United States v. Wells*, 519 U.S. 482, 489 (1997) (quoting *Kungys*, 485 U.S. at 770).

As explained above, with respect to an applicant for a practitioner's registration, the CSA imposes the prerequisite requirement that the applicant be "authorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. 823(f); *see also Blanton*, 43 FR at 27617 ("State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration.").

Certainly, if Respondent had truthfully disclosed that he had surrendered his state license, Agency personnel who reviewed the application would have known that they needed to check with the State Board to determine whether his license had been reinstated. Moreover, they would have determined that Respondent's state license is "null and void," thus rendering him ineligible to be registered.

Respondent committed additional material falsifications when he represented that he was "currently authorized to prescribe . . . dispense, or otherwise handle . . . controlled substances . . . under the laws of the state . . . in which [he was] propos[ing] to operate" when he listed a state license number, which he represented was issued by the State of West Virginia and would not expire until July 1, 2017. Each of these representations was false and materially so because it was capable of influencing the Agency's determination as to whether Respondent was currently authorized to handle controlled substances and thus met the prerequisite for obtaining a registration.

In support of its motion, the Government provided reliable and probative evidence including a copy of the Board's complaint, the letter from Respondent's counsel to the Board surrendering his state license, the Board's Order accepting the surrender and declaring the license null and void effective June 15, 2016, a printout from the Board's website showing that his license had expired on June 15, 2016, and Respondent's August 31, 2016 DEA application which contained the various false statements. This evidence is sufficient to show that Respondent knowingly falsified his application by representing that his license had not been subject to discipline by the State Board and that he was, at the time of his application, not currently authorized to handle controlled substances in the State where he sought registration.

By contrast, Respondent did not even respond to the Government's motion,<sup>6</sup> let alone offer any evidence to support the assertion made in his hearing request which characterizes the false statements as irregularities and mistakes.<sup>7</sup> Thus, I conclude that there is no dispute as to the

---

<sup>6</sup> While the ALJ's November 1, 2016, order setting the briefing schedule for the lack of state authority allegation addressed only the timing of "any motion for summary disposition on these grounds," the Government's Motion for Partial Summary Disposition provided Respondent with ample notice that it was seeking a ruling on the material falsification allegation as well. Notably, the opening paragraph of the motion states that "[t]he Government respectfully requests that the ALJ grant the Government's request for summary disposition on two issues: that Respondent lacks state authority in West Virginia [and] that Respondent materially falsified his Application for a DEA registration. Motion, at 1.

Moreover, the Government set forth various facts which it asserted were undisputed, including Respondent's answers which provided a license number for a purported West Virginia license, which he then represented would not expire until July 1, 2017, as well as his "No" answer to Question three on the application. Later, the Government devoted a separate section of its motion to arguing that Respondent made false statements on his application by failing to disclose that he had surrendered his state license for cause, that this was a material falsification under the *Kungys* standard, and that it was entitled to summary disposition on this issue. *Id.* at 6-7. Yet Respondent offered no response to the Motion.

Also, in its Exceptions to the ALJ's R.D., the Government took issue with the ALJ's failure to grant its motion with respect to the material falsification allegations. *See generally* Gov. Exceptions. Here again, Respondent offered no response. *See* 21 CFR 1316.66(c) (providing for "the filing of a response to the exceptions filed by another party").

<sup>7</sup> While the "usual rule [is] that all doubts are resolved against the moving party," as a leading authority explains, "[i]f the movant presents credible evidence that, if not controverted at trial, would entitle the movant to a . . . judgment as a matter of law that evidence must be accepted as true on a summary-judgment motion when the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting the opposing contention that an issue of fact remains, or does not show a good reason . . . why he is unable to present facts

material fact that Respondent materially falsified his August 31, 2016 application and that he did so knowingly.

Accordingly, I conclude that the Government was entitled to summary disposition on the allegation that Respondent materially falsified his August 31, 2016 application for a new DEA registration. This provides an additional and independent basis apart from his lack of state authority for denying his application.

### **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 Richard Jay Blackburn, D.O., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective immediately.

Date: April 14, 2017

Chuck Rosenberg  
Acting Administrator

---

justifying opposition to the motion.” 10A, Charles Alan Wright, *et al.*, *Federal Practice and Procedure Civ.* § 2727.1 (4th ed. 2017). Here, as Respondent did not even respond to the Government’s motion, let alone offer any evidence to create a triable issue of fact, the Government was clearly entitled to summary disposition on the allegation.

[FR Doc. 2017-08014 Filed: 4/19/2017 8:45 am; Publication Date: 4/20/2017]