

(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.

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 a registration should be revoked or an application for registration denied. See Henry J. Schwarz, Jr., M.D., Docket No. 88-42, 54 FR 16422 (1989).

In this case, factors two, four, and five are relevant in determining whether the Respondent's continued registration would be inconsistent with the public interest. As to factor two, the Respondent's "experience in dispensing * * * controlled substances," and factor four, the Respondent's compliance with "Federal, State, or local law," the Government contends that during the periods March through October 1988, and 1991 through 1993, the Respondent prescribed controlled substances in the treatment of Patient A not for a legitimate medical purpose and not in the usual course of his professional practice, in violation of State and Federal law. Specifically, the Government argues that controlled substances were prescribed to Patient A during these periods to maintain her addiction, and that the amount of narcotics prescribed far exceeded what Patient A needed for pain relief.

An "addict" is defined in 21 U.S.C. 802(1) as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to [one's] addiction." There was no dispute that very high doses of narcotic analgesics were administered to Patient A, but the evidence also demonstrated that she had a high tolerance to the controlled substances and required this dosage to effectively treat her pain. Patient A's medical records and the statements and testimony of medical experts establish that Patient A had several injuries and was plausibly experiencing severe and chronic pain. Further, the evidence did not adequately establish that Patient A was an "addict." No evidence was presented to show that Patient A had acted to "endanger the public morals, health, safety, or welfare," or that she

had a compulsion to use drugs, had lost control over the drugs, or that she continued to use the drugs in spite of adverse consequences. Also, medical testimony was presented to establish that, although considered, there was no evidence of abstinent syndrome, slurred speech, inability to have cognitive speech, nor clinical or laboratory evidence of toxicity. However, there was expert testimony to establish that use of the controlled substances helped Patient A to function and participate in her professional activities in spite of chronic pain. Although the Respondent did not deny that Patient A had a chemical dependency, he testified that he was not prescribing controlled substances to Patient A to maintain an addiction, for she did not present any addictive behavior to him. Therefore, the Deputy Administrator concurs with Judge Tenney's finding that Patient A is a chronic pain patient being maintained on opioids for treatment of pain, and that she is not an "addict."

The Government also asserted that the Respondent's practices violated California Health and Safety Code Sections 11153 and 11154. Pursuant to Section 11153(a), a "prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice," and a prescription issued "for an addict or habitual user of controlled substances, which is issued not in the course of professional treatment * * * but for the purpose of providing the user with controlled substances, sufficient to keep him or her comfortable by maintaining customary use" would not be a legal prescription pursuant to this section. Section 11154 provides in relevant part that "[e]xcept in the regular practice of his or her profession, no person shall knowingly prescribe, administer, dispense, or furnish a controlled substance to or for any person * * * which is not under his or her treatment for a pathology or condition other than addiction to a controlled substance. * * *

The Respondent asserted that prescribing in good faith was an absolute defense to an allegation of violation of these provisions. Dr. Ling testified that he accepted that the Respondent believed Patient A was in pain, and that he was treating her in good faith. Dr. Margoles also testified to the Respondent's good faith treatment of Patient A.

The Deputy Administrator agrees with the conclusion of Judge Tenney, that the Respondent did not violate these State code provisions. See *People v.*

Loneragan, 219 Cal.App.3d 82, 90 (1990) (acting in "good faith," as defined by California Health and Safety Code 11210, exempts a physician from criminal liability under the provision of 11153). In response to the Government's exceptions relevant to the standard applicable in this administrative proceeding, the Deputy Administrator also finds that the preponderance of the evidence establishes that the Respondent prescribed controlled substances to Patient A for a legitimate medical purpose while acting in the usual course of his professional practice, and thus, he did not violate the cited State law.

Next, the Government asserted that the Respondent performed detoxification or maintenance treatment of a narcotic drug-dependent patient without obtaining a registration for that purpose in violation of Federal law. Pursuant to 21 U.S.C. 802(30), "detoxification treatment" is

The dispensing for a period not in excess of one hundred and eighty days of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period. (Emphasis added).

Further, the statute defines "maintenance treatment" as the dispensing, "for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs." 21 U.S.C. 802(29) (emphasis added). However, the applicable implementing regulation states in pertinent part:

This section is not intended to impose any limitations on a physician * * * to administer or dispense narcotic drugs in a hospital to maintain or detoxify a person as an incidental adjunct to medical or surgical treatment of conditions other than addiction, or * * * to persons with intractable pain in which no relief or cure is possible or none has been found after reasonable efforts. 21 C.F.R. 1306.07(c).

The preponderance of the evidence supports a finding that the Respondent was tapering the drugs prescribed to Patient A after acute pain resolved. Dr. Ling, as well as others, testified that such tapering would be appropriate under such circumstances. Further, the record does not establish that Patient A experienced "adverse physiological or psychological effects incident to withdrawal" nor that, in fact, Patient A exhibited behavior consistent with the finding that she was an "addict." Therefore, the Deputy Administrator agrees with Judge Tenney that the