

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5437
Summary Calendar

ANANT N. MAUSKAR, M.D.,

Petitioner,

versus

THE DRUG ENFORCEMENT ADMINISTRATION
THE UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

Petition for Review of an Order of the
Drug Enforcement Administration
(92-24173)

(August 25, 1994)

Before JOLLY, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner Anant M. Mauskar, M.D., petitions for review of the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

decision and final order of the Administrator of the DEA¹, which revoked his DEA Certificate of Administration pursuant to 21 U.S.C. § 823. Dr. Mauskar asserts that the government did not prove by a preponderance of the evidence that he prescribed Tylenol #4 (Tylenol) and Xanax without a legitimate medical purpose, or that he falsified patient records by making an entry of "pain" when no such complaint existed. The sole issue in this appeal is whether the findings upon which the DEA Administrator revoked the doctor's registration to dispense controlled substances were supported by substantial evidence. Finding the existence of substantial evidence and thus no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Acting on information received from the Houston Police Department Narcotics Division and from the State Medicaid Fraud Division, as well as complaints received from pharmacists in the Houston area, the DEA commenced an investigation of the prescribing practices of Dr. Mauskar. The doctor was a DEA-registered practitioner in Schedule II through V controlled substances. On three occasions))December 5, 1990, July 22, 1991, and August 29, 1991))the DEA sent Agent Sam Mahon, posing as a patient named Sherman Scott, to Dr. Mauskar's office to obtain prescriptions for Xanax, a Schedule IV controlled substances, and Tylenol #4 with codeine, a Schedule III controlled substance. DEA Agent William

¹58 Fed. Reg. 51,385 (1993) (revoking Dr. Mauskar's DEA certification)

Hull tape-recorded and transcribed each of Mahon's office visits.

During the office visit in December 1990, Agent Mahon complained to Dr. Mauskar that he (Mahon) was "kind of depressed," and had a "little domestic problem." Agent Mahon told Dr. Mauskar that (1) another doctor had prescribed Tylenol six months earlier because Mahon was "hurting," (2) that he "quit hurting," and (3) that the Tylenol "relaxes" him and makes him "feel good." Agent Mahon then asked the doctor for Xanax, stating that he took the Xanax in combination with the Tylenol. The doctor examined Agent Mahon and expressed concern about the agent's weight and high blood pressure. The doctor then prescribed Tylenol and Xanax, and gave the agent some samples of a blood pressure medication.

In July 1991, Agent Mahon again visited Dr. Mauskar and asked for Tylenol #4 and Xanax. When asked by the doctor, "Where is your pain?" and "What do you want Tylenol for?", Agent Mahon specifically responded, "I feel fine" and "It just makes me feel good." Dr. Mauskar again expressed concern about the agent's weight and high blood pressure, and then issued some prescriptions for Tylenol and Xanax to agent Mahon.

Finally, in August 1991, Agent Mahon visited Dr. Mauskar a third time and again asked for Tylenol and Xanax. The doctor asked the agent, "Where is your pain))why do you want Tylenol #4?" In response, the agent stated, "[t]hey make me feel good." After noting that the agent had not lost any weight since his last visit, Dr. Mauskar again prescribed Tylenol and Xanax.

Tylenol #4 and Xanax are a "known street combination" used

together by addicts to create a euphoric state. Tylenol #4 has no proper medical role in the treatment of depression, anxiety, or high blood pressure. Rather, it treats symptoms of acute pain. Xanax does not treat pain or high blood pressure, but the parties dispute whether it is an appropriate medication for depression. Dr. Mauskar asserts that the Physician Desk Reference (PDR) recommends that Xanax be used to treat anxiety associated with depression.² The DEA asserts that Xanax is used to treat anxiety but not depression alone.

In June 1992, the Deputy Assistant Administrator of the DEA issued an Order to Show Cause why the petitioner's DEA Certificate of Registration should not be revoked pursuant to 21 U.S.C. § 823. The order stated that Dr. Mauskar's continued registration would be inconsistent with the public interest in light of the doctor's history of improper prescribing practices. Dr. Mauskar requested a hearing, which was held before an administrative law judge (ALJ) in Houston. The DEA called one witness, Agent Hull, and both parties introduced documents into evidence.³

Post-hearing, the DEA submitted proposed findings of fact and conclusions of law. The petitioner made no such submissions. In May 1993, the ALJ submitted its findings and conclusion to the

²PHYSICIAN'S DESK REFERENCE, 2482 (47th ed. 1993).

³Dr. Mauskar also requested a stay of the hearing to await the outcome of a pending state criminal case, arguing that his Fifth Amendment right against self-incrimination would be infringed if he wished to testify at the hearing. The ALJ overruled the objection; the petitioner does not raise this issue on appeal.

Administrator of the DEA. The ALJ recommended that Dr. Mauskar's registration be revoked and any pending application for renewal be denied.

Upon reviewing the record, the Administrator issued a decision in which he adopted the findings of fact, conclusions of law, and recommended ruling of the ALJ in its entirety.⁴ He then issued an order revoking the doctor's registration. Dr. Mauskar filed a motion with the DEA to stay the final order revoking his registration, but that motion was denied. The doctor then sought review of the final order before this court.

Dr. Mauskar contends on appeal that the government did not prove by a preponderance of the evidence that he prescribed Tylenol and Xanax without a legitimate medical purpose to Agent Sam Mahon, or that he falsified patient records of Agent Mahon by making an entry of "pain" when no such complaint existed. In addition, Dr. Mauskar attacks the ALJ's decision, arguing that the ALJ abused his discretion by (1) failing to take into account Hull's personal bias against petitioner; (2) considering lay opinion testimony of DEA Agent Hull, a pharmacist, as to the medical use of Xanax; and (3) accepting into evidence transcriptions of recorded conversations between Dr. Mauskar and Detective Mahon that contained inaudible portions)) portions the doctor contends could have contained important statements relating to his diagnosis and prescription

⁴The findings of the ALJ and those of the Administrator will be referred to as those of the Administrator alone because the Administrator adopted the findings of the ALJ.

writing.

II

ANALYSIS

The sole issue in this appeal is whether the findings upon which the DEA Administrator revoked the petitioner's registration to dispense controlled substances were supported by substantial evidence. Dr. Mauskar contends that the DEA failed to prove by a preponderance of evidence that the petitioner improperly prescribed Tylenol #4 and Xanax.

A. STANDARD OF REVIEW

Pursuant to 21 U.S.C § 877, "[f]indings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive." As the Attorney General has delegated fact determination power to the DEA Administrator in these matters, we review the Administrator's findings to determine if they are supported by substantial evidence.⁵ Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."⁶ We set aside an agency finding if, after reviewing the entire record, the finding is "unreasonable."⁷ Accordingly, we do not review agency findings to determine whether

⁵NLRB v. Motorola, 991 F.2d 278, 282 (5th Cir. 1993), Gibson v. FTC, 682 F.2d 554, 568 (5th Cir. 1982), NLRB v. National Fixtures, 574 F.2d 1305, 1306 (5th Cir. 1978).

⁶Abilene Sheet Metal v. NLRB, 619 F.2d 332, 337 (5th Cir. 1980).

⁷Id. at 338.

they were correct; we merely review such findings to determine if they were reasonable when looking at the record as a whole.⁸ A review of the record here shows that the Administrator's findings were reasonable.

B. SUBSTANTIAL EVIDENCE

The record shows that during the three meetings Dr. Mauskar issued Xanax even when the detective repeatedly told him he took it because it made him "feel good." The parties dispute, however, whether petitioner's dispensing of Xanax lacked a legitimate medical purpose.

Dr. Mauskar argues that Xanax was appropriately prescribed because Xanax can be used to treat depression alone. Agent Mahon told the doctor he had "domestic problems"; consequently, the doctor insists, he prescribed Xanax to help the patient cope with his problems. The DEA, however, retorts that doctors prescribe Xanax simply to counter anxiety.

The record also reveals that on three separate occasions Dr. Mauskar prescribed Tylenol even when the "patient" said he was not in pain. Agent Mahon repeated that the Tylenol made him "feel good." Tylenol is not used to treat anxiety or depression: it is a highly addictive pain medicine.

Even assuming that Dr. Mauskar had a legitimate medical purpose for prescribing Xanax, however, he clearly prescribed Tylenol without legitimate medical purpose. Moreover, the record as a whole shows that the petitioner dispensed Xanax and Tylenol

⁸Id. at 338.

concurrently on each of the three separate occasions. The doctor continued to prescribe these two drugs together, even after being told that the patient wanted them because "they made him feel good." In addition, the record indicates that these two drugs are a "known street combination" to get an enhanced high.

Dr. Mauskar contends that the ALJ should have believed that he had a legitimate medical purpose to prescribe Tylenol because the patient's records reflect a complaint of "pain" by Agent Mahon. Dr. Mauskar asserts that the transcripts of the conversations were incomplete: when Agent Hull transcribed the recording, he made a notation of inaudible for each portion of the conversation that he could not understand.

Nothing in the record indicates, however, that the detective communicated that he had a legitimate need for Tylenol. Moreover, in the taped conversations, the detective never mentioned he had any pain, yet the record shows that the doctor wrote "pain" in the patient's medical records. The ALJ found that this notation of "pain" was inconsistent with the recorded conversation which he found to be a more reliable account of the visit than Dr. Mauskar's patient records. In sum, based on the record as a whole, we cannot say that revoking Dr. Mauskar's certification was unreasonable.

Despite our finding that the ALJ findings were supported by substantial evidence, Dr. Mauskar asserts that the ALJ acted arbitrarily because he (1) failed to take into account Hull's personal bias against petitioner; (2) considered lay opinion testimony of DEA Agent Hull, a pharmacist, as to the medical use of

Xanax; and (3) accepted into evidence transcriptions of recorded conversations between petitioner and Detective Mahon that contained inaudible portions)) portions the doctor contends could have contained important statements relating to the diagnosis and prescriptions of Dr. Mauskar. Dr. Mauskar failed to object to the ALJ admitting Agent Hull's testimony. He also failed to object to the credibility of the transcripts. We do not consider on appeal an issue not raised below unless we find the issue to be either purely legal or review is necessary to avoid a miscarriage of justice.⁹ Even assuming that a failure to consider these arguments could result in manifest injustice, we find petitioner's arguments here to be without merit.

C. BIASED WITNESS

Dr. Mauskar asserts that before the investigation, Agent Hull, a pharmacist, knew him. In particular, the doctor contends that Agent Hull filled "very few prescriptions" for the doctor's patients, and that Agent Hull instigated the investigation of the petitioner. These facts, Dr. Mauskar asserts, raise an "inference" of bias))an inference, he contends, that was disregarded by the ALJ. The record, however, discloses no such bias. Rather, Agent Hull "instigated" the investigation because of complaints received from pharmacists in the Houston area and information provided by the Houston Police Department Narcotics Division and the State Medicaid Fraud Division. The ALJ did not fail to perceive any

⁹Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1163 (5th Cir. 1992) (citing In re Johnson, 724 F.2d 1138, 1140 (5th Cir. 1984)).

bias. The record is simply void of evidence of bias.

D. LAY OPINION

Dr. Mauskar waived any objection to the ALJ's consideration of Agent Hull's opinion testimony. The record shows that Dr. Mauskar did not object to the admissibility of Agent Hull's testimony regarding the proper therapeutic uses of Xanax and Tylenol. Dr. Mauskar contends that the ALJ should not have allowed Hull to testify because Hull was not qualified as an expert, even though Hull was a registered pharmacist for over twenty years prior to becoming an investigator. Dr. Mauskar also asserts that the ALJ erred by accepting and crediting Hull's testimony. Unless, however, acceptance of testimonial credibility seems inherently unreasonable or self-contradictory, a reviewing court gives great deference to the credibility determinations by an ALJ.¹⁰ We cannot say here that the ALJ overstepped his bounds.

Dr. Mauskar states that because the ALJ adopted "carte blanche" Agent Hull's "mere" opinion, the ALJ has an "obvious" pro-DEA bias. Albeit conclusionary, Dr. Mauskar makes a serious accusation. Courts will not accept unsupported allegations to sustain a finding of bias, and here, the doctor never offered any evidence to show bias. In addition, we find nothing in the record from which to "infer" any "bias," and we certainly do not find any evidence of an "obvious" bias. Besides indicating a weak case, such ill-supported claims offend a reviewing court and add nothing

¹⁰NLRB v. National Fixtures, 574 F.2d 1305, 1308 (5th Cir. 1978) (citing NLRB v. Standard Forge & Axle, 420 F.2d 508, 510 (5th Cir. 1969), cert. denied, 400 U.S. 903 (1970)).

to help the court's understanding.

E. TRANSCRIPT EVIDENCE

Petitioner argues that because the recordings of Hull's office visits omit portions of the conversation, as reflected by the "inaudibles," the portions omitted might have contained statements that would have affected Dr. Mauskar's diagnosis and prescriptions. Agent Hull denied that these inaudibles could have contained information that would have affected the doctor's prescriptions, and he testified that the transcriptions captured the essence of the conversation. The ALJ found, upon a complete review of the transcript, no indication that))even considering the inaudible portions))Agent Hull complained of pain. We cannot say that the ALJ's finding is not supported by substantial evidence.

Dr. Mauskar produced no evidence to contradict the accuracy of the transcriptions and did not raise any objection to the ALJ's admission of the transcripts to support the ALJ's findings. Although the doctor made a notation of "pain" on the agent's medical record during the visit, the ALJ found the transcriptions to be a more accurate record of what took place. Moreover, according to the record, there were three separate meetings, and during each meeting much of what was said was repeated several times. The ALJ found that Hull had transcribed the essence of the conversation and, based on the record, we do not believe that finding was unreasonable.

III

CONCLUSION

As there is substantial evidence to support the DEA Administrator's decision, we
AFFIRM.