

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Steven C. Wein, D.O.
Docket No. A-12-60
Decision No. 2473
August 20, 2012

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Stephen C. Wein, D.O. (Petitioner) appeals the March 15, 2012 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes sustaining Petitioner's exclusion from all federal health care programs until he regains his license to practice osteopathic medicine. *Steven C. Wein, D.O.*, DAB CR2514 (2012). The Inspector General of the Department of Health and Human Services (I.G.) excluded Petitioner under section 1128(b)(4) of the Social Security Act (Act). The ALJ concluded that the I.G. had a basis for the exclusion because Petitioner surrendered his license during a formal disciplinary proceeding that concerned his professional competence or performance. Petitioner challenges the basis for the exclusion by disputing that a disciplinary proceeding was pending or, alternatively, that any pending disciplinary proceeding concerned his professional competence or performance.

After carefully considering the arguments made by Petitioner in his Notice of Appeal and Brief (NA Br.) and at oral argument before us on July 24, 2012, we affirm the ALJ Decision for the reasons stated below.

Statutory and Regulatory Background

The Act authorizes the Secretary of the Department of Health and Human Services (Secretary) to exclude an individual or entity from participation in all federal health care programs if that individual or entity "surrendered . . . a license [to provide health care] while a formal disciplinary proceeding was pending before [any State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity." Act § 1128(b)(4)(B); *see also* 42 C.F.R. § 1001.501(a) (authorizing the I.G. to impose exclusions under Act § 1128(b)(4)). Any exclusion imposed under this authority "shall not be less than the period during which the individual's . . . license . . . is . . . surrendered" Act § 1128(c)(3)(E); *see also* 42 C.F.R. § 1001.501(b).

When the I.G. excludes an individual or entity, that individual or entity may request a hearing before an ALJ. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). ALJ review is limited to whether the “basis for the imposition of the sanction exists” and whether the “length of exclusion is unreasonable.”¹ 42 C.F.R. § 1001.2007(a)(1). Any party dissatisfied with the ALJ’s decision may appeal to the Board. 42 C.F.R. § 1005.21(a).

Case Background

Petitioner was an osteopath, licensed in the State of Nevada, who practiced as a psychiatrist. A Complaint & Request for Summary Suspension (Complaint) filed with the Nevada State Board of Osteopathic Medicine (state board) on December 3, 2009 charged Petitioner with “unprofessional and unethical conduct that raised questions about his competence to practice osteopathic medicine ‘with reasonable skill and safety to patients.’”² ALJ Decision at 3. More specifically, the complaint charged “that ‘acts of open and gross lewdness’ constitute unprofessional conduct, defined as ‘conduct that is detrimental to the public’s health, safety, and against the public’s morals,’ and unethical conduct, defined as ‘conduct that indicates and/or constitutes an unfitness to practice osteopathic medicine, especially in the area of psychiatric medicine dealing with potentially vulnerable patients.’” *Id.*, citing I.G. Ex. 3, at 2-3 (Complaint ¶¶ 5, 9, 10). Noting that Petitioner’s “actions put the public’s health, safety, and welfare at risk[,]” the complaint “alleged that ‘the public health, safety, and welfare imperatively require action and summary suspension[.]’” *Id.*, citing I.G. Ex. 3, at 3 (Complaint ¶ 13). The complaint also ordered a mental examination to determine Petitioner’s competence to continue practicing osteopathic medicine. *Id.*, citing I.G. Ex. 3, at 3 (Complaint ¶ 11) and I.G. Ex. 6. The Chairman/President of the state board, “based upon the . . . disciplinary Complaint . . . and good cause appearing therefor,” issued an Order of Summary Suspension on December 3, 2009, the same date the Complaint was filed. I.G. Ex. 5.

In November 2010, the parties signed a Settlement Agreement and Order (Agreement) that reiterated the charges against Petitioner. ALJ Decision at 3, citing I.G. Ex. 2. In the Agreement, Petitioner admitted he had been convicted of open and gross lewdness and that his conviction constituted unprofessional and unethical conduct that was a basis for disciplinary action by the state board under Nevada law. *Id.* Petitioner also admitted that he was charged with arson in Tempe, Arizona – allegedly setting fire to the home of two of the complaining witnesses in the then-pending Nevada criminal case – that “‘may also be considered unprofessional conduct’” *Id.* at 3 and n.2, citing I.G. Ex. 2, at 3 and I.G. Ex. 7. Petitioner surrendered his license and agreed to pay a \$10,593.75 fine that

¹ The I.G. here imposed the minimum exclusion period allowed by the statute so there is no basis for challenging the length of the exclusion.

² An investigating member of the state board filed the complaint on December 3, 2009. I.G. Ex. 3, at 4. As we indicate later, the Chairman/President of the state board acted on the Complaint the same date.

consisted of \$5,000 for unprofessional and unethical conduct in Nevada, \$5,000 for unprofessional and unethical conduct in Arizona and \$593.75 for costs of investigation. *Id.* at 3, citing I.G. Ex. 2, at 3-4. The state board accepted the Agreement and “ordered Petitioner Wein’s license surrendered and no longer valid.” *Id.*, citing I.G. Ex. 2, at 5 and I.G. Ex. 5.

The I.G. notified Petitioner of his exclusion in a letter dated August 31, 2011. *Id.* at 2, citing I.G. Ex. 1. Petitioner timely requested ALJ review. *Id.* The parties filed briefs and exhibits, all of which were admitted, and agreed to have the case decided on the written record. *Id.*, citing I.G. Br. at 8, and P. Br. at 5.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to “whether the initial decision is supported by substantial evidence on the whole record.” 42 C.F.R. § 1005.21(h). Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). We review a disputed issue of law as to “whether the initial decision is erroneous.” 42 C.F.R. § 1005.21(h).

Analysis

Petitioner makes two arguments as to why, in his view, the ALJ erred in concluding that the elements for a section 1128(b)(4)(B) exclusion are present. Petitioner first argues that the surrender of his license did not occur “while a formal disciplinary proceeding was pending” as required by the exclusion statute. More specifically, Petitioner asserts that under Nevada law, “[t]here was no formal disciplinary proceeding before the [Nevada] Board – as the Investigative Board Member’s issuance of charges did not constitute the initiation of formal proceedings.” NA Br. at 3 (citations omitted). The I.G. asserts that Petitioner cannot argue on appeal that there was no pending formal disciplinary proceeding because Petitioner did not make this argument in the ALJ proceeding.

The regulations provide that the “DAB will not consider . . . any issue in the briefs that could have been raised before the ALJ but was not.” 42 C.F.R. § 1005.21(e); *accord Michael J. Rosen*, DAB No. 2096 at 16 (2007) (“Petitioner did not raise that argument before the ALJ, and we are barred from considering it.”), *aff’d*, Michael J. Rosen, M.D., No. cv07-1686-PHX-EHC (D. Ariz. Aug. 10, 2009). In the instant proceeding, Petitioner did not file a brief replying to the I.G.’s assertion that he did not raise before the ALJ the argument that no formal disciplinary proceeding was pending when he surrendered his license. However, at oral argument, Petitioner’s counsel argued that Petitioner did raise the issue below. Transcript (Tr.) at 6-7. In support of this argument, counsel cited the

Informal Brief of Petitioner in which Petitioner responded “No” to the following question: “Do you agree that you surrendered your license to provide health care while a State formal disciplinary proceeding was pending against you and the proceeding concerned your professional competence, professional performance, or financial integrity?” *Id.*, citing Informal Brief of Petitioner at 5. Counsel cited no other evidence of record in support of his argument that he raised this issue below. *See Tr.* at 6-7, 16.

The “No” response on which Petitioner relies does not support Petitioner’s argument that he raised the issue of whether there was a pending disciplinary proceeding when he surrendered his license. The “No” is an ambiguous response to a compound question addressing more than one element of the exclusion statute, and Petitioner did not indicate in his Informal Brief, or any other filing below, that his “No” response related to the “pending disciplinary proceeding” element of the statute. Moreover, elsewhere in his Informal Brief, Petitioner stated that the “issues in dispute” were “whether Petitioner’s conduct concerned his professional competence and whether the conduct concerned his professional performance.” *Id.* Petitioner made no mention of any issue involving the “pending disciplinary hearing” element of the statute.

Finally, as the I.G. notes, following a prehearing conference with the parties, the ALJ issued an order that states: “During the conference call, the parties agreed that there is no dispute that Petitioner surrendered his license while a formal proceeding was pending before the Nevada State Board of Osteopathic Medicine.” Order and Schedule for Filing Briefs and Documentary Evidence at 2 (Nov. 30, 2011) (Order), cited in I.G. Response at 6. The Order expressly stated that “[a]ny objections to the summary or synopsis of the results of the Prehearing Conference. . . must be filed within 10 days from receipt of this Order.” Order at 4. Petitioner did not file any challenge to the accuracy of this summary or synopsis within the specified time frame, and Petitioner’s Informal Brief, which he contends raised the issue by way of his “No” response, was not filed until January 27, 2012, nearly two months after the time allotted Petitioner to challenge the accuracy of the Order.

We conclude that Petitioner did not raise before the ALJ the issue of whether a formal disciplinary proceeding was pending when he surrendered his license to practice osteopathy. The record shows, and Petitioner does not dispute, that Petitioner had ample opportunity to make such an argument before the ALJ. Accordingly, we will not entertain this argument on appeal.

Petitioner’s second argument is a reiteration of the argument he made below – that the charges brought against him by the Nevada state board (“acts of open and gross lewdness”) were not “concerned [with] his professional competence [or] professional performance” as required to exclude an individual or entity under section 1128(a)(4)(B). NA Br. at 3-5. More specifically, Petitioner argues that the record contains no substantial

evidence supporting the ALJ's finding that the record of the state board proceedings established that those proceedings concerned his professional competency or performance. *Id.* at 3, citing ALJ Decision at 2.

Here, as below, Petitioner argues that the “unsavory details” underlying his Nevada criminal conviction show “how the facts giving rise to Petitioner Wein’s misdemeanor arrest did not relate to quality of patient care” *Id.* at 4; *compare* Informal Brief of Petitioner at 2-4. In support of this argument on appeal, he points out that the Nevada statutes define “unprofessional conduct” as “[e]ngaging in any . . . conduct detrimental to the public health, safety or morals **which does not constitute . . . professional incompetence** .” NA Br. at 4 (emphasis added by Petitioner). Petitioner asserts that this definition undercuts the ALJ’s finding that the “unprofessional conduct” which formed the basis of the state board charges amounts to “professional incompetence.” *Id.* at 4-5. The ALJ stated that she found it “highly questionable” that “a disciplinary proceeding charging “unprofessional conduct” would not necessarily ‘concern’ competence/performance within the meaning of section 1128(b)(4)” ALJ Decision at 3-4. She also noted that the Complaint “called for Petitioner Wein to undergo a mental examination to determine his competence to continue practicing osteopathic medicine.” *Id.* at 3, citing I.G. Ex. 3, at 3 (Complaint ¶ 11), and I.G. Ex. 6 (Order for Medical Examination). However, the ALJ concluded that she did not need to reach the issue of whether Petitioner’s “unprofessional conduct” concerned his “professional competence or performance” because “[t]he state board [also] determined that Petitioner Wein engaged in unethical conduct, which it defined as conduct that ‘constitutes *unfitness to practice osteopathic medicine.*’” *Id.* at 4, citing I.G. Ex. 3, at 1 (Complaint ¶ 4) (ALJ’s italics).

We agree with the ALJ that it is not necessary to decide whether the unprofessional conduct with which Petitioner was charged, and to which he admitted in the Agreement, concerned his professional competence or performance. We also agree with the ALJ that it is unnecessary to probe the “unsavory details” of the particular criminal conduct underlying Petitioner’s admitted unprofessional conduct. We need not do either “[b]ecause the record of the state board proceedings definitively establish that the proceedings concerned Petitioner Wein’s professional competence.” ALJ Decision at 2. The state board charged Petitioner with “unethical conduct” as well as “unprofessional conduct,” and defined “unethical conduct” as “conduct that indicates and/or constitutes an unfitness to practice osteopathic medicine, especially in the area of psychiatric medicine dealing with potentially vulnerable patients.” *See* I.G. Ex. 3, at 2-3 (Complaint ¶¶ 9, 10), cited in ALJ Decision at 3; *see also* I.G. Ex. 3, at 1 (Complaint ¶ 4) (stating that pursuant to the Nevada Administrative Code, “a licensee engages in unethical conduct if he engages in any other conduct that the Board determines constitutes unfitness to practice osteopathic medicine.”). Petitioner himself states before us that the state board Complaint alleged “unethical conduct under NAC § 633.350, which under the guidelines may constitute ‘unfitness to practice medicine’” NA Br. at 5. The ALJ concluded,

“Where, as here, a formal disciplinary proceeding involves whether an individual’s *conduct* demonstrates that he is *unfit to practice medicine*, it is a proceeding that concerns the individual’s professional competence or performance” ALJ Decision at 4 (emphasis in original). Petitioner does not challenge that conclusion, and it is consistent with the plain meaning of the word “unfit”, which is synonymous with the word “incompetent.” *See Webster’s II New Riverside University Dictionary* at 1260 (1984 ed.). Thus, Petitioner effectively concedes that at least some of the charges to which he agreed in the Agreement that resulted in the surrender of his license concerned his competence to practice osteopathic medicine. This is all that is required to uphold the exclusion under section 1128(b)(4)(B). Petitioner seeks to avoid the legal effect of his concession by asserting that the ALJ “ignored that no formal proceedings before the Board had ever been initiated.” NA Br. at 5. However, we have already held that we will not entertain this issue here since Petitioner did not raise it below.

Conclusion

For the reasons stated above, we affirm the ALJ Decision upholding Petitioner’s exclusion.

/s/

Judith A. Ballard

/s/

Stephen M. Godek

/s/

Sheila Ann Hegy
Presiding Board Member