

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Rockie C. McDaniel  
(O.I. File Number 4-09-40137-9),

Petitioner,

v.

The Inspector General

Docket No. C-10-327

Decision No. CR2157

Date: June 15, 2010

**DECISION**

I find that the Inspector General (I.G.) was authorized by section 1128(b)(4) of the Social Security Act (Act) to exclude Petitioner, Rockie C. McDaniel, from participating in Medicare, Medicaid, and all federal health care programs. Petitioner's exclusion will remain in effect until he regains his license as a registered nurse (RN) or advanced registered nurse practitioner (ARNP) in the State of Kentucky.

**I. Background**

By letter dated December 31, 2009, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, 42 U.S.C. § 1320a-7(b)(4). By letter dated January 6, 2010, Petitioner requested a hearing. Following a telephonic prehearing conference and issuance of my Order of February 17, 2010, the I.G. filed a motion for summary disposition and brief in support (I.G. Br.), accompanied by four exhibits (I.G. Exs. 1-4). Petitioner filed an answer brief (P. Br.), accompanied by one exhibit (P. Ex. 1). The I.G. filed a reply brief (I.G. Reply). In the absence of objection, I receive I.G. Exs. 1-4 and P. Ex. 1 in evidence. Although offered the opportunity, Petitioner did not file a response brief.

## **II. Issue**

The only issue in this case is whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. Petitioner acknowledges that if I find the I.G. is authorized to exclude him, the length of his exclusion is “a matter of the way the law is written” and thus not unreasonable. P. Br. at 2.

## **III. Controlling Law**

Section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), authorizes exclusion from participation in Medicare, Medicaid, and all federal health care programs of any individual or entity “whose license to provide health care has been revoked or suspended by any State licensing authority . . . for reasons bearing on the individual’s or entity’s professional competence, professional performance, or financial integrity.” The terms of section 1128(b)(4)(A) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a)(1).

An exclusion under section 1128(b)(4)(A) of the act is discretionary. If the I.G. exercises his discretion to proceed, then the mandatory minimum period of exclusion to be imposed “shall not be less than the period during which the individual’s or entity’s license to provide health care is revoked, suspended, or surrendered . . . .” Act, section 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E). Regulatory language at 42 C.F.R. § 1001.501(b)(1) echoes the statute.

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals:

When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by [a] Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

## **IV. Findings and Conclusions**

I make findings and conclusions to support my decision in this case. I set forth each below as a separate heading.

*1. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act.*

Petitioner was a licensed RN and a registered ARNP in the State of Kentucky.<sup>1</sup> The Kentucky Board of Nursing (Nursing Board) initiated an investigation of Petitioner on November 19, 2003, based on allegations indicating that Petitioner practiced outside the scope of his ARNP registration and illegally prescribed controlled substances. As a result of this investigation, and in order to protect the public, the Nursing Board entered an order of immediate temporary suspension of Petitioner's RN license and ARNP registration. On July 7, 2005, the Nursing Board found that Petitioner had practiced as an ARNP in violation of the order of temporary suspension. On December 14, 2005, Petitioner surrendered his ARNP registration and signed an agreed order issued by the Nursing Board to resolve the investigation and avoid a formal administrative hearing. The Nursing Board approved the surrender on December 20, 2005. The agreed order reinstated Petitioner's RN license on a probationary basis, subject to certain conditions. Petitioner specifically waived his right to hearing or appeal for any violation of the conditions of the agreed order. I.G. Ex. 2.

By letter dated February 18, 2009, the Nursing Board notified Petitioner that his RN license was suspended (and noted that Petitioner had voluntarily surrendered his ARNP registration on December 20, 2005) based on violations of four conditions of the agreed order. The Nursing Board found that Petitioner had: failed to seek prior written approval from the President of the Nursing Board, or his designee, by seeking employment as an RN prior to completion of the first three years of practice required by the agreed order; misrepresented to a potential employer facts relating to the terms and conditions of the agreed order; did not appear for a meeting with his Nursing Board case manager on January 8, 2009; and failed to submit written notification of a change in nursing employment within 15 days of the event. The Nursing Board suspension prohibits Petitioner from "engaging in the practice of nursing within the Commonwealth of Kentucky for a period of at least four (4) years." I.G. Ex. 3.

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A) of the Act. First, the I.G. must prove that the license to provide health care of the individual to be excluded has been revoked or suspended by a state licensing authority. Second, the I.G. must prove that the license was revoked or suspended for

---

<sup>1</sup> Kentucky statutes define ARNP practice as "the performance of additional acts by registered nurses who have gained knowledge and skills . . . [which] include but [are] not limited to prescribing treatment, drugs, devices and ordering diagnostic tests. KY. REV. STAT. ANN. § 314.011(8) (Michie 2004) (amended 2006 and 2007). Practitioners allowed to engage in ARNP practice include nurse anesthetists, nurse midwives, clinical nurse specialists and nurse practitioners. KY. REV. STAT. ANN. § 314.011(7) (Michie 2004) (amended 2006 and 2007). Petitioner's RN license was a pre-requisite to obtaining his ARNP registration.

reasons bearing on the individual's professional competence, professional performance, or financial integrity. *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); *Thomas I. DeVol, Ph.D.*, DAB CR1652 (2007); *Sherry J. Cross*, DAB CR1575 (2007); *Michele R. Rodney*, DAB CR1332 (2005); *Edmund B. Eisnaugle, D.O.*, DAB CR1010 (2003); *Marcos U. Ramos, M.D.*, DAB CR788 (2001); *Allison Purtell, M.D.*, DAB CR781 (2001).

The suspension of Petitioner's RN license clearly satisfies the first element under section 1128(b)(4)(A), and Petitioner does not contest that his RN license was suspended by the Nursing Board (or that he surrendered his ARNP registration to avoid a formal disciplinary hearing as outlined in the agreed order). Further, he does not contest that the Nursing Board had the authority to take action against his registration and license. Instead, Petitioner asserts that he did not lose his RN license for reasons bearing on his professional competence, professional performance, or financial integrity. Petitioner specifically addresses each of the violations of the agreed order cited in the Nursing Board's February 18, 2009 letter in an attempt to show that they do not bear on his professional competence, professional performance, or financial integrity.

First, Petitioner admits that he failed to get written approval from the Nursing Board prior to seeking employment as an RN, which was a violation of the agreed order. However, Petitioner asserts that this failure has nothing to do with his professional competence, professional performance, or financial integrity. Petitioner asserts there is no allegation of theft or financial misfeasance on his part. And he asserts that the terms professional competence and professional performance "must mean his work as a nurse, whether he was negligent in treating patients in some manner." P. Br. at 3.

Next, Petitioner asserts that he did not misrepresent the terms of the agreed order to a potential employer. He contends that he could lawfully administer medication "like any other RN", and the agreed order did not restrict him from administering medication. P. Br. at 3-4.

Third, Petitioner admits that he failed to attend a monitoring meeting with the Nursing Board. Petitioner asserts this was because he got the dates "mixed up." Petitioner admits this was a violation of the agreed order, but he argues it does not bear on his professional competence, professional performance, or financial integrity. P. Br. at 4.

And finally, Petitioner admits he failed to notify the Nursing Board of a change of employment within fifteen days of his being relieved of nursing duties by the employer for whom he had worked for thirty-three months. While he agreed this failure violated the agreed order, he maintains that it does not bear on his professional competence, professional performance, or financial integrity. P. Br. at 4.

Petitioner also asserts that the surrender of his ARNP registration was an entirely separate incident and the reasons for that surrender were not the reasons his RN license was suspended. Petitioner notes that he surrendered his ARNP registration on December 20,

2005, but that the I.G. did not exclude him at that time. Petitioner notes that the I.G. cited the decision in the case of *Maureen Felker*, DAB CR1110 (2003) in arguing for Petitioner's exclusion.<sup>2</sup> However, Petitioner asserts that the *Felker* case is different from his, as Felker lost her license in part because she failed a licensure exam twice, which is an indication of a lack of competence to practice social work. And Petitioner points out that Felker held only one license and lost it. Petitioner lost his ARNP registration, but did not lose his RN license until three years later. Petitioner asserts that the I.G. "basically admits that the violations of the Agreed Order do not bear on Petitioner's professional competence or performance but relies on connecting the RN loss to the ARNP loss." P. Br. at 5-6. Petitioner notes the I.G.'s comment that Petitioner's loss of his ARNP registration was for reasons bearing on his professional competence or professional performance, but that the ultimate loss of his RN license also related to his professional competence or professional performance. P. Br. at 6.

Petitioner's arguments are unavailing. The issue before me is not whether the suspension of Petitioner's RN license was explicitly for professional competence or professional performance, or for some financial malfeasance. The issue is whether the suspension was for reasons "bearing on" his professional competence, professional performance, or financial integrity. Significantly, the Departmental Appeals Board (Board) has held that

[W]hen a health care license has been revoked for a violation of conditions placed on the license, it is appropriate, in determining whether the revocation was for reasons bearing on professional competence, professional performance or financial integrity, to look at the reasons why conditions were placed on the license in the first place. Those reasons resulted in the immediate basis for the license revocation and are thus reasonably viewed as reasons for the license revocation.

*Tracey Gates, R.N.*, DAB No. 1768 (2001); *Roy Cosby Stark*, DAB No. 1746, at 4 (2000). This reasoning applies in a license suspension action as well.

Thus, in evaluating whether the suspension of Petitioner's license is related to professional competence, professional performance, or financial integrity, I am obliged to look both at the events surrounding the suspension of Petitioner's ARNP registration and then his RN license.

The I.G. asserts that the Nursing Board suspended Petitioner's ARNP registration and RN license for reasons bearing on his professional competence or professional performance, but does not suggest that the Nursing Board's action was for reasons bearing on

---

<sup>2</sup> *Felker* concerned a license surrender under section 1128(b)(4)(B) of the Act. Felker's social work license had been placed on probation. The licensing board determined to revoke her probation for failure to comply with conditions of her probation, which included twice failing to pass state license examinations and failing to pay mandated restitution. The licensing board entered into a stipulation with Felker in which she surrendered her license as a precondition for reapplying for a license later.

Petitioner's financial integrity. I.G. Br. at 6. For that reason, I do not address the issue of financial integrity.

The I.G. notes that the Board has found that the plain meaning of the terms "professional competence" and "professional performance" "encompasses the ability to practice a licensed service with reasonable skill and safety." *Jerry D. Harrison, D.D.S.*, DAB No. 1365 (1992). Petitioner surrendered his ARNP registration because the Nursing Board concluded, and Petitioner stipulated to, these facts: a physician with whom Petitioner had a collaborative agreement provided him with forty-two controlled substance prescription forms that the physician had pre-signed; the pre-signed prescription forms were to be used for patients seen by Petitioner; Petitioner acknowledged that he used the forms to prescribe controlled substances for patients; Petitioner asserted that he used the forms in conjunction with the physician for patients who had established treatment plans; a Nursing Board consultant reviewed the medical records of Petitioner's patients and opined that he did not meet the standard of care for an ARNP in the community in terms of assessment, documentation of physical findings, diagnosis rendered, and prescribing of medications; and Petitioner later practiced as an ARNP in direct violation of the Nursing Board's March 2, 2005 Order of Immediate Temporary Suspension. Not meeting the standard of care for an ARNP certainly bears on Petitioner's professional competence and professional performance. I.G. Ex. 2.

The surrender of his ARNP registration and the suspension of his RN license are not, as Petitioner would have it, entirely separate incidents. P. Br. at 5. Instead, there is a causal link between Petitioner's surrender of his ARNP registration and his license suspension. The suspension of his RN license, as was the case with the final proceedings in the *Felker* case, "sprang from findings of professional incompetence and poor performance." *Maureen Felker*, DAB CR1110. As a result of the surrender of his ARNP license, the Nursing Board imposed requirements on Petitioner's RN license. Petitioner's nursing practice would be monitored and evaluated for several years to give the Nursing Board time to decide whether to fully reinstate his ARNP registration and RN license. I.G. Ex. 2, at 2-4. Petitioner understood he was subject to discipline if he violated these conditions. He was on notice that any violation of the agreed order would be an independent basis for the Nursing Board to impose discipline. Petitioner admittedly violated these conditions. P. Br. at 3-4; P. Ex. 1. The I.G. notes that one violation, the denial of any restriction on his ability to administer medications, conflicts with the agreed order's stipulation that he lost his ARNP registration in part because he was using pre-signed prescription forms to prescribe controlled substances.<sup>3</sup> Moreover, not seeking

---

<sup>3</sup> Petitioner does assert that there is nothing in the agreed order restricting his administration of medication and that he thus did not misrepresent facts to a potential employer. P. Br. at 3-4. Petitioner, however, in the agreed order, waived the right to appeal the Nursing Board's findings of violation or non-compliance with regard to the conditions and provisions of the agreed order and cannot now collaterally attack the findings of the Nursing Board. I.G. Ex. 2, at 2; 42 C.F.R. § 1001.2007(d).

employment without written approval from the Nursing Board, missing — for no better reason than carelessness — monitoring meetings after being notified of their dates, and failing to timely notify the Nursing Board of changes of employment, are unprofessional actions for an ARNP or an RN, and bear on Petitioner’s professional performance. Because they do, the second essential element is satisfied.

Finally, although the I.G. did not impose an exclusion when Petitioner’s ARNP registration was suspended, that does not mean that I cannot consider the reasons why the registration was suspended. Had the I.G. done so, the Nursing Board’s decision to allow Petitioner to practice as an RN with probationary restrictions would have been, as the I.G. notes, “null.” I.G. Reply at 4. The passage of time between the agreed order and the final order suspending Petitioner’s RN license does not, as the I.G. recognizes, negate the relationship between the ARNP registration and the RN license, nor disprove that the final proceedings sprang from findings made against Petitioner in the agreed order. I.G. Reply at 4, citing *Felker*, DAB CR1110, at 4.

***2. Petitioner’s exclusion is reasonable as a matter of law.***

While the I.G. has discretion to exclude an individual pursuant to section 1128(b)(4) of the Act, the I.G. has no discretion in determining the term of that exclusion. Section 1128(c)(3)(E) of the Act provides that any exclusion imposed under section 1128(b)(4) of the Act must be for no less than the period during which the excluded individual’s license to provide health care is revoked, suspended, or surrendered. Since I have found that the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act, an exclusion coterminous with the period during which his license is suspended is mandated by law.

**V. Conclusion**

The I.G.’s Motion for Summary Disposition must be, and it is, GRANTED. The I.G. is authorized to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs until he regains his RN license or ARNP registration in the State of Kentucky.

\_\_\_\_\_  
/s/  
Richard J. Smith  
Administrative Law Judge