

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Susan Denise Cluff,  
(OI File No. H-16-4-2675-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-487

Decision No. CR4940

Date: September 25, 2017

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Susan Denise Cluff, from participating in Medicare, Medicaid, and other federally funded health care programs. I find also that the length of the exclusion, until she regains her professional license, is reasonable as a matter of law.

**I. Background**

Petitioner challenged the I.G.'s exclusion determination. The I.G. filed a brief, three proposed exhibits that are identified as I.G. Ex. 1-I.G. Ex. 3, and a reply brief. Petitioner filed a brief plus an attachment headed with the phrase "Outpatient Neuropsychological Evaluation." Petitioner did not identify this document as an exhibit but I infer that it is her intent to offer it on her behalf. I identify it as P. Ex. 1.

Petitioner offered no objection to my receiving I.G. Ex. 1-I.G. Ex. 3 and I receive them into the record. The I.G. objected to my receiving P. Ex. 1. I overrule the objection and I receive it.

Petitioner averred that she would like an in-person hearing in this case. However, she has not offered any proposed testimony nor has she explained what purpose an in-person hearing would serve. I conclude that this case may be decided without an in-person hearing, based on the written record.

## **II. Issues, Findings of Fact and Conclusions of Law**

### **A. Issues**

The issues are whether the I.G. may exclude Petitioner and whether the length of the exclusion imposed by the I.G. is reasonable as a matter of law.

### **B. Findings of Fact and Conclusions of Law**

The I.G. excluded Petitioner on the authority of section 1128(b)(4) of the Social Security Act (Act). This section permits the I.G. to exclude any individual whose license to provide health care is revoked, suspended, or otherwise lost for reasons bearing on that individual's professional competence, professional performance, or financial integrity during the pendency of a formal disciplinary proceeding. Act § 1128(b)(4)(B).

The evidence establishes unequivocally that Petitioner, a nurse, surrendered her professional license in the State of Utah for reasons relating to her professional performance and competence while a formal disciplinary proceeding was pending against her. Consequently, the I.G. may exclude her.

In October 2016, Petitioner and the Utah Division of Occupational and Professional Licensing (Division) entered into a stipulation and order pursuant to which Petitioner agreed to surrender her nursing license during a formal disciplinary proceeding. I.G. Ex. 2. The Division initiated the 2016 proceeding against Petitioner based on allegations that she repeatedly violated a previous stipulation and order that Petitioner and the Division entered into in 2012. *Id.* at 3. The 2012 stipulation and order addressed Petitioner's problems with substance abuse including abuse of alcohol. I.G. Ex. 3. The 2016 allegations of noncompliance with the 2012 stipulation and order included assertions that Petitioner failed to provide samples for drug and alcohol testing on multiple occasions; that she had tested positive for consumption of alcohol; and that on at least one occasion she had consumed alcohol. *Id.*

The 2016 stipulation and order relates to Petitioner's history of substance abuse and her failure to comply with a previous order and stipulation between Petitioner and the Division relating to substance abuse. That clearly addresses Petitioner's professional competence and performance. Under Utah law unprofessional conduct includes, among other things, use of intoxicants, drugs, narcotics, or similar chemicals if that use impairs a licensee's ability to engage safely in his or her occupation or profession. Utah Code Ann.

§§ 58-1-501(2)(a), (e), (h). The Division initiated disciplinary proceedings against Petitioner, both in 2012 and in 2016, because it determined that Petitioner's abuse of alcohol and other controlled substances was unprofessional conduct under State law.

Petitioner does not dispute that she surrendered her license in 2016 nor does she deny that a formal disciplinary hearing was pending against her at that time. Furthermore, Petitioner doesn't challenge the reasons for the 2016 proceeding. Specifically, she does not deny that the Division premised the 2016 proceeding on Petitioner's history of substance abuse, the 2012 stipulation and order, and Petitioner's alleged failure to comply with that document. Rather, she argues that her reason for surrendering her license in 2016 had nothing to do with the 2016 proceeding but was because she was unsuccessful in finding work as a nurse.

That argument is irrelevant. The issue before me is not what motivated Petitioner to surrender her license. It is whether she surrendered her license in the course of proceedings that addressed her professional competence, her professional performance, or her financial integrity. As I have discussed, Petitioner's professional performance clearly was the subject of the 2016 proceedings during which she surrendered her license. Whatever may have motivated Petitioner to surrender her license during the pendency of these proceedings is of no legal consequence given that the proceedings concerned her professional performance.

I find that the term of exclusion in this case is reasonable as a matter of law. Section 1128(b)(4) of the Act requires that the exclusion period shall not be less than the period during which the individual's license is revoked, suspended, or surrendered. Act § 1128(c)(3)(E); *see* 42 C.F.R. § 1001.501.

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge