Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Jane Espejo Norton, M.D.,	)	Date: July 20, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-298
	)	Decision No. CR1627
	)	
The Inspector General.	)	
	)	

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner Jane Espejo Norton, M.D., from participation in Medicare, Medicaid, and all other federal health care programs. The I.G. relies on the discretionary authority to do so conveyed to him by section 1128(b)(4)(B) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(B). The predicate for the I.G.'s action is Petitioner's permanent surrender of her license to practice medicine in California. The I.G. has filed a Motion for Summary Affirmance, and Petitioner has filed a Motion for Summary Reversal.

The undisputed material facts in this case support the I.G.'s imposition of the exclusion. The I.G. has set the period of exclusion to be concurrent with the period during which Petitioner's license to practice medicine in California remains surrendered, the minimum period of exclusion required by law. For those reasons, I grant the I.G.'s Motion for Summary Affirmance, and deny Petitioner's Motion for Summary Reversal.

I. Procedural Background

Petitioner Jane Espejo Norton, M.D., was licensed to practice medicine in the State of California in 1977, and in the State of New York in 1999.

In 1995, Petitioner was disciplined by the Division of Medical Quality, Medical Board of California (California Board). Her license to practice medicine was suspended for one year, but that suspension was stayed and Petitioner was instead placed on supervised probation for five years. She sought and was granted early termination of that probationary period in 1998.

On June 2, 2004, Petitioner appeared in United States District Court for the Southern District of New York. Although the Indictments and their dates do not appear in this record, she had earlier been charged by the Federal Grand Jury sitting for that District with three felonies.

Her appearance on June 2, 2004, was in response to a misdemeanor Information charging her with two counts of violating 18 U.S.C. §§ 2 and 1003 by making false claims against the United States. The two charges alleged that between November 5, 1999 and January 18, 2000, Petitioner made false statements to two federal agencies, the Small Business Administration (SBA) and the Federal Emergency Management Agency (FEMA), in support of claims for reimbursement for losses sustained by her medical practice as the result of Hurricane Floyd.

Petitioner pleaded guilty to the two charges and was convicted on those guilty pleas. She was sentenced on September 28, 2004.

On September 30, 2004, the California Board issued its *ex parte* Interim Order of Suspension of Petitioner's license. After a hearing on October 27, 2004, the California Board issued its second Interim Order of Suspension on November 10, 2004. Immediately following that Interim Order of Suspension, an Accusation was filed before the California Board in which eight Causes for Disciplinary Action were charged against Petitioner. The First Cause for Disciplinary Action was based on Petitioner's federal-court convictions, and the remaining seven Causes in general charged various acts of misconduct arising from her California medical practice.

Assisted by counsel, Petitioner negotiated a disposition of the charges set out in the Accusation by admitting the charges in the First Cause for Disciplinary Action and by permanently surrendering her license to practice medicine in California. On January 6, 2006, she signed the Stipulated Surrender of License and Order, and thereby agreed that

she would "never re-apply for licensure as a physician and surgeon in the State of California" and that she would thus "be forever barred from seeking reinstatement as a physician and surgeon in the State of California." The California Board accepted and adopted the Stipulation in its Decision and Order of February 17, 2006.

On March 9, 2006, Petitioner was named in a Statement of Charges filed in the New York Department of Health's State Board for Professional Medical Conduct (New York Board). The statement of charges alleged three specifications of professional misconduct which were based on her federal court convictions and her permanent surrender of her California license. Assisted by the same counsel who appeared for her before the California Board, Petitioner negotiated the disposition of the charges before the New York Board and agreed to a two-year suspension of her New York license effective September 28, 2004, but with all except 30 days of that suspension stayed during a three-year period of supervision. Petitioner signed the Consent Agreement and Order effecting that disposition on May 9, 2006.

On December 29, 2006, the I.G. notified Petitioner that she was to be excluded from Medicare, Medicaid, and all federal health care programs because "your license to practice medicine or provide health care as a medical doctor in the State of California was . . . surrendered while a formal disciplinary proceeding was pending before the Medical Board of California for reasons bearing on your professional competence, professional performance, or financial integrity." The exclusion was to take effect 20 days from the date of the I.G.'s letter, and was to remain in effect until Petitioner became eligible for reinstatement by regaining her license to practice medicine in California. The I.G.'s letter relied on the terms of section 1128(b)(4) of the Act, 42 U.S.C. §§ 1320a-7(b)(4). Although the I.G.'s letter did not so state explicitly, the proposed exclusion would have permanent effect, since Petitioner's license had been permanently surrendered.

Acting through counsel, Petitioner timely sought review of the I.G.'s action on March 2, 2007. On April 4, 2007, I held a telephone conference with the parties to discuss the issues presented by the case and to establish procedures for addressing them; the results of the conference are set out in my Order of April 4, 2007.

That Order contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. The cycle of briefing has closed, and this record closed for purposes of 42 C.F.R. § 1005.20(c) on June 25, 2007, under the circumstances set out in the Order Closing Record of that date.[1]

The evidentiary record on which I decide this case contains six exhibits. With his Motion for Summary Affirmance (I.G. Br.), the I.G. has proffered I.G.'s Exhibits 1-4 (I.G. Exs. 1-4), and with her Motion for Summary Reversal (P. Br), Petitioner has proffered Petitioner's Exhibits 1-2 (P. Exs. 1-2). Neither party has objected to the admission of any of these exhibits, and so all are admitted as designated.

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4)(B) of the Act; and

2. Whether the length of the exclusion is unreasonable.

I resolve these issues in favor of the I.G.'s position. Section 1128(b)(4)(B) of the Act supports Petitioner's exclusion from all federal health care programs, for she surrendered her license to practice medicine to the California Board while a formal proceeding concerning her professional competence, professional performance, or financial integrity was pending against her before that Board. Petitioner's exclusion during the period that her license to practice medicine in California remains revoked, suspended, or surrendered is the minimum period established by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), and is therefore reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(b)(4)(B) of the Act, 42 U.S.C. § 1320a-7(b)(4)(B), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity "who surrendered [a license to provide health care] while a

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[1] Petitioner did not renew her request for oral argument. *See* my letter dated June 27, 2002.

formal disciplinary proceeding was pending before [a State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity." The terms of section 1128(b)(4)(B) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a)(2).

An exclusion based on section 1128(b)(4)(B) of the Act is discretionary. If the I.G. exercises his discretion to proceed with the sanction, then the mandatory minimum period of exclusion to be imposed under section 1128(b)(4)(B) of the Act "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) affirms the statutory provision.

If the I.G. determines that an event constitutes a valid predicate for the exclusion, he must send written notice of his final decision to exclude to the affected individual or entity, and must in that notice provide information about the appeal rights of the excluded party. 42 C.F.R. § 1001.2002. *See also* Act, section 1128(c), 42 U.S.C. § 1320a-7(c).

IV. Findings and Conclusions

I find and conclude as follows:

1. Between September 30, 2004 and February 17, 2006, a formal disciplinary proceeding against Petitioner Jane Espejo Norton, M.D., was pending before the California Board. I.G. Ex. 2.

2. The formal disciplinary proceeding described above in Finding 1 concerned Petitioner's professional competence, professional performance, and financial integrity. I.G. Ex. 2.

3. On January 6, 2006, while the formal disciplinary proceeding described above in Findings 1 and 2 was pending against her, Petitioner permanently surrendered her license to practice medicine in California. I.G. Ex. 3.

4. On February 17, 2006, the California Board, entered its Decision and Order accepting the permanent surrender of Petitioner's license to practice medicine in California. I.G. Ex. 4.

5. On December 29, 2006, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until she should regain her license as a medical doctor in California, based on the authority set out in section 1128(b)(4) of the Act. I.G. Ex. 1.

6. On or about March 2, 2007, Petitioner perfected this appeal from the I.G.'s action by filing a timely hearing request.

7. By reason of Petitioner's surrender of her license to practice medicine in California while a formal disciplinary proceeding against her was pending concerning her professional competence, professional performance, or financial integrity, as set out in Findings 1-4 above, a basis exists for the I.G.'s exercise of discretionary authority, pursuant to section 1128(b)(4)(B) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

8. The exclusion of Petitioner until she should regain her license as a medical doctor in California is for the minimum period prescribed by law and is therefore as a matter of law not unreasonable. Act, section 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).

9. There are no remaining disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

There are three essential elements necessary to support an exclusion based on section 1128(b)(4)(B) of the Act. First, the I.G. must prove that the individual to be excluded has surrendered her or his license to provide health care to a State licensing authority. Second, the I.G. must prove that the license was surrendered while a formal disciplinary proceeding against the individual was pending before the State authority. Third, the I.G. must prove that the pending proceeding concerned the individual's professional competence, professional performance, or financial integrity. *James Latimer, M.D.*, DAB CR1578 (2007); *Julia Maria Nash*, DAB CR1277 (2005); *Maureen Felker*, DAB CR1110 (2003); *April Ann May, P.A.*, DAB CR1089 (2003); *Djuana Matthews Beruk, D.D.S.*, DAB CR950 (2002).

Petitioner explicitly admits the first two elements. She admits that a formal disciplinary proceeding was pending against her before the California Board between November 10, 2004 and February 17, 2006, and she admits that she surrendered her license to practice medicine to the California Board in January 2006. P. Br. at 4, 6. Admitted or not, these first two essential elements are amply proven by I.G. Exs. 2, 3, and 4.

Petitioner's concession of the third essential element is less clear. She concedes that her license surrender was predicated on her admission of the misconduct charged in the California Board's First Cause for Disciplinary Action (I.G. Ex. 2, at 7-9), which alleged her convictions in United States District Court for the Southern District of New York. P. Br., at 6. She does not concede here that her federal-court convictions "concerned" her professional competence and performance or her financial integrity, but she did admit to the California authorities that her convictions "thereby subjected her license to disciplinary action." I.G. Ex. 3, at 4. Since on their face the convictions were based on false statements Petitioner made to SBA and FEMA about damage to her medical office's anesthesia equipment, about resultant economic losses to her medical practice, about the physical location of her New York medical office, and about a variety of documents supporting her SBA and FEMA claims, there is an obvious nexus between her federal-court conviction and both her professional performance and her financial integrity. I.G. Ex. 2, at 7-9.

But section 1128(b)(4) does not demand a nexus between the license surrender and the specific charge admitted: the statute requires only that the pending proceeding generally "concerned" Petitioner's professional competence, professional performance, or financial integrity. The Second, Third, Fourth, Sixth, and Eighth Causes for Disciplinary Action all charged Petitioner with acts of professional misconduct related directly to patient care. The Fifth Cause charged Petitioner with the deliberate falsification of patient records and false statements. The Seventh Cause charged that Petitioner violated California statutes that required her to provide adequate security, *e.g.* malpractice insurance, against claims arising from her care of patients. The disciplinary proceedings were manifestly "concerned" with Petitioner's professional competence, professional performance, or financial integrity, and thus the third essential element is established. The evidence before me fully demonstrates the I.G.'s basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4)(B) of the Act.

The first of the defenses Petitioner raises to the proposed exclusion is a constitutional argument. She asserts, without citation of apposite authority, that it is "a well established legal principle that the practice of medicine and various healing arts is regulated under state law." P. Br., at 8. This assertion is the foundation of her argument that U.S. CONST.

amend. X forbids the extension of federal authority into matters related to the licensing and supervision of those who practice medicine, and makes those persons subject to federal sanction only if they "have some factual nexus or link to the federal or state health care programs." *Id.* at 8-9. Thus launched, the argument sails on under a flag of convenience, since the intention of the exclusion sanction created by sections 1128(a) and 1128(b) of the Act is palpably not to regulate or license the practice of medicine anywhere by anyone, but is rather to regulate participation in protected federally-funded health-care programs and prevent participation in those programs by providers who might do the programs and their beneficiaries harm. *Dr. Darren James, D.P.M.*, DAB No. 1828 (2002); *Joann Fletcher Cash*, DAB No. 1725 (2000). It is difficult to detect a Tenth Amendment argument in that statutory scheme. But Petitioner's constitutional argument would be better saved for another forum: I simply cannot address it. *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Susan Malady, R.N.*, DAB No. 1816 (2001).

Petitioner acknowledges the discretionary nature of the exclusion authority conveyed by section 1128(b)(4)(B), but she would engraft onto that authority a requirement not supported by law. She argues that the I.G. must explain and defend here the rationale by which the I.G.'s discretion was invoked in favor of exclusion. P. Br., at 11-13. Her argument is directly contrary to the regulations that govern this case, and forgets the settled rule that governs my disposition of it: once I have found that there is a nexus of fact and law by which Petitioner became subject to exclusion, I am without jurisdiction to evaluate on any basis whatsoever the propriety, wisdom, or fairness of the I.G.'s exercise of discretion in deciding to proceed with imposition of the exclusion. *Michael J. Rosen, M.D.*, DAB No. 2096; *Keith Michael Everman, D.C.*, DAB No. 1880; *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Wayne E. Imber, M.D.*, DAB No. 1740 (2000); *see also* 42 C.F.R. §§ 1001.2007(a)(1) and 1005.4(c)(5).

The *Rosen-Everman-Gates-Imber* line of cases also provides the resolution of a more specific challenge Petitioner raises to the I.G.'s exercise of his discretionary authority. She asserts — and I have no reason to doubt her assertion — that her specialized medical practices in California and New York never provided items or services under the Medicare or Medicaid programs. On the basis of that assertion, she then argues that she was *in the past* never in a position to abuse or defraud those programs *or their beneficiaries*, that she would not *in the future* be in such a position, that she therefore poses no danger from which those programs *or their beneficiaries* need protection *in the future*, and that her exclusion from those programs has wrought invidious collateral effects on her employability. She points to the appellate panel's willingness to reverse what it saw as unnecessary exclusions in *Hanlester Network, et al, v. Shalala*, 51 F.3d 1390 (9th Cir. 1995) as support for her suggestion that I do so here. P. Br., at 11. But, as I have pointed out above, it is not for the Administrative Law Judge in a case brought

under section 1128(b) of the Act to assess the wisdom, fairness, propriety, or collateral consequences of the I.G.'s decision to exclude. 42 C.F.R. § 1005.4(c)(5). The facts before me demonstrate the required nexus by which Petitioner became subject to exclusion, and I am explicitly forbidden to evaluate, according to any criteria, the I.G.'s exercise of discretion in choosing to impose the exclusion. *Michael J. Rosen, M.D.*, DAB No. 2096; *Keith Michael Everman, D.C.*, DAB No. 1880; *Tracey Gates, R.N.*, DAB No. 1768; *Wayne E. Imber, M.D.*, DAB No. 1740; *see also* 42 C.F.R. § 1001.2007(a)(1).

Petitioner characterizes the practical effect of the I.G.'s proposed exclusion as "perverse," (P. Br., at 11) and bases her characterization on the fact that although she is still licensed to practice medicine in New York, the permanent surrender of her California license operates to permanently exclude her from the protected federal programs. She argues that had she kept her California license but pleaded guilty to a health-care-related felony, the period of her exclusion might have been shorter: "As applied by the I.G., Dr. Norton would have received a shorter period of exclusion if she had plead (*sic*) guilty to a health care related felony." *Id.* This argument is indebted far more to imaginative and disingenuous speculation than to a careful reading of the law.[2]

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[2] Assuming that Petitioner's comparison to the consequences of her hypothetical plea of "guilty to a health care related felony" is based on her hypothetical exclusion under section 1128(a)(3) of the Act, she appears to have forgotten the I.G.'s authority to extend substantially any five-year mandatory minimum period of exclusion imposed under that section by relying on the aggravating factors set out at 42 C.F.R. § 1001.102(a). The facts alleged in this record might invoke at least seven of those aggravating factors. Misconduct extending from 1999 to 2004 is alleged in I.G. Ex. 2, and thus suggests the application of the aggravating factor defined at 42 C.F.R. § 1001.102(a)(2). The acts of misconduct alleged in I.G. Ex. 2, at 9-20, reasonably could be understood to have had significant adverse physical impacts on Petitioner's patients, thereby raising the potential invocation of the aggravating factor noted at 42 C.F.R. § 1001.102(a)(3). Those acts of misconduct might have been assessed as a continuing pattern of behavior, and thereby supported reliance on the aggravating factor listed at 42 C.F.R. § 1001.102(a)(4). Petitioner's criminal sentence included home confinement, I.G. Ex. 2, at 9, and thus might have brought to bear the "incarceration" aggravating factor listed at 42 C.F.R. § 1001.102(a)(5), and the conviction itself might have justified invocation of the aggravating factor identified at 42 C.F.R. § 1001.102(a)(8). Petitioner's 1995 sanctioning by the California medical authorities, shown in I.G. Ex. 2, at 2-3, might have supported reliance on the aggravating factor set out at 42 C.F.R. § 1001.102(a)(6). Finally, and by Petitioner's own admission in P. Ex. 2, the New York Board's 2006 sanctions, based on the same set of circumstances as those before the California Board,

What Petitioner characterizes as "perverse" is in fact the precise result desired by Congress in 1987, when it enacted section 1128(b)(4)(B) as part of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93. Although the I.G. may exercise discretion in deciding whether to exclude an individual pursuant to section 1128(b)(4) of the Act, the I.G. may exercise no similar discretion in determining the minimum period of such an exclusion. Section 1128(c)(3)(E) of the Act mandates that any period of exclusion based on section 1128(b)(4) must not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Thus, where the I.G. is authorized to impose an exclusion pursuant to section 1128(b)(4), that exclusion is reasonable as a matter of law if it is concurrent with the period during which the individual's license to provide health care is revoked, suspended, or surrendered. *Tracey Gates, R.N.*, DAB No. 1768; *Julia Maria Nash*, DAB CR1277; *Maureen Felker*, DAB CR1110; *April Ann May, P.A.*, DAB CR1089; *Djuana Matthews Beruk, D.D.S.*, DAB CR950. The reasonableness of an individual's *ipso facto* permanent exclusion based on the *de facto* permanent revocation, suspension, or surrender of the individual's license has been explicitly considered and approved. *Lori E. Miller*, DAB CR961 (2002); *Marcos U. Ramos, M.D.*, DAB CR788 (2001); *John C. Cheek, M.D.*, DAB CR665 (2000), *aff'd John C. Cheek, M.D.*, DAB No. 1738 (2000). *See Judy Pederson Rogers and William Ernest Rogers*, DAB No. 2009, n.5 (2006); *Kenneth M. Behr*, DAB No. 1997, n.7 (2005). The onerous results of such an exclusion for the excluded party's employability are simply not cognizable defenses to the exclusion or to its length. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein*, DAB No. 1865 (2003); *George E. Smith, M.D., M.Ed.*, DAB CR885 (2002).

Summary disposition in a case such as this is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision issues accordingly.

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might have warranted application of the aggravating factor specified at 42 C.F.R. § 1001.102(a)(9).

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. Petitioner's Motion for Summary Reversal is denied. The I.G.'s exclusion of Petitioner Jane Espejo Norton, M.D., from participation in Medicare, Medicaid, and all other federal health care programs is SUSTAINED, pursuant to the terms of section 1128(b)(4) of the Act, 42 U.S.C. § 1320a-7(b)(4). That exclusion remains in effect, by operation of section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), while her license to provide health care in California remains revoked, suspended, or surrendered.

/s/
Richard J. Smith
Administrative Law Judge