

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pamela J. Cortez a/k/a Pamela J. Cruz
(O.I. File No. H-13-41468-9),

Petitioner

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-15-3839

Decision No. CR4658

Date: July 12, 2016

Petitioner, Pamela J. Cortez a/k/a Pamela J. Cruz, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(4)), effective December 19, 2013. Petitioner is excluded because she voluntarily surrendered her license to practice medicine or provide health care as a vocational nurse pursuant to an agreement with the Texas Board of Nursing while a formal disciplinary proceeding was pending before that board bearing on Petitioner's professional performance. There is a proper basis for the exclusion. The Act requires Petitioner's exclusion for not less than the period during which her state license is surrendered, that is, until she regains her vocational nurse license in Texas.¹ Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) sent Petitioner a letter dated November 29, 2013, which notified Petitioner that she was being excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(b)(4) of the Act and 42 C.F.R. § 1001.501.² The letter further advised Petitioner that the exclusion would remain in effect until she regained her license to practice medicine in Texas and she is reinstated by the I.G. I.G. Exhibit (Ex.) 1 at 4. The I.G. notice was returned as undeliverable on December 13, 2013. I.G. Ex. 1 at 2, 8. Petitioner sent the I.G. a letter dated January 14, 2015, asking about her exclusion. I.G. Ex. 2. On March 16, 2015, the I.G. served Petitioner the notice of exclusion dated November 29, 2013. I.G. Ex. 1 at 1-5.

Petitioner filed a timely request for hearing pursuant to 42 C.F.R. §§1001.2007 and 1005.2, on May 15, 2015.³ The case was assigned to Judge Joseph Grow on September 22, 2015. Judge Grow convened prehearing conferences on October 14, 2015 and February 10, 2016, the substance of each are memorialized in his orders dated October 15, 2015 and February 12, 2016, respectively.

The I.G. filed I.G. Exs. 1 and 2 on November 13, 2015. The I.G. filed a completed questionnaire (I.G Br.) and I.G. Ex. 3 on April 7, 2016. The I.G. waived oral hearing. I.G. Br. at 7-8. On May 16, 2016, Petitioner filed her completed questionnaire (P.Q.) and written arguments (P. Br.). Petitioner also waived an oral hearing. P.Q. at 3. The I.G. waived the filing of a reply brief on May 17, 2016. Petitioner filed no exhibits for me to consider. Petitioner did not object to my consideration of I.G. Exs. 1, 2, and 3 and they are admitted.

² Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

³ This case was initially assigned to Judge Joseph Grow. On February 12, 2016, Judge Grow issued an “Order and Schedule for Filing Briefs and Documentary Evidence” (Order and Schedule). Departmental Appeals Board Electronic Filing system (DAB E-File) Item # 12. Judge Grow denied in his order a pending I.G. motion to dismiss Petitioner’s request for hearing on grounds that it was untimely filed. Judge Grow found that Petitioner timely filed her request for hearing on May 15, 2015. Order and Schedule ¶ 1. The I.G. does not challenge that ruling before me and I find no reason to upset Judge Grow’s ruling.

II. Discussion

A. Issues

The Secretary of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

B. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary.

Pursuant to section 1128(b)(4)(A) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual whose license to provide health care is revoked or suspended by any state licensing authority for reasons bearing upon the individual's professional competence, professional performance, or financial integrity. 42 C.F.R. § 1001.501(a)(1). Pursuant to section 1128(b)(4)(B) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual who surrenders his or her license while a formal disciplinary action is pending before the licensing authority related to the individual's professional competence, professional performance, or financial integrity. 42 C.F.R. § 1001.501(a)(2).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

C. Analysis

My conclusions of law are in bold followed by my findings of fact and analysis.

1. Petitioner's request for hearing is timely and I have jurisdiction.

Petitioner's request for hearing was timely and I have jurisdiction. Order and Schedule ¶ 1.

2. There is a basis for Petitioner’s exclusion pursuant to section 1128(b)(4) of the Act.

The I.G. cites section 1128(b)(4) of the Act as the basis for Petitioner’s permissive exclusion. I.G. Ex. 1. The statute provides:

(b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f):

* * * *

(4) LICENSE REVOCATION OR SUSPENSION. – Any individual or entity –

(A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who has otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual’s or entity’s professional competence, professional performance, or financial integrity, or

(B) who surrendered such license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual’s or entity’s professional competence, professional performance, or financial integrity.

Act § 1128(b)(4)(A) - (B). The statute permits, but does not require, the Secretary to exclude from participation any individual: (1) whose state license to provide health care has been suspended or revoked by a state licensing authority, and (2) the revocation or suspension is for reasons bearing on an individual’s professional competence, professional performance, or financial integrity. The statute also permits exclusion when an individual: (1) surrenders a license while a formal disciplinary proceeding is pending; and (2) the proceeding concerns the individual’s or entity’s professional competence, professional performance, financial integrity. In this case, Petitioner voluntarily surrendered her vocational nursing license rather than her license being suspended or revoked by the Texas Board of Nursing. Therefore, section 1128(b)(4)(B) is at issue.

Petitioner does not dispute that she voluntarily surrendered her license to the Texas Board of Nursing. P. Br. at 1; P.Q. at 1. Petitioner also does not deny the facts reflected in her “Agreed Order” with the Texas Board of Nursing, which she signed and dated May 29,

2013. I.G. Ex. 3 at 6. The Agreed Order reflects that Petitioner was licensed to practice vocational nursing in Texas on May 25, 1993. Petitioner's license was suspended December 3, 2001, subsequently revoked on September 2, 2002, and reinstated on August 8, 2006. I.G. Ex. 3 at 1-3. On September 14, 2010, Petitioner entered an Agreed Order with the Texas Board of Nursing. The Texas Board initiated proceedings against Petitioner's license because on or about April 22, 2013, Petitioner submitted a specimen for drug screening that was determined to include the metabolite of alcohol. Consumption of alcohol was prohibited by the September 14, 2010 Agreed Order. The Texas Board of Nursing found that Petitioner violated the September 14, 2010 Agreed Order by failing to abstain from the use of alcohol. I.G. Ex. 3 at 3. On June 4, 2013, the Texas Board of Nursing accepted Petitioner's voluntary surrender of her vocational nurse license in lieu of disciplinary action. I.G. Ex. 3 at 4, 6. These undisputed facts satisfy the first element for permissive exclusion under section 1128(b)(4)(B) of the Act, that is Petitioner voluntarily surrendered her vocational nurses license to the Texas Board of Nursing during a formal disciplinary proceeding before that body.

The crux of Petitioner's argument is that the second element for exclusion under section 1128(b)(4)(B) of the Act is not satisfied, that is, the Texas State Board of Nursing proceeding did not concern Petitioner's professional competence, professional performance, or financial integrity.

Petitioner argues that the alcohol could have been from any number of different sources, such as lotions, perfumes, and over-the-counter medications, which she was not prohibited from using. P. Br. at 1. However, the Texas Board of Nursing fact finding that Petitioner violated the September 14, 2010 Agreed Order by having failed to abstain from alcohol is not subject to collateral attack in this proceeding or review by me. 42 C.F.R. § 1001.2007.

I conclude that the Texas Board of Nursing findings of a violation of the September 14, 2010 Agreed Order by Petitioner based on her having failed to abstain from alcohol is directly related to her professional performance. The basis for the Texas Board's concern and decision is stated specifically as follows: "there exists [sic] serious risks to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances." I.G. Ex. 3 at 3. The Board did not specifically find that Petitioner was under the influence on duty or that consumption of alcohol impaired her performance at any time. However, such a finding is not necessary for permissive exclusion. The Texas Board of Nursing finding is sufficient to establish that that Board's proceeding against Petitioner's license was, in fact, concerned with her professional performance and the possible impact of alcohol consumption (whether from her hand lotion or cough syrup) on her ability to reliably and safely discharge her duties as a nurse. I conclude that the second element necessary to permit the Secretary to exclude under section 1128(b)(4)(B) of the Act is established.

Accordingly, I conclude that the elements necessary for a permissive exclusion pursuant to section 1128(b)(4)(B) of the Act are satisfied and that there is a basis for Petitioner's permissive exclusion pursuant to that provision. When I conclude that the Secretary had a basis for permissive exclusion, I have no authority to review the exercise of discretion by the I.G. to exclude. 42 C.F.R. § 1005.4(c)(5). The exclusion is effective 20 days from the date of the I.G.'s November 29, 2013 notice of exclusion, that is, December 19, 2013. 42 C.F.R. § 1001.2002(b).

3. The period of exclusion is reasonable as a matter of law.

Petitioner does not specifically challenge that her exclusion does not end until her vocational nurse license is reinstated in Texas and she is reinstated by the I.G. The length of the period of exclusion is established by section 1128(c)(3)(E) of the Act and 42 C.F.R. § 1001.501(b). The length of a permissive exclusion pursuant to section 1128(b)(4) of the Act and 42 C.F.R. § 1001.501(b), is no less than the period the individual's state license is revoked, suspended or otherwise not in effect. Because the length of exclusion is dictated by the Act and the Secretary's regulation, the period of exclusion is not subject to my review or action. I am bound to follow the federal statutes and the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1).

Finally, I have no authority to fashion or grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”)

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective December 19, 2013, for the period specified by the regulations.

/s/
Keith W. Sickendick
Administrative Law Judge