

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arlene Bailey,
(O.I. File No.: H-16-40274-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-783

Decision No. CR4738

Date: November 17, 2016

DECISION

Petitioner, Arlene Bailey, was a licensed practical nurse (LPN) in the State of Louisiana. Following a hearing at which Petitioner appeared and testified, the Louisiana State Board of Practical Nurse Examiners (State Board) found that Petitioner had violated the nursing practice statute by engaging in unprofessional conduct. Based on these findings, the State Board suspended Petitioner's LPN license. Now, pursuant to section 1128(b)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs until she regains her LPN license.

For the reasons set forth below, I find that Petitioner's LPN license was suspended for reasons bearing on her professional competence or professional performance. The I.G. therefore had a legal basis to exclude her from program participation. The duration of the exclusion is the minimum required by section 1128(c)(3)(e) of the Act; accordingly, it is reasonable as a matter of law.

I. Background

In a letter dated May 30, 2016, the I.G. advised Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs because her license to provide health care as a licensed practical nurse in the State of Louisiana was revoked, suspended, or otherwise lost for reasons bearing on her professional competence, professional performance, or financial integrity. I.G. Exhibit (Ex.) 2. The letter explained that section 1128(b)(4) of the Act authorizes the exclusion. *Id.* Petitioner timely requested review. I convened a telephone prehearing conference and issued an Order and Schedule for Filing Briefs and Documentary Evidence.

Pursuant to that order, the I.G. submitted a brief and four proposed exhibits (I.G. Br.; I.G. Exs. 1-4). Petitioner presented her position in a letter (P. Br.). Petitioner also submitted answers to the questions posed in the informal short form brief which this office provided to her (P. Informal Br.). In the absence of any objections, I admit into evidence I.G. Exs. 1-4.

The parties agreed that this case could be resolved without an in-person hearing. I.G. Br. at 6; P. Informal Br. at 3; *see also* Order and Schedule for Filing Briefs and Documentary Evidence ¶ 6. I therefore decide this case based on the written record.

II. Discussion

1. The I.G. is authorized to exclude Petitioner because the Louisiana State Board suspended Petitioner's LPN license for reasons bearing on her professional competence or professional performance.¹

The Act authorizes the Secretary of Health and Human Services to exclude from program participation an individual whose license to provide health care is revoked, suspended, or otherwise lost for reasons bearing on her professional competence, professional performance, or financial integrity. Act § 1128(b)(4); *accord* 42 C.F.R. § 1001.501(a).

Petitioner does not dispute that her LPN license is suspended. Nor does she dispute that the suspension was imposed for reasons bearing on her professional competence or professional performance, within the meaning of section 1128(b)(4) of the Act. P. Br.; P. Informal Br. There can be no doubt that these elements are satisfied in the present case.

The State hearing officer who presided at Petitioner's license suspension hearing found that Petitioner tested positive for cocaine while at work. I.G. Ex. 4 at 1. The hearing officer found credible Petitioner's assertion that she did not knowingly ingest the cocaine;

¹ My findings of fact and conclusions of law are set out in bold italic type.

nevertheless, the hearing officer found that the toxicology report confirmed that cocaine was found in Petitioner's system. I.G. Ex. 4 at 2. Based on the hearing officer's findings, the State Board concluded that Petitioner had violated Louisiana nursing practice statutes and regulations in that she was unfit or incompetent, and was guilty of unprofessional conduct. *Id.* Among other things, the State Board cited the following instance of unprofessional conduct:

...[U]sing or being under the influence of drugs which impair judgment while on duty, or using or being under the influence of illegal drugs whether on or off duty....

Id. (bold type in original). It is well settled that findings of unprofessional conduct under state law bear on an individual's professional competence or performance within the meaning of section 1128(b)(4). *See, e.g., Marvin L. Gibbs, Jr., M.D., DAB No. 2279 at 7 (2009)* (and cases cited therein).

Petitioner's letter explains the circumstances that led to her positive drug test. She states that she did not ingest cocaine and that the testing facility must have misidentified her urine sample. P. Br. Even if I found Petitioner's explanation credible (as apparently the State hearing officer did), I have no authority to look behind the State Board's conclusions that Petitioner had cocaine in her system and that the positive drug test represents unprofessional conduct. To do so would represent an impermissible collateral attack on the State Board's decision to suspend Petitioner's license. *See* 42 C.F.R. § 1001.2007(d) (providing that, where an exclusion is based on an agency's prior determination where the facts were adjudicated and a final decision was made, the underlying basis for that determination is not reviewable and may not be collaterally attacked).

2. As a matter of law, Petitioner must be excluded until she regains her LPN license in Louisiana.

The Act requires that Petitioner's period of exclusion "shall not be less than the period during which the individual's . . . license. . . is . . . revoked, suspended, or surrendered" Act § 1128(c)(3)(E). Petitioner does not dispute that she must be excluded until she regains her LPN license. Instead, Petitioner asks that I reinstate her LPN license. P. Br. Petitioner's request reflects a misunderstanding of my authority. I cannot direct the State to take any action on Petitioner's license. Petitioner must address her request to reinstate her LPN license to Louisiana State authorities (either the State Board or a State court). If, in the future, Louisiana authorities reinstate her LPN license, Petitioner may then request that the I.G. reinstate her participation in Medicare, Medicaid, and other federal health programs.

III. Conclusion

For the above reasons, I conclude that the I.G. had a legal basis to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for so long as her LPN license is suspended.

/s/
Leslie A. Weyn
Administrative Law Judge