

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Erica L. Pedersen,)	Date: November 28, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-474
)	Decision No. CR1700
The Inspector General.)	
_____)	

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner *pro se* Erica L. Pedersen 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)(A) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(A). The predicate for the I.G.'s action is the suspension of Petitioner's license to practice nursing in Pennsylvania. The I.G. has filed a Motion for Summary Affirmance.

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 practical nursing in Pennsylvania remains suspended, the minimum period of exclusion required by law. For those reasons, I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Petitioner *pro se* Erica L. Pedersen is a practical nurse and was licensed to practice nursing in the Commonwealth of Pennsylvania. Between 2004 and July 6, 2006, a disciplinary proceeding against Petitioner was pending before the State Board of Nursing of the Commonwealth of Pennsylvania, and that disciplinary proceeding concerned

Petitioner's professional competence and professional performance. On July 6, 2006, the State Board of Nursing entered its Final Order suspending Petitioner's license to practice practical nursing in Pennsylvania for a period of at least three years.

On March 30, 2007, 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 to practice as a practical nurse in Pennsylvania, based on the authority set out in section 1128(b)(4) of the Act. Petitioner perfected her appeal of the I.G.'s action by her *pro se* letter of May 21, 2007.

I held the prehearing conference required by 42 C.F.R. § 1005.6(a) on July 2, 2007. The Order of July 3, 2007 summarized the discussions held in the conference and contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. The cycle of briefing and this record closed for purposes of 42 C.F.R. § 1005.20(c) on November 5, 2007, under the circumstances set out in the Orders of October 9, 2007 and July 3, 2007.

The evidentiary record on which I decide this case contains eight exhibits. The I.G. has proffered I.G.'s Exhibits 1-6 (I.G. Exs. 1-6). Petitioner has not objected to the admission of these exhibits, and they are admitted as designated. Petitioner has proffered Petitioner's Exhibits 1-2 (P. Ex. 1-2), and all are admitted as designated in the absence of objection from the I.G.

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)(A) of the Act; and
2. Whether the length of the exclusion is unreasonable.

The I.G.'s position on both issues is correct. Section 1128(b)(4)(A) of the Act supports Petitioner's exclusion from all federal health care programs, for her license to practice practical nursing in Pennsylvania has been suspended for reasons bearing on her professional competence and professional performance. Petitioner's exclusion during the

period that her license to practice practical nursing in Pennsylvania remains suspended 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)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), authorizes the exclusion from participation in Medicare, Medicaid, and all other 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).

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

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.

An exclusion based on section 1128(b)(4)(A) 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)(A) 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.

IV. Findings and Conclusions

I find and conclude as follows:

1. Between 2004 and July 6, 2006, a disciplinary proceeding against Petitioner was pending before the State Board of Nursing of the Commonwealth of Pennsylvania. I.G. Exs. 3, 4, 5.

2. The disciplinary proceeding described above in Finding 1 concerned Petitioner's professional competence and professional performance. I.G. Exs. 3, 4, 5.
3. On July 6, 2006, the State Board of Nursing of the Commonwealth of Pennsylvania entered its Final Order suspending Petitioner's license to practice practical nursing in Pennsylvania for a period of at least three years, for reasons bearing on her professional competence and professional performance. I.G. Ex. 5.
4. On March 30, 2007, 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 to practice as a practical nurse in Pennsylvania, based on the authority set out in section 1128(b)(4) of the Act. I.G. Ex. 1.
5. On May 21, 2007, Petitioner perfected this appeal from the I.G.'s action by filing a timely hearing request.
6. Because Petitioner's license to practice practical nursing in Pennsylvania was suspended for reasons bearing on her professional competence and professional performance, as set out in Findings 1-3 above, a basis exists for the I.G.'s exercise of his discretionary authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.
7. The exclusion of Petitioner during the period that her license to practice as a practical nurse in Pennsylvania remains suspended 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).
8. 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

Two essential elements must be proven in order 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 reasons bearing on the individual's professional competence, professional performance, or financial integrity. *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); *Mark C.*

Sorensen, M.D., DAB CR1664 (2007); *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 I.G.'s evidence establishes both essential elements conclusively. Petitioner's license to practice practical nursing was suspended by the State Board of Nursing on July 6, 2006, and it was suspended on the explicit basis of her frequent lapses into alcohol abuse. I.G. Exs. 3, 4, 5, 6. The State Board of Nursing expressly concluded that Petitioner "is unable to practice the profession with reasonable skill and safety to patients by reason of . . . addiction to drugs or alcohol . . ." I.G. Ex. 3, at 2-3. That a license suspension or revocation based on substance abuse is a revocation for reasons bearing on the individual's professional competence or professional performance is particularly well-settled in this forum. *Lori E. Miller*, DAB CR961 (2002); *Tracey Gates, R.N.*, DAB CR708 (2000), *aff'd* DAB No. 1768 (2001); *Roy Cosby Stark*, DAB CR676 (2000); *aff'd* DAB 1746 (2000); *Wilbur D. Hilst, M.D.*, DAB CR621 (1999).

Petitioner admits that the proceedings against her took place and that they resulted in the suspension of her license. Her defense to the I.G.'s action takes the form of a vigorous and articulate attack on the fairness of those proceedings and on the scientific soundness of the test relied on by the State Board of Nursing in suspending her license. Her briefing and exhibits mount a careful and well-documented discussion of the testing protocol, the specific circumstances under which she took the test, and the reliability of the test itself; she admits, however, that she did not contest the State Board of Nursing's final action, and thus did not take the opportunity to impeach the test results before that body.

Those arguments may in theory have merit, but this is not the forum in which they may be raised. Valid or not, all Petitioner's arguments share this characteristic: they all constitute collateral attacks on the State Board of Nursing's action, and the settled rule is that such collateral attacks on the soundness or the validity of a state action are impermissible in this forum. *Judy Pederson Rogers and William Ernest Rogers*, DAB No. 2009 (2006); *Hassan M. Ibrahim, M.D.*, DAB No. 1613 (1997); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Olufemi Okonuren, M.D.*, DAB No. 1319 (1992); *see also Mark C. Sorensen, M.D.*, DAB CR1664. Those cases are supported by the controlling regulation, 42 C.F.R. § 1001.2007(d). Nor may the effect of Petitioner's acquiescence in the state action be avoided by the claim that she was unaware of its consequences. *Stella Remedies Lively*, DAB CR1369 (2005); *Steven Caplan, R.Ph.*, DAB CR1112 (2003), *aff'd* *Steven Caplan v. Thompson*, CIV No. 04-00251 (D. Haw. Dec. 17, 2004).

Petitioner also challenges the proposed period of exclusion as harsh and unreasonably long. But 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, if 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; *Mark C. Sorensen, M.D.*, DAB CR1664; *Thomas I. DeVol, Ph.D.*, DAB CR1652; *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). That is the period of exclusion the I.G. proposes in this case, and it is reasonable as a matter of law.

Resolution of a case by summary disposition 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 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, and support summary disposition as a matter of law.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Erica L. Pedersen from participation in Medicare, Medicaid, and all other federal health care programs is SUSTAINED, pursuant to the terms of section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A). 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 practice as a practical nurse in Pennsylvania remains suspended.

/s/

Richard J. Smith
Administrative Law Judge