

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Steven C. Wein,  
(O.I. File No.: 11-40476-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-82

Decision No. CR2514

Date: March 15, 2012

**DECISION**

Petitioner, Steven C. Wein, was an osteopath, licensed in the State of Nevada, who practiced as a psychiatrist. Following his arrest for “open and gross lewdness,” the Nevada State Board of Osteopathic Medicine charged him with unprofessional and unethical conduct and sought to revoke his license. While that disciplinary proceeding was pending, he voluntarily surrendered his license. Now, pursuant to section 1128(b)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded him from participation in Medicare, Medicaid, and all federal health care programs until he regains his license.

For the reasons set forth below, I find that Petitioner Wein surrendered his license while a formal disciplinary proceeding involving his professional competence or performance was pending before the state licensing board. The I.G. therefore appropriately excluded him from program participation.

## Background

In a letter dated August 31, 2011, the I.G. advised Petitioner Wein that he was excluded from participation in Medicare, Medicaid, and all federal health care programs because he had surrendered his license to practice medicine/provide health care as a doctor of osteopathic medicine while a formal disciplinary proceeding, bearing on his professional competence, professional performance, or financial integrity, was pending before the Nevada Board of Osteopathic Medicine. The letter explained that section 1128(b)(4) authorizes the exclusion. I.G. Ex. 1. Petitioner Wein timely requested review.

The parties have submitted briefs (I.G. Br.; P. Br.). The I.G. also submitted seven exhibits (I.G. Exs. 1-7), and a reply brief (I.G. Reply). In the absence of any objections, I admit into evidence I.G. Exs. 1-7.

The parties agree that this case should be resolved without an in-person hearing. I.G. Br. at 8; P. Br. at 5.

## Discussion

***Because Petitioner Wein surrendered his license to practice osteopathic medicine while a formal disciplinary proceeding bearing on his professional competence or performance was pending, the I.G. may appropriately exclude him from participation in Medicare, Medicaid, and other federally funded health care programs.<sup>1</sup>***

The Act authorizes the Secretary of Health and Human Services to exclude from program participation an individual who surrendered his license to provide health care while a formal disciplinary proceeding was pending before any state licensing authority if the proceeding concerned the individual's professional competence, professional performance, or financial integrity. Act § 1128(b)(4); *accord* 42 C.F.R. § 1001.501(a).

The parties agree that Petitioner Wein voluntarily surrendered his license to practice as an osteopath while formal disciplinary proceedings were pending against him. I.G. Br. at 3-4; P. Br. at 1; I.G. Exs. 3, 5. Petitioner argues, however, that the conduct that caused the licensing board to bring charges against him, "did not concern either his professional competence or his professional performance." P. Br. at 2. In fact, the state board's documents – complaint, settlement agreement and order, order of summary suspension, and order for medical examination – say otherwise. I.G. Exs. 2, 3, 5, 6. Because the record of the state board proceedings definitively establish that the proceedings concerned Petitioner Wein's professional competence, I need not consider the unsavory

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<sup>1</sup> I make this one finding of fact/conclusion of law.

details of the conduct that underlay the board's actions (which are nevertheless outlined in some detail in the I.G.'s submissions). 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).

In a complaint and request for summary suspension, the Nevada State Board of Osteopathic Medicine charged that Petitioner Wein engaged in unprofessional and unethical conduct that raised questions about his competence to practice osteopathic medicine "with reasonable skill and safety to patients." Specifically, the state board charged that "acts of open and gross lewdness" constitute unprofessional conduct, defined as "conduct that is detrimental to the public's health, safety, and against the public's morals," and unethical conduct, defined as "conduct that indicates and/or constitutes an unfitness to practice osteopathic medicine, especially in the area of psychiatric medicine dealing with potentially vulnerable patients." I.G. Ex. 3 at 2-3 (Complaint ¶¶ 5, 9, 10). The complaint alleged that "the public health, safety, and welfare imperatively require action and summary suspension," noting that his actions put the public's health, safety, and welfare at risk. I.G. Ex. 3 at 3 (Complaint ¶ 13).

The complaint also called for Petitioner Wein to undergo a mental examination to determine his competence to continue practicing osteopathic medicine. I.G. Ex. 3 at 3 (Complaint ¶ 11); I.G. Ex. 6.

A settlement agreement and order, signed by the parties in November 2010 and issued by the state board on December 7, 2010, reiterated the state board's charges. I.G. Ex. 2. Petitioner Wein admitted that he had been convicted of open and gross lewdness, and that his conviction constituted unprofessional and unethical conduct. He also admitted that "the alleged criminal acts/conduct occurring in May 2009[sic] in Tempe, Arizona . . . may also be considered unprofessional conduct. . . ." I.G. Ex. 2 at 3.<sup>2</sup> He surrendered his license and agreed to pay a fine of \$10,593.75 (\$5,000 for unprofessional and unethical conduct in Nevada; \$5,000 for unprofessional and unethical conduct in Arizona; and \$593.75 for investigative costs). I.G. Ex. 2 at 3-4. The state board accepted the agreement and ordered Petitioner Wein's license surrendered and no longer valid. I.G. Ex. 2 at 5; I.G. Ex. 5.

Petitioner, nevertheless, argues that he does not fall within the definition of section 1128(b)(4), because the I.G. did not establish that his "unprofessional conduct amounts to a question of professional competence or performance. . . ." P. Br. at 3. That a disciplinary proceeding charging unprofessional conduct would not necessarily "concern" competence/performance within the meaning of section 1128(b)(4) is highly

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<sup>2</sup> Petitioner Wein was charged with setting fire to the home of two of the complaining witnesses in the criminal case then-pending against him. I.G. Ex. 7.

questionable. But I need not reach that issue here. The state board determined that Petitioner Wein engaged in unethical conduct, which it defined as conduct that “*constitutes unfitness to practice osteopathic medicine.*” I.G. Ex. 3 at 1 (Complaint ¶ 4) (emphasis added). Where, as here, a formal disciplinary proceeding involves whether an individual’s *conduct* demonstrates that he is *unfit to practice* medicine, it is a proceeding that concerns the individual’s professional competence or performance, and the I.G. may appropriately exclude him from program participation under section 1128(b)(4) of the Act.

The statute requires that Petitioner Wein’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).

### **Conclusion**

For the above reasons, I conclude that the I.G. properly excluded Petitioner Wein from participation in Medicare, Medicaid, and all other federal health care programs for so long as his medical license is suspended.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge