

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sandra Marie Lubinski,
(O.I. File No. H-12-4-1352-9)

Petitioner,

v.

The Inspector General.

Docket No. C-13-715

Decision No. CR2968

Date: October 24, 2013

DECISION

Petitioner, Sandra Marie Lubinski, was a registered nurse licensed in the State of Arizona. The Arizona State Board of Nursing (Nursing Board) investigated numerous complaints against her relating primarily to her substance abuse. Petitioner Lubinski surrendered her license to practice nursing while facing disciplinary proceedings relating to those complaints. Pursuant to section 1128(b)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded her from participation in Medicare, Medicaid, and all federal health care programs until she regains her license. Petitioner now appeals the exclusion.

For the reasons set forth below, I find that Petitioner Lubinski surrendered her nursing license while a formal disciplinary proceeding involving her professional competence or performance was pending before the Nursing Board. The I.G. therefore appropriately excluded her from program participation.

Background

In a letter dated February 28, 2013, the I.G. advised Petitioner Lubinski that she was excluded from participation in Medicare, Medicaid, and all federal health care programs because she had surrendered her license to practice nursing while a formal disciplinary proceeding, bearing on her professional competence, professional performance, or financial integrity, was pending before the Arizona State Board of Nursing. The letter explained that section 1128(b)(4) authorizes the exclusion. I.G. Ex. 1. Petitioner Lubinski timely requested review.

The parties have submitted briefs (I.G. Br.; P. Br.). The I.G. also submitted five exhibits (I.G. Exs. 1-5), and a reply brief (I.G. Reply). Petitioner submitted six exhibits (P. Exs. 1-6). In the absence of any objections, I admit into evidence I.G. Exs. 1-5 and P. Exs. 1-6.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary and, if so, to explain why any witness's "proposed testimony does not duplicate something that is already stated in an exhibit." June 10, 2013 Email Providing Petitioner's Informal Brief, Attachment 1 (Informal Brief of Petitioner ¶ II). The I.G. indicates that a hearing is not necessary and submits no declarations from proposed witnesses. I.G. Br. at 9. Petitioner argues that a hearing is "appropriate in establishing credibility of witnesses, demonstrating trustworthiness of Petitioner, and helpful in deciding this case." P. Br. at 12. Petitioner submits two declarations from proposed witnesses, and a report from one of the declarants.¹ See P. Br. at 12; P. Exs. 2-4. Petitioner fails to demonstrate how the testimony of her proposed witnesses would deviate from that which is already stated in exhibits; indeed, Petitioner affirms that it would not. See P. Br. at 12. There are no questions of witness credibility in this case. The I.G. did not express an interest in cross-examining any of Petitioner's proposed witnesses. I.G. Br. at 9; I.G. Reply at 7-8. I therefore decline to schedule a hearing that would serve no purpose.

¹ Petitioner submits two declarations, Petitioner's Exhibits 2-3. Petitioner's Exhibit 2 is the declaration of Katherine Busby, J.D., who provides an authoritative interpretation of how Arizona state law defines a "formal disciplinary proceeding." See P. Ex. 2. Arizona law, however, is irrelevant in determining whether a formal disciplinary proceeding was pending in this case. See P. Ex. 2. Petitioner's Exhibit 3 is the declaration of a Michel A. Sucher, M.D., who evaluated Petitioner and determined that she did not abuse prescription drugs. P. Ex. 3, at 1. Petitioner's Exhibit 4 is Dr. Sucher's full evaluation of the Petitioner. Dr. Sucher's statements and evaluation constitute a collateral attack on the Board's findings and I cannot consider them. 42 C.F.R. § 1001.2007(d); *Roy Crosby Stark*, DAB No. 1746 (2000); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991).

Discussion

Because Petitioner Lubinski surrendered her license to practice nursing while a formal disciplinary proceeding bearing on her professional competence or performance was pending, the I.G. may appropriately exclude her from participation in Medicare, Medicaid, and other federally funded health care programs.²

The Act authorizes the Secretary of Health and Human Services to exclude from program participation an individual who surrendered her 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 Lubinski voluntarily surrendered her nursing license. I.G. Br. at 3; P. Br. at 4. Petitioner argues, however, that a formal disciplinary proceeding was not pending against her when she voluntarily agreed to surrender her license. P. Br. at 2-6. In fact, the Nursing Board's documents – the Consent for Entry of Voluntary Surrender (Consent Order) and the Board Meeting Overview (Overview) – say otherwise. I.G. Exs. 2, 4.

Petitioner argues that under Arizona law, “a [Nursing] Board meeting is not a formal disciplinary proceeding,” and that “[i]n Arizona, disciplinary proceedings are initiated when the Notice of Charges is served.” P. Br. at 6; P. Ex. 2, at 1-2. I find Petitioner's arguments unavailing and adopt the reasoning of numerous other ALJ's who have held that “the interpretation of a federal statute or regulation is a question of federal, not state, law.” *Chester A. Bennett, M.D.*, DAB CR64, at 7 (1990) (citing *United States v. Allegheny Cnty.*, 322 U.S. 174, 183 (1944)); *Maurice Labbe*, DAB CR488 (1997); *Dillard P. Enright*, DAB CR138, at 9 (1991); *see also Henry L. Gupton*, DAB No. 2058, at 8 (2007), *aff'd*, *Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008) (explaining, in a different context, that federal definitions must trump the state's in order to assure that statutory goals are met).

A formal disciplinary proceeding is a proceeding that “places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in a license suspension or revocation” *John W. Foderick M.D.*, DAB No. 1125, at 5 (1990) (quoting DAB CR43 (1989)). A “formal disciplinary proceeding” can involve different stages, and is not, therefore, limited to a formal hearing. *Foderick*, DAB No. 1125, at 6.

² I make this one finding of fact/conclusion of law.

The Nursing Board's Overview demonstrates that a "formal disciplinary proceeding" began when the Nursing Board initiated its investigation of Petitioner as a result of the charges made against her and was pending against Petitioner when she voluntarily surrendered her license. *See* I.G. Ex. 4; *Foderick*, DAB No. 1124, at 6-7. Petitioner concedes that the Nursing Board investigated her based on complaints made against her. P. Ex. 6, at 14. The investigation put Petitioner on notice of that charges were filed against her. I.G. Ex. 4, at 1 ("The investigator . . . interviews the subject of the complaint[s] . . . and then compiles the findings into an investigative report."). The Overview establishes that two of the possible outcomes of Board investigations, such as the one conducted on Petitioner Lubinski, are revocation and suspension. I.G. Ex. 4, at 2. Because the Board initiated an investigation of Petitioner that could lead to the revocation or suspension of her license, the first requirement for a "formal disciplinary proceeding" is met.

The second requirement for a "formal disciplinary proceeding" is met because Petitioner had an opportunity to defend herself from the charges made against her, and Petitioner would have had an additional opportunity had she not voluntarily surrendered her license. The Nursing Board gave Petitioner the opportunity to "give a verbal presentation (up to 5 minutes), to provide [Nursing] Board members with information [she] feel[s] is pertinent for their consideration." I.G. Ex. 4, at 1. Petitioner declined that opportunity. P. Ex. 6, at 3. The Nursing Board voted unanimously to offer Petitioner a Consent Agreement "based upon the findings of fact and statute/rule violations identified in the investigative report . . ." I.G. Ex. 3, at 3. The Nursing Board ordered a Notice of Charges to be issued if Petitioner rejected the Consent Agreement. I.G. Ex. 3, at 3.

Petitioner voluntarily gave up an additional opportunity to defend herself from the complaints made against her in a formal hearing. Petitioner surrendered her license, which prevented the formal disciplinary proceedings from advancing to the next stage, a formal hearing. P. Br. at 2-3; I.G. Ex. 4, at 2; *see* A.R.S. § 32-1663(C), (F)(3). Petitioner cannot voluntarily surrender her right to a formal hearing and then claim she did not have an opportunity to defend herself in a formal hearing. *See* I.G. Ex. 2, at 4; P. Ex. 6, at 47 ("In lieu of a formal hearing on these issues, [Petitioner] . . . waives all rights to a hearing, rehearing, appeal or judicial review related to this matter."). The ultimate outcome of the Board's decision to offer Petitioner a Consent Agreement or, alternatively, issue a Notice of Charges, was that Petitioner would have had the chance to offer a fuller defense of the charges against her. P. Br. at 2-3; I.G. Ex. 4, at 2; *see* A.R.S. § 32-1663(C), (F)(3). Petitioner's voluntary surrender of her license was the sole reason Petitioner did not advance to a formal hearing. I.G. Reply at 3-4; P. Br. at 4; I.G. Ex. 4, at 2. The second requirement for a "formal disciplinary proceeding" is thus met. Petitioner, therefore, surrendered her license while a "formal disciplinary proceeding" was pending against her.

Petitioner Lubinski also argues that she did not surrender her license for reasons concerning her professional competence and performance. P. Br. at 6-11. The Consent Order, agreed to and signed by Petitioner Lubinski, demonstrates otherwise. P. Ex. 6, at 44-50; I.G. Ex. 2. In the Consent Order, Petitioner “admits the [Nursing] Board’s Findings of Fact, Conclusions of Law.” P. Ex. 6, at 47; I.G. Ex. 2, at 4. The Nursing Board determined that “the admissions in the Findings of Fact are conclusive evidence of a violation of the Nurse Practice Act” P. Ex. 6, at 47; I.G. Ex. 2, at 4. Specifically, the Nursing Board concluded as a matter of law that Petitioner Lubinski violated rules concerning “[a] pattern of failure to maintain minimum standards of acceptable and prevailing nursing” and “[a] pattern of using or being under the influence of alcohol, drugs, or a similar substance to the extent that judgment may be impaired and nursing practice detrimentally affected, or while on duty in any health care facility, school, institution, or other work location[.]” P. Ex. 6, at 46; I.G. Ex. 2, at 3. Where, as here, a formal disciplinary proceeding involved whether an individual’s *conduct* demonstrates that she failed to maintain even the minimum standards governing her profession, it is a proceeding that concerns the individual’s professional competence or performance, and the I.G. may appropriately exclude her from program participation under section 1128(b)(4) of the Act.

Petitioner submits evidence concerning her moral character and the impact that her exclusion will have on her employer. P. Ex. 6, at 5, 31-33, 41-42. As the Departmental Appeals Board observed in *Donna Rogers*, such arguments and evidence are not relevant. DAB No. 2381 (2011). I may not review the I.G.’s decision to impose an exclusion under section 1128(b)(4) “on the ground that the excluded person is a good person or well-thought of in the profession” *Rogers*, DAB No. 2381, at 6.

Petitioner also submits evidence attempting to demonstrate that the complaints against her, which the Board investigated and found sufficient to justify disciplinary action, came from a disgruntled former co-worker. P. Ex. 6, at 23-30. I cannot, however, consider collateral attacks on the underlying basis of the Board’s Consent Order. 42 C.F.R. § 1001.2007(d); *Stark*, DAB No. 1746; *Iturralde, M.D.*, DAB No. 1374; *Friedman, M.D.*, DAB No. 1281.

The statute requires that Petitioner Lubinski’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); *see also* 42 C.F.R. § 1001.501(b)(1).

