

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Anne Marie Lucas,
(OI File No.: H-13-40092-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-882

Decision No. CR3005

Date: November 21, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Anne Marie Lucas from participation in Medicare, Medicaid, and all other federal health care programs until she regains her license to practice as a registered nurse in the State of Kentucky. The I.G.'s Motion and determination are based on section 1128(b)(4)(A) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(A).

The undisputed material facts of this case show that the I.G. is authorized to impose the exclusion against Petitioner and that the length of that period of exclusion is not unreasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Anne Marie Lucas was first licensed to practice as a registered nurse in the State of Kentucky in 1993. In December 2010 she acknowledged that she had developed chemical dependencies and reached an agreement with the Kentucky Board of Nursing (KBN) to address those dependencies by participation in a program known as the

Kentucky Alternative Recovery Effort for Nurses (KARE). Sadly, Petitioner's efforts to comply with KARE program requirements were unsuccessful. By its Notice of May 5, 2011, the KBN terminated Petitioner's participation in the KARE program. By that same Notice the KBN denied for two years the reinstatement of Petitioner's license, that license having lapsed during her period in the KARE program.

On May 31, 2013 the I.G. sent a notice-of-exclusion letter to Petitioner, relying on the terms of section 1128(b)(4) of the Act, 42 U.S.C. § 1320a-7(b)(4). I.G. Ex. 1. Acting *pro se* Petitioner sought review of the I.G.'s determination in a request for hearing in a letter dated June 11, 2013.

I attempted to convene a prehearing conference by telephone on August 13, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures and a schedule for addressing the issues presented by this case. That effort was not successful, and in order to avoid further delays in the progress of this case toward hearing I set out those procedures and a schedule in my Order of August 13, 2013. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on November 19, 2013.

The evidentiary record on which I decide the issues before me contains three exhibits. The I.G. proffered three exhibits marked I.G. Exhibits 1 through 3 (I.G. Exs. 1-3). Petitioner proffered no exhibits of her own. I have admitted all proffered exhibits.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

- a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(b)(4)(A) of the Act; and
- b. Whether the length of the proposed period of exclusion is unreasonable.

I decide these issues in favor of the I.G.'s position. Section 1128(b)(4)(A) of the Act supports Petitioner's exclusion from all federal health care programs, for her license to practice as a registered nurse was suspended by the KBN, the State licensing authority, for reasons bearing on her professional competence and professional performance. The length of this proposed period of exclusion is 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, or who 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.”

The terms of sections 1128(b)(4)(A) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a)(1).

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 § 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.

Although an exclusion based on section 1128(b)(4)(A) of the Act is discretionary, the I.G.’s decision to exercise his discretion and proceed with the sanction is not subject to review. *Donna Rogers*, DAB No. 2381 (2011); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Sheldon Stein, M.D.*, DAB No. 1301 (1992); 42 C.F.R. § 1005.4(c)(5).

The KBN is Kentucky’s licensing authority for registered nurses. KY. REV. STAT. §§ 314.099 and 314.121. The KARE program is established at KY. REV. STAT. § 314.171.

IV. Findings and Conclusions

I find and conclude as follows:

1. As a consequence of her chemical dependencies, Petitioner entered the KBN’s KARE treatment program in December 2010. I.G. Exs. 2, 3.
2. Petitioner’s participation in the KARE treatment program was unsuccessful. I.G. Ex. 3.
3. During the period of her participation in the KARE treatment program, Petitioner’s license to practice as a registered nurse lapsed. I.G. Ex. 2.
4. On May 5, 2011 the KBN notified Petitioner that her license to practice as a registered nurse in the State of Kentucky was denied reinstatement. I.G. Exs. 2, 3.

5. The KBN took action against Petitioner's license for reasons bearing on her professional competence and professional performance. I.G. Exs. 2, 3.
6. Because the KBN denied the reinstatement of Petitioner's lapsed license to practice as a registered nurse in the State of Kentucky for reasons bearing on her professional competence and professional performance, a basis exists for the I.G.'s exercise of authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(b)(4)(A).
7. The I.G.'s exclusion of Petitioner until such time as she regains her license to practice as a registered nurse in the State of Kentucky is not unreasonable. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
8. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *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

The exclusion of an individual based on section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4), is a derivative action, based on an action previously taken by a court, licensing board, or other agency. In this case the I.G. relies on the actions of the KBN and invokes section 1128(b)(4)(A) of the Act.

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A). First, the I.G. must prove that the license to provide health care of the individual to be excluded, or the right to apply for or renew such a license, has been lost, 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); *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 first element required to be shown by section 1128(b)(4)(A) is established by uncontroverted evidence that Petitioner's license had lapsed and was denied reinstatement by the KBN on May 5, 2011. Petitioner does not deny the KBN action or its effect. The I.G. has made the first required showing.

The nexus between the KBN proceeding and Petitioner's professional performance and professional competence — the second essential element of the I.G.'s 1128(b)(4)(A) theory — has not been contested in Petitioner's letters and briefing, but in any case the I.G. has proven it. The record of the KBN proceedings between December 2010 and May 2011 shows that Petitioner's admission to the KARE program was predicated on her admission that her chemical and alcohol dependencies classified her as "a person whose ability to practice nursing according to acceptable and prevailing standards of care is or may be impaired by reason of alcohol or drug abuse." 201 KY. ADMIN. REGS. 20:450.

With the proof of that nexus accomplished, the I.G. has proven all of the elements essential to his theory, and Petitioner's exclusion pursuant to sections 1128(b)(4)(A) of the Act is authorized.

Petitioner is candid in admitting her failure to complete the KARE program, and the factors she points to as the reasons she failed are understandable. She also makes a point that suggests very strongly that she is hopeful of regaining her license and is motivated to do so:

If I understand the exclusion correctly it is in a sense urging me to take the steps necessary to regain my nursing license. In order to take the steps necessary, I will need to earn enough money to begin this process.

Petitioner Answer Brief at 1.

Very few petitioners in cases based on section 1128(b)(4) are so perceptive: in most such cases, the incentive to regain a license inherent in the exclusion process under 1128(b)(4) is ignored or overlooked. And the incentive can be a real one to a motivated professional interested in returning to a licensed field of practice, as this Petitioner appears to be. But the obstacle in this situation is simply the mandatory nature of the period of exclusion: by law the period of exclusion "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 § 1128(c)(3)(E), 42 U.S.C. § 1320a-7(c)(3)(E).

The two-year denial of reinstatement order by the KBN has presumably now expired. If Petitioner is able to satisfy the KBN that she is now ready for reinstatement, and if the KBN agrees to renew her license, then she may ask the I.G. to end her exclusion pursuant to the terms of 42 C.F.R. § 1001 Subpart F. However, regardless of the difficulties her exclusion may present to Petitioner's finding employment, it is simply not subject to any exception or alteration that I can effect. It must remain in place until she regains her license to practice as a registered nurse in Kentucky.

Because the I.G. has established a basis for the exclusion of Petitioner pursuant to section 1128(b)(4)(A) of the Act, her exclusion until such time as she regains her license to practice as a registered nurse in the State of Kentucky is required by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a7(c)(3)(E) and 42 C.F.R. § 1001.501(b)(1). That period is reasonable as a matter of law, based as it is on that statute and regulation. Its effect is that desired by Congress in 1987, when it enacted section 1128(b)(4) as part of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93. Any suspension of the period of Petitioner's exclusion is explicitly beyond my authority. 42 C.F.R. §§ 1005.4(c)(5) and (6).

Petitioner appears here *pro se*. Because of that I have been guided by the Departmental Appeals Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Gibbs*, DAB No. 2279; *Michael J. Rosen, M.D.*, DAB No. 2096. This Decision issues accordingly, for the material facts in this case are undisputed, unambiguous, and support summary disposition as a matter of settled law.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Anne Marie Lucas from participation in Medicare, Medicaid, and all other federal health care programs pursuant to the terms of sections 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), until such time as she regains her license to practice as a registered nurse in the State of Kentucky is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge