

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christopher Scott Carter, M.D.,
(O.I. File No.: H-13-40437-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-937

Decision No. CR3063

Date: January 6, 2014

DECISION

Petitioner, Christopher Scott Carter, M.D., appeals the determination by the Inspector General (I.G.) for the U.S. Department of Health and Human Services to exclude him from participating in Medicare, Medicaid, and other federally-funded health care programs until he regains his Florida medical license and reinstatement from the I.G. For the reasons discussed below, I find the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) (42 U.S.C. § 1320a-7(b)) of the Social Security Act (Act) and that the duration of his exclusion must be for a period that is as long as his license to practice medicine in the State of Florida remains revoked.

I. Procedural Background

In a letter dated May 31, 2013, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and other federal health care programs because the Florida Board of Medical Examiners (State Board) revoked his medical license for reasons bearing on his professional competence, professional performance, or financial integrity. The letter explained that section 1128(b)(4) of the Act authorizes the exclusion.

Petitioner timely filed a request for hearing, and this case was assigned to me for hearing and decision. On July 24, 2013, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6(c).

Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on August 21, 2013, along with I.G. exhibits (I.G. Exs.) 1 through 5. I issued an Amended Order and Schedule for Filing Briefs and Documentary Evidence (Amended Order) on September 18, 2013, that granted Petitioner additional time to file his brief and supporting documents. Pursuant to the Amended Order, Petitioner filed a brief dated October 15, 2013, along with Petitioner's exhibits (P. Exs.) 1 through 4. On November 6, 2013, the I.G. filed a reply brief. Petitioner did not object to the I.G.'s exhibits, and I admit into evidence I.G. Exs. 1-5. I admit P. Ex. 1-4 into evidence as well. Both parties indicated in their exchanges that an in-person hearing was unnecessary and that neither party had any witness testimony to offer. I.G. Br. at 6-7; P. Br. at 8.

Therefore, I now decide this case based on the written record.

II. Issue

The only issue in this case is whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act. If I find that the I.G. is so authorized, Petitioner's exclusion must continue at least until Petitioner regains his license to practice medicine in Florida. Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)); 42 C.F.R. § 1001.501(b).

III. Applicable Law

Section 1128(b)(4) of the Act states in relevant part:

(b) *Permissive Exclusion.*— The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

* * * *

(4) License revocation or suspension.—Any individual or entity—

(A) 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

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. Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

The regulations governing exclusions at 42 C.F.R. § 1001.2007(d) limit the scope of an appeal of an exclusion as follows:

§ 1001.2007 Appeal of exclusions.

* * * *

(d) When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by 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.

IV. Findings of Fact and Conclusions of Law

- 1. The I.G. had a legal basis to exclude Petitioner from participation in Medicare, Medicaid, and other federally-funded health care programs because the State Board revoked his medical license for reasons bearing on his professional competence.***

The Act authorizes the Secretary of the U.S. Department of Health and Human Services to exclude from program participation an individual whose license to provide health care has been revoked by the state licensing authority for reasons bearing on the individual's professional competence, professional performance, or financial integrity. Act § 1128(b)(4)(A); 42 C.F.R. § 1001.501(a).

Petitioner was a licensed physician in the State of Florida and certified by the American Board of Internal Medicine in the specialty areas of Internal Medicine and Critical Care Medicine. I.G. Ex. 2 at 1-2; P. Ex. 1 at 1-2. On April 19, 2010, the United States Attorney for the Northern District of Florida, Gainesville Division, filed an Information in United States District Court alleging that Petitioner knowingly possessed material containing images of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(b) and (b)(2). I.G. Ex. 3 at 4-5; P. Ex. 2 at 4-5. On July 21, 2010, an Amended Judgment was filed that accepted Petitioner's plea and adjudicated him guilty of one count of possession of child pornography. Petitioner was sentenced to 48 months of incarceration followed by supervised release for life. I.G. Ex. 3 at 7; P. Ex. 2 at 7.

On October 9, 2012, an administrative hearing was conducted by an Administrative Law Judge for the State of Florida's Division of Administrative Hearings (State ALJ) to resolve the issue of whether Petitioner was convicted of, pled guilty, or pled nolo contendere to a crime directly related to the practice or the ability to practice medicine, in violation of section 456.072(1)(c) of the Florida Statutes and, if so, what penalty should be imposed.¹ I.G. Ex. 3 at 1-2; P. Ex. 2 at 1-2. On November 26, 2012, the State ALJ issued a Recommended Order listing her Findings of Fact and Conclusions of Law and recommended that the State Board revoke Petitioner's license for violating section 456.072(1)(c) of the Florida Statutes. I.G. Ex. 3 at 17; P. Ex. 2 at 17. On February 11, 2013, the State Board issued a Final Order which revoked Petitioner's Florida medical license. In that order, the State Board approved, adopted and incorporated by reference, the Findings of Fact and Conclusions of Law set forth in the Recommended Order of the State ALJ. I.G. Ex. 5 at 3; P. Ex. 3 at 3.

Among those findings was the State ALJ's reliance on the opinion of the Florida Department of Health's expert witness, Dr. Francisco Calimano, that one of the "qualities essential to the practice of medicine [is] sound judgment and respect for the welfare of others." I.G. Ex. 3 at 11; P. Ex. 2 at 11. Therefore, in the present case, the State Board has considered that sound judgment and respect for the welfare of others are among the necessary qualities that an individual must possess to be a licensed physician in the State of Florida. The State ALJ recommended, and the State Board agreed, that Petitioner's medical license should be revoked because of his "serious judgment lapse" and his "total disregard for one of the most vulnerable segments of our population." I.G. Ex. 3 at 11; P. Ex. 2 at 11. The State ALJ concluded that "[w]hether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession." I.G. Ex. 3 at 14; P. Ex. 2 at 14. The State ALJ went on to state that "[i]t is the lack of respect for human life and the exploitation of others for personal gain—whether it be for financial gain, personal pleasure, revenge, or something else entirely—that demonstrates the impaired judgment of the licensee and reflects the antithesis of what is required . . . to practice medicine." I.G. Ex. 3 at 15-16; P. Ex. 2 at 15-16.

¹ Under Fla. Stat. § 456.072 (2009), the State Board's authority includes:

Grounds for discipline; penalties; enforcement.--

- (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

. . .

- (c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.

Petitioner argues that “the rationale for applying the [Florida] statute rested heavily upon practical barriers imposed by my conditions of supervised release, rather than upon issues of professional competence.” P. Br. at 7. However, the State ALJ reviews Petitioner’s “total disregard for one of the most vulnerable segments of our population” and his “serious judgment lapse” before she discusses any of the “practical ramifications” involved with Petitioner’s practice of medicine in the State of Florida. The State ALJ states “[i]n *addition* to the serious judgment lapse and breach of public trust involved in [Petitioner’s] behavior, the practical ramifications of the terms of [Petitioner’s] supervised release make the practice of medicine problematic if not impossible.” I.G. Ex. 3 at 11; P. Ex. 2 at 11 (emphasis added). Accordingly, I find that the State Board revoked Petitioner’s medical license for reasons bearing on his professional competence and not just for reasons relating to conditions of Petitioner’s supervised release.

2. *I may not consider Petitioner’s collateral attacks to the State revocation action.*

Petitioner argues that the State Board’s decision to revoke his medical license is not a reflection of his competence to practice medicine. He argues that his “‘ability to practice medicine’ is contingent on licensure—‘ability’ here describes the legal right to practice, and is not a synonym for competence to practice.” P. Br. at 4. Petitioner also challenges some of the State ALJ’s findings and conclusions as set out in the Recommended Order when he states “[t]hese statements of the ALJ represent a misreading of my conditions of supervised release,” and when he claims that one of the cases the State ALJ cites is “simply not comparable to the possession of images downloaded from the Internet.” P. Br. at 4.

As noted prior, the State Board adopted all of the State ALJ’s findings and conclusions in the Recommended Order, which found Petitioner’s criminal violation directly related to his professional competence, thus, these arguments amount to a collateral attack on the State Board’s actions. Under 42 C.F.R. § 1001.2007(d), such collateral attacks are prohibited, and I am unable to consider them here. *See, e.g., John W. Foderick, M.D.*, DAB No. 1125 (1990) (holding that the exclusion statute never intended that the party being excluded under section 1128(b)(4) could mount a collateral attack on the state disciplinary procedure); *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279, at 9 (2009) (“Petitioner’s efforts to deny the validity of or show error in the Medical Board’s Order revoking his license are clearly collateral attacks on that Order.”).

Petitioner also attempts to distinguish the facts in his case from the facts in the cases the I.G. cited in support of Petitioner’s discretionary exclusion. P. Br. at 5-7. Petitioner’s arguments are unpersuasive because they do not negate, as detailed above, the results of the State action in question here constitute a legal basis for the I.G. to exclude Petitioner under section 1128(b)(4)(A) of the Act and under 42 C.F.R. § 1005.4(c)(5). A Federal

