

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Donovan C. James, M.D.,
(OI File No. H-13-4-2607-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-1841

Decision No. CR4127

Date: August 17, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Donovan C. James, M.D., from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4), effective February 19, 2015. Petitioner requested a hearing to dispute the exclusion. As explained below, I conclude that the IG had a basis for excluding Petitioner from participation in federal health care programs because Petitioner voluntarily surrendered his Colorado medical license while a formal disciplinary proceeding was pending before the Colorado Medical Board (Medical Board) for reasons bearing on his professional competence or professional performance. The exclusion must last until Petitioner regains his license. 42 U.S.C. § 1320a-7(c)(3)(E).

I. Background

By letter dated January 30, 2015, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4) until he regains his license as a physician in Colorado and the IG reinstates him. The IG advised Petitioner that the exclusion was based on the revocation,

suspension, loss, or surrender of his license to provide health care as a physician while a formal disciplinary proceeding was pending before the Medical Board for reasons bearing on his professional competence, professional performance, or financial integrity. IG Exhibit (Ex.) 1.

Petitioner timely requested a hearing to dispute the exclusion. On May 6, 2015, 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) of May 7, 2015. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG submitted the IG's brief (IG Br.) along with seven exhibits (IG Exs. 1-7). Petitioner submitted an informal brief in response (P. Informal Br.), a brief (P. Brief), and eight exhibits designated as Exs. A-H. The I.G. filed a reply brief (IG Reply).

II. Decision on the Record

Because the parties have not objected to any of the proposed exhibits, I admit IG Exs. 1-7 and Petitioner's Exs. A-H into the record. *See* Order ¶¶ 5, 6, 8.

Both the IG and Petitioner indicated that they did not have any witnesses to offer and that it was not necessary to hold an in-person hearing. IG Br. at 13; P. Informal Br. at 3. Therefore, an in-person hearing is unnecessary and I issue this decision on the basis of the written record.

III. Issue

The sole issue before me is whether Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending before a state licensing authority for reasons bearing on his professional competence, professional performance, or financial integrity. 42 U.S.C. § 1320a-7(b)(4)(B).

IV. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

V. Findings of Fact, Conclusions of Law, and Analysis¹

A. There is a basis for Petitioner's exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4)(B), and the IG has proven each required element under the statute.

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

The IG cites 42 U.S.C. § 1320a-7(b)(4) as the basis for Petitioner's permissive exclusion. IG Ex. 1. The statute provides:

(b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program

* * * *

(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, or

(B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance or financial integrity.

Thus, the elements that the IG must prove for exclusion pursuant to section 1320a-7(b)(4)(B) in this case are: (1) Petitioner surrendered his license to provide health care to a State licensing authority; (2) Petitioner surrendered his license while a formal disciplinary proceeding was pending before the State licensing authority; and (3) the pending proceeding involved Petitioner's professional competence, professional performance, or financial integrity. For the reasons stated below, I find that the IG has proven each of these elements.

1. Petitioner surrendered his medical license to a State licensing authority on September 30, 2013.

In September 2013, Petitioner signed, and the Medical Board approved, a Stipulation and Final Agency Order whereby Petitioner agreed to permanently relinquish his medical license in the state of Colorado and not apply for reactivation, reinstatement, or issuance of a new license to practice medicine in the state of Colorado at any time in the future, commencing September 30, 2013. IG Ex. 4 at 6-8. The Medical Board is the licensing

authority with jurisdiction over Petitioner in Colorado. Colo. Rev. Stat. §§ 12-36-103, 12-36-104; IG Ex. 4 at 1. Therefore, based on the evidence of record, the first element under 42 U.S.C. § 1320a-7(b)(4)(B) was proven.

2. Petitioner surrendered his medical license while a formal disciplinary proceeding was pending before the Colorado Medical Board.

On or about August 7, 2012, the Medical Board filed Case No. 2011-002403-B with the Office of Administrative Court concerning Petitioner's improper treatment of Patient A. *See* IG Ex. 4 at 1-2. This case was scheduled for a five-day hearing. IG Ex. 4 at 1. However, Petitioner and the Medical Board executed the Stipulation and Final Agency Order to settle Case No. 2011-002403-B, as well as three other cases involving Petitioner still under Medical Board investigation. IG Ex. 4 at 1-2. In the Stipulation and Final Agency Order, Petitioner explicitly and knowingly gave up his right to a formal hearing, and the Stipulation and Final Agency Order provided that it would "have the same force and effect as an order after a formal hearing." IG Ex. 4 at 6. Petitioner admits that Case No. 2011-002403-B was "in fact a formal disciplinary proceeding." P. Br. at 2.

Contradictorily, Petitioner also claims that he closed his practice on September 30, 2013, for financial reasons and there was no formal disciplinary proceeding pending with the Medical Board at that time. Petitioner claims this assertion is supported by the Stipulation and Final Agency Order and email correspondence with the Medical Board. P. Informal Br. at 2. However, Petitioner did not submit any email correspondence as an exhibit. Further, the Stipulation and Final Agency Order certainly does not support his assertion.

The purpose behind 42 U.S.C. § 1320a-7(b)(4)(B) is to "prevent unfit practitioners from avoiding exclusion through the expedient of surrendering their license before the state can conclude proceedings against them." *John W. Foderick, M.D.*, DAB CR43, at 13 (1989), *aff'd*, DAB No. 1125 (1990). A "formal disciplinary hearing" is "a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in license suspension or revocation." *Foderick*, DAB CR43, at 6. Further, "[t]he law presumes that an individual or entity who surrenders a health care license in the face of charges, and in the circumstance where he has an opportunity to defend himself, is likely to be as untrustworthy as the individual or entity who loses a license after litigating the issue." *Foderick*, DAB CR43, at 7.

Although a hearing does not have to take place or be scheduled for the license surrender to have occurred while a formal disciplinary proceeding was pending, Petitioner executed the Stipulation and Final Agency Order when a lengthy formal hearing was already scheduled to be held. Consequently, there was a formal disciplinary proceeding pending against Petitioner within the meaning of 42 U.S.C. § 1320a-7(b)(4)(B), when Petitioner

agreed to relinquish his medical license, and Petitioner only avoided the hearing by settling the case against him through surrender of his license. *See April Ann May, P.A.*, DAB CR1089 (2003). Therefore, based on the evidence of record, the second element under 42 U.S.C. § 1320a-7(b)(4)(B) was proven.

3. *The pending Colorado Medical Board proceeding involved Petitioner's professional competence or professional performance.*

Petitioner admitted in the Stipulation and Final Agency Order that if the facts alleged against Petitioner in Medical Board Case No. 2011-002403-B were proven, they would constitute a prima facie case of unprofessional conduct as defined in the Colorado Medical Practice Act that would subject him to discipline. IG Ex. 4 at 2, 4. Specifically, the Medical Board found and Petitioner acknowledged that his conduct, if proven, would have represented unprofessional conduct by: (1) failing to meet generally accepted standards of medical practice; (2) failing to obtain consultations or referrals when failing to do so is not consistent with the standard of care for the profession; and (3) falsifying or repeatedly making incorrect essential entries or repeatedly failing to make essential entries on patient records. *See Colo. Rev. Stat. § 12-36-117(1)(p), (bb)(1), (cc)*; IG Ex. 4 at 3-4.

According to the Stipulation and Final Agency Order, Medical Board Case No. 2011-002403-B involved Petitioner's treatment of Patient A, Petitioner's treatment of Patient A allegedly fell below the standard of care and Petitioner's various failures ultimately resulted in the amputation of Patient A's leg due to gangrene. IG Ex. 4 at 2-4. There is no doubt that the subject of Case No. 2011-002403-B directly involved Petitioner's professional competence and performance. The charges against him included failures to properly diagnose a muscle infection, to properly document Patient A's condition, to leave orders with nursing staff for treatment, to consult with an infectious disease expert when a rare bacteria was detected in Patient A, and to examine Patient A for many days following nursing staff requests for Petitioner to do so. IG Ex. 4 at 2-4. Therefore, I find that the final element under 42 U.S.C. § 1320a-7(b)(4)(B) is satisfied.

Petitioner attempts to collaterally attack the facts and circumstances surrounding the permanent surrender of his medical license. Petitioner asserts that Patient A sued Petitioner in civil court and that a jury found in Petitioner's favor. P. Informal Br. at 4; P. Ex. C. Petitioner also relies on the opinion of two vascular surgeons, who reviewed Petitioner's care of Patient A, and believed that Petitioner's care met the requisite standard of care. P. Br. at 5, 7. However, Petitioner may not use these proceedings to collaterally attack the validity of the Medical Board's action against Petitioner's medical license. 42 C.F.R. § 1001.2007(d); *see also Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *Anderson v. Thompson*, 311 F. Supp. 2d at 1128 (D. Kan. 2004).

Petitioner cites to the IG's nonbinding criteria for implementing permissive exclusions pursuant to another section of the Act, 42 U.S.C. § 1320a-7(b)(7), and relying on those criteria, seeks to show his trustworthiness to participate in the federal health care programs. Even if I were able to review the exercise of the IG's discretion to impose a permissive exclusion, which I am not, those criteria are immaterial in this case. Those criteria are not cognizable mitigating factors in a case under 42 U.S.C. § 1320a-7(b)(4). Petitioner's contentions that he never attempted to defraud the federal health care programs, that he has taken steps to improve the care he provides to patients, and that the exclusion will deprive him of his livelihood provide no grounds for me to reverse or reduce the length of his exclusion. *See* 57 Fed. Reg. 3298, 3316 (Jan. 29, 1992) ("If it is determined that someone should be excluded from the programs because continued participation puts the program at risk, the fact that the exclusion may affect his or her financial condition is not our concern; our concern is in protecting the programs."). Petitioner's contentions are not relevant here because I cannot review the IG's decision to impose a permissive exclusion. *See* 42 C.F.R. § 1005.4(c)(5). Although I have the authority to reverse an exclusion, *see* 42 C.F.R. §§ 1001.3005(a)(3), 1005.20(b), I can only do so if the IG has failed to prove that there is a basis for the exclusion. *See* 42 C.F.R. § 1001.2007(a), 1005.15(b)(2); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003).

B. The length of Petitioner's exclusion is reasonable as a matter of law.

I conclude that the period of exclusion, which is until the Medical Board reinstates Petitioner's medical license, is required by 42 U.S.C. § 1320a-7(c)(3)(E). I cannot waive the requirement that Petitioner regain his Colorado license in order for the exclusion to end. *See* 42 C.F.R. § 1005.4(c)(1).

Pursuant to 42 U.S.C. § 1320a-7(c)(3)(E), 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" Petitioner has not presented any evidence to support that he has been reinstated as a physician in Colorado. Therefore, I conclude that the period of exclusion is mandated by law under 42 U.S.C. § 1320a-7(c)(3)(E), based on the facts in the record.

VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4).

/s/

Scott Anderson
Administrative Law Judge