

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Keith Howard Roberts,)	Date: May 5, 2009
)	
Petitioner,)	Docket No. C-09-146
)	Decision No. CR1948
v.)	
)	
The Inspector General.)	

DECISION

Petitioner, Keith Howard Roberts, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(4)), effective October 20, 2008. Petitioner is excluded because his license to provide health care as a professional counselor in the State of Ohio was revoked by the Ohio Counselor, Social Worker & Marriage and Family Therapist Board (The Ohio Board), for reasons bearing upon his professional competence, professional performance, or financial integrity. There is a proper basis for exclusion. Petitioner’s exclusion for not less than the period during which his state license is revoked, is required by the Act.¹ Act, § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated September 30, 2008, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, until he regains his license as a counselor in the State of Ohio. Petitioner requested a hearing by an undated “Notice of Appeal” received at the

¹ Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

Departmental Appeals Board on December 12, 2008. The I.G. has not asserted that the request for hearing was untimely. The case was assigned to me for hearing and decision. On January 5, 2009, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated January 6, 2009. The parties agreed that the case could be decided based on briefs and documentary evidence, and Petitioner waived the right to an in-person hearing.

The I.G. filed a brief in support of exclusion on February 4, 2009 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 and 2. Petitioner filed a response (P. Brief) on April 6, 2009. Petitioner did not file any exhibits. The I.G. filed a reply (I.G. Reply) on April 24, 2009, with I.G. Ex. 3. No objection has been made to my consideration of I.G. Exs. 1 and 2 and both are admitted. I.G. Ex. 3 is not admitted because it is not relevant.²

II. Discussion

A. Issues

The Secretary of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

B. Applicable Law

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

² I.G. Ex. 3 is a clinical evaluation of Petitioner prepared in 2004 related to an application to become a Licensed Professional Clinical Counselor. Although it is listed as a state exhibit in The Ohio Board's Adjudication Order (I.G. Ex. 2, at 2), the order does not indicate whether the evaluation impacted the decision to revoke Petitioner's license. Because the evaluation was completed in 2004, it does not provide any information regarding Petitioner's professional competence or performance in 2007 when his license was revoked.

Pursuant to section 1128(b)(4)(A) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual whose license to provide health care is revoked or suspended by any state licensing authority for reasons bearing upon the individual's professional competence, professional performance, or financial integrity. *See also* 42 C.F.R. § 1001.501(a)(1). The standard of proof is a preponderance of the evidence and the state agency determination revoking Petitioner's state license is not subject to my review. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

C. Analysis

My conclusions of law are in bold followed by my findings of fact and analysis.

1. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.

The I.G. cites section 1128(b)(4) of the Act as the basis for Petitioner's permissive exclusion. I.G. 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 (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,

....

The statute permits the Secretary to exclude from participation any individual: (1) whose state license to provide health care has been suspended or revoked by a state licensing authority; and (2) the revocation or suspension is for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

Petitioner does not dispute that his license to practice counseling was revoked by The Ohio Board on January 19, 2007. P. Brief at 2. Petitioner does not deny or rebut the I.G.'s evidence that shows The Ohio Board revoked Petitioner's professional counselor license based on findings that Petitioner was "impaired and unable to practice to the standards expected of a licensed professional counselor." I.G. Ex. 2, at 3. The Ohio Board based its decision on evidence that Petitioner had a history of substance abuse, and that he had recently relapsed into active substance abuse, which impaired his ability to perform properly as a professional counselor. The Ohio Board's decision indicates it considered a complaint against Petitioner from his employer due to Petitioner's erratic and irresponsible work behavior and his admission, when pressed for a drug and alcohol screen, that he had indeed relapsed. The Ohio Board also considered Petitioner's March 9, 2006 letter to The Ohio Board in which he admitted that he had another relapse into active substance abuse in January 2006, he resigned his counseling jobs on February 9, 2006, and he sought treatment beginning February 14, 2006. I.G. Ex. 2, at 2-3, 17-18, 20. Prior to issuing its Order, the Board provided Petitioner with several notices of the Board's proposed action as well as an opportunity for a hearing. I. G. Ex. 2 at 6-11, 15, 16. Petitioner did not request a hearing before The Ohio Board. I.G. Ex. 2, at 2.³

Petitioner argues before me that the I.G. has no authority or jurisdiction to exclude him pursuant to section 1128(b)(4) of the Act because, as a counselor, he was not a "health care provider." P. Brief at 2-3. Petitioner also argues that the I.G. cannot show that his counselor's license was revoked for reasons bearing upon his professional competence or performance or his financial integrity. P. Brief at 3. Neither argument has any merit.

Section 1128(b)(4)(A) of the Act permits the Secretary to exclude "individuals and entities" "whose license to provide health care" has been suspended or revoked by a state licensing authority. Contrary to Petitioner's argument, the plain language of the section does not limit the Secretary to excluding only those who meet the definition of "health care provider." Petitioner does not dispute that he had a license to practice as a licensed professional counselor in Ohio as required by Ohio Rev. Code Ann. § 4757.23. He does not dispute that his counselor's license was revoked by The Ohio Board – the state agency responsible for the regulation of counselors, social workers and marriage and family therapists in the State of Ohio. I.G. Ex. 2; P. Brief at 2; Ohio Rev. Code Ann. §§ 4757.05, 4757.36.

³ Petitioner stated in his request for hearing (RFH) that he appealed the decision of The Ohio Board to the Mahoning County Common Pleas Court and the appeal was pending. RFH at 2. Petitioner does not indicate in his brief whether the appeal was still pending. However, if his appeal is successful, the regulations require that he be reinstated in Medicare, Medicaid, and other federal health care programs retroactive to the effective date of the exclusion. 42 C.F.R. § 1001.3005.

I conclude, based upon the applicable Ohio law, that Petitioner's professional counselor license authorized him to provide health care. Pursuant to Ohio Rev. Code Ann. § 4757.01(A), the "[p]ractice of professional counseling" means rendering or offering to render to individuals, groups, organizations, or the general public a counseling service involving the application of clinical counseling principles, methods, or procedures to assist individuals in achieving more effective personal, social, educational, or career development and adjustment, including the diagnosis and treatment of mental and emotional disorders." "Clinical counseling principles, methods, or procedures" means an approach to counseling that emphasizes the counselor's role in systematically assisting clients through all of the following: assessing and analyzing background and current information, diagnosing mental and emotional disorders, exploring possible solutions, and developing and providing a treatment plan for mental and emotional adjustment or development. "Clinical counseling principles, methods or procedures" includes at least counseling, appraisal, consulting and referral." Ohio Rev. Code Ann. § 4757.01(B). A licensed professional counselor in Ohio is permitted to diagnose and treat mental and emotional disorders under supervision of a psychologist, psychiatrist, professional clinical counselor, independent marriage and family therapist, or independent social worker. Ohio Rev. Code Ann. § 4757.21. Petitioner was licensed as a professional counselor under the Ohio law. The foregoing sections of the Ohio law clearly show that Petitioner was authorized by his license to "provide health care" within the meaning of section 1128(b)(4) of the Act. I further conclude, contrary to Petitioner's argument, that he was a "health care provider" within the meaning of section 1171(3) of the Act (42 U.S.C. § 1320d(3)), because he fit within the catch-all provision of the definition, i.e., "any other person furnishing health care services or supplies."

Petitioner's second argument is also without merit because The Ohio Board's decision clearly shows that his license was revoked for reasons bearing upon his professional competence and performance. The Act permits the I.G. to exclude an individual whose license has been revoked by a state licensing agency, such as the state agency here, where the reason for the revocation or suspension bore on the individuals' professional competence, performance, or financial integrity. The Ohio Board revoked Petitioner's license as a professional counselor based on the finding that Petitioner was "impaired" due to substance abuse and was "unable to practice to the standards expected of a licensed professional counselor." I.G. Ex. 2, at 3. The Ohio Board's choice of language clearly reflects a nexus between his relapse into substance abuse and the Board's conclusion that he could not meet the standards of professional competence and performance The Ohio Board expected of a licensed professional counselor.

I conclude that the evidence shows that Petitioner's professional counselor's license was revoked and that the revocation was for reasons related to Petitioner's professional competence and performance. Accordingly, there is a basis for Petitioner's exclusion from Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act.

2. The period of exclusion is reasonable as a matter of law.

There is no issue regarding the duration of the exclusion, as section 1128(c)(3)(E) of the Act specifies that the exclusion shall not be less than the period during which Petitioner's state license to provide health care is revoked, suspended, or surrendered. *See also* 42 C.F.R. § 1001.501(b)(1). The Secretary's regulations provide that the I.G. will consider a request for reinstatement only after the individual obtains a valid license in the state where the individual's license was originally suspended or revoked. 42 C.F.R. § 1001.501(b)(4).

Petitioner argues in his request for hearing that if he had been excluded pursuant to section 1128(a) of the Act for commission of a crime, he could have been excluded for as few as five years rather than what amounts to a lifetime exclusion under section 1128(b)(4) of the Act. RFH at 2. Congress specified that the period of exclusion under section 1128(b)(4) would be not less than the period during which the state license was revoked or suspended. Act, § 1128(c)(3)(E). The Secretary, the I.G. and I are bound by the statute.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective October 20, 2008, 20 days after the September 30, 2008 I.G. notice of exclusion, and for a period coterminous with his license revocation.

/s/
Keith W. Sickendick
Administrative Law Judge