

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rhonda Stinnett, R.N.,
(O.I. File No. H-12-4-1237-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-49

Decision No. CR2761

Date: April 18, 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* Rhonda Stinnett, R.N., from participation in Medicare, Medicaid, and all other federal health care programs until she regains her license as a registered nurse in the State of Arizona. The I.G.'s Motion and determination are based on section 1128(b)(4)(B) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(B).

The undisputed material facts of this case demonstrate 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 *pro se* Rhonda Stinnett earned her R.N. degree in 1992, and was first licensed as a registered nurse that year in Virginia. I.G. Exs. 5, 6.

In May 2011 she began working as a registered nurse in Arizona, under terms of the Nurse Licensure Compact, an agreement among several states that permits a nurse licensed in one state to practice in any other state party to the Compact. I.G. Ex. 3. Petitioner's work history in Arizona was marked by short periods of employment often terminated under circumstances suggesting disagreement or dissatisfaction with assignments, supervisors, and co-workers. I.G. Ex. 2, at 1-3.

On December 21, 2011, the Arizona State Board of Nursing (ASBN) received a complaint from Petitioner's most recent employer alleging "bizarre" and "harassing" behavior by Petitioner in dealing with patients and co-workers, behavior alleged to have included "verbal accusations," failure to "complete patient homecare visits," and failure to "complete patient care documentation." The ASBN opened an investigation and interviewed two employees of that employer who described Petitioner as displaying "paranoia, obsessive thoughts, and hostility toward staff . . . and false accusations about patient complaints." I.G. Ex 2, at 1-2.

How and when Petitioner learned of the ASBN investigation does not appear in ASBN records, but those records do show that Petitioner requested to surrender voluntarily her license privilege to practice as a registered nurse on April 19, 2012. I.G. Ex. 2, at 3.

The ASBN determined that Petitioner had violated the Arizona Nurse Practice Act and granted her request to surrender her multistate license privilege voluntarily. On May 17, 2012, Petitioner signed a consent order to surrender her multistate licensure privilege in Arizona, including a cease and desist order, which she filed with the ASBN on May 23, 2012. I.G. Ex. 2, at 1, 5-6.

On June 14, 2012, Virginia's Department of Health Professions, Virginia Board of Nursing (VBN) mandatorily suspended Petitioner's Virginia nursing license in response to the ASBN's findings and Petitioner's voluntary surrender of her multistate license privilege in Arizona. I.G. Ex. 4, at 1.

On August 31, 2012, 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 September 26, 2012.

I attempted to convene a prehearing conference by telephone on November 14, 2012, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by this case. Petitioner failed to provide a telephone number at which she could be contacted for the conference. Under those circumstances I issued an Order on November 14, 2012 noting Petitioner's unavailability, setting out information intended to assist her in presenting her appeal, and establishing a schedule for the submission of

documents and briefs. That schedule was modified by my Order of January 18, 2013. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on March 28, 2013.

The evidentiary record on which I decide the issues before me contains six exhibits. The I.G. proffered six exhibits marked I.G. Exhibits 1-6 (I.G. Exs. 1-6). Petitioner proffered no exhibits in support of her position.¹ In the absence of objection, I have admitted all six exhibits proffered by the I.G.

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 section 1128(b)(4)(B) 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)(B) of the Act supports Petitioner's exclusion from all federal health care programs, for her license as a registered nurse in Arizona was surrendered while a formal disciplinary proceeding against her was pending before the state authority, and that proceeding concerned 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)(B) of the Act, 42 U.S.C. § 1320a-7(b)(4)(B), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity "who surrendered [a license to provide health care] while a formal disciplinary proceeding was pending before [a State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity." The terms of section 1128(b)(4)(B) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a)(2).

¹ Petitioner's request for hearing enclosed a letter to her dated September 10, 2012 from the VBN. By the explicit terms of paragraph 7 of my Order of November 14, 2012, that letter is not part of the evidentiary record. But even if it were, its relevance would be far from clear, and it is plainly related to a different complaint against Petitioner ("Case Number: 145055"), and not the one on which this action is based ("Case # 145046"). I.G. Ex. 4, at 1.

An exclusion based on section 1128(b)(4)(B) 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)(B) 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, section 1128(c)(3)(E), 42 U.S.C. § 1320a7(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)(B) 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).

IV. Findings and Conclusions

I find and conclude as follows:

1. Petitioner was licensed as a registered nurse by the Commonwealth of Virginia in 1992, and in 2011 she began working as a registered nurse in the State of Arizona, under terms of the Nurse Licensure Compact. I.G. Ex. 2, at 1.
2. In December 2011 the ASBN opened a formal investigation into Petitioner’s professional conduct. I.G. Ex. 2, at 1-3.
3. The ASBN investigation was concerned with Petitioner’s professional competence and professional performance. I.G. Ex. 2, at 1-5.
4. While the ASBN proceeding against her was pending, Petitioner requested that she be allowed to surrender her license privilege to practice nursing in Arizona. I.G. Ex. 2, at 3.
5. Petitioner signed a consent order to voluntary surrender her multistate licensure privilege in Arizona, including a cease and desist order, filed with the ASBN on May 23, 2013, which terminated the ASBN’s proceeding against Petitioner. I.G. Ex. 2, at 1, 5-6.
6. The VBN mandatorily suspended Petitioner’s Virginia nursing license on June 14, 2012, based on the voluntary surrender of her multistate licensure privilege in Arizona. I.G. Ex. 4, at 1.
7. Because Petitioner surrendered her multistate licensure privilege in Arizona while a formal disciplinary proceeding concerning her professional competence and professional performance was pending against her before the

ASBN, 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)(B).

8. The I.G.'s exclusion of Petitioner until such time as she regains her ability to practice as a registered nurse in the State of Arizona is not unreasonable. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
9. 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)(B) of the Act, 42 U.S.C. § 1320a-7(b)(4)(B) is a derivative action, and depends upon proof of three essential elements. First, the I.G. must prove that the individual to be excluded has surrendered her or his license to provide health care to a State licensing authority. Second, the I.G. must prove that the license was surrendered while a formal disciplinary proceeding against the individual was pending before the State authority. Third, the I.G. must prove that the pending proceeding concerned the individual's professional competence, professional performance, or financial integrity. *Linda R. Ghaffari*, DAB CR2268 (2010); *Jane Espejo Norton, M.D.*, DAB CR1627 (2007); *James Latimer, M.D.*, DAB CR1578 (2007); *Julia Maria Nash*, DAB CR1277 (2005); *Maureen Felker*, DAB CR1110 (2003); *April Ann May, P.A.*, DAB CR1089 (2003); *Djuana Matthews Beruk, D.D.S.*, DAB CR950 (2002).

The I.G. has made the first showing. This record shows that Petitioner was authorized to practice as a registered nurse in Arizona by terms of the Nurse Licensure Compact and her license in Virginia. The evidence demonstrates that she requested to surrender her Arizona license privilege on April 19, 2012, and that her surrender of that license became effective May 23, 2012. I.G. Ex. 2. The first essential element is established in this record.²

The I.G. has made the second showing as well. The ASBN proceeding began in December 2011. I.G. Ex. 2, at 1-2. Petitioner took steps to surrender her license in April

² The VBN action shown in I.G. Ex. 4 might very well provide an alternate basis for Petitioner's exclusion. Because the VBN suspended Petitioner's Virginia license based on ASBN's proceeding, the terms of section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), might be argued to authorize this exclusion. The I.G. has not made that argument.

2012. The surrender of her license became final with the entry of the ASBN's final Order on May 23, 2012. I.G. Ex. 2, at 5-6. That sequence of events demonstrates the Petitioner surrendered her license while the ASBN proceeding was pending against her, and thus proves the second essential element.

The third essential element — the nexus between the ASBN proceeding and Petitioner's professional performance and professional competence — has been established. The record of the ASBN proceeding makes reference to Petitioner's violation of three explicit nursing standards, violations Petitioner admitted by executing the license-surrender document on May 23, 2012. I.G. Ex. 2, at 3-5. The first violation was of ARIZ. REV. STAT. § 32-1601(18)(d), a statute dealing with conduct or practice by a nurse "that is or might be harmful or dangerous to the health of a patient and the public." The second and third violations were of provisions in the Arizona Administrative Code, ARIZ. ADMIN. CODE §§ R4-19-403(1) and R4-403(31), dealing respectively with a nurse's "pattern of failure to maintain minimum standards of acceptable and prevailing nursing practice" and with a nurse's practicing in any other manner "that gives the Board reasonable cause to believe the health of a patient or the public may be harmed." Thus, the I.G. has proven all three essential elements, and Petitioner's exclusion pursuant to section 1128(b)(4)(B) of the Act is authorized.

In resisting the I.G.'s action, Petitioner has denied any misconduct whatsoever while employed as a nurse in Arizona. Her description of events would show her to be the victim of malicious and unfounded accusations motivated by the animus of her employers and coworkers. But her denials and descriptions are attacks on the allegations that led to her voluntary surrender of her nurse's license, and they are made too late to aid Petitioner's cause here. I cannot consider them, for such collateral attacks on the soundness or fairness of the ASBN proceeding are explicitly barred in appeals based on section 1128(b)(4). *Gibbs*, DAB No. 2279; *Roy Cosby Stark*, DAB No. 1746 (2000); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); 42 C.F.R. § 1001.2007(d). Petitioner's claims that she did not understand this consequence of her license surrender, or that she was misled about it, are also beyond my consideration: they are no defense to the exclusion. *Erica L. Pedersen*, DAB CR1700 (2007); *Stella Remedies Lively*, DAB CR1369 (2005); *Steven Caplan, R.Ph.*, DAB CR1112 (2003); *aff'd sub nom. Steven Caplan v. Thompson*, CIV No. 04-00251 (D. Haw. Dec. 17, 2004).

Because the I.G. has established a basis for the exclusion of Petitioner pursuant to section 1128(b)(4)(B) of the Act, her exclusion until such time as she regains her ability to practice as a licensed registered nurse in the State of Arizona 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. Petitioner's request that I limit the period and effect of her exclusion is explicitly beyond my authority. 42 C.F.R. §§ 1005.4(c)(5) and (6).

I note once more that Petitioner appears here *pro se*. Because of that I have taken additional care in reading her submissions, guided by the 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 Petitioner's submissions for any arguments or contentions that might raise a valid, relevant defense to the proposed exclusion, 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; *Rosen*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

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 Rhonda Stinnett, R.N., from participation in Medicare, Medicaid, and all other federal health care programs pursuant to the terms of section 1128(b)(4)(B) of the Act, 42 U.S.C. § 1320a-7(b)(4)(B) until such time as she regains her license as a registered nurse in the State of Arizona, is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge