

Department of Health And Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
James Latimer, M.D.,)	Date: March 19, 2007
)	
Petitioner,)	
)	Docket No. C-06-466
- v. -)	Decision No. CR1578
)	
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, James Latimer, M.D., from participating in Medicare, Medicaid, and all federal health care programs, until he regains his license to practice medicine in the State of New York. The I.G. is authorized to impose this exclusion pursuant to section 1128(b)(4)(B) of the Social Security Act (Act) because Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending against him in New York which concerned his professional competence and professional performance.

I. BACKGROUND

On March 31, 2006, the I.G. notified Petitioner that he was being excluded from participation in the Medicare, Medicaid, and all federal health care programs pursuant to the requirements of section 1128(b)(4) of the Act. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. During a prehearing conference on September 11, 2006, the parties agreed to submit the case for decision on a written record. The I.G. submitted a motion for summary affirmance¹ (I.G. Br.), accompanied by I.G.

¹ The I.G. titled his brief a "motion for summary affirmance." However, I do not decide this case by summary judgement or affirmance. Instead, I am deciding the case based on the written record submitted. I note, however, that neither party asserts that there are material facts in dispute.

exhibits (I.G. Exs.) 1-6. Petitioner submitted a brief in opposition (P. Br.), accompanied by Petitioner's exhibits (P. Exs.) A-K, and the I.G. submitted a reply (I.G. Reply Br.). Neither party objected to admission of the other party's exhibits. I therefore receive into evidence I.G. Exs. 1-6 and P. Exs. A-K.

II. ISSUE

The only issue in this case is whether Petitioner surrendered his license to practice medicine in New York while a formal disciplinary proceeding was pending against him that related to his professional competence or professional performance.²

III. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act, because Petitioner surrendered his license to practice medicine in New York while a formal disciplinary proceeding was pending in that State which concerned his professional competence and professional performance.

Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who surrenders a state license to provide health care while a formal disciplinary proceeding is pending before a state licensing authority and the proceeding concerns the individual's professional competence, professional performance, or financial integrity. The I.G. asserts that the facts of this case establish a basis to exclude Petitioner pursuant to this section of the Act. Petitioner disagrees, arguing that he did not surrender his medical license while formal disciplinary proceedings were pending (and also arguing that the scope of the I.G. exclusion is unfairly broad, which I discuss in Finding 2). I find that, in fact, Petitioner did surrender his medical license while a formal disciplinary proceeding was pending which related to his professional competence and professional performance (but not to his financial integrity, which the I.G. did not allege).

² I note that I do not have the authority to decide whether the I.G. should have used his discretion and not excluded Petitioner (42 C.F.R. § 1005.4(c)(5)), nor do I have the authority to decide here that the term of Petitioner's exclusion is unreasonable, as it is the term required by law. Act, section 1128(c)(3)(E).

The sequence of events surrounding the surrender of Petitioner's medical license are as follows and materially uncontested. In September 2005, Petitioner signed an agreement with the Acting District Attorney for St. Lawrence County, New York (Prosecutor), in which he agreed to surrender his medical license in exchange for the Prosecutor not bringing criminal charges against him. P. Ex. H. It was signed by the Prosecutor on October 7, 2005. *Id.* On October 12, 2005, Petitioner filed an application to surrender his medical license with the New York State Board for Professional Medical Conduct (New York Board). P. Ex. I. The application stated that "I understand the New York State Board . . . has charged me with one specification of professional misco[nduct]." *Id.* On October 20, 2005, the New York Board filed a Statement of Charges against Petitioner alleging that Petitioner had committed professional misconduct by practicing medicine with negligence on more than one occasion. The Statement of Charges alleged specifically that Petitioner had negligently prescribed excessive doses of narcotic medications containing acetaminophen to two patients. P. Ex. J; P. Br. at 5. On October 28, 2005, the New York Board accepted Petitioner's surrender, and the surrender became effective on November 8, 2005. P. Ex. K; I.G. Ex. 6.

Petitioner admits that he surrendered his license. Petitioner does not contest that the surrender related to his professional competence and professional performance.³ Instead, Petitioner argues only that, because he submitted his application to surrender his medical license on October 12, 2005, and the New York Board did not file its Statement of Charges until October 20, 2005, he did not surrender his license *pending* a formal disciplinary hearing. P. Br. at 7-10. Petitioner's argument is unavailing.

The purpose behind section 1128(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 (1989), *aff'd.*, DAB No. 1125 (1990). *Foderick* defines a "formal disciplinary hearing" as "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." *Id.* The decision states further that "[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 the opportunity to defend himself, is as likely to be untrustworthy as the

³ If Petitioner had contested whether or not his surrender related to his professional competence or professional performance, I would have found the surrender so related. This is because a finding that a physician practiced medicine with negligence necessarily and on its face relates to a physician's professional competence and professional performance.

individual or entity who loses a license after litigating the issue . . .” *Id.* The hearing does not have to take place or be scheduled for the surrender to have been while formal disciplinary proceedings were pending. *See, e.g., April Ann May, P.A.*, DAB CR1089 (2003).

Petitioner’s license surrender comports with the intent of the law, which is to prevent practitioners from avoiding exclusion by surrendering their license during the pendency of state proceedings against them. Petitioner’s October 12, 2005 application to surrender his license stated that he understand that the New York Board had charged him with professional misconduct. P. Ex. I. This statement shows that Petitioner was specifically aware that he was facing charges of professional misconduct before he filed the application and that he was aware that his license was in jeopardy. Had Petitioner not surrendered his license there would have been a formal hearing at which he would have had the chance to defend against the New York Board’s charges. Moreover, Petitioner did not surrender his license until after the New York Board filed charges against him. I agree with the I.G. that Petitioner’s October 12, 2005 application to surrender his license was simply a request to surrender his license, which was not accepted until the New York Board acted and accepted the surrender on October 28, 2005, after the New York Board had filed its Statement of Charges on October 20, 2005. *See Maurice Labbe*, DAB CR488 (1997).

2. I am without authority to address the scope of Petitioner’s exclusion.

Petitioner argues that his exclusion is too broad in scope, in that it excludes him not only from work related to his activities as a physician, but to employment in other capacities by hospitals, nursing homes, or other institutions participating in federal health care programs or other federal programs. P. Br. at 10.

I do not have the authority to consider or alter the scope of an I.G. exclusion. My authority here is limited to determining whether there is a basis for the I.G. to exclude Petitioner, which I have done. 42 C.F.R. § 1001.2007 (and, as noted above, as the I.G. has excluded Petitioner for the statutory term of exclusion, there is no issue regarding whether the length or term of his exclusion is unreasonable). Thus, although the I.G. has addressed and discussed the law surrounding the scope of Petitioner’s exclusion (I.G. Reply Br. at 7-10), I decline to address it as I do not have the authority to consider it.

IV. CONCLUSION

For the foregoing reasons, I sustain the I.G.'s exclusion of Petitioner until Petitioner regains his license to practice medicine in New York.

/s/

Alfonso J. Montano
Administrative Law Judge