Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Donna Rogers,
(O.I. File Number L-09-40336-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-1014

Decision No. CR2320

Date: February 10, 2011

DECISION

Petitioner *pro se* Donna Rogers appeals a determination by the Inspector General (I.G.) to exclude her from participating in Medicare, Medicaid, and all federal health care programs until she regains her certification as a nurse assistant in the State of California. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Social Security Act (Act) and that the exclusion must remain in effect until she regains her certification as a nurse assistant in the State of California.

I. Procedural Background

By letter dated July 30, 2010, the I.G. notified Petitioner that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs until she regained her license as a nurse assistant in California. The I.G. advised Petitioner that her exclusion was imposed under section 1128(b)(4) of the Act and was due to the revocation, suspension or loss of her nurse assistant license or the surrender of her license while a formal disciplinary proceeding was pending before the California Department of Public Health, Licensing and Certification, Investigation Section (state agency) for

reasons bearing on her professional competence, professional performance, or financial integrity. Act, section 1128(b)(4); 42 C.F.R. § 1001.501. Petitioner requested a hearing pursuant to 42 C.F.R. § 1005.2 on September 24, 2010.

I held a pre-hearing conference by telephone on October 28, 2010. Petitioner appeared *pro se*. I informed Petitioner that she had the right to retain counsel but that I could not appoint counsel for her. Petitioner did not retain counsel during the course of this proceeding. I also informed Petitioner that based on my review of the file it appeared likely that the issues in the case could be addressed in summary fashion in the context of a motion for summary disposition. I assured the parties that if any issues could not be resolved in summary fashion I would schedule an evidentiary hearing to address them.

The I.G. filed a motion for summary disposition (I.G. Br.), accompanied by three exhibits (I.G. Exs. 1-3). Petitioner filed an answer brief which she states is her "letter Exhibit A" (P. Br.), accompanied by exhibits B and C (P. Exs. B and C) and an audiocassette tape. The I.G. filed a reply (I.G. Reply), and Petitioner filed a final response (P. Response), accompanied by what she has termed P. Ex. L and various attachments. I receive into evidence I.G. Exs. 1-3 and P. Exs. B, C, and L.[1] I retain the attachments submitted by Petitioner in the record, although I do not admit them as exhibits. The I.G. objects to the admissibility of the tape on the grounds such tape is irrelevant and immaterial and constitutes oral testimony not given under oath. The I.G. also notes that Petitioner asserts that her answer brief and P. Exs. B and C are to be found on the tape "for audio listening," and the tape is thus irrelevant and immaterial in light of the fact that it merely repeats the written exhibits submitted by Petitioner. The I.G. moves to strike the tape pursuant to 42 C.F.R. §§ 1005.16 and 1005.17.[2] Petitioner states in her response that she "understand[s] that it is unnecessary to listen to my text on tape," (P. Response at 1) and she further suggests in her answer brief that I "please read and/or listen to my Exhibits for the information is still the same." P. Br. at 1. As the tape apparently repeats the content of the written exhibits submitted by Petitioner, and Petitioner is not specifically

[1] P. Ex. L consists of a May 11, 2008 letter from Petitioner; a map of St. Joseph's Health and Retirement Center (St. Josephs); a September 18, 2008 letter from the state agency to Petitioner; an October 29, 2008 letter from St. Josephs to Petitioner; the state agency's January 16, 2009 revocation of Petitioner's nurse assistant certification; an employee separation report with a separation date of January 19, 2009; an April 20, 2009 letter to Petitioner from the state agency Office of Legal Services; a March 28, 2010 letter from Lynne McConnell R.N.; a December 6, 2010 letter from Petitioner to the Administrator of St. Josephs; and a January 23, 2011 document prepared by Petitioner headed "co-workers, documented workers and, residents-certified."

[2] The I.G. states that it objects to the admission of two audiocassette tapes. However, Petitioner filed only one tape with my office. As I do not admit this tape, I have not required Petitioner to provide an explanation of this disparity.

requesting that I listen to the tape, I have not listened to it and have not admitted it into evidence. However, I have retained the tape in the record file of the case.

II. Issues

The only issue in this case is whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. If I find that the I.G. is so authorized, Petitioner's exclusion must continue until she regains her certification as a nurse assistant in the State of California. Act, section 1128(c)(3)(E); 42 C.F.R. § 1001.501(b).

III. Controlling Statutes and Regulations

Section 1128(b)(4) of the Act authorizes that an individual be excluded from Medicare, Medicaid and all federal health care programs when the individual's "(A) . . . 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 . . . 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 . . . professional competence, professional performance, or financial integrity." Exclusion under section 1128(b)(4) of the Act is a discretionary action taken by the I.G. on behalf of the Secretary of Health and Human Services. Where a legal basis to exclude exists under section 1128(b) of the Act, however, an Administrative Law Judge is without authority to review the I.G.'s decision to exercise his discretion. 42 C.F.R. § 1005.4(c)(5). If the I.G. exercises his discretion to proceed with exclusion, section 1128(c)(3)(E) of the Act requires that the "period of exclusion shall not be less than the period during which the individual's . . . license to provide health care is revoked, suspended, or surrendered . . . ."

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by [a] 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.

The regulations governing my resolution of this case, set forth at 42 C.F.R. Part 1005, do not specify summary disposition procedures, but summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to Fed. R. Civ. P. 56 for guidance in applying that regulation.

Summary disposition is appropriate in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Tanya A. Chuoke, R.N.,* DAB No. 1721 (2000); *David A. Barrett,* DAB No. 1461 (1994); *Robert C. Greenwood,* DAB No. 1423 (1993); *Thelma Walley,* DAB No. 1367 (1992); *Catherine L. Dodd, R.N.,* DAB No. 1345 (1992); *John W. Foderick, M.D.,* DAB No. 1125 (1990). All the facts and the inferences reasonably to be drawn from those facts must be viewed in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3rd Cir. 1986); *Brightview Care Center,* DAB No. 2132 (2007); *Madison Health Care, Inc.,* DAB No. 1927, at 5-7 (2004). When the undisputed material facts of a case support summary disposition, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.,* DAB No. 1138 (1990); *John W. Foderick, M.D.,* DAB No. 1125.

In opposing a properly-supported motion for summary disposition as described by FED. R. CIV. P. 56, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's *prima facie* case or might establish a defense. *Garden City Med. Clinic,* DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center,* DAB No. 1628 (1997). It is insufficient for the nonmoving party to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986).

Below, I find that there are no genuine issues of material fact in dispute and that summary disposition is thus appropriate.

IV. Discussion

My findings of fact and conclusions of law are set forth below in bold. My analysis follows each finding and conclusion.

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A) of the Act. First, the I.G. must prove that the license to provide health care of the individual to be excluded has been revoked or suspended by a state licensing authority. Second, the I.G. must prove that the license was revoked or suspended for reasons bearing on the individual's professional competence, professional performance, or financial integrity. *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); *Thomas I. DeVol, Ph.D.,* DAB CR1652 (2007); *Sherry J. Cross,* DAB CR1575 (2007); *Michele R. Rodney,* DAB CR1332 (2005); *Edmund B. Eisnaugle, D.O.,* DAB CR1010 (2003); *Marcos U. Ramos, M.D.,* DAB CR788 (2001); *Allison Purtell, M.D.,* DAB CR781 (2001).

1. Petitioner's certification to practice as a nurse assistant was revoked by a state licensing authority for reasons bearing on her professional performance.

a. Petitioner's certification to practice as a nurse assistant was revoked by a state licensing authority.

The first essential element, the revocation of Petitioner's nurse assistant certification, [3] is conclusively established by the records in evidence. Petitioner was certified as a nurse assistant on June 30, 1989. I.G. Ex. 2, at 1. On January 16, 2009, the state agency notified Petitioner that it had made a determination to revoke her "Nurse Assistant Certification, Number 271072." The state agency indicated that unless Petitioner timely requested a hearing, the revocation would be effective 21 business days from her receipt of the January 16, 2009 letter. I.G. Ex. 3. Petitioner does not assert that she timely requested such a hearing. In fact, she stated at P. Ex. B, at 22, that she was "ill when I received my notice in January 2009, I wasn't able to think through a hearing." In her response she states "January 16, 2009, I was completely broken down and sent back a note to the State that I quit." P. Response at 2. Accordingly, I find that Petitioner did not request a hearing and that her nurse assistant certification was revoked 21 days after her receipt of the January 16, 2009 letter.

b. The loss of Petitioner's nurse assistant certification was for reasons bearing on her professional performance.

In its January 16, 2009 letter to Petitioner notifying her of the revocation of her nurse assistant certification, the state agency wrote:

> This action is based on the Department's investigation concerning an allegation that you slapped a female resident's hand(s). The incident occurred on or about 05/11/08 at St. Joseph's Health and Retirement Center in Ojai, California[.]

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[3] The Act does not define what is meant by the term "license to provide health care" in section 1128(b)(4). I find that the meaning of the term "license" in this section of the Act is intended to apply to situations in which state certification or approval is a prerequisite to performing work in the health care field. The state agency has jurisdiction over nurse assistants in California. CAL. HEALTH & SAFETY CODE § 1337. Nurse assistants are certified, not licensed, and certification of professional competence and training is a necessary prerequisite for an individual to be employed as a nurse assistant. CAL. HEALTH & SAFETY CODE § 1337.2(e). Such certification operates as a license limiting the state's permission to provide nurse assistant services to only those who meet minimum competency and training standards. Certification as a nurse assistant in California is thus the equivalent of a "license" because it has the same legal function as a license to provide such health care. *Eno Essien*, DAB CR1714 (2007); *Owen C. Gore,* DAB CR1070 (2003).

> The Department has concluded that the allegation has been substantiated. Your action constituted physical abuse sufficient to support a revocation of your certificate pursuant to Health and Safety Code Section 1337.9(c)(1). Pursuant to 42 Code of Federal Regulations (CFR) Section 483.156(c), a finding of abuse will be included on the State Nurse Assistant Registry.

I.G. Ex. 3, at 1. This finding by the state agency that Petitioner physically abused a resident in the facility where she was working as a nurse assistant plainly relates to her professional performance. Nurse assistants are, quite obviously, neither expected nor permitted to abuse residents under their care.

Petitioner argues in her submissions that she did not slap the resident, but only interceded in an altercation between two residents to prevent one of the residents from being assaulted. She argues that she was "using self defense to save someones (sic) life." P. Ex. C, at 12. Petitioner's arguments are not relevant or material to the issues before me because those arguments constitute a collateral attack on the state agency determination which is the basis for Petitioner's exclusion. I am precluded by regulation from considering Petitioner's arguments.[4] 42 C.F.R. § 1001.2007(d).

2. Petitioner's exclusion is reasonable as a matter of law.

While the I.G. has the discretion to exclude an individual pursuant to section 1128(b)(4)(A) of the Act, the I.G. has no discretion in determining the term of that exclusion. Section 1128(c)(3)(E) of the Act provides that any exclusion imposed under section 1128(b)(4) of the Act must be for no less than the period during which the excluded individual's license to provide health care is revoked, suspended, or surrendered. Since I have found the I.G. authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act, an exclusion coterminous with the period during which her certification to practice as a nurse assistant is revoked is mandated by law.

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[4] Petitioner argues also that her constitutional rights have been violated and that "Miranda rights" were not extended to her. P. Ex. C, at 7. It is not clear from Petitioner's submissions and argument exactly how she believes her constitutional rights have been violated. However, constitutional arguments are not relevant in this forum, because as an Administrative Law Judge I am without the authority to entertain them. *Michael J. Rosen, M.D.,* DAB No. 2096, n.10 (2007); *Keith Michael Everman, D.C.,* DAB No. 1880 (2003); *Susan Malady, R.N.,* DAB No. 1816 (2002). I infer that where Petitioner is referring to her "Miranda rights" she is referring to the standard and well-known police practices developed following the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). It is not clear how Petitioner intends this as a defense in this proceeding, as it appears from her argument that she believes "Miranda rights" should have been extended to her during the state agency investigation. Such argument is not relevant in this forum.

V. Conclusion

For the reasons set forth above, the I.G.'s motion for summary disposition must be, and it is, GRANTED. The I.G. is authorized to exclude Petitioner until she regains her certification to practice as a nurse assistant in the State of California.

/s/
Richard J. Smith
Administrative Law Judge