

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Sherry J. Cross,	)	Date: March 13, 2007
	)	
Petitioner,	)	Docket No. C-07-12
	)	Decision No. CR1575
-v.-	)	
	)	
The Inspector General.	)	

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**DECISION**

Petitioner, Sherry J. Cross, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4)(A) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(b)(4)(A)), effective September 20, 2006, because her license to provide health care as a registered nurse in the State of Arizona was revoked by the Arizona State Board of Nursing, for reasons bearing upon her professional competence, professional performance, or her financial integrity. There is a proper basis for exclusion. Petitioner's exclusion for not less than the period during which her state license is revoked is required by the Act.\* 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 (the I.G.) notified Petitioner by letter dated August 31, 2006, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act for not less than the period that her license is revoked, suspended, or otherwise lost or surrendered.

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\* 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.

Petitioner timely requested a hearing by letter dated October 1, 2006. The case was assigned to me for hearing and decision on October 26, 2006. On November 14, 2006, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order of the same date.

The I.G. filed a motion for summary judgment and supporting brief on December 14, 2006 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 6. Petitioner filed her response to the motion for summary judgment on January 11, 2007 (P. Response), with exhibits (P. Exs.) 1 through 5. The I.G. filed a reply brief on January 30, 2007 (I.G. Reply). No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 6, and P. Exs. 1 through 5, are admitted.

## **II. Discussion**

### **A. Findings of Fact**

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated August 31, 2006, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, for a period of not less than the period during which her state license is revoked.
2. Petitioner timely requested a hearing by letter dated October 1, 2006.
3. Petitioner does not dispute that her registered nurse license was revoked by the Arizona State Board of Nursing on August 29, 2005. I.G. Exs. 2, 3.
4. Petitioner does not dispute that the revocation of her license was pursuant to the terms of a consent agreement that she signed on June 27, 2005. I.G. Exs. 4, 6.
5. Petitioner does not dispute that the revocation of her license was for reasons bearing upon her professional competence or professional performance. P. Response at 1.

**B. Conclusions of Law**

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Summary judgment is appropriate.
3. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.
4. Pursuant to section 1128(c)(3)(E) of the Act, the minimum period of exclusion under section 1128(b)(4) is not less than the period during which her state license is revoked, suspended, or surrendered and is presumptively reasonable. *See also*, 42 C.F.R. § 1001.501(b)(1).

**C. Issues**

The Secretary of the Department 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).

**D. Applicable Law**

Petitioner's right to a hearing by an 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.

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).

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 her 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 surrendered. 42 C.F.R. § 1001.501(b)(4).

## **E. Analysis**

### **1. Summary judgment is appropriate in this case.**

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). The ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also*, *New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case and summary judgment is appropriate. Petitioner does not dispute any facts alleged by the I.G. and concedes that the I.G. has authority to exclude her. P. Response at 1.

### **2. 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)(A) of the Act as the basis for Petitioner's mandatory exclusion. I.G. Ex. 1, at 1; I.G. Brief at 6. 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 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 or entity: (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 her registered nurse license was revoked by the Arizona State Board of Nursing on August 29, 2005. I.G. Exs. 2, 3. Petitioner does not dispute that the revocation of her license was pursuant to the terms of a consent agreement that she signed on June 27, 2005. I.G. Exs. 4, 6. Petitioner also does not dispute that the revocation by the state was for reasons bearing upon her professional competence or professional performance. P. Response at 1. Thus, there is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.

Petitioner argues that the I.G. was not required to exclude her and she presents argument and evidence in support of her position that her rehabilitation is progressing and that she has the need and desire to continue working in health care administration rather than direct patient care. P. Response at 1-2, P. Exs. 1-5. However, once I determine that there is a basis for exclusion, it is not for me to review the I.G.'s exercise of discretion in determining whether or not exclusion is appropriate. *Keith Michael Everman, D.C.*, DAB No. 1880 (2003).

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid and all federal health care programs effective September 20, 2006, 20 days after the August 31, 2006, I.G. notice of exclusion.

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Keith W. Sickendick  
Administrative Law Judge