

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Karon Fay Matheny,)	Date: December 13, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-450
)	Decision No. CR1710
The Inspector General.)	
_____)	

DECISION

I sustain the Inspector General’s (I.G.) determination to exclude Karon Fay Matheny, Petitioner, from participation in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(b)(4) and 1128(c)(3)(E) of the Social Security Act (Act).

I. Background

This case is before me pursuant to a request for hearing dated May 13, 2007, by Petitioner.

By letter dated April 30, 2007, the I.G. notified Petitioner that she was being excluded from participating in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act. I.G. Exhibit (Ex.) 1. The I.G. further informed Petitioner that the exclusion was based on section 1128(b)(4) of the Act, in view of the revocation, suspension, loss, or surrender of her license to practice medicine or provide health care as a practical nurse in the State of Florida, for reasons bearing on her professional competence, professional performance, or financial integrity. The exclusion, the I.G. informed Petitioner, would be in effect until she regained her license as a practical nurse in the State of Florida and was reinstated by the I.G.

The I.G. is represented in this case by the Office of Counsel to the Inspector General. Petitioner appears *pro se*. At a telephone conference held on July 30, 2007, I informed Petitioner of her right to retain counsel, and she indicated that she understood that right. Inasmuch as I concluded that this matter could be decided based on written arguments and documentary evidence, I issued an Order on August 21, 2007, establishing a briefing schedule. Pursuant to that order, on August 31, 2007, the I.G. submitted a memorandum of law accompanied by two proposed exhibits, I.G. Exs. 1-2. In the absence of objection, I admit into evidence I.G. Exs. 1-2. Petitioner prematurely submitted her brief on August 24, 2007, accompanied by eight exhibits, P. Exs. 1-8. In the absence of objection, I admit into evidence P. Exs. 1-8. The I.G. filed a reply brief on October 16, 2007.

It is my decision to sustain the determination of the I.G. to exclude Petitioner, Karon Fay Matheny, from participating in the Medicare, Medicaid, and all other federal health care programs, for a period coterminous with the loss of her license to practice medicine or provide health care in the State of Florida. I base my decision on the documentary evidence, the applicable law and regulations, and the arguments of the parties. It is my finding that Petitioner's license was suspended by the State of Florida, Board of Nursing, for reasons bearing on her professional competence, professional performance, or financial integrity. Additionally, I find that when an exclusion imposed by the I.G. runs concurrent with the remedy imposed by the state licensing authority, such exclusion shall not be less than the period during which the individual's license is suspended or revoked.

II. Issues

1. Whether the I.G. had a basis upon which to exclude Petitioner from participating in the Medicare, Medicaid, and all other federal health care programs.
2. Whether the length of the exclusion imposed and directed against Petitioner by the I.G. is unreasonable.

III. Applicable Law and Regulations

Under section 1128(b) of the Act, the Secretary of Health and Human Services (Secretary) may exclude individuals from receiving payment for services that would otherwise be reimbursable under Medicare, Medicaid, or other federal health care programs.

The Act defines “[f]ederal health care program,” as “(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government . . .; or (2) any State health care program, as defined in section 1128(h).” Act, section 1128B(f).

Section 1128(b)(4) of the Act authorizes the Secretary to exclude an individual whose license has been lost, suspended, revoked, or surrendered 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. According to section 1128(c)(3)(E) of the Act, the minimum term of exclusion of an individual who is excluded pursuant to section 1128(b)(4) must be coterminous with the term of loss, suspension, or surrender of that individual's license to provide health care.

The regulations promulgated at 42 C.F.R. §§ 1001.501 and 1001.1901(b) mirror the statutory provisions set forth in the Act.

IV. Findings of Fact and Conclusions of Law

1. Petitioner was licensed to provide health care within the meaning of section 1128(b)(4) of the Act as a Practical Nurse in the State of Florida (LPN). I.G. Ex. 2, at 5; I.G. Ex. 1.
2. On or about January 20, 2005, while employed as an LPN at Marianna Dialysis, located in Marianna, Florida, Petitioner submitted to a "for cause" Petitioner employer-ordered urine drug screen. I.G. Ex. 2, at 6.
3. On or about February 2, 2005, Petitioner was referred to the Intervention Project for Nurses (IPN), after the urine drug screen returned positive for amphetamines. I.G. Ex. 2, at 6.
4. IPN is the impaired nurses program for the Florida Board of Nursing (Board), pursuant to Section 456.076, Florida Statutes. It is an independent program which monitors the evaluation, care and treatment of impaired nurses, and oversees random drug screening. I.G. Ex. 2, at 6.
5. Amphetamines are Schedule II controlled substances under Section 893.03, Florida Statutes. Schedule II substances have a high potential for abuse, which may lead to severe psychological and physical dependence. I.G. Ex. 2, at 6.
6. Petitioner did not have a lawful prescription or legitimate reason for possession of amphetamines. I.G. Ex. 2, at 7.
7. Petitioner engaged in a two-year IPN monitoring contract. I.G. Ex. 2, at 7.

8. On or about December 2, 2005, Petitioner was terminated from IPN due to non-compliance with the requirements of her IPN Advocacy Contract. I.G. Ex. 2, at 7.
9. In June 2006, the Florida Department of Health (Department) filed an administrative complaint, seeking disciplinary action against Petitioner's license on the basis that she tested positive for amphetamines in January 2005, a substance for which she did not have a lawful prescription, and was terminated from the IPN for non-compliance with program requirements. I.G. Ex. 2, at 7-9.
10. The Department determined that Petitioner violated State law and failed to meet minimal standards of acceptable and prevailing nursing practice. I.G. Ex. 2, at 8, 9.
11. In October 2006, the Board conducted a hearing on the matter of the Department's administrative complaint against Petitioner. I.G. Ex. 2, at 1.
12. Petitioner did not respond to the administrative complaint, did not contest the factual allegations in the complaint, and did not attend the hearing. I.G. Ex. 2, at 1, 2.
13. The Board adopted the findings of the administrative complaint and, based upon those findings, suspended Petitioner's license until such time as she entered into the IPN and complied with any and all terms of that program. I.G. Ex. 2, at 3.
14. The Board directed that Petitioner's reinstatement as an LPN be contingent upon her appearance before the Board to demonstrate her ability to engage in the safe practice of nursing, which would include two years of documented continuous sobriety. I.G. Ex. 2, at 3.
15. The Board ordered that, should Petitioner enter into the IPN, and comply with any and all terms imposed by the IPN, the suspension of her license would be stayed as long as she participated in the rehabilitation program. I.G. Ex. 2, at 3.
16. The Board ordered that failure to comply with all conditions of Petitioner's IPN Advocacy Contract would constitute a violation of the Order, resulting in the immediate lifting of the stay of suspension. I.G. Ex. 2, at 3.
17. As of the date of the Board's order, October 30, 2006, Petitioner had failed to comply with IPN requirements and had been terminated from the program. I.G. Ex. 2, at 9.
18. Effective October 31, 2006, the Board suspended Petitioner's Florida nursing license. I.G. Ex. 2, at 3, 4.

19. Petitioner possessed a license to provide health care within the meaning of section 1128(b)(4) of the Act. I.G. Ex. 1.

20. Petitioner's nursing license was suspended by the state licensing authority for the State of Florida.

21. The Board determined that Petitioner lacked the professional competence to meet the minimal standards of acceptable and prevailing nursing practice.

22. The Board suspended Petitioner's nursing license for reasons bearing on her professional competence and/or professional performance within the meaning of section 1128(b)(4) of the Act.

23. Under section 1128(b)(4) of the Act, the I.G. had a legal basis to exclude Petitioner from participation in federal health care programs, based on the suspension of her license to practice nursing in the State of Florida.

24. Under section 1128(c)(3)(E) of the Act, the period of exclusion is presumptively reasonable because it is coterminous with the length of the suspension.

25. Petitioner's argument that the investigative file the attorney for the Department offered into evidence, and that the Board found as uncontested facts was not true, lacks merit inasmuch as it constitutes an impermissible collateral attack on the state proceedings that resulted in her suspension. 42 C.F.R. § 1001.2007(d).

V. Conclusion

It is my decision that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b) (4) of the Act. Additionally, I conclude that the indefinite period of exclusion imposed by the I.G. is the minimum period mandated by section 1128(c)(3)(E) of the Act.

/s/

José A. Anglada
Administrative Law Judge