

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer Dawn Speer
(O.I. File No. H-11-4-3052-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-393

Decision No. CR2826

Date: June 13, 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* Jennifer Dawn Speer from participation in Medicare, Medicaid, and all other federal health care programs until she regains her license as a Certified Addiction Counselor in the State of Colorado. 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* Jennifer Dawn Speer first qualified to be a Certified Addiction Counselor in the State of Colorado in 2006. I.G. Ex. 2; P. Ex. 2. In 2011, her personal relationship with one of her professional clients was the subject of a complaint to that state's Department of Regulatory Agencies (DORA). On September 27, 2011, DORA

notified Petitioner that the DORA's Office of Addiction Counselors had initiated a disciplinary action against her. P. Ex. 1. That disciplinary action was docketed as Case Number 2011-3970, and while the action was pending, Petitioner formally agreed on November 21, 2011 to relinquish her certification and her right to practice as a Certified Addiction Counselor.

Over one year later, on November 30, 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 dated January 20, 2013.

I convened a prehearing conference by telephone on February 27, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures and a schedule for addressing the issues presented by this case. The details of that conference and the schedule established appear in my Order of February 28, 2013. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on May 28, 2013.

The evidentiary record on which I decide the issues before me contains four exhibits. The I.G. proffered two exhibits marked I.G. Exhibits 1 and 2 (I.G. Exs. 1, 2). Petitioner proffered two exhibits in support of her position, marked Petitioner's Exhibits 1 and 2 (P. Exs. 1, 2). In the absence of objection, I have admitted all four proffered exhibits.

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 Certified Addiction Counselor in Colorado was surrendered while a formal disciplinary proceeding against her was pending before the state licensing 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).

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 § 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).

The State of Colorado has established a detailed statutory system to credential and supervise persons who provide mental health services. In general, Title 12, Article 43 of the Colorado Revised Statutes addresses the spectrum of mental health workers, and Colo. Rev. Stat. §§ 12-43-101, 12-43-201(3.5), 12-43-210, 12-43-804, and 12-43-804.5 create the standards by which Certified Addiction Counselors are qualified, credentialed, permitted to practice, supervised, and disciplined or sanctioned when necessary.

IV. Findings and Conclusions

I find and conclude as follows:

1. Petitioner was certified as a Certified Addiction Counselor by the State of Colorado in 2006. I.G. Ex. 1; P. Ex. 2.
2. In September 2011, the DORA opened a formal investigation into Petitioner’s professional conduct. I.G. Ex. 2; P. Ex. 1.
3. The DORA investigation was concerned with Petitioner’s professional competence and professional performance. I.G. Ex. 2.

4. While the DORA proceeding against her was pending, Petitioner agreed to relinquish her certification and her right to practice as a Certified Addiction Counselor in Colorado. I.G. Ex. 2.
5. Petitioner signed a Stipulation and Final Agency Order on November 21, 2011, which terminated the DORA proceeding against Petitioner. I.G. Ex. 2.
6. Because Petitioner surrendered her certification while a formal disciplinary proceeding concerning her professional competence and professional performance was pending against her before the DORA, 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).
7. The I.G.'s exclusion of Petitioner until such time as she regains her right to practice as a Certified Addiction Counselor in the State of Colorado is not unreasonable. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
8. 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. *Rhonda Stinnett, R.N.*, DAB CR2761 (2013); *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 Certified Addiction Counselor in Colorado. The evidence demonstrates that she agreed to relinquish her certification and her right to practice as a Certified Addiction Counselor on November 21, 2011, and that her surrender of that certification became effective on that date. I.G. Ex. 2. Petitioner's relinquishment of her certification in the

DORA proceeding is the equivalent of the surrender of a license to provide health care to a State licensing authority. *Donna Rogers*, DAB No. 2381. The first essential element is established in this record.

The I.G. has made the second showing. The DORA proceeding began in September 2011. P. Ex. 1. Petitioner took steps to relinquish her certification, and that relinquishment became final with the entry of the DORA's Stipulation and Final Agency Order on November 21, 2011. I.G. Ex. 2. That sequence of events demonstrates the Petitioner surrendered her certification while the DORA proceeding was pending against her, and thus proves the second essential element.

The third essential element — the nexus between the DORA proceeding and Petitioner's professional performance and professional competence — has been established. The record of the DORA proceeding is based on Petitioner's violation of two explicit statutory standards, violations Petitioner admitted by executing the license-surrender document November 21, 2011. I.G. Ex. 2, at 1. The first violation was of Colo. Rev. Stat. § 12-43-221(1)(g), a statute dealing with conduct or practice by a counselor who has "acted . . . in a manner that does not meet the generally accepted standards of the professional discipline under which the person practices." The second violation was of a related but distinct provision in Colorado's regulatory plan for mental health workers, Colo. Rev. Stat. § 12-43-221(1)(i), dealing with a counselor who has "maintained relationships with clients that are likely to impair such person's professional judgment or increase the risk of client exploitation" 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 does not deny the misconduct with which she was charged in the DORA proceeding, or that the outcome of that proceeding was the relinquishment of her counseling certificate. She concedes that she is subject to the I.G.'s discretionary determination to exclude her, and she frankly states that she has no intention of regaining her status as a Certified Addiction Counselor in Colorado.¹

But she points out that her decision not to seek re-certification places her in the position of being unemployable in any other capacity — regardless of whether that capacity might require certification or not — by any health care facility participating in the protected programs.

¹ It appears that Petitioner's certification actually expired on August 31, 2011, approximately a month before the DORA letter of September 27, 2011 and almost three months before the Stipulation and Final Agency Order of November 21, 2011. The parties have not argued, and I explicitly do not decide, whether the surrender of an *already-expired* certification falls within the ambit of section 1128(c)(3)(E).

It is not impossible to appreciate how such a situation could lead to an onerous result on suitable facts; the point was noted in *Michael D. Cerny, M.D.*, DAB CR1026 (2003) and *Lori E. Miller*, DAB CR961 (2002). Onerous or not, however, the Departmental Appeals Board has interpreted section 1128(c)(3)(E) of the Act strictly: “It is clear from the Act that once the exclusion remedy is properly imposed for license revocation . . . license reinstatement is the only statutorily authorized way to lift the exclusion.” *John C. Cheek, M.D.*, DAB No. 1738 (2000).

Petitioner’s additional 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. *Rhonda Stinnett, R.N.*, DAB CR2761; *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 Certified Addiction Counselor in the State of Colorado 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 have pointed out 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 Jennifer Dawn Speer from participation in Medicare, Medicaid, and all other federal health care programs pursuant

