

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Donna Rogers
Docket No. A-11-57
Decision No. 2381
May 23, 2011

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Donna Rogers (Petitioner) appeals the February 10, 2011 decision of Administrative Law Judge (ALJ) Richard J. Smith granting the Inspector General's (I.G.) motion for summary affirmance and sustaining the exclusion of Petitioner from participating in Medicare, Medicaid, and all other federal health care programs. *Donna Rogers*, DAB CR2320 (2011) (ALJ Decision). The I.G. excluded Petitioner pursuant to section 1128(b)(4) of the Social Security Act (Act) after the California Department of Public Health (State agency) revoked her nurse assistant certification. Section 1128(b)(4) authorizes the exclusion of an individual whose license to provide health care has been revoked by any state licensing authority "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity."

Petitioner does not dispute that her certificate was revoked for reasons bearing on her professional performance. Rather she seeks to collaterally attack the State agency's revocation of her certificate and to raise other issues that are not relevant in this proceeding. As we discuss below, Petitioner's arguments on appeal are without merit. We thus sustain the exclusion.

Applicable law

Section 1128(b)(4) of the Act (42 U.S.C. § 1320a-7(b)(4)) states in relevant part:

(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(A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on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

Section 1128(c)(3)(E) of the Act mandates that any period of exclusion based on section 1128(b)(4) must not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered.

Standard of Review

The regulations set out the Board's standard of review in I.G. exclusion cases. The standard of review on a disputed factual issue is whether the initial decision is supported by substantial evidence on the whole record; the standard of review on a disputed issue of law is whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h). An ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact" 42 C.F.R. § 1005.4(b)(12).

Case Background¹

On January 16, 2009, the State agency notified Petitioner that it had made a determination to revoke her "Nurse Assistant Certification, Number 271072 . . . based on the [State agency's] investigation concerning an allegation that you slapped a female resident's hand(s) [on] 5/11/08" while working in a "retirement center." I.G. Ex. 3, at 1. The State agency stated that it had --

concluded that [this] 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).

Id. The notice informed Petitioner that unless she timely requested an administrative hearing, the revocation would be effective 21 business days from her receipt of the notice. *Id.*

Before the ALJ, Petitioner wrote "[I was] ill when I received my notice in January 2009, I wasn't able to think through a hearing" and in "January 16, 2009, I was

¹ The information in this section is drawn from the ALJ Decision and the record and is not intended as new findings.

completely broken down and sent back a note to the State that I quit.” ALJ Decision at 5, citing P. Response at 2; *see also* P. Ex. B. The ALJ found that Petitioner had not requested a hearing before the State agency and that the State agency therefore revoked her nurse assistant certification 21 days after her receipt of the January 16, 2009 letter. ALJ Decision at 5.

On July 30, 2010, the I.G. notified Petitioner that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs under section 1128(b)(4) of the Act until she regained her license as a nurse assistant in California. I.G. Ex. 1. Petitioner timely sought ALJ review of the exclusion.

Before the ALJ, the I.G. filed a motion for summary disposition. After reviewing the parties’ submissions, the ALJ granted the I.G.’s motion to exclude Petitioner pursuant to section 1128(b)(4) on the ground that Petitioner did not dispute that her certification to practice as a nurse assistant was revoked by a state licensing authority for reasons bearing on her professional performance. ALJ Decision at 5. He concluded further that the I.G., having elected to exclude Petitioner pursuant to section 1128(b)(4), must exclude her for as long as her certificate to work as a nurse assistant remained revoked. *Id.* at 6.

Analysis

The ALJ correctly stated that, to prevail here the I.G. was required to show that Petitioner’s “license to provide health care” had been revoked by the State agency for reasons bearing on her professional competence or performance. As to this question, the ALJ noted that the “Act does not define what is meant by the term ‘license to provide health care.’” *Id.* n.3. He concluded 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.” *Id.* The ALJ found:

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.

Id. The ALJ concluded further that “[c]ertification 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).” *Id.*

The question of whether a nursing assistant certification is a “license to provide health care” within the meaning of section 1128(b)(4) has not previously been considered by the Board. We conclude that the ALJ’s determination that section 1128(b)(4) applies here to the State agency’s revocation of Petitioner’s nurse assistant certification is not erroneous for the reasons he stated.

In her appeal to the Board, Petitioner does not challenge the ALJ’s conclusion that her certification as a nurse assistant was a “license to provide health care” within the meaning of section 1128(b)(4), that her certification was revoked for reasons bearing on her professional performance, and that the length of the exclusion must be for no less than the period during which her nursing assistant certificate remained revoked. ALJ Decision at 5-6. Rather, Petitioner makes the same arguments which she made before the ALJ, which, as we explain below, the ALJ properly rejected.

Petitioner writes at length about what happened on May 11, 2008 at the retirement center, denying that she slapped a resident and explaining she merely acted to protect a second resident who was being attacked by that resident. She discusses the personalities of the residents involved in the incident, conditions at the center and long-term care facilities generally, her long service as a nursing assistant, attitudes of co-workers and the state investigator, and other matters she regards as helpful in providing a full picture of the May 11 incident.

The ALJ correctly identified this line of argument as an impermissible collateral attack on the State agency’s finding that Petitioner, in her capacity as a nursing assistant, had abused a resident. In enacting section 1128(b)(4), Congress gave the I.G. derivative exclusion authority, i.e. the authority to rely on the factual findings of other government agencies and to base exclusions on the determinations of those agencies. The implementing regulations governing derivative exclusions expressly limit the scope of an ALJ appeal in derivative exclusions as follows:

§ 1001.2007 Appeal of exclusions.

* * *

(d) When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by 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.

42 C.F.R. § 1001.2007(d) (emphasis added). Therefore, the ALJ could not consider Petitioner's assertions that she did not abuse the resident in question and that the State agency wrongly revoked her certification. *See, e.g., Marvin L. Gibbs, M.D., DAB No. 2279 (2009)* (holding that the petitioner's arguments amounted to collateral attacks on the State agency's determination and were prohibited by section 1001.2007(d)).

Petitioner also makes a number of what appear to be due process-related arguments. For example, she refers to rights under the United States and California Constitutions (Request for Review (RR) at 6-7), the unfairness created by the fact the State investigator took her notes in Chinese (RR at 13, 14), her failure to remember "my rights" in the investigation (*id.* (emphasis in original)), "lack of Due Process," and the fact that she "did not sign a release of Miranda rights" when "interrogated" by the state investigator (RR at 20).

To the extent that Petitioner is arguing that the process by which the state agency revoked her certification was flawed, she is making an impermissible procedural collateral attack on the state agency's determination. As noted, section 1001.2007 provides that an excluded individual may not collaterally attack the state's determination on "substantive or procedural grounds" in a derivative exclusion (emphasis added). *See, e.g., Olufemi Okonuren, M.D., DAB No. 1319 (1992)* (holding that in section 1128(b)(4) exclusions "an excluded individual cannot collaterally attack the process by which the State suspended him"); *Leonard R. Friedman, M.D., DAB No. 1281 (1991)* (explaining the rationale for prohibiting collateral challenges in section 1128(b)(4)(A) exclusion actions).

To the extent that Petitioner is arguing that section 1128(b)(4) or the implementing regulations are unconstitutional, she is making an argument which, as the ALJ pointed out, ALJs have no authority to review. The regulations governing this matter expressly preclude the ALJ (and hence the Board in its review of the ALJ Decision) from finding "invalid or refusing to follow Federal statutes or regulations or secretarial delegations of authority." 42 C.F.R. § 1005.4(c)(1). We note also that federal courts have rejected constitutional challenges to the Secretary's section 1128 exclusion authority. *See, e.g., Manocchio v. Sullivan, 961 F.2d 1539, at 1541-1543 (11th Cir. 1992); Greene v. Sullivan, 731 F. Supp. 838, at 839-840 (E.D. Tenn. 1990).*

