Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Christy Nichols Frugia
Docket No. A-16-109
Decision No. 2736
September 22, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Christy Nichols Frugia (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding her exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period coterminous with her loss of her nursing licenses in the State of Texas. *Christy Nichols Frugia*, DAB CR4638 (2016) (ALJ Decision). The ALJ determined that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Social Security Act (Act).[1] The ALJ further determined that the period of exclusion was consistent with the Act and the implementing regulations at 42 C.F.R. § 1001.501(b)(1). The Board affirms the ALJ Decision for the reasons set out below.

Legal Background

The Act authorizes the Secretary of the Department of Health and Human Services (Secretary) to exclude an individual or entity from participation in all federal health care programs if that individual or entity "surrendered ... a license [to provide health care] while a formal disciplinary proceeding was pending before [any State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity." Act § 1128(b)(4)(B); *see also* 42 C.F.R. § 1001.501(a) (authorizing the I.G. to impose exclusions under Act § 1128(b)(4)). Any exclusion imposed under this authority "shall not be less than the period during which the individual's or entity's license is ... surrendered ...." Act § 1128(c)(3)(E); *see also* 42 C.F.R. § 1001.501(b)(1).

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[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

If, as here, the exclusion is permissive, the individual may request a hearing before an ALJ only on the issues of whether the "basis for the imposition of the [exclusion] exists" and the "length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1). An ALJ "does not have the authority to--. . . Review the exercise of discretion by the OIG [Office of Inspector General] to exclude an individual or entity under section 1128(b) of the Act, or determine the scope or effect of the exclusion[.]" *Id.* § 1005.4(c)(5). Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. *Id.* § 1005.21(a).

Case Background[2]

Petitioner was licensed as a registered nurse and a vocational nurse in the State of Texas. In 2007, the Texas Board of Nursing (Texas Board) issued an Agreed Order under which Petitioner's licenses were suspended until verification of completion of a substance abuse program and 12 consecutive months of sobriety, following which she would be placed on probation for three years. I.G. Ex. 3, at 20, 25-39. In 2011, the Texas Board issued another order in which it accepted Petitioner's surrender of her licenses after the Texas Board found that Petitioner failed to comply with the requirement in the 2007 Agreed Order to abstain from the consumption of alcohol. *Id.* at 18-23. In 2012, the Texas Board issued a Reinstatement Agreed Order that conditioned the reinstatement of Petitioner's licenses on certain conditions and stipulations. *Id.* at 7-17. In 2015, after the Texas Board found that Petitioner failed to comply with two conditions of the Reinstatement Agreed Order, the Texas Board issued an Order accepting Petitioner's voluntary surrender of her licenses. *Id.* at 1-6.

By letter dated January 29, 2016, the I.G. notified Petitioner that, pursuant to section 1128(b)(4) of the Act, she was being excluded from Medicare, Medicaid, and all federal health care programs because her "licenses to . . . provider health care as a registered nurse and vocational nurse in the State of Texas were . . . surrendered while a formal disciplinary proceeding was pending before the Texas Board of Nursing for reasons bearing on your professional competence, professional performance, or financial integrity." I.G. Ex. 2, at 2. The letter stated that the exclusion "will remain in effect until you are reinstated by the Office of Inspector General" and that "[t]o be eligible for reinstatement you must regain your licenses as a registered nurse and vocational nurse in the State of Texas." *Id.*

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[2] This summary derives from the undisputed facts in the ALJ Decision and the record and is intended only to provide context for our discussion and not to present new findings of fact.

Petitioner requested a hearing before an ALJ. While the case was pending, the ALJ extended the parties' briefing deadlines to permit the I.G. to consider additional information concerning her exclusion. ALJ Decision at 1.[3] In a letter dated April 28, 2016, the I.G. stated that it had considered the information furnished by Petitioner on April 4 and 7, 2016 and "concluded that the January 29, 2016 notice of exclusion remains in effect." I.G. Ex. 2. The ALJ issued a decision based on the written record since neither party requested an in-person hearing. ALJ Decision at 1.

The ALJ found that the "facts of this case satisfy the requirements of section 1128(b)(4)(B) of the Act and the I.G. had authority to exclude Petitioner pursuant to that section." *Id*. at 2. The ALJ further found that excluding Petitioner "coterminous with her loss of her nursing licenses . . . is consistent with the Act and regulatory requirements governing exclusions imposed pursuant to section 1128(b)(4)(B). . . ." *Id*. Finally, the ALJ stated:

> Petitioner does not assert that the I.G. lacked authority to exclude her. Rather, she asserts that the I.G. abused his discretion in excluding her because he failed to take into account nonbinding guidelines that the I.G. published in 1997 that ostensibly established criteria for determining whether to exclude an individual under any of the Act's permissive authorities, including section 1128(b)(4)(B). I have no authority to consider this argument. The I.G.'s determination to exclude Petitioner was an act of discretion. An administrative law judge does not have the authority to review the I.G.'s exercise of discretion to exclude an individual under any of the subsections of section 1128(b) or to determine the scope or effect of any exclusion that the I.G. imposes. 42 C.F.R. § 1005.4(c)(5).

Id. at 3.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to "whether the initial decision is erroneous." *Id*.

[3] The parties moved jointly for the extension on the ground that the I.G. did not receive Petitioner's response to the I.G.'s August 26, 2015 notice of intent to exclude, which gave Petitioner an opportunity to provide additional information.

Analysis

On appeal, Petitioner argues generally that the I.G. has no basis for the imposition of the exclusion and that the period of the exclusion is unreasonable. Notice of appeal (NA) at 1, 6. We explain below why we conclude that those arguments have no merit.

1. The ALJ's conclusion that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) is supported by substantial evidence and is free from legal error.

Petitioner first reprises her argument below that the I.G. should have applied guidelines published by the I.G. on December 24, 1997 in determining whether to exclude her. Petitioner asserts that "[b]ecause the exclusion is under the 'permissive' provisions of the [A]ct it is axiomatic that standards must exist to control" the I.G.'s discretion; that she "has no way of knowing what facts [led] the Inspector General to exercise the . . . discretion to exclude," and that, applying the guidelines issued by the I.G. to the "readily available facts," "it seems clear that exclusion is not necessary to protect the Health Care System from untrustworthy health care providers[.]" NA at 2, 4.

As the ALJ stated, section 1005.4(c)(5) precludes an ALJ from reviewing the I.G.'s exercise of discretionary authority to impose a permissive exclusion pursuant to section 1128(b). Accordingly, where the statutory requirements for a permissive exclusion are met, the ALJ, and thus the Board, may not look behind the I.G.'s decision to impose an exclusion to determine whether the I.G. considered appropriate factors before deciding to impose the exclusion. As discussed below, Petitioner does not dispute that the requirements for an exclusion under section 1128(b)(4)(B) were met in her case. Moreover, as the Board noted in a prior decision, the guidelines on which Petitioner relies expressly state that they are "to be used by the OIG in assessing whether to impose a permissive exclusion in accordance with section 1128(b)(7) of the Social Security Act." 62 Fed. Reg. 67,392 (Dec. 24, 1997) (quoted in *Keith Michael Everman, D.C.*, DAB No. 1880, at 7 (2003). Since Petitioner was excluded under section 1128(b)(4)(B), the guidelines do not apply here. The guidelines also state that they are "non-binding" and caution that they "are not intended to limit or bind the OIG's discretionary authority to exclude. . . . [,] do not create any rights or privileges in favor of any party. . . . [and] do not supply or modify in any way the OIG regulations . . . governing program exclusions." 62 Fed. Reg. 67,392, 67,393 (quoted in *Everman* at 7-8). Thus, by their "own terms, the [guidelines] cannot be used . . . as a source of an independent right to challenge the I.G.'s exercise of discretion in deciding to impose an exclusion in the first instance." *Everman* at 8. Accordingly, the ALJ did not err in declining to consider Petitioner's argument concerning the guidelines.

Moreover, if in stating that she has no way of knowing what facts led the I.G. to exclude her, Petitioner means to argue that the I.G. is required to identify the factors that were taken into account in deciding whether to impose a permissive exclusion, that argument has no merit. As the Board stated in a prior decision, the I.G.'s notice of exclusion "does not have to reveal how the Secretary made [the] determination [to exclude petitioner] in order to constitute a lawful determination." *Michael J. Rosen, M.D.*, DAB No. 2096, at 13 (2007) (upholding permissive exclusion under section 1128(b)(14)).

Petitioner also argues, as she did below, that the I.G. improperly relied on findings in the Texas Board's 2015 and 2011 orders that there exist "serious risks to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances or chemical dependency" and the finding in the Texas Board's 2011 order that "a nurse's use of alcohol may impair her ability to treat patients 'thereby placing the patient in potential danger.'" NA at 4. Petitioner characterizes these findings as "just hearsay and opinions" that are not "tied to any specific event in which [Petitioner] was involved." *Id.* Petitioner asserts: "If the Inspector General could produce even one documented incident in which [Petitioner] was actually 'impaired' on the job or placed her patients in potential danger, those items should be produced and available to [Petitioner]. She should not lose her employment over mere unsubstantiated opinions of the Texas Board of Nursing." *Id.*

In essence, Petitioner implies that, while employed as a nurse, she was never impaired on the job due to substance abuse and thus did not pose a serious risk to public health and safety. This argument does not go to an issue material to the I.G.'s authority to exclude Petitioner. As noted above, the Act and implementing regulations authorize the I.G. to exclude an individual who "surrendered ... a license [to provide health care] while a formal disciplinary proceeding was pending before [any State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity." Petitioner does not dispute that she surrendered licenses to provide health care while a formal disciplinary proceeding was pending before a state licensing authority, the Texas Board. Nor does Petitioner dispute that the proceeding before the Texas Board concerned her professional competence or professional performance; she argues only that the Texas Board did not find, or incorrectly found, that her substance abuse affected her professional competence or performance. Accordingly, the argument does not provide a basis for reversing the ALJ Decision.

Petitioner argues in addition that the I.G. should have relied on letters she provided from "the management of the Medical Center of Southeast Texas, Physicians who have worked beside [Petitioner], coworkers and department heads" attesting that Petitioner was moved to a non-patient care position that "presents no risk of damage to the Health Care system." NA at 5-6. Whether Petitioner presents a risk to federal health care programs in her current position is not material to the issue of the I.G.'s authority to exclude her for the same reasons as Petitioner's argument discussed above is not material.

Petitioner further argues that the "decision to exclude [Petitioner] from her current job is not supported by facts and thus constitutes an error of law." NA at 6. To the extent Petitioner intended this as an argument that the exclusion should be limited in scope so as to enable her to work in a non-patient care position, such an argument is unavailing since section 1005.4(c)(5) provides that the ALJ does not have authority to limit the scope or effect of the exclusion. In addition, in a prior decision addressing an argument that the petitioner should be excluded only from practicing as a registered nurse, the Board stated that "the Act and regulations provide only for exclusions 'from participation in any Federal health care program' and thus do not permit an exclusion to be limited or tailored in the way that Petitioner here seeks." *Tracy Gates, R.N.*, DAB No. 1768, at 10 (2001).

Petitioner also suggests that the exclusion violates the Americans with Disabilities Act (ADA), stating that the federal government "ignored any responsibilities [it] may have in this area" by not recognizing the efforts that Petitioner's hospital made to find a position for her "in which she could continue working with her disability without risk to the Heath Care System or patients." NA at 7.[4] Even if the exclusion prevented Petitioner's employer from providing a reasonable accommodation to Petitioner that might be required by the ADA, that is not a basis for concluding that the I.G. was not authorized to impose the exclusion. As the Board stated in *Tracey Gates, R.N.*, "[t]o reverse the exclusion as violative of the Americans with Disabilities Act would require the ALJ to either find section 1128 invalid or otherwise refuse to follow its requirements," which the "regulations specifically preclude the ALJ from doing[.]" DAB No. 1768, at 10, citing 45 C.F.R. § 1005.4(c)(1).

2. The ALJ's conclusion that the period of exclusion is reasonable is free from legal error.

Petitioner argues that that the length of the exclusion is unreasonable as applied to her "because it is indefinite and requires action (regaining the nursing license and working in patient care) that is adverse to the goals the Inspector General hopes to achieve through exclusion." NA at 7. It is unclear why Petitioner believes that she would be required to work in patient care if she were to be relicensed as a nurse. Even if that were the case, Petitioner's desire not to work in direct patient care would not render the length of the exclusion unreasonable. Where, as here, the basis for the exclusion is an individual's surrender of a nursing license while a formal disciplinary proceeding was pending before

[4] Petitioner refers to the "federal 'Citizens with disabilities Act'." We assume that Petitioner intends to refer to Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.*, which prohibits discrimination in employment and requires employers to provide reasonable accommodations for employees with disabilities.

a state licensing authority that concerned the individual's professional competence or performance, the Act does not give the I.G. discretion to set the length of the exclusion less than the period during which the individual's license is surrendered. Thus, the length of Petitioner's exclusion is reasonable as a matter of law.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Christopher S. Randolph
Presiding Board Member