

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Charles S. Krin, D.O.
(O.I. File No. 7-10-40136-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-672

Decision No. CR2485

Date: January 9, 2012

DECISION

Petitioner, Charles S. Krin, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(4)), effective July 20, 2011. Petitioner is excluded because his license to practice medicine was revoked by the Missouri State Board of Registration for the Healing Arts (Missouri Board) for reasons bearing on his professional competence, professional performance, or financial integrity. There is a proper basis for the exclusion. The Act requires Petitioner's exclusion for not less than the period during which his state license is revoked.¹ Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ 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.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated June 30, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, until he regains his license to practice medicine in the State of Missouri. Petitioner requested a hearing pursuant to 42 C.F.R. §1005.2, by letter dated August 2, 2011. The case was assigned to me for hearing and decision.

On September 22, 2011, I convened a telephonic conference, the substance of which is memorialized in my Order dated September 23, 2011. During the conference, Petitioner did not waive an oral hearing and the I.G. requested an opportunity to file a motion for summary judgment.

The I.G. filed a motion for summary judgment on October 24, 2011 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 5. Petitioner filed his response (P. Brief) on November 20, 2011, with five exhibits (P. Exs.) 1 through 5. Petitioner filed a sixth exhibit (P. Ex. 6) under separate cover dated November 20, 2011. The I.G. filed a reply (I.G. Reply) on December 9, 2011. Petitioner filed a sur-reply on December 23, 2011 (P. Reply). No objection has been made to my consideration of any of the exhibits and I.G. Exs. 1 through 5 and P. Exs. 1 through 6 are admitted.

II. Discussion

A. Issues

The Secretary 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).

B. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary.

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. 42 C.F.R. § 1001.501(a)(1).

The standard of proof is a preponderance of the evidence, and the state agency determination revoking Petitioner's state license is not subject to my review. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigation factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

C. Analysis

My conclusions of law are in bold followed by my findings of fact and analysis.

- 1. Petitioner's request for hearing is timely, and I have jurisdiction.**
- 2. Summary judgment is appropriate in this case.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 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). An 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 prevails 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 that, if true, would refute the facts that the moving party relied upon. *See, e.g., Fed. R. Civ. P. 56(c); Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding 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 Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC, Inc.*, DAB CR672 (2000).

Summary judgment is appropriate in this case. There is no dispute that Petitioner's state license was revoked. There is no genuine dispute as to any material issue of fact related to the issue of whether Petitioner's state license was revoked for reasons bearing upon his professional competence, professional performance, or financial integrity. Rather, the

issue must be resolved against Petitioner as a matter of law in this case based upon the decision of the state board that revoked his license. Thus, there is a basis for the I.G. to exclude Petitioner. Act § 1128(b)(4); 42 C.F.R. § 1001.501(a). The decision of the I.G. to exercise delegated authority to exclude Petitioner is not subject to review if I conclude that there is a legal basis for permissive exclusion. 42 C.F.R. § 1005.4(c)(5). The duration of the exclusion is fixed by law and is not subject to review but is reasonable as a matter of law. Act § 1128(c)(3)(E). There is no genuine dispute as to any material fact and all issues must be resolved against Petitioner as a matter of law.

3. There is a basis for Petitioner’s exclusion pursuant to section 1128(b)(4) of the Act.

The I.G. cites section 1128(b)(4) of the Act as the basis for Petitioner’s permissive exclusion. I.G. Ex. 1. 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 1128(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 has 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.

The statute permits the Secretary to exclude from participation any individual: (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 an individual’s professional competence, professional performance, or financial integrity.

Petitioner does not deny that his license to practice medicine was revoked by the Missouri Board for a period of seven years. P. Brief at 5; P. Reply at 2; I.G. Ex. 2. Thus, the first element under section 1128(b)(4) of the Act is satisfied. Petitioner argued in his request for hearing dated August 2, 2011, and in a subsequent letter dated September 2, 2011, that his Missouri license was not revoked for reasons bearing upon his professional competence, professional performance, or financial integrity as required by the second element of section 1128(b)(4) of the Act. The I.G. argues that the revocation of Petitioner’s license by the Missouri Board was based upon his professional competence

and that that element of section 1128(b)(4) of the Act is satisfied as a matter of law. I conclude that the elements of section 1128(b)(4) of the Act are satisfied as a matter of law and the I.G. has a basis to exclude Petitioner.

On May 19, 2009, Petitioner pled guilty in the Circuit Court of Crawford County Missouri to one felony count of second degree statutory rape and one felony count of second degree statutory sodomy, both in violation of Missouri Revised Statutes § 566.064. The victim of the rape and sodomy was the fourteen year old granddaughter of Petitioner's wife and the crimes occurred in Petitioner's backyard pool. I.G. Exs. 4, 5; P. Br.

On January 28, 2010, Petitioner's license to practice medicine was revoked by the Missouri Board. I.G. Ex. 2. The revocation of Petitioner's license was predicated on his felony convictions for statutory rape and statutory sodomy. The Missouri Board specifically found as fact that Petitioner's "felony offense . . . is a severe offense, is reasonably related to the qualifications, functions or duties of the profession and was for a felony offense of which an essential element was fraud or dishonesty; and involved moral turpitude." I.G. Ex. 2, at 2. The Missouri Board entered a conclusion of law that Petitioner committed "a felony offense reasonably related to the qualifications, functions or duties of the medical profession; of which an essential element was fraud or dishonesty; and involved moral turpitude" and that revocation of his license was, therefore, required under Missouri law. I.G. Ex. 2, at 2. The specific finding of fact and conclusion of law of the Missouri Board, show that the Missouri Board revoked Petitioner's license to practice medicine in Missouri for reasons related to his professional competence and professional performance. Petitioner cannot attack in this proceeding and I may not review the findings and conclusion of the Missouri Board. 42 C.F.R. § 1001.2007(d); *Roy Cosby Stark*, DAB No. 1746 (2000); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Olufemi Okonuren, M.D.*, DAB No. 1319 (1992). Accordingly, I conclude that the second element required for exclusion pursuant to 1128(b)(4) of the Act is satisfied, and the I.G. has a legal basis to exclude Petitioner.

Petitioner argues that it is not necessary for the I.G. to exercise permissive exclusion in this case. Petitioner points out that he surrendered his 2009 license to a state investigator in June 2009, returned his 2010 medical license, and expected to be able to regain his license after his evaluation from the Impaired Physicians program. P. Brief at 4. Petitioner also argues that section 1128(b)(4) of the Act was not intended to be used in cases such as his. Petitioner argues that the exclusion is unnecessary because he retired from the active practice of medicine over a month before his conviction, has not submitted claims to federal health care programs since 2009, and has received therapy since his conviction. He argues that he wants to regain his license as a therapy goal, and, if the opportunity presents itself, he would want to volunteer or work in a non patient care capacity in the health care field. In his sur-reply, Petitioner asserts that he would like to be able to perform consulting in non-clinical matters. P. Br. at 6; P. Reply at 2.

Petitioner urges me by his arguments to review the I.G.'s decision to exercise the discretion to exclude Petitioner. My authority is limited to determining whether there is a basis for exclusion. I have no authority to review the I.G.'s exercise of discretion to exclude Petitioner once I conclude that there is a legal basis for exclusion. 42 C.F.R. § 1005.4(c)(5); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003).

4. The period of exclusion is reasonable as a matter of law.

There is no issue of whether the period of exclusion is unreasonable in this case. Section 1128(c)(3)(E) of the Act specifies that the exclusion shall not be less than the period during which Petitioner's state license to provide health care is revoked, suspended, or surrendered. 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 suspended or revoked. 42 C.F.R. § 1001.501(b)(4).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective July 20, 2011, for the period specified by the regulations.

/s/
Keith W. Sickendick
Administrative Law Judge