

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Jennifer Lynn Dohl  
(O.I. File No. H-12-40408-9),

Petitioner

v.

The Inspector General.

Docket No. C-12-1188

Decision No. CR2695

Date: January 22, 2013

**DECISION**

Petitioner, Jennifer Lynn Dohl, 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 19, 2012. Petitioner is excluded because her license to practice nursing was suspended by the Wisconsin Board of Nursing in the Wisconsin Department of Safety and Professional Services (Wisconsin Board of Nursing) for reasons bearing on her professional competence or professional performance. There is a proper basis for the exclusion. The Act requires Petitioner's exclusion for not less than the period during which her state license is suspended.<sup>1</sup> Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

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<sup>1</sup> 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 29, 2012, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, until she regains her license as a registered nurse in the State of Wisconsin and is reinstated in the program by the I.G. Petitioner requested a hearing pursuant to 42 C.F.R. §1005.2, by letter dated July 5, 2012, which was received by the Civil Remedies Division on August 17, 2012. The case was assigned to me for hearing and decision on August 24, 2012. On September 21, 2012, I convened a telephonic prehearing conference, the substance of which is memorialized in my Order dated September 21, 2012. 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 19, 2012 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 3. Petitioner filed her response (P. Brief) on November 20, 2012, with Petitioner's affidavit and three exhibits (P. Exs.) 1 through 3.<sup>2</sup> The I.G. filed a reply (I.G. Reply) on December 4, 2012. No objection has been made to my consideration of I.G. Exs. 1 through 3 and they are admitted as evidence. The I.G. objects to my consideration of Petitioner's proposed exhibits and argues that they should be excluded. The I.G. contends that Petitioner's exhibits are not admissible because they are not marked as required by the CRDP. Petitioner corrected the error by filing its amended exhibit list and exhibits properly marked on December 7, 2012, and the exhibits are not excluded on that basis. The I.G. also objects to the admission of P. Ex. 2 and P. Ex. 3, arguing that the exhibits are irrelevant and have no bearing on the issue of whether the I.G. is authorized to exclude Petitioner based on Petitioner's loss of her nursing license in Wisconsin for reasons bearing on her professional competence and professional performance; or the issue of the reasonableness of the period of exclusion. I.G. Reply at 2. P. Ex. 2 and P. Ex. 3 are not relevant because they do not help me resolve any issue in dispute before me. P. Ex. 2 and P. Ex. 3 are also not relevant as evidence reflecting Petitioner's credibility or character as Petitioner's credibility and her character are not in issue. Petitioner's P. Ex. 2 and P. Ex. 3 are not relevant and not admitted as evidence. Although P. Ex. 1 seems to support the Wisconsin Board of Nursing's action, that action is not subject to my review and P. Ex. 1 is not relevant to any issue I may decide. I do

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<sup>2</sup> Petitioner originally submitted exhibits which were not marked in accordance with my September 21, 2012 Prehearing Order and the Civil Remedies Division Procedures (CRDP). Petitioner's exhibits were not returned to Petitioner for correct marking as the exhibits are distinguishable despite the incorrect marking. On December 7, 2012, Petitioner filed an amended exhibit list and P. Exs. 1 through 3 marked correctly.

consider Petitioner's affidavit (P. Aff.) submitted in support of her opposition to the I.G. motion for summary judgment.

## **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 reasonable notice and an opportunity for a hearing before 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.

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 Wisconsin nursing license was suspended for an indefinite period. I.G. Ex. 3; P. Aff.; P. Br. at 2. There is also no genuine dispute as to any material issue of fact related to the issue of whether Petitioner's nursing license was suspended for reasons bearing upon her professional competence, professional performance, or financial integrity as discussed hereafter. Whether the I.G. has authority to exclude Petitioner pursuant to 1128(a)(4) is an issue that must be resolved against Petitioner as a matter of law based upon the undisputed facts. The issue of the reasonableness of the period of exclusion must also be resolved against Petitioner as the period of exclusion is specified by section 1128(c)(3)(E) of the Act. Accordingly, summary judgment is appropriate.

### **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.

Thus, the elements that must be proven for exclusion pursuant to section 1128(b)(4) are: (1) the individual's 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 the individual's professional competence, professional performance, or financial integrity.

Petitioner held a nursing license in Wisconsin. In January 2012, the Wisconsin Board of Nursing brought formal disciplinary proceedings against Petitioner. P. Br. at 2; P. Aff.; I.G. Ex. 3. Petitioner admits that she developed an addiction to prescription drugs, due to pain resulting from surgeries, and that her nursing license was suspended by the Wisconsin Board of Nursing based on facts to which she stipulated. P. Br. at 2; P. Aff. The Wisconsin Board of Nursing made findings of fact based on Petitioner's stipulations of fact. The findings of fact included that:

[Petitioner] was working as a home health care nurse . . . in Fond du Lac, Wisconsin.

On September 2, 2011 and September 3, 2011, a patient reported that [Petitioner] diverted approximately 100 Morphine tablets from her home. The tablets varied in strength from 15mg to 60mg.

On September 6, 2011, [Petitioner] was admitted, voluntarily, to a treatment center in Florida for opioid, benzodiazepine, and alcohol dependency. [Petitioner] left the treatment facility on September 27, 2011 against doctor recommendation.

[Petitioner] disclosed that she uses approximately ten (10) opioid tablets per day, stolen from patient prescriptions, and three (3) benzodiazepine tablets per day, which she obtained from her mother's prescription."

I.G. Ex. 3 at 2. The Wisconsin Board of Nursing concluded that Petitioner used drugs to an extent that such use impaired her ability to safely or reliably perform her nursing duties. P. Br. at 2-3; I.G. Ex. 3 at 1-2; Wis. Admin. Code § 7.03(2).

Petitioner does not deny that her nursing license was suspended by the Wisconsin Board of Nursing. P. Brief at 2; P. Aff.; I.G. Ex. 3. Thus, the first element under section 1128(b)(4) of the Act is satisfied.

The I.G. argues regarding the second element that the suspension of Petitioner's license by the Wisconsin Board of Nursing was for reasons bearing on her professional competence and professional performance. Petitioner disputes the I.G.'s conclusion and argues that the I.G. should not exercise a permissive exclusion in this case. Petitioner contends that her nursing license was not suspended for reasons bearing on her professional competence and professional performance. Petitioner argues that the suspension of her "nursing license was for reasons that her addiction impaired her ability to safely and reliably perform her nursing duties" and "there was no finding that she actually put any patient in harm's way or underperformed in her actual job." P. Br. at 4. Petitioner also argues that the Wisconsin Board of Nursing did not use the terms "professional competence" or "professional performance" in the findings of fact in its enforcement action. P. Br. at 4. Thus, Petitioner contends that there are issues of material fact in dispute which impact the I.G.'s authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. P. Br. at 4.

The I.G. argues that the plain meaning of the terms "professional competence" and "professional performance" encompasses the ability to practice a licensed service with reasonable skill and safety. I.G. Br. at 8. The I.G. points out that the Wisconsin Administrative Code provision under which the Wisconsin Board of Nursing reviewed Petitioner's conduct and the statute under which the Wisconsin Board of Nursing suspended Petitioner's nursing license relate to issues of "professional competence" and "professional performance". Wis. Stat. § 441.07(1)(c) (Wisconsin Nursing Board may revoke, limit, or suspend nursing license for acts that show nurse is "unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency."); Wis. Admin. Code § 7.03(2) ("[a]buse of alcohol or other drugs' is the use of alcohol or any drug to an extent that such use impairs the ability of the licensee to safely or reliably practice"). The I.G. contends that although the Wisconsin Board of Nursing did not explicitly use the terms "professional competence" and "professional performance" the underlying basis for the Wisconsin Board of Nursing's action related to Petitioner's professional competence and professional performance. I.G. Br. at 8. The I.G. argues that section 1128(b)(4) of the Act does not require that the state agency make specific findings regarding an individual's professional competence or professional performance as a prerequisite to the I.G. exercising authority to exclude an individual. The I.G.'s position is that the statute only requires that a formal disciplinary proceeding concern the individuals' professional competence or professional performance. I.G. Br. at 8-9.

The facts are not in dispute. Petitioner's license to practice nursing was suspended by the Wisconsin Board of Nursing on January 26, 2012. I.G. Ex. 3. The Wisconsin Board of

Nursing found, based upon Petitioner's stipulations, that Petitioner stole narcotics from patient prescriptions for her personal use and that she was admitted to a treatment facility for opioid, benzodiazepine, and alcohol dependency. I.G. Ex. 3 at 2. The Wisconsin Board of Nursing decided to suspend Petitioner's nursing license pursuant to Wis. Stat. § 441.07(1)(c) based upon the conclusion that Petitioner was unfit or incompetent by reason of abuse of alcohol or other drugs within the meaning of Wis. Stat. § 441.07(1)(c). The Board of Nursing found that Petitioner used alcohol and drugs to such an extent that her usage had impaired her ability to safely or reliably practice nursing. I.G. Ex. 3 at 2. The specific findings of facts and conclusions of law of the Wisconsin Board of Nursing show that the Wisconsin Board of Nursing suspended Petitioner's Wisconsin nursing license, as well as Petitioner's privilege to practice as a nurse under the authority of another state's license pursuant to the Nurse Licensure Compact. I conclude as a matter of law based on the stipulated facts and the language of the Wisconsin statute and administrative code that the suspension was for reasons related to Petitioner's professional competence and professional performance. I.G. Ex. 3. Section 1128(b)(4) does not require that any patient suffer deficient care or actual harm at the hands of Petitioner. Furthermore, Petitioner cannot attack in this proceeding and I may not review the findings and conclusions of the Wisconsin Board of Nursing. 42 C.F.R. § 1001.2007(d). 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 urges me to review the I.G.'s decision to exercise the discretion to exclude Petitioner from all healthcare fields. 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.**

Petitioner argues that the length of her exclusion is not reasonable. Petitioner argues that it is unreasonable for the I.G. to require that Petitioner's nursing licensing be reinstated by the Wisconsin Nursing Board as a requisite for Petitioner's reinstatement in Medicare. Petitioner does not read section 1128(c)(3)(E) of the Act to require that the health care license suspended or revoked be reinstated. Rather, Petitioner argues that 1128(c)(3)(E) of the Act should be construed to provide that the duration of the period of exclusion under section 1128(b)(4) is only until Petitioner obtains a license to provide healthcare. P. Br. at 4. Petitioner hopes to obtain a health care license as an Alcohol and Other Drug Abuse (AODA) counselor. Petitioner argues that if she is able "to obtain a license to provide health care treatment as an AODA counselor, this should be appropriate to terminate the exclusion." P. Br. at 5. Petitioner contends that "the duration of her exclusion should not be concurrent with the period of her suspension from the practice of nursing in Wisconsin, it should be until she obtains another health care license in the

Medical area, such as an AODA counselor's license, at which point she should then be permitted to participate in Medicare, Medicaid, and all other federal health care programs." P. Br. at 5.

The I.G. argues that as long as Petitioner's license to practice nursing in Wisconsin is suspended, she is excluded from participation in all federal health care programs. The I.G. states that "[i]t is plain from the language of the 1996 amendment of section 1128(c)(3) of the Act that the minimum length of the exclusion must be coterminous with the term of revocation or suspension" and that "Petitioner is required to obtain the same type of license that she lost before she can be considered for reinstatement as a participant in Medicare Medicaid, and other federal health care programs." I.G. Reply at 3. The I.G. cites to cases of other ALJ's such *John C. Cheek, M.D.*, DAB CR665 (2000), *Jordan Sterns, M.D.*, DAB CR669 (2000) and *Mary E. Groten*, DAB CR518 (1998) to support the I.G.'s position. The I.G. also contends that "Congress has determined that the licensing authority taking action against an individual's license is in the best position to determine whether or not the reasons for the disciplinary action have been remediated" and cites to section 1128(b)(4) of the Act and *Manuel Roque Carranto*, DAB CR1412 (2006). I.G. Reply at 3-4.

Petitioner's license to deliver health care as a nurse remains suspended and there is a basis for Petitioner's exclusion from the federal Medicare program. Pursuant to section 1128(c)(3)(E) of the Act, the period of exclusion "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, or the individual is excluded or suspended from a Federal or State health care program." Petitioner has not been reinstated as a nurse and she has not received a license as an AODA counselor. I may not issue an advisory opinion or a decision based on hypothetical facts. Accordingly, I conclude that there are currently no facts that raise an active issue before me requiring interpretation of section 1128(c)(3)(E) of the Act or its application. I conclude that the period of exclusion is reasonable as a matter of law under section 1128(c)(3)(E) of the Act on the facts before me.

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective July 19, 2012, for the period specified by the regulations.

/s/

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Keith W. Sickendick  
Administrative Law Judge