

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Yetunde Falowo,)	Date: January 11, 2007
)	
Petitioner,)	
)	
- v. -)	
)	Docket No. C-06-695
The Inspector General.)	Decision No. CR1555
)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Yetunde Falowo, from participating in Medicare and other federally funded health care programs until she is reinstated in the New Jersey Medicaid program.

I. Background

On August 31, 2006 the I.G. notified Petitioner that she was being excluded from Medicare and other federally funded health care programs. The I.G. asserted that the exclusion was authorized by section 1128(b)(5) of the Social Security Act (Act). He advised Petitioner that she would remain excluded until she is reinstated by the New Jersey Medicaid program.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I gave the parties a schedule for submitting briefs and proposed exhibits. I informed the parties that either of them could request that a hearing be convened in person if that party had evidence in the form of testimony which was relevant and did not duplicate an exhibit.

Neither party requested an in-person hearing. Each party submitted a brief and proposed exhibits. The I.G. submitted five proposed exhibits (I.G. Ex. 1 - I.G. Ex. 5). Petitioner submitted five proposed exhibits (P. Ex. 1 - P. Ex. 5). I am receiving all of these exhibits into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. A basis exists to exclude Petitioner pursuant to section 1128(b)(5) of the Act; and
2. The duration of her exclusion is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. A basis exists to exclude Petitioner pursuant to section 1128(b)(5) of the Act.

Section 1128(b)(5) of the Act authorizes the I.G. to exclude an individual who has been suspended or excluded from participating in any federal program or a State health care program for reasons bearing on that individual's professional competence, professional performance, or financial integrity. The evidence in this case establishes that Petitioner was excluded from participating in the New Jersey Medicaid program, a State health care program, for reasons bearing on her professional competence or performance. Consequently, the I.G. is authorized to exclude her pursuant to section 1128(b)(5).

Petitioner was employed as a nurse's aide in New Jersey. In order to be eligible for employment as a nurse's aide in New Jersey a person must have a valid nurse aide certificate and be registered in good standing on the New Jersey Nurse Aide Registry. I.G. Ex. 2, at 2. A finding of mental abuse, neglect, and verbal abuse next to an enrollee's name on the registry disqualifies that person from the status of good standing and that person is, consequently, prohibited from employment as a certified nurse aide in a licensed long term care facility in New Jersey so long as the citation remains next to his or her name on the registry. *Id.*

On July 15, 2005 the New Jersey Department of Health and Senior Services issued a final decision concerning Petitioner's standing on the New Jersey Nurse Aide Registry. I.G. Ex. 3. The agency upheld findings by a State Administrative Law Judge that Petitioner, verbally abused a resident of a nursing facility. *Id.*, at 5. As a consequence, a notation of a finding of abuse was placed next to Petitioner's name on the New Jersey Nurse Aide

Registry. I.G. Ex. 2. On December 7, 2005, the New Jersey Department of Human Services notified Petitioner that she would be disqualified from participating in any capacity in the New Jersey Medicaid and other State health care programs for a minimum of eight years. I.G. Ex. 4.

These facts – which are not disputed by Petitioner – plainly establish a basis for the I.G. to exclude her pursuant to section 1128(b)(5). Petitioner was excluded from participating in New Jersey’s Medicaid program, a State health care program. The reason for her exclusion was that she was found to have engaged in abusive conduct during the course of her employment as a nurse’s aide. A finding of abuse is on its face inconsistent with Petitioner’s professional responsibilities as a nurse’s aide and, so, bears on her professional competence and performance.

Petitioner argues that, in fact, she was wrongly accused and found culpable of abuse. However, her assertions establish no basis for me to find the I.G. was without authority to exclude her. The authority to exclude pursuant to section 1128(b)(5) derives from action by a State agency and not from the underlying facts which are the basis for that action. Consequently, Petitioner may not, in effect, reargue before me the issue of her conduct which formed the basis for the adverse State findings against her.

2. The duration of Petitioner’s exclusion is reasonable as a matter of law.

If the I.G. determines to exclude a person pursuant to section 1128(b)(5) of the Act, the duration of the exclusion must be at least coterminous with the period for which that individual is excluded or suspended by a State health care program. Act, section 1128(c)(3)(E). Here, the I.G. determined to exclude Petitioner for a period that was coterminous with her exclusion from the New Jersey Medicaid program. That is reasonable as a matter of law.

/s/

Steven T. Kessel
Administrative Law Judge