

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Thomas I. DeVol, Ph.D.,)	Date: September 18, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-353
)	Decision No. CR1652
The Inspector General.)	
_____)	

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner *pro se* Thomas I. DeVol, Ph.D. (Petitioner), from participation in Medicare, Medicaid, and all other federal health care programs. The I.G. relies on the discretionary authority to do so conveyed to him by section 1128(b)(4)(A) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(A). The predicate for the I.G.’s action is the revocation of Petitioner’s license to practice psychology in Missouri. The I.G. has filed a Motion for Summary Affirmance.

The undisputed material facts in this case support the I.G.’s imposition of the exclusion. The I.G. has set the period of exclusion to be concurrent with the period during which Petitioner’s license to practice psychology in Missouri remains revoked, the minimum period of exclusion required by law. For those reasons, I grant the I.G.’s Motion for Summary Affirmance.

I. Procedural Background

Petitioner was a psychologist licensed to practice in the State of Missouri. Beginning in January 2002, a formal disciplinary proceeding against Petitioner was pending before the Administrative Hearing Commission of the State of Missouri, on a complaint filed by the

Missouri State Committee of Psychologists. That complaint alleged ten counts of misconduct in which Petitioner's professional competence, professional performance, and financial integrity were explicitly at issue.

On November 7, 2005, at the conclusion of the formal disciplinary proceeding, the Administrative Hearing Commission of the State of Missouri sustained the charges in all ten counts and found cause for the State Committee of Psychologists to discipline Petitioner.

The State Committee of Psychologists entered its Findings of Fact, Conclusions of Law, and Disciplinary Order on March 22, 2006, and thereby revoked Petitioner's license to practice psychology in Missouri.

On January 31, 2007 the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until he regains his license as a psychologist in Missouri, based on the authority set out in section 1128(b)(4)(A) of the Act. Petitioner wrote a *pro se* letter to the I.G. on February 11, 2007, and the I.G. forwarded that letter to the Civil Remedies Division, where it was construed as a request for hearing filed pursuant to 42 C.F.R. § 1005.2.

Two efforts to conduct the prehearing conference required by 42 C.F.R. § 1005.6(a) were unsuccessful for reasons attributable to Petitioner. The circumstances of those two unsuccessful efforts are set out in the Orders of May 7, 2007 and May 22, 2007, and the Notice sent electronically to the parties on May 17, 2007. The Order of May 22, 2007 contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. The cycle of briefing and this record closed for purposes of 42 C.F.R. § 1005.20(c) on August 27, 2007, under the circumstances set out in the Order Closing Record of that date.

The evidentiary record on which I decide this case contains four exhibits. With his Motion for Summary Affirmance and his Brief in Support of that Motion (I.G. Br.), the I.G. has proffered I.G. Exhibits (Exs.) 1-4. Petitioner has not objected to the admission of these exhibits, and so all are admitted as designated. Petitioner has proffered no exhibits of his own.

Petitioner's *pro se* participation in this appeal has been minimal. What little there has been of it has been unhelpful, and might easily be understood as intended to subvert the orderly and lucid discussion of the case. I specifically refer to his failure to file his request for hearing properly with the Civil Remedies Division, his failure to participate in the second scheduled prehearing conference, his failure to file his Answer Brief timely

and in a proper manner with the Civil Remedies Division, and his failure to file his Response Brief timely and in a proper manner with the Civil Remedies Division. The details of Petitioner's failings in those matters are set out in the Order Closing Record.

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4)(A) of the Act; and
2. Whether the length of the exclusion is unreasonable.

I resolve these issues in favor of the I.G.'s position. Section 1128(b)(4)(A) of the Act supports Petitioner's exclusion from all federal health care programs, for his license to practice psychology in Missouri has been revoked for reasons bearing on his professional competence, professional performance, or financial integrity. Petitioner's exclusion during the period that his license to practice psychology in Missouri remains revoked is the minimum period established by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), and is therefore reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity "whose license to provide health care has been revoked or suspended by any State licensing authority . . . for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity." The terms of section 1128(b)(4)(A) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a)(1).

An exclusion based on section 1128(b)(4)(A) of the Act is discretionary. If the I.G. exercises his discretion to proceed with the sanction, then the mandatory minimum period of exclusion to be imposed under section 1128(b)(4)(A) of the Act "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 . . ." Act, § 1128(c)(3)(E), 42 U.S.C. § 1320a-7(c)(3)(E). Regulatory language at 42 C.F.R. § 1001.501(b)(1) affirms the statutory provision.

If the I.G. determines that an event constitutes a valid predicate for the exclusion, he must send written notice of his final decision to exclude to the affected individual or entity, and must in that notice provide information about the appeal rights of the excluded party. 42 C.F.R. § 1001.2002; *see also* Act, § 1128(c), 42 U.S.C. § 1320a-7(c).

IV. Findings and Conclusions

I find and conclude as follows:

1. Between January 3, 2002 and November 7, 2005, a formal disciplinary proceeding against Petitioner was pending before the Administrative Hearing Commission of the State of Missouri, on a complaint filed by the State Committee of Psychologists. I.G. Ex. 1.
2. The formal disciplinary proceeding described above in Finding 1 concerned Petitioner's professional competence, professional performance, and financial integrity. I.G. Exs. 1, 2.
3. On November 7, 2005, at the conclusion of the formal disciplinary proceeding described above in Findings 1 and 2, and for reasons bearing on his professional competence, professional performance, and financial integrity, the Administrative Hearing Commission of the State of Missouri found cause for the State Committee of Psychologists to discipline Petitioner. I.G. Ex. 1.
4. On March 22, 2006, the State Committee of Psychologists entered its Findings of Fact, Conclusions of Law, and Disciplinary Order revoking Petitioner's license to practice psychology in Missouri for reasons bearing on his professional competence, professional performance, and financial integrity. I.G. Ex. 2.
5. On January 31, 2007, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until he regains his license as a psychologist in Missouri, based on the authority set out in section 1128(b)(4)(A) of the Act. I.G. Ex. 4.
6. On or about February 11, 2007, Petitioner perfected this appeal from the I.G.'s action by filing a timely hearing request.
7. Because Petitioner's license to practice psychology in Missouri was revoked for reasons bearing on his professional competence, professional performance, or financial integrity, as set out in Findings 1-4 above, a basis exists for the I.G.'s

exercise of discretionary authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

8. The exclusion of Petitioner during the period that his license as a psychologist in Missouri remains revoked is for the minimum period prescribed by law and is therefore as a matter of law not unreasonable. Act, § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
9. There are no remaining disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A) of the Act. First, the I.G. must prove that the license to provide health care of the individual to be excluded has been revoked or suspended by a State licensing authority. Second, the I.G. must prove that the license was revoked or suspended for reasons bearing on the individual's professional competence, professional performance, or financial integrity. *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); *Sherry J. Cross*, DAB CR1575 (2007); *Michele R. Rodney*, DAB CR1332 (2005); *Edmund B. Eisnagle, D.O.*, DAB CR1010 (2003); *Marcos U. Ramos, M.D.*, DAB CR788 (2001); *Allison Purtell, M.D.*, DAB CR781 (2001).

Petitioner does not deny the I.G.'s proof of those two elements. As I shall note below, his only effort here is to raise an argument based on what he calls "my due process rights under the US Constitution." Petitioner's Answer Br. (P. Ans. Br.) at 1. But the I.G.'s evidence establishes both essential elements conclusively: Petitioner's license to practice psychology was revoked by the State Committee of Psychologists on March 22, 2006, and it was revoked on the explicit basis of proven examples of his remarkable professional incompetence and misconduct, and flagrant—if petty— financial chiseling. I.G. Exs. 1, 2. Moreover, Petitioner's state-court challenge to the revocation of his license was rejected in the Circuit Court of Cole County, State of Missouri, on November 6, 2006. I.G. Ex. 3. The I.G.'s evidence establishes both essential elements.

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. Thus, where the I.G. is authorized to impose an exclusion pursuant to section 1128(b)(4), that exclusion is

reasonable as a matter of law if it is concurrent with the period during which the individual's license to provide health care is revoked, suspended, or surrendered. *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Julia Maria Nash*, DAB CR1277 (2005); *Maureen Felker*, DAB CR1110 (2003); *April Ann May, P.A.*, DAB CR1089 (2003); *Djuana Matthews Beruk, D.D.S.*, DAB CR950 (2002). That is the period of exclusion proposed in this case, and it is *ipso jure* reasonable.

The totality of Petitioner's defense to the proposed exclusion is phrased by him as a constitutional argument, but is in fact based on his assertion that the Circuit Court's action has been appealed to the Missouri Court of Appeals, Western District. He asserts in his February 11, 2008 letter:

Does it make any difference that the adverse action of the State Committee of Psychologists (SCOP) resulting in revocation is now before the Western District of Missouri Court of Appeals? I shouldn't think that the adverse action of the Office of the Inspector General could be implemented until court remedies are exhausted.

Petitioner's Hearing Request at 1.

His Answer Brief comprises one paragraph two sentences long. Those sentences read:

My meritorius (*sic*) reason to not affirm is that DeVol vs. SCOP is before the Western District of Missouri Court of Appeals. To affirm the position of SCOP to revoke would deny me my due process right under the US Constitution.

P. Ans. Br. at 1.

His Response Brief is even more pithy. Excluding his name and the date, Petitioner's Response Brief is 13 words in length:

My only defense is that I am still in the court of appeals.

Petitioner's Response Brief at 1.

It is very difficult to detect a serious Fifth or Fourteenth Amendment argument anywhere in that defense, particularly since Petitioner has no constitutionally-protected property interest in participation in the Medicare and Medicaid programs. *Kahn v. Inspector General*, 848 F. Supp. 432 (S.D.N.Y. 1994); *Hillman Rehabilitation Center*, DAB No.

1611 (1997), *aff'd*, *Hillman Rehabilitation v. U.S. Dept of Health and Human Services*, No. 98-3789 (GEB), slip op. at 25 (DNJ May 13, 1999); *Michael J. Rosen, M.D.*, DAB CR1566 (2007), *aff'd*, DAB No. 2096 (2007); *Edmund B. Eisnaugle, D.O.*, DAB CR1010; *Morton Markoff, D.O.*, DAB CR538 (1998). But if Petitioner has a constitutional argument, it would be better saved for another forum: I simply cannot entertain it. *Michael J. Rosen, M.D.*, DAB No. 2096, n. 10; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Susan Malady, R.N.*, DAB No. 1816 (2002). And if the Missouri Court of Appeals, Western District, does indeed have before it Petitioner's appeal of the licensing board's action, that is no impediment whatsoever to the I.G.'s proposed exclusion. *Joann Fletcher Cash*, DAB No. 1725, n. 2 (2000); *Sushil Gupta, M.D.*, DAB CR1561 (2007); *Affiong Ikpeme Ekong*, DAB CR1432 (2006); *Jeffrey Gottlieb, M.D. a/k/a Jeffrey Gotlieb*, DAB CR1211 (2004). Should Petitioner succeed in winning the reversal of the Circuit Court's Order and Judgment, the State Committee of Psychologists' Disciplinary Order, and the Administrative Hearing Commission of the State of Missouri's Decision, he can confidently expect retroactive reinstatement by the I.G. 42 C.F.R. § 1001.3005(a)(2). I. G. Reply Br. at 3.

Summary disposition in a case such as this is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to the Federal Rules of Civil Procedure for guidance in applying that regulation. Fed. R. Civ. P. 56; *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous, and support summary disposition as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Thomas I. DeVol, Ph.D., from participation in Medicare, Medicaid, and all other federal health care programs is SUSTAINED, pursuant to the terms of section 1128(b)(4)(A) of the Act, 42 U.S.C.

§ 1320a-7(b)(4)(A). That exclusion remains in effect, by operation of section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), while his license to practice psychology in Missouri remains revoked, suspended, or surrendered.

_____/s/_____
Richard J. Smith
Administrative Law Judge