

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Jerry Lee Stayton,

Petitioner,

v.

The Inspector General.

Docket No. C-13-701

Decision No. CR2998

Date: November 19, 2013

**DECISION**

The Inspector General (I.G.) of the United States Department of Health and Human Services (HHS) notified Petitioner, Jerry Lee Stayton, that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4), effective April 18, 2013. For the reasons stated below, I conclude that the I.G. has a basis for excluding Petitioner from participation in federal health care programs because his license to provide health care as a Certified Addiction Counselor (CAC) was surrendered while a formal disciplinary proceeding was pending before the Colorado State Board of Addiction Counselor Examiners and the proceeding concerned Petitioner's professional performance. The exclusion must last while his state license is surrendered. 42 U.S.C. § 1320a-7(c)(3)(E).

**I. Background**

By letter dated March 29, 2013, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b) until he regains his license as a CAC in Colorado and is reinstated in the program by the I.G. The I.G. advised Petitioner that the exclusion was because his license to provide health care as a CAC was revoked, suspended, otherwise lost or

surrendered while a formal disciplinary proceeding was pending before the Colorado Addiction Counselor Program for reasons bearing on his professional competence, professional performance, or financial integrity. 42 U.S.C. § 1320a-7(b); 42 C.F.R. § 1001.501. I.G. Exhibit (Ex.) 1.

Petitioner timely filed his request for a hearing (RFH) and this case was assigned to me for hearing and decision. On May 22, 2013, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) of that same date. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. submitted the I.G.'s brief (I.G. Br.) together with six exhibits (I.G. Exs. 1-6). Petitioner submitted a response brief (P. Br.) together with 14 exhibits (P. Exs. 1-14). Petitioner sent his response brief and exhibits to counsel for the I.G., rather than filing with my office. Counsel for the I.G. forwarded Petitioner's submission to my office and my staff uploaded all the documents on to the Departmental Appeals Board's electronic filing system. The I.G. then submitted its reply brief (I.G. Reply Br.). Because neither the I.G. nor Petitioner objected to any of the proposed exhibits, I admit into evidence I.G. Exs. 1-6 and P. Exs. 1-14. Neither party proposed any witnesses to testify. I.G. Br. at 13; P. Br. at 5. Therefore, an in-person hearing is unnecessary and I issue this decision on the basis of the written record.

## II. Issue

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4)(B).

## III. Jurisdiction

I have jurisdiction to decide this issue. 42 C.F.R. §§ 1001.2007(a)(1), 1005.2(a).

## IV. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>

***A. On May 15, 2012, Petitioner admitted, while a disciplinary proceeding was pending before the Colorado Board of Addiction Counselor Examiners, that he violated section 12-43-222(1)(g)(I) and (i) of the Colorado Revised Statutes and stipulated to the surrender of his CAC certificate.***

On May 15, 2012, Petitioner signed a Stipulation for Voluntary Relinquishment and Final Agency Order (Stipulation and Final Order) in a proceeding before the State Board of Addiction Counselor Examiners in the State of Colorado. The Stipulation and Final

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<sup>1</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

Order indicates that it is “In the Matter of Disciplinary Proceedings Regarding the Certificate to Practice Addiction Counseling in the State of Colorado of Jerry Stayton, Certificate No. CAC III 4951.” The stated purpose of the Stipulation and Final Order is to provide for a settlement of all matters arising out of the case without the necessity of holding a formal hearing. Finally, the Stipulation and Final Order constitutes a full and final resolution of the matter. I.G. Ex. 3.

In the Stipulation and Final Order, Petitioner admitted to several facts including that he “spent the night in a client’s room while the client was out on pass but another client was present”, “acted in a manner that did not meet generally accepted standards of care while employed by Arapahoe House”, and “maintained a relationship with clients that increased the risk of client exploitation.” I.G. Ex. 3, at 1-2. By virtue of these facts, Petitioner admitted that he violated section 12-43-222(1)(g) and (i) of the Colorado Revised Statutes (C.R.S.). I.G. Ex. 3, at 2. The Colorado Board of Addiction Counselors found that a disciplinary sanction was necessary to protect public health, safety, and welfare. I.G. Ex. 3, at 2. Thus, Petitioner agreed to relinquish his CAC certificate to practice addiction counseling in Colorado and agreed to surrender his certification as of the date of the execution of the Stipulation and Final Order. I.G. Ex. 3, at 2. By the terms of the Stipulation and Final Order, Petitioner understood and agreed that he was ineligible to apply for certification as an addiction counselor in Colorado for at least three years from the date of surrender of the certification and any reapplication would be treated as a new application. I.G. Ex. 3, at 2. Petitioner indicated that he was “fully aware of and understands the right to receive a formal notice of hearing and charges and to have a formal disciplinary hearing, pursuant to § 12-43-224, C.R.S., and hereby waives those rights” and acknowledged “that this waiver constitutes a waiver of all rights to appeal in this matter.” I.G. Ex. 3, at 2.

***B. There is a basis for Petitioner’s exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4)(B) as each of the elements has been proven in this case.***

The I.G. cites 42 U.S.C. § 1320a-7(b)(4) 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

\* \* \* \*

(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 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, or

(B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned 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 1320a-7(b)(4) in this case are: (1) Petitioner's license to provide health care has been surrendered while a formal disciplinary proceeding was pending before a State licensing authority, and (2) the proceeding concerned Petitioner's professional competence, professional performance, or financial integrity.

***1. Petitioner surrendered his license to provide health care and the surrender of Petitioner's license occurred while a formal disciplinary proceeding was pending before a State licensing authority.***

The Stipulation and Final Order in Petitioner's disciplinary case before the Colorado Board of Addiction Counselor Examiners clearly indicates that Petitioner surrendered his CAC certificate to practice addiction counseling in Colorado. I.G. Ex. 3, at 2, 4. Petitioner characterizes his action of signing the Stipulation and Final Order as signing "an agreement which placed my Certification on an Inactive Status." P. Br. at 1. However, Petitioner did not simply opt to make his license to practice addiction counseling or CAC certificate inactive. Petitioner agreed to "relinquish" his certificate to practice addiction counseling and "surrender" his CAC certification in the State of Colorado. I.G. Ex. 3, at 2. Petitioner also agreed that he could not apply for another certification as an addiction counselor for three years. I.G. Ex. 3, at 2. The Stipulation and Final Order states that Petitioner was subject to a "disciplinary sanction" and that the Stipulation and Final Order has the same effect as an order issued following a disciplinary hearing. I.G. Ex. 3, at 2. Petitioner also agreed that the Stipulation and Final Order was entered into "voluntarily and without coercion, after an opportunity to consult with counsel and with full understanding of the legal consequences of [the Stipulation and Final] Order and the right to a formal hearing on all matters herein." I.G. Ex. 3, at 2. Therefore, I find that Petitioner surrendered his license to provide health care as a CAC in Colorado on June 4, 2012, the date of the execution of the Stipulation and Final Order.

Further, Petitioner surrendered his license while formal proceedings were pending before a state licensing authority. According to the record of this case, a June 10, 2010 letter from the Colorado Department of Regulatory Agencies indicates that Petitioner was offered the opportunity to voluntarily relinquish his CAC certificate and avoid a formal proceeding, and it appears that Petitioner did not accept this offer. I.G. Ex. 6. However, it is clear that a formal proceeding was initiated at some time after the June 10, 2010 letter. Both an Assistant Attorney General and Petitioner signed a document in July and August 2012, respectively, seeking mediation of Petitioner's case by the Colorado Office of Administrative Courts. P. Ex. 5C. The record also contains a July 1, 2011 letter from a Senior Assistant Attorney General indicating that Petitioner had a hearing on the revocation of his CAC certificate scheduled for July 14, 2011. P. Ex. 5A. Further, the Stipulation and Final Order that resulted in the surrender of Petitioner's CAC certificate makes it clear that the surrender occurred during a disciplinary proceeding before the State Board of Addiction Counselor Examiners in Colorado. The Stipulation and Final Order is formally captioned and the title indicates it is a Final Agency Order. I.G. Ex. 3. Thus, I find that the first element under 42 U.S.C. § 1320a-7(b)(4) is satisfied.

***2. The proceeding concerned Petitioner's professional performance.***

The I.G. argues that the surrender of Petitioner's CAC certificate was for reasons bearing on his professional competence and professional performance. As discussed above, Petitioner admitted to acting in a manner that did not meet generally accepted standards of care while working at his former employer and maintaining a relationship with clients that increased the risk of client exploitation. I.G. Ex. 3, at 1-2. Furthermore, Petitioner admitted that he violated § 12-43-222(1)(g)(I) and (i), a Colorado statute applicable to mental health care professionals which states that:

(1) A person licensed, registered, or certified under this article violates this article if the person:

\* \* \* \*

(g)(I) Has acted or failed to act in a manner that does not meet the generally accepted standards of the professional discipline under which the person practices. Generally accepted standards may include, at the board's discretion, the standards of practice generally recognized by state and national associations of practitioners in the field of the person's professional discipline.

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(i) Has maintained relationships with clients that are likely to impair such person's professional judgment or increase the risk of client exploitation, such as treating employees, supervisees, close colleagues, or relatives;

C.R.S.A. § 12-43-222(1)(g)(I), (i).

Petitioner disputes the I.G.'s conclusion and argues that the I.G. should not exercise a permissive exclusion in this case. Petitioner appears to explain the facts surrounding the incident that led to the disciplinary proceeding which resulted in the Stipulation and Final Order and argues that "[l]aws and ethics code provide guidelines, yet neither offers clear cut answers to situational problems." P. Br. at 1. Although Petitioner may contend that he did not surrender his CAC certificate for reasons bearing on his professional competence and professional performance, I find the relevant fact is that Petitioner signed the Stipulation and Final Order, which is undisputed. Therefore, I conclude as a matter of law, based on the facts, that the surrender of Petitioner's CAC certification in Colorado pursuant to the Stipulation and Final Order was for reasons related to Petitioner's professional competence and professional performance. I.G. Ex. 3. Accordingly, I conclude that the second element required for exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4) is satisfied. Therefore, the I.G. has a legal basis to exclude Petitioner.

***C. The length of Petitioner's exclusion is reasonable as a matter of law.***

In his RFH, Petitioner disputes the length of his exclusion as being unreasonable. The I.G. exclusion letter indicates that Petitioner cannot be reinstated until his Colorado CAC certificate has been restored to him. I.G. Ex. 1. Petitioner suggests difficulty in obtaining a new Colorado certificate because he no longer lives in Colorado. RFH at 1. The I.G. argues that Petitioner is excluded from participation in all federal health care programs until he regains his CAC certificate in Colorado and that term of exclusion is reasonable as a matter of law. I.G. Br. at 12.

It is clear that Petitioner agreed to relinquish his certificate to practice addiction counseling and surrender his CAC certification in Colorado. I.G. Ex. 3, at 2. Pursuant to 42 U.S.C. § 1320a-7(c)(3)(E), 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 . . . ." Petitioner has not presented any evidence to support that he has been reinstated as an addiction counselor in Colorado or any other state. Accordingly, I conclude that there are currently no facts that raise an issue before me requiring interpretation or application of 42 U.S.C. § 1320a-7(c)(3)(E). Further, I cannot waive the requirement that Petitioner obtain a new CAC certificate in order for the exclusion to end. *See* 42 C.F.R. § 1005.4(c)(1). Therefore, I conclude that the period of exclusion is reasonable as a matter of law under 42 U.S.C. § 1320a-7(c)(3)(E), based on the facts in the record.

***D. I am unable to consider collateral attacks on the Stipulation and Final Order.***

Petitioner raises many issues related to the surrender of his CAC certificate and his signing of the Stipulation and Final Order. Petitioner indicates that a manager at Arapahoe House filed an untimely complaint with the state of Colorado. P. Br. at 1. Petitioner also asserts that two other employees at Arapahoe House lied about the incident that became the subject of the disciplinary action against Petitioner and that those employees received probation related to a lack of maintaining confidentiality. P. Br. 1. Further, Petitioner states: “I would hope that you will find that just because a person signed [the Stipulation and Final Order] it does not mean I committed the allegation . . . .” P. Br at 1-2. These arguments are all impermissible collateral attacks on the Stipulation and Final Order. I cannot review the Stipulation and Final Order and Petitioner cannot collaterally attack it on either substantive or procedural grounds in this appeal because “facts were adjudicated and a final decision was made” in the disciplinary proceedings before the State Board of Addiction Counselor Examiners in Colorado. I.G. Ex. 3, at 1-2; 42 C.F.R. § 1001.2007(d); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991).<sup>2</sup>

***E. Petitioner’s exclusion cannot be reversed on equitable grounds.***

Petitioner also appears to urge me to review the I.G.’s decision to exercise his discretion to exclude Petitioner from all healthcare fields and argues that “the definition of exclusion is very narrow . . . .” P. Br. at 1. Petitioner filed copies of a positive performance review, reference letters from individuals who have worked with him, and certificates and awards from employers. *See* P. Exs. 11-14. However, Petitioner’s arguments and evidence are not relevant because I have very limited authority to reverse an exclusion under 42 U.S.C. § 1320a-7(b)(4). *See* 42 C.F.R. § 1005.4(c)(5). Although I have the authority to reverse an exclusion, *see* 42 C.F.R. §§ 1001.3005(a)(3), 1005.20(b), I can only do so if the I.G. has failed to prove that there is a basis for the exclusion. *See* 42 C.F.R. § 1001.2007(a); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003). Furthermore, I cannot reverse the I.G.’s decision to impose an exclusion based upon equitable considerations such as past positive performance reviews, awards, and good character reference letters. *Donna Rogers*, DAB No. 2381, at 6 (2011).

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<sup>2</sup> Administrative decisions and rulings cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

**V. Conclusion**

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4)(B).

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/s/  
Scott Anderson  
Administrative Law Judge