

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ashley William Forsyth, D.O.
(OI File Number H-13-41298-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-247

Decision No. CR3219

Date: May 6, 2014

DECISION

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Petitioner, Ashley William Forsyth, D.O., from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4), effective November 20, 2013. The I.G. based the exclusion on Petitioner's surrender of his medical license while a formal disciplinary proceeding was pending before the Oregon Medical Board for reasons bearing on Petitioner's professional performance, professional competence, or financial integrity. The I.G. indicated that the exclusion would last until Petitioner regained his medical license in Oregon. For the reasons stated below, I affirm the I.G.'s determination to exclude Petitioner.

I. Background

In an October 31, 2013 letter, 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)(4). I.G. Exhibit (Ex.) 1, at 1. The I.G. excluded Petitioner because his "license to practice medicine or provide health care as an osteopath in the State of Oregon was

revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the Oregon Medical Board for reasons bearing on your professional competence, professional performance, or financial integrity.” I.G. Ex. 1, at 1. The I.G. stated that Petitioner’s exclusion would remain in effect until the I.G. reinstated him and that Petitioner would be eligible for reinstatement only if Petitioner regains his license to practice as an osteopathic physician in Oregon. I.G. Ex. 1, at 1. Petitioner timely filed a request for hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division, and the Director of the Civil Remedies Division administratively assigned this case to me for hearing and decision.

On December 18, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my December 20, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on January 23, 2014, with five exhibits (I.G. Exs. 1-5). Petitioner electronically filed a response (P. Br.) on March 24, 2014, 11 days after the deadline established in my Order. *See* Order ¶ 5.b. However, Petitioner has asserted that he attempted to file his brief electronically earlier and believed he successfully did so. Once Petitioner was made aware that my office had not received his brief, he promptly filed it. The I.G. has not requested that I strike Petitioner’s brief for untimeliness. Therefore, I accept Petitioner’s brief and will consider it as though it was timely filed. Petitioner did not submit any exhibits with his response. The I.G. elected not to file a reply brief.

II. Decision on the Record

Petitioner did not object to any of the I.G.’s proposed exhibits. Therefore, I admit I.G. Exs. 1-5 into the record.

Both the I.G. and Petitioner indicated that they did not have any witnesses to offer and that it was not necessary to hold an in-person hearing. I.G. Br. at 4; P. Br. at 3. Therefore, an in-person hearing is unnecessary and I issue this decision on the basis of the written record.

III. Issue

The sole issue before me is whether Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending before a state licensing authority for reasons bearing on his professional competence, professional performance, or financial integrity. 42 U.S.C. § 1320a-8(b)(4)(B).

I have jurisdiction to decide this issue. 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

IV. Findings of Fact, Conclusions of Law, and Analysis

The I.G. relies on 42 U.S.C. § 1320a-7(b)(4) as the basis for Petitioner’s 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 1128B(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 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.

42 U.S.C. § 1320a-7(b)(4). Therefore, the I.G. must prove the following elements: (1) Petitioner’s license to provide health care has been surrendered, (2) while a formal disciplinary proceeding was pending before a state licensing authority, and (3) the proceeding concerned Petitioner’s professional competence, professional performance, or financial integrity. For the reasons stated below, I find that the I.G. has proven each of these elements.

1. Petitioner surrendered his license to practice as an osteopathic physician in Oregon on January 10, 2013.¹

The Board Chair of the Oregon Medical Board entered a Stipulated Order on January 10, 2013, in which Petitioner agreed to “surrender[] his license to practice medicine while under investigation.” I.G. Ex. 4, at 5. Prior to that time, Petitioner was licensed to practice in Oregon as an osteopathic physician. *See* I.G. Exs. 2, at 1; 4, at 1. The Stipulated Order stated that Petitioner cannot reapply for a license to practice medicine in

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

Oregon for two years. I.G. Ex. 4, at 5. The Stipulated Order also stated that “all open investigations” pertaining to Petitioner would be terminated. I.G. Ex. 4, at 5. Thus, the Stipulated Order demonstrates that Petitioner surrendered his license to practice in Oregon as an osteopathic physician on January 10, 2013, and that he remains unlicensed to practice medicine in Oregon.

2. A formal disciplinary proceeding was pending before the Oregon Medical Board at the time Petitioner surrendered his medical license.

The Oregon Medical Board is the licensing authority for physicians in Oregon. I.G. Ex. 4, at 1. Petitioner does not dispute that he surrendered his license while a formal disciplinary proceeding was pending before the Oregon Medical Board. P. Br. at 2. The Oregon Medical Board issued a “Complaint and Notice of Proposed Disciplinary Action” against Petitioner on September 2, 2011. I.G. Ex. 2, at 2. On May 3, 2012, Petitioner appeared before the Board’s Investigative Committee, and on August 1, 2012, the Board issued an “Amended Complaint and Notice of Proposed Disciplinary Action, in which the Board proposed taking disciplinary action by imposing up to the maximum range of potential sanctions identified in [Oregon Revised Statutes] 677.205(2).” I.G. Ex. 4, at 1, 4. While the Oregon Medical Board referred to “this investigation” in the Stipulated Order and stated that Petitioner surrendered his license while “under investigation,” *see* I.G. Ex. 4, at 4, this “investigation” was formally initiated under state statute by a complaint and later an amended complaint. *See* Or. Rev. Stat. § 677.200. Accordingly, the Oregon Medical Board’s complaint and amended complaint against Petitioner, which included proposed disciplinary sanctions, and Petitioner’s appearance before a committee of the Oregon Medical Board, demonstrate that there was a “formal disciplinary proceeding” pending at the time Petitioner surrendered his medical license.

3. The disciplinary proceeding before the Oregon Medical Board concerned Petitioner’s professional competence and professional performance.

The disciplinary proceeding before the Oregon Medical Board against Petitioner was triggered by an allegation of malpractice against Petitioner and, in the course of that litigation, his admission to using marijuana on a regular basis for his alleged chronic back pain. I.G. Ex. 4, at 2. The conduct involving the malpractice action resulted from Petitioner’s “failure to timely and accurately diagnose” a patient in April 2007 who was exhibiting signs of a stroke and his failure to order the transfer of that patient to a medical facility equipped to handle such a problem. The patient, a 24-year-old female, was later determined to have a vertebral arterial dissection and pontine infarction (stroke in the brain stem). I.G. Ex. 4, at 2.

The family of the patient sued Petitioner for malpractice. During the malpractice case, Petitioner acknowledged that he used marijuana since 2003 and continued through 2007 for chronic pain, usually being “gifted” marijuana from friends. I.G. Ex. 4, at 3. He

advised the Oregon Medical Board that he had a “medical marijuana card in either 2006 or sometime in 2007.” I.G. Ex. 4, at 3. Petitioner also held a medical marijuana card from 2009 to 2010. I.G. Ex. 4, at 3. On July 25, 2011, while employed as an emergency room physician, Petitioner provided a urine sample to the Oregon Medical Board, which tested positive for marijuana even though Petitioner did not have a valid medical marijuana card at the time. In August 2011, Petitioner told the Oregon Medical Board that he “forgot to renew” his medical marijuana card and continued his marijuana use throughout 2011. He admitted to using marijuana on days he was scheduled to work, but always two hours or more prior to his reporting time so that the effects had “worn off.” I.G. Ex. 4, at 3.

On May 3, 2012, Petitioner told the Investigative Committee of the Oregon Medical Board that he was receiving treatment for a degenerative disc disorder and was prescribed Vicodin and Neurontin. Petitioner admitted that he also used marijuana on a daily basis, and would not cease using marijuana even on days he was scheduled to see patients. He told the Committee that he did not intend to stop using marijuana as a way to treat his pain. I.G. Ex. 4, at 5.

The Oregon Medical Board concluded that Petitioner’s conduct with regard to the patient who suffered a stroke constituted “gross or repeated acts of negligence” pursuant to section 677.190(13) of the Oregon Revised Statutes.² I.G. Ex. 4, at 1. It also found that Petitioner violated section 677.190(1)(a) of the Oregon Revised Statutes when he engaged in “unprofessional or dishonorable conduct.” I.G. Ex. 4, at 5. That phrase is defined as:

Conduct unbecoming a person licensed to practice medicine or podiatry, or detrimental to the best interests of the public, and includes:

(a) Any conduct or practice contrary to recognized standards of ethics of the medical or podiatric profession or any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public or any conduct, practice or condition which does or might adversely affect a physician’s ability safely and skillfully to practice medicine or podiatry

Or. Rev. Stat. § 677.188(4)(a). Further, the Oregon Medical Board concluded that Petitioner violated the Federal Controlled Substances Act, a separate ground for suspension or revocation of Petitioner’s medical license. *See* Or. Rev. Stat. § 677.190(a)(23); I.G. Ex. 4, at 5.

² Section 677.190 of the Oregon Revised Statutes states 26 grounds upon which the Oregon Medical Board may “refuse to grant, or may suspend or revoke a license to practice” *See generally* Or. Rev. Stat. § 677.190(1)-(26).

The Oregon Medical Board’s conclusion that Petitioner engaged in “gross or repeated negligence” with regard to his misdiagnosis of a patient reflects that the disciplinary proceeding involved Petitioner’s professional competence. Further, the finding that Petitioner used marijuana on days when he would provide care to patients, and his insistence that he would continue to use marijuana in such circumstances, means that the Oregon Medical Board concluded that he posed a danger to the health or safety of a patient or the public because Petitioner’s action was “unprofessional or dishonorable conduct.” *See* Or. Rev. Stat. § 677.188(4)(a); I.G. Ex. 4, at 5.

4. *The I.G. has a basis to exclude Petitioner under 42 U.S.C. § 1320a-7(b)(4).*

As seen above, Petitioner surrendered his medical license while a formal disciplinary proceeding was pending before the Oregon Medical Board and the proceeding concerned his professional competence and performance. Thus, the elements of 42 U.S.C. § 1320a-7(b)(4) are satisfied, and the I.G. has a basis to exclude Petitioner.

Petitioner appears to urge me to review the I.G.’s discretionary decision to exclude Petitioner claiming that the Oregon Medical Board’s zero-tolerance approach to medical marijuana does not reflect current science and research about the issue. *See* P. Br. at 3. Petitioner also filed articles with his RFH about medical marijuana to support his argument. But Petitioner’s arguments and evidence are not relevant because I have no authority to review the I.G.’s decision to impose a permissive exclusion under 42 U.S.C. § 1320a-7(b)(4).³ *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).⁴

Furthermore, even though Petitioner expects to obtain a medical license in a state other than Oregon, I cannot reverse the exclusion on this basis because “the period of the 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 or

³ If I had such authority, I would agree with the I.G.’s decision to impose exclusion. The Oregon Medical Board took necessary and appropriate action to protect the public from a physician who is regularly using marijuana, an addictive drug that is illegal under federal law. *See generally* U.S. Dep’t of Justice, Drug Enforcement Admin., *The Dangers and Consequences of Marijuana Abuse* (Jan. 2014), *available at* <http://www.justice.gov/dea/docs/dangers-consequences-marijuana-abuse.pdf>.

⁴ Administrative decisions and rulings cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

the entity is excluded or suspended from a Federal or State health care program.”
42 U.S.C. § 1320a-8(c)(3)(E).

Finally, Petitioner indicates that he is an excellent and knowledgeable physician who should be allowed to provide services to Medicare beneficiaries. However, I cannot reverse the I.G.’s decision to impose an exclusion based upon equitable considerations. *See Donna Rogers*, DAB No. 2381, at 6 (2011).

V. Conclusion

For the reasons explained above, I affirm the I.G.’s determination to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(b)(4).

/s/

Scott Anderson
Administrative Law Judge