

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert Treuherz, M.D.
(O.I. File No. H-14-42070-9),

Petitioner

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-15-2281

Decision No. CR4606

Date: May 11, 2016

DECISION

Petitioner, Robert Treuherz, M.D., 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 January 20, 2015. Petitioner is excluded because he voluntarily relinquished or surrendered his license to practice medicine pursuant to an agreement with the Florida Board of Medicine while a formal disciplinary proceeding bearing on his professional competence, professional performance, or financial integrity was pending before that board. There is a proper basis for the exclusion. The Act requires Petitioner's exclusion for not less than the period during which his state license is suspended.¹ Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ 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.) sent Petitioner a letter dated December 31, 2014, that notified Petitioner he was being excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(b)(4) of the Act and 42 C.F.R. § 1001.501.² The letter further advised Petitioner that the exclusion would remain in effect until he regains his license to practice medicine in Florida and is reinstated by the I.G. I.G. Exhibit (Ex.) 4.

Petitioner requested a hearing pursuant to 42 C.F.R. §§ 1001.2007 and 1005.2, by letter dated April 28, 2015. The case was assigned to me for hearing and decision on May 20, 2015. On June 2, 2015, I convened a telephonic prehearing conference, the substance of which is memorialized in my Order dated June 3, 2015. During the conference, the I.G. requested to file a motion to dismiss before further case development on grounds that Petitioner's request for hearing was untimely and there is no jurisdiction for administrative law judge (ALJ) review. Given the question of jurisdiction, the I.G.'s request was granted and a schedule for filing and briefing the motion to dismiss was set.

The I.G. filed his motion to dismiss on June 15, 2015, with I.G. Exs. 1 through 6. On July 1, 2015, Petitioner filed his brief in opposition to the motion to dismiss. On July 6, 2015, I ordered supplemental briefing on the motion to dismiss, which the parties filed on July 15 and 16, 2015. On September 18, 2015, I denied the I.G.'s motion to dismiss. I concluded that Petitioner made a reasonable showing that he did not receive the December 31, 2014 I.G. notice of exclusion within five days of the date of the notice; that he did not receive the notice until April 7, 2015; and that his request for hearing was timely filed less than 60 days after his receipt of the notice of exclusion. In my September 18, 2015 Order, I also addressed the additional issue raised by the parties in their briefing on the motion to dismiss related to whether or not Petitioner was deprived of procedural due process because he did not receive the I.G.'s notice of intent to exclude dated August 27, 2014. I.G. Ex. 1. The I.G. was required by 42 C.F.R. § 1001.2001 to notify Petitioner that the I.G. proposed to exclude him and permit 30 days for Petitioner to submit documentary evidence and written argument for the I.G. to consider before imposing the permissive exclusion pursuant to section 1128(b)(4) and 42 C.F.R. § 1001.501. Because Petitioner did not receive the notice of intent to exclude as required by 42 C.F.R. § 1001.2001, he was deprived of the right to submit evidence and argument for the I.G. to consider before imposing the permissive exclusion. Only the I.G. or Secretary of the Department of Health and Human Services may exercise the permissive

² Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

exclusion authority under section 1128(b) of the Act. Rather than remand the case to the I.G. to permit Petitioner to file evidence and argument, I permitted Petitioner 30 days to file any documentary evidence and argument Petitioner wanted the I.G. to consider on the issue of whether or not a permissive exclusion should be imposed. I further ordered that the I.G. file a status report within 60 days advising me whether the I.G. requested remand to permit action by the I.G. related to the permissive exclusion or whether the I.G. concluded that there was no change in his decision to impose the permissive exclusion. Ruling Denying Motion to Dismiss and Order Permitting Submissions of Evidence and Argument for Review by the Inspector General (Ruling Denying Motion to Dismiss), dated September 18, 2015. On October 17, 2015, Petitioner filed his submission for consideration by the Secretary. On November 9, 2015, the I.G. filed his status report advising me that there was no change in the decision to impose a permissive exclusion.

On November 24, 2015, a prehearing conference was convened by telephone. The parties participated through counsel. Petitioner declined to waive an oral hearing. The I.G. requested to file a motion for summary judgment and a schedule for filing briefs and documentary evidence was set. Prehearing Conference Order and Schedule for Filing Briefs, dated November 30, 2015.

The I.G. filed a motion for summary judgment on January 5, 2016, with a brief (I.G. Brief). Petitioner filed his brief in opposition (P. Brief) on February 22, 2016, and P. Exhibits (Exs.) 1 through 3 on March 15, 2016. The I.G. filed a reply (I.G. Reply) on February 29, 2016. No objection has been made to my consideration of I.G. Exs. 1 through 6 or P. Exs. 1 through 3, and they are admitted as evidence.

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 a hearing by an 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). Pursuant to section 1128(b)(4)(B) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual who surrenders his or her license while a formal disciplinary action is pending before the licensing authority related to the individual's professional competence, professional performance, or financial integrity. 42 C.F.R. § 1001.501(a)(2). The I.G. notices do not specifically state which subsection was applied in this case but alleged both. I conclude that any error in not specifying the subsection is not prejudicial as Petitioner was clearly on notice of the factual and legal basis for exclusion.

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating 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.**

The I.G. originally disputed the timeliness of Petitioner's request for hearing, but I ruled that Petitioner's hearing request was timely on September 18, 2015. Ruling Denying Motion to Dismiss at 5.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for hearing. 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 genuine disputes 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., CMHC*, DAB CR700 (2000); *New Millennium CMHC, Inc.*, DAB CR672 (2000).

Summary judgment is appropriate in this case. There is no dispute that Petitioner voluntarily surrendered his Florida license to practice medicine and agreed to never again apply for licensure as a physician in Florida. Pursuant to the Final Order of the Florida Board of Medicine dated August 6, 2014, the voluntary relinquishment was a disciplinary action. The voluntary relinquishment occurred while a formal disciplinary action was pending before the Florida Board. I.G. Ex. 5. Petitioner concedes that he voluntarily surrendered his Florida medical license; he surrendered his license while a formal disciplinary action was pending before the Florida Board; the loss of his Florida license is permanent; and there is a basis for permissive exclusion pursuant to section 1128(b) of the Act. P. Br. at 1-3. Petitioner does not dispute that the Florida Board disciplinary proceedings were related to Petitioner's professional competence, professional performance, or financial integrity. Petitioner has identified no genuine dispute as to any material fact that would require a hearing or prevent summary judgment. Whether the I.G. has authority to exclude Petitioner pursuant to 1128(b)(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. 4. 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, or

(B) who surrendered such 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.

Act § 1128(b)(4)(A) - (B). The statute permits the Secretary to exclude from participation any individual: (1) whose 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 an individual's professional competence, professional performance, or financial integrity. The statute also permits exclusion when an individual: (1) surrenders a license while a formal disciplinary proceeding is pending; and (2) the proceeding concerns the individual's or entity's professional competence, professional performance, financial integrity.

Petitioner held a license to practice medicine as a physician in Florida. In January and April 2013 and March 2014, administrative complaints were filed with the Florida Board of Medicine related to Petitioner's practices for prescribing medications. I.G. Ex. 6. Petitioner states that in August 2014, on advice of counsel, he elected not to defend the license action in Florida. Petitioner states that, although he thought the action unwarranted, he never intended to practice medicine in Florida again because he moved to California. Petitioner further states that he was unaware that the voluntary surrender of his license could result in permissive exclusion from participating in Medicare forever. P. Br. at 1-3.

Petitioner agrees that he surrendered his license to practice medicine while a disciplinary action was pending before the Florida Board of Medicine and that he agreed never to reapply for a Florida license. He does not dispute that the disciplinary proceeding was related to his professional competence and professional performance. P. Br. at 1-3. Accordingly, I conclude that the elements necessary for a permissive exclusion pursuant to section 1128(b)(4)(B) of the act are satisfied, and there is a basis for Petitioner's permissive exclusion pursuant to that provision. The exclusion is effective 20 days from the date of the I.G.'s December 31, 2014 notice of exclusion, that is, January 20, 2015. 42 C.F.R. § 1001.2002(b).

4. The period of exclusion is reasonable as a matter of law.

Petitioner argues that the length of his lifetime exclusion is not reasonable. Petitioner also argues that summary judgment is not appropriate because there remains an issue of whether the Secretary has abused her discretion in excluding Petitioner for life. P. Br. at 3. These issues must be resolved against Petitioner as a matter of law.

I have found a basis for permissive exclusion. I have no authority to review whether the I.G. properly exercised his discretion to permissively exclude Petitioner. 42 C.F.R. § 1005.4(c)(5).

The length of the period of exclusion is established by section 1128(c)(3)(E) of the Act and 42 C.F.R. § 1001.501(b). The length of a permissive exclusion pursuant to section 1128(b)(4) of the Act and 42 C.F.R. § 1001.501(b), is no less than the period the individual's state license is revoked, suspended or otherwise not in effect. Because the length of exclusion is dictated by the Act and the Secretary's regulation, the period of exclusion is not subject to my review or action. I am bound to follow the federal statutes and the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1).

The Florida Board of Medicine Final Order, dated August 6, 2014, accepting Petitioner's voluntary surrender of his state license and treating it as discipline upon Petitioner's license, is not subject to collateral attack in this proceeding or subject to my review. 42 C.F.R. § 1001.2007(d).

Finally, I have no authority to fashion or grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective January 20, 2015, for the period specified by the regulations.

/s/
Keith W. Sickendick
Administrative Law Judge