Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Marvin L. Gibbs, Jr., M.D.,	)	Date: July 1, 2009
Petitioner,	)	
- v. -	)	Docket No. C-09-169
	)	Decision No. CR1969
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* Marvin L. Gibbs, Jr., M.D. 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) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4). The predicate for the I.G.'s action is the revocation of Petitioner's license to practice medicine in Arizona. 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 medicine in Arizona 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 *pro se* Marvin L. Gibbs, Jr., M.D., was licensed to practice medicine in the State of Arizona in 1980. *See* P. Ex. 12, at 19; *but see* P. Ex. 12, at 2. In August 2004, Petitioner opened a clinic named Universal Health and Wellness, where he treated patients with male sexual dysfunction.

On August 8, 2007, a formal disciplinary proceeding against Petitioner took place before the Arizona Medical Board (Medical Board). The disciplinary proceeding concerned Petitioner's professional competence and professional performance. Petitioner had been under investigation for failing to treat a patient's erectile dysfunction appropriately, as well as for dispensing prescribed injectable medications to a patient through a clinic employee, without having a dispensing certificate.

On August 9, 2007, following the disciplinary proceeding, the Medical Board entered an Order revoking Petitioner's license to practice medicine in Arizona. I.G. Ex. 3, at 6. The Medical Board made the following Conclusions of Law: (1) Petitioner violated ARIZ. REV. STAT. § 32-1401(27)(a), specifically ARIZ. REV. STAT. § 32-3202(A), by practicing medicine while his license was suspended; (2) Petitioner violated the provisions of ARIZ. REV. STAT. § 32-1401(27)(r) ("[v]iolating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter."); and (3) the evidence of record "supported the Board's summary suspension of Petitioner's medical license on April 19, 2007, to protect the public health, safety or welfare. ARIZ. REV. STAT. § 32-1451(D)."[1] I.G. Ex. 3, at 5.

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[1] ARIZ. REV. STAT. §§ 32-1401(27)(a) and (r) states:

> 27. "Unprofessional conduct" includes the following, whether occurring in this state or elsewhere:
>
> (a) Violating any federal or state laws, rules or regulations applicable to the practice of medicine.
>
> * * *
>
> (r) Violating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter.

ARIZ. REV. STAT. § 32-3202 states:

> The certificate or license of a health professional who does not renew the certificate or license as prescribed by statute and who has been advised in writing that an investigation is pending at the time the certificate or license is due to expire or terminate does not expire or terminate until the investigation is resolved. The license is suspended on the date it would otherwise expire or terminate and the health professional shall not practice in this state until the investigation is resolved. The certificate is suspended on the date it would otherwise expire or terminate and the health professional shall not practice as a certified health professional in this state until the investigation is resolved.

(…continued)

As part of the August 9, 2007 Order, the Medical Board made Findings of Fact that described prior disciplinary actions taken by the Medical Board against Petitioner's license in 2006 and April 2007, following investigations relating to his professional competence and professional performance. The Medical Board stated that, on August 25, 2006, it had issued an Order summarily suspending Petitioner's license, pending a formal state administrative hearing before a state administrative law judge.[2] The Medical Board noted that a formal hearing was conducted, and in February 2007 the Medical Board adopted the administrative law judge's recommended Order, "'lifted Petitioner's suspension for "time served,'" and placed Petitioner on probation for one year to monitor his medical records keeping. I.G. Ex. 3, at 2.

The Medical Board noted that Petitioner continued to operate his clinic after his license was summarily suspended in August 2006, and that he had hired other physicians to work at the clinic. I.G. Ex. 3, at 3-4. The Medical Board stated that on April 19, 2007, it considered another summary action against Petitioner in a different case, and entered an Order suspending his medical license. I.G. Ex. 3, at 2.

On November 28, 2008, 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 should regain his license to practice medicine in the State of Arizona, based on the authority set out in section 1128(b)(4) of the Act. Petitioner perfected his appeal of the I.G.'s action by his *pro se* letter of December 3, 2008.

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[1](continued…)

> (I note that, although the Medical Board's Order referenced ARIZ. REV. STAT. § 32-3202(A), the section, as it appears on Westlaw, did not have a subsection (A).)

ARIZ. REV. STAT. § 32-1451(D) states:

> D. If the board finds, based on the information it receives under subsections A and B of this section, that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, the board may restrict a license or order a summary suspension of a license pending proceedings for revocation or other action. If the board takes action pursuant to this subsection it shall also serve the licensee with a written notice that states the charges and that the licensee is entitled to a formal hearing before the board or an administrative law judge within sixty days.

[2] In 2006, the Medical Board investigated a complaint against Petitioner that Petitioner had failed to treat appropriately a patient's erectile dysfunction.

I held the prehearing conference required by 42 C.F.R. § 1005.6(a) on January 22, 2009. The Order of that date summarized the discussions held in the conference and 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 May 4, 2009.

The evidentiary record on which I decide this case contains 19 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.'s Exhibits 1-6 (I.G. Exs. 1-6). In Petitioner's Response Brief (P. Response Br.), Petitioner objects to the admission of I.G. Exs. 4-6, on the grounds that the I.G. was "disingenuous" in including exhibits related to prior Medical Board actions taken against him. P. Response Br. at 8-11. I.G. Ex. 4 is titled "Findings of Fact, Conclusions of Law and Order (Decree of Censure, Probation & Civil Penalty)," and was entered by the Medical Board against Petitioner on May 14, 2003. I.G. Ex. 5 is titled "Findings of Fact, Conclusions of Law and Order (Letter of Reprimand)" and was entered by the Medical Board against Petitioner on December 12, 2005. I.G. Ex. 6 is titled "Interim Findings of Fact, Conclusions of Law and Order for Summary Suspension of License," and was entered by the Medical Board against Petitioner on August 25, 2006. The I.G. responded to Petitioner's objections (I.G. Reply), and asserted that the Medical Board's revocation Order specifically mentioned the document submitted as I.G. Ex. 6, and that I.G. Exs. 4 and 5 demonstrate Petitioner's knowledge of the Medical Board's procedures and standards of professional conduct and performance. The I.G. contends that these exhibits provide a more complete record for my review in this exclusion proceeding, and that the previous Medical Board actions against Petitioner, while not a basis for the I.G.'s exclusion determination in this case, provide valuable insight as to Petitioner's overall trustworthiness as a provider. I.G. Reply at 8.

Because the Medical Board's revocation Order of August 9, 2007, does mention the suspension of Petitioner's medical license that occurred on or about August 25, 2006, the fuller context of which is set forth in I.G. Ex. 6, I find I.G. Ex. 6 to be relevant and material in this case. I further find that its admission will not prejudice Petitioner's legal arguments here, or result in confusion or delay in my resolution of the legal issues before me. *See* 42 C.F.R. §§ 1005.17(c) and (d). Therefore, I admit I.G. Ex. 6 into the record on which I decide this case. But in so doing, I emphasize that its admission and my consideration of it is limited to its importance in clarifying, completing, and elucidating the Medical Board's Order of August 9, 2007. That Order is the predicate for the I.G.'s proposed exclusion in this case, and given Petitioner's defense in these proceedings, it requires examination *in toto*. I have not considered I.G. Ex. 6 for any other reason, and specifically have not considered it as an independent source of support for the I.G.'s proposed exclusion. *See* 42 C.F.R. § 1005.17(g).

With respect to I.G. Exs. 4 and 5, the I.G. correctly acknowledges that the prior Medical Board actions against Petitioner encompassed in those exhibits are not before me. I will, however, accept the I.G.'s proffer of these exhibits for the limited purposes stated here. I find that I.G. Exs. 4 and 5 are reliable, given their source, and are relevant to Petitioner's state of mind: *inter alia*, they show a pattern of conduct and an absence of mistake on his part, and very strongly suggest a common and repeated scheme or design. *See* 42 C.F.R § 1005.17(g). I further find that admission into evidence of I.G. Exs. 4 and 5 is not prejudicial to Petitioner's case and will not result in confusion or delay. Therefore, I admit I.G. Exs. 4 and 5. As with I.G. Ex. 6, I have not considered I.G. Exs. 4 and 5 as independent sources of support for the I.G.'s proposed exclusion.

Petitioner has proffered Petitioner's Exhibits 1-12 (P. Exs. 1-12). Subsequently, Petitioner, under separate cover, proffered P. Ex. 13, stating that he had inadvertently excluded it from his Brief. I admit P. Exs. 1-13 in the absence of objection from the I.G.

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) of the Act; and

2. Whether the length of the exclusion is unreasonable.

The I.G.'s position on both issues is correct. Section 1128(b)(4) of the Act supports Petitioner's exclusion from all federal health care programs, for his license to practice medicine in the State of Arizona has been revoked for reasons bearing on his professional competence and professional performance. Petitioner's exclusion during the period that his license to practice medicine in Arizona remains revoked is the minimum period established by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a7(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).

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals in this forum:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by (a) Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment, or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

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.

IV. Findings and Conclusions

I find and conclude as follows:

1. On August 8, 2007, a disciplinary proceeding against Petitioner took place before the Arizona Medical Board. I.G. Ex. 3.

2. The disciplinary proceeding described above in Finding 1 concerned Petitioner's professional competence and professional performance. I.G. Ex. 3.

3. On August 9, 2007, following the disciplinary proceeding described above in Findings 1 and 2, the Arizona Medical Board made the following Conclusions of Law: (1) Petitioner violated ARIZ. REV. STAT. § 32-1401(27)(a), specifically ARIZ. REV. STAT. § 32-3202(A), by practicing medicine while his license was suspended; (2) Petitioner violated the provisions of ARIZ. REV. STAT. § 32-1401(27)(r) ("[v]iolating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter."); and (3) the evidence of record "supported the Board's summary suspension of Petitioner's medical license on April 19, 2007, to protect the public health, safety or welfare. ARIZ. REV. STAT. § 32-1451(D)." I.G. Ex. 3, at 5.

4. On August 9, 2007, the Arizona Medical Board entered an Order revoking Petitioner's license to practice medicine in Arizona, for reasons bearing on his professional competence and professional performance. I.G. Ex. 3, at 5-6.

5. On November 28, 2008, 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 should regain his license to practice medicine in the State of Arizona, based on the authority set out in section 1128(b)(4) of the Act.

6. On December 3, 2008, Petitioner perfected this appeal from the I.G.'s action by filing a *pro se* letter challenging the I.G.'s action.

7. Because Petitioner's license to practice medicine in Arizona was revoked for reasons bearing on his professional competence and professional performance, as set out in Findings 1-4 above, a basis exists for the I.G.'s exercise of his 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 to practice medicine in Arizona 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

Two essential elements must be proven in order 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); *Mark C. Sorensen, M.D.*, DAB CR1664 (2007); *Thomas I. DeVol, Ph.D.*, DAB CR1652 (2007); *Sherry J. Cross*, DAB CR1575 (2007); *Michele R. Rodney*, DAB CR1332 (2005); *Edmund B. Eisnaugle, D.O.*, DAB CR1010 (2003); *Marcos U. Ramos, M.D.*, DAB CR788 (2001); *Allison Purtell, M.D.*, DAB CR781 (2001).

The I.G.'s evidence establishes both essential elements conclusively. Petitioner's license to practice medicine was revoked by the Medical Board on August 9, 2007. In finding that Petitioner violated ARIZ. REV. STAT. § 32-1401(27)(a), specifically ARIZ. REV. STAT. § 32-3202(A), the Medical Board concluded that Petitioner engaged in unprofessional conduct by practicing medicine while his license was suspended. The Medical Board concluded further that Petitioner violated the provisions of ARIZ. REV. STAT. § 32-1401(27)(r) ("[v]iolating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this

chapter.") I.G. Ex. 3, at 5. These findings by the Medical Board clearly show that the revocation of Petitioner's license was for reasons bearing on his professional competence and professional performance. Indeed, the Medical Board rather pointedly wrote that "[t]he evidence of record supports the Board's summary suspension of [Petitioner's] medical license on April 19, 2007 to protect the public health, safety or welfare." I.G. Ex. 3, at 5. That the Medical Board expressed concern that the public be protected from Petitioner conclusively demonstrates that its revocation of Petitioner's medical license related to his professional competence and professional performance.

Petitioner does not deny that his license was revoked by the Medical Board. P. Br. at 1. Petitioner contends, however, that his license was not revoked for reasons bearing on his professional performance, professional competence, or financial integrity. In his briefing, he attempts to explain further the circumstances underlying the Medical Board's action and disputes the specific findings of the Medical Board. All of Petitioner's arguments amount to collateral attacks on the Medical Board's action, and the settled rule is that such collateral attacks on the soundness or the validity of a state action are impermissible in this forum. *Judy Pederson Rogers and William Ernest Rogers*, DAB No. 2009 (2006); *Hassan M. Ibrahim, M.D.*, DAB No. 1613 (1997); *George Iturralde*, M.D., DAB No. 1374 (1992); *Olufemi Okonuren*, M.D., DAB No. 1319 (1992); *see also Mark C. Sorensen, M.D.*, DAB CR1664. Those cases are supported by the controlling regulation, 42 C.F.R. § 1001.2007(d).

Interestingly enough, Petitioner concedes that certain findings of the Medical Board, specifically Findings of Fact 19, 28, and 29 set forth in its August 9, 2007 Order, may demonstrate that he engaged in "professional misconduct." P. Response Br. at 2. Nevertheless, Petitioner contends that even if his behavior constituted "professional misconduct," he did not violate "the federal statute pertaining to professional performance, professional competence or financial integrity." *Id*.

In furtherance of his argument, Petitioner relies on *Jerold Morgan, D.O.*, DAB CR768 (2001). In *Morgan*, the I.G. had excluded the petitioner under section 1128(b)(4) of the Act based on the revocation of his Arizona license by the Arizona Board of Osteopathic Examiners in Medicine and Surgery following his felony conviction for attempted aggravated assault. The ALJ in *Morgan* reversed the I.G.'s exclusion determination on the grounds that the circumstances surrounding the petitioner's conviction did not relate to his professional competence or performance, and, therefore, his license revocation was for reasons that had no bearing on his professional competence, professional performance, or financial integrity.

Although Petitioner acknowledges that the facts of his case and those of *Morgan* are "completely different," he nevertheless suggests that the circumstances surrounding the revocation of his license warrant the same treatment as that given to the petitioner in *Morgan* – that is, that I should find that his unprofessional conduct, as determined as a

matter of fact by the Medical Board, has no relationship whatsoever to his professional conduct as a physician, including his professional competence or performance, and that therefore, the I.G. has no basis to exclude him under section 1128(b)(4) of the Act.

The answer to Petitioner's argument is not difficult to find: it appears *verbatim* in the Medical Board's Findings of Fact 19, 28, and 29 as set forth in its August 9, 2007 Order. Those Findings of Fact declare:

> 19. Dr. Berke candidly testified he was dispensing medications to patients while working at [Petitioner's] clinic. [Petitioner] had knowledge that such dispensing was occurring.[3]
>
> * * *
>
> 28. [Petitioner] dispensed prescribed injectable medications to J.E. through his employee in March 2007 without having a dispensing certificate.
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> 29. On or about April 12, 2007 [Petitioner] appeared with patient J.E. at the emergency department of St. Luke's hospital in Tempe, Arizona. J.E. presented with priaprism that had lasted at least 48 hours. The emergency department staff was under the impression that [Petitioner] was an actively licensed physician based upon their interactions with him. J.E. had surgery to resolve his condition.

For Petitioner to admit that the behavior described above may have constituted professional misconduct, and then argue that such misconduct has no relationship to his professional performance or professional competence, is disingenuous at best, and disturbing at worst. The Medical Board's Findings of Fact explicitly concern Petitioner's professional performance or professional competence. Moreover, by citing ARIZ. REV. STAT. § 32-1401(27)(a), the Medical Board plainly articulated the crucial point that Petitioner engaged in unprofessional conduct, specifically, *by practicing medicine while his license was suspended.* In *Morgan*, the petitioner's conviction for attempted aggravated assault was found to be unrelated to his performance as a physician. Here, unlike the petitioner in *Morgan*, the circumstances surrounding the revocation of Petitioner's medical license have everything to do with Petitioner's practice as a

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[3] According to the Medical Board's findings, Dr. Berke worked for Petitioner from September 6, 2006 to October 3, 2006. Dr. Berke did not have a dispensing certificate. I.G. Ex. 3, at 3.

physician. In acting to stop Petitioner's practice of medicine, the Medical Board explicitly sought to "protect the public health, safety or welfare." I.G. Ex. 3, at 5. The rationale of *Morgan* has absolutely no applicability to Petitioner's case.

Petitioner, citing *Morgan*, asserts further that, in drafting the regulations implementing section 1128(b)(4) of the Act, the Secretary rejected a *per se* rule, noting that Congress vested the Secretary with the discretion and the responsibility to determine whether or not it would be appropriate to exclude an individual. P. Response at 2. Petitioner also asserts that the Secretary declined to list factors to be considered in determining whether to impose an exclusion under section 1128(b)(4), noting that the factors would vary depending on the facts of a case. *Id*.

By the issuance of the notice-of-exclusion letter (I.G. Ex. 1) in this case, the I.G. has exercised his discretionary authority. *Michael J. Rosen, M.D.*, DAB No. 2096. By its Order of August 9, 2007, the Medical Board unquestionably revoked Petitioner's medical license for reasons bearing on his professional competence or professional performance. That is all that the I.G. needs as a predicate for the exercise of his discretion to exclude Petitioner under section 1128(b)(4) of the Act. And once the I.G. has proven that there is that nexus of fact and law by which Petitioner became subject to exclusion, an ALJ is without jurisdiction to evaluate on any basis whatsoever the propriety of the I.G.'s exercise of discretion in deciding to proceed with imposition of the exclusion. *Michael J. Rosen, M.D.*, DAB No. 2096; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Wayne E. Imber, M.D.*, DAB CR661 (2000), *aff'd*, DAB No. 1740 (2000); *see also* 42 C.F.R. § 1005.4(c)(5).

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, if 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; *Mark C. Sorensen, M.D.*, DAB CR1664; *Thomas I. DeVol, Ph.D.*, DAB CR1652; *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 the I.G. proposes in this case, and it is reasonable as a matter of law.

Resolution of a case by summary disposition 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 authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to

FED. R. CIV. P. 56 for guidance in applying that regulation. *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.

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 Marvin L. Gibbs, Jr., M.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 medicine in Arizona remains revoked.

/s/
Richard J. Smith
Administrative Law Judge