

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Steven Barry Greenman,
(OI File Number: H-11-42412-9),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-1077

Decision No. CR2699

Date: January 29, 2013

DECISION

Petitioner, Steven Barry Greenman, was a physician, licensed in the State of Wisconsin, whose medical license was suspended. Pursuant to section 1128(b)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded him from participation in Medicare, Medicaid, and all federal health care programs until he regains his license. Petitioner now appeals the exclusion.

For the reasons set forth below, I find that the Wisconsin licensing authority revoked Petitioner's medical license for reasons bearing on his professional competence and performance, so the I.G. has appropriately excluded him from program participation.

Background

In a letter dated April 30, 2012, the I.G. advised Petitioner Greenman that he was excluded from participation in Medicare, Medicaid, and all federal health care programs because his licenses to practice medicine or provide health care as a medical doctor in the State of Wisconsin was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding, bearing on his professional competence, professional

performance, or financial integrity, was pending before the Wisconsin Department of Regulation and Licensing. The letter explained that section 1128(b)(4) authorizes the exclusion. I.G. Ex. 3. Petitioner Greenman requested review.

The I.G. submitted its brief (I.G. Br.) and four exhibits (I.G. Exs. 1-4). In the absence of any objection, I admit into evidence I.G. Exs. 1-4.

Describing Petitioner's somewhat scattered submissions is, unfortunately, far more complicated. Pursuant to my scheduling order, his submissions were due October 18, 2012. Based on his claim that he did not receive the I.G. submissions until October 10, 2012, I extended that deadline to November 13. *See* October 15, 2012 email from Sapper to Greenman. In November, Petitioner submitted his brief (P. Br.), two additional documents titled "Answer to 1B" and "Prosecutorial Misconduct by Wisconsin Medical Examining Board Dept. of Regulation and Licensing," along with 26 exhibits (P. Exs. 1-26). In the absence of any objection, I admit into evidence P. Exs. 1-26.

Attached to his brief is a note requesting 14-21 more days in which to submit his "final statements." I gave him until December 11 to complete his submissions. Thereafter, however, Petitioner Greenman called this office, to say that he wanted a full three-week extension. *See* November 27, 2012 email from Sapper to Greenman. Then, on December 14, he asked leave to supplement his exchange and submitted an additional 16 hand-written, un-numbered pages of argument (P. 12/14 Supp.). Among those pages, he asked for an additional week in which to provide "better, more cogent oral arguments as well as enter other exhibits which are not patient records." P. 12/14 Supp. at 6.

With his December 14 supplemental exchange, Petitioner submitted several CDs, which he identified as P. Exs. 31-36.¹ According to Petitioner, these exhibits contain patient medical records that the state licensing board relied on when it suspended his license. By letter dated December 19, 2012, we advised Petitioner that we would treat those confidential medical records as sealed documents and would not include them in our electronic filing system. We have, however, retained them as part of a paper file. For the reasons that I discuss below, I decline to admit P. Exs. 31-36, because they are irrelevant. 42 C.F.R. § 1005.17(c).

On December 26, Petitioner submitted twelve additional pages of argument (P. 12/26 Supp.), a two-page document titled "Principles of Medical Ethics," labeled P. Ex. 37, and a nine-page document labeled P. Ex. 38. In the absence of any objection, I admit into evidence P. Ex. 37. P. Ex. 38 consists of a hand-written cover sheet (P. Ex. 38 at 1) with an 8-page patient record attached. The cover sheet describes the exhibit as a transcription he dictated and presented to the state licensing board. Again, because the document is a confidential medical record, we treated it as sealed and did not include it in the electronic

¹ Petitioner filed no documents labeled P. Exs. 27-30.

file, although we have retained it as part of the paper file. For reasons discussed below, I decline to admit P. Ex. 38 into evidence, because it is irrelevant.

Finally, Petitioner filed a written request for another extension of time (until February 19, 2013) in which to supplement his exchange. On January 7, 2013, I denied his request for additional time, and closed the record.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to “describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses’ proposed testimony.” I specifically directed the parties to explain why the testimony would be relevant.² The I.G. indicates that an in-person hearing is not necessary. I.G. Br. at 5.

Petitioner, on the other hand, contends that an in-person hearing is necessary and refers to a “witness list.” P. Br. at 3. However, he submitted no such list. He did not describe any proposed testimony or suggest any other reason for conducting a hearing. I therefore decline to schedule a hearing that would serve no purpose.

Discussion

- 1. Because Wisconsin’s medical examining board revoked Petitioner Greenman’s medical license for reasons bearing on his professional competence or performance, the I.G. may appropriately exclude him from participation in Medicare, Medicaid, and other federally funded health care programs.***³

The Act authorizes the Secretary of Health and Human Services to exclude from program participation an individual whose license to provide health care “has been revoked or suspended by any State licensing authority” for reasons bearing on the individual’s “professional competence, professional performance, or financial integrity.” Act § 1128(b)(4)(A); *see also* 42 C.F.R. § 1001.501.

² These instructions are included in the “short form brief,” which I directed the parties to complete and submit. Order and Schedule for Filing Briefs and Documentary Evidence (August 14, 2012). Although a copy was attached to my August 14, 2012 scheduling order and mailed to Petitioner Greenman, and he subsequently completed and filed it, CRD staff failed to enter the attachment to the scheduling order into the electronic file.

³ My findings of fact/conclusion of law are set forth, in italics and bold, in the discussion captions of this opinion.

Here, the undisputed evidence establishes that, on March 16, 2011, the Wisconsin Medical Examining Board suspended Petitioner Greenman's license to practice medicine pending a final decision and order in disciplinary proceedings against him. I.G. Ex. 1 at 12-13. Following a hearing before a state administrative law judge (ALJ), the State of Wisconsin revoked his license to practice medicine on September 7, 2011. I.G. Ex. 2. In a lengthy opinion, the state ALJ detailed the uncontroverted facts regarding Petitioner Greenman's patient care. Based on these facts, the judge concluded that Petitioner Greenman had "engaged in practice or conduct which tended to constitute a danger to the health, welfare, or safety of patients or the public in his treatment of patients," in violation of Wisconsin law; and that he failed to maintain patient records in accordance with the requirements of Wisconsin law. I.G. Ex. 2 at 33. Based on these findings, the ALJ ordered his license revoked. I.G. Ex. 2 at 37.

Petitioner concedes that his professional competence was "found lacking by the Wisconsin Medical Examining Board," but argues that the Board applied standards that are "arbitrary and unfair." Answer to 1B at 1. He attacks the state agency's tactics and defends the practices the state cited as evidence of the danger he poses to patient safety. *See generally* "Prosecutorial Misconduct"; P. Exs. 13, 16-22; P. 12/14 Supp. at 1-2; P. 12/26 Supp. at 8. But Petitioner may not use this forum to challenge the state proceedings. The regulations explicitly preclude any such collateral attack:

When the exclusion is based on . . . 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 . . . determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). *See Donna Rogers*, DAB No. 2381 at 4-5 (2011). For this reason, the proffered medical records, P. Exs. 31-36 and 38, are irrelevant.

Petitioner also discusses the hardships brought on by his exclusion. As the Departmental Appeals Board observed in *Donna Rogers*, such arguments are not relevant. My authority is constrained by the regulations, and I may not review the I.G.'s decision to impose an exclusion under section 1128(b)(4) on the ground that the excluded person is suffering from the loss of his vocation. DAB No. 2381 at 6.

Petitioner raises some Constitutional challenges that I have no authority to review. DAB No. 2381 at 5; *see* 42 C.F.R. § 1005.4(c)(1).

2. The period of Petitioner's exclusion may not be less than the period during which his medical license is revoked.

Petitioner challenges the length of his exclusion, contending that he is not likely to regain his medical license, so he has been effectively excluded for life. The statute, however, absolutely requires that Petitioner Greenman's period of exclusion "shall not be less than the period during which [his] . . . license. . . is . . . revoked." Act § 1128(c)(3)(E); *see also* 42 C.F.R. § 1001.501(b)(1).

Conclusion

For the above reasons, I conclude that the I.G. properly excluded Petitioner Greenman from participation in Medicare, Medicaid, and all other federal health care programs for so long as his medical license is revoked.

/s/ _____
Carolyn Cozad Hughes
Administrative Law Judge