

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Briana L. Boyd, M.D.,
(OI File No. H-14-43010-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3593

Decision No. CR4583

Date: April 12, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Briana L. Boyd, M.D. (Dr. Boyd or Petitioner) from participation in Medicare, Medicaid, and all other federal health care programs because the Kentucky Board of Medical Licensure (Licensure Board) revoked Dr. Boyd's medical license. The IG stated that the exclusion would last until Dr. Boyd regains her Kentucky medical license and the IG reinstates her. Dr. Boyd requested a hearing before an Administrative Law Judge to dispute the exclusion.

Because the Licensure Board revoked Dr. Boyd's medical license based on lying on a license renewal application, operating a vehicle under the influence of alcohol and prescription medications, seriously injuring other individuals due to her intoxication, and being found guilty of two felony offenses and one misdemeanor offence related to her intoxication, I conclude that the Licensure Board revoked Dr. Boyd's medical license for reasons bearing on her professional competence and professional performance. Further, I conclude that the IG excluded Petitioner for the minimum length of time permitted under law. Therefore, I affirm the IG's exclusion.

I. Background

The IG issued a notice on May 29, 2015, in which he notified Dr. Boyd that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs based on the revocation, suspension, loss, or surrender of her medical license while a formal disciplinary proceeding was pending before the Licensure Board for reasons bearing on her professional competence, professional performance, or financial integrity. IG Exhibit (Ex.) 1; 42 U.S.C. § 1320a-7(b)(4). The IG stated that the exclusion would remain in effect until the IG reinstated her; however, the IG advised that before he could reinstate her, Dr. Boyd must regain her Kentucky medical license. IG Ex. 1 at 1.

Petitioner timely requested a hearing to dispute the exclusion. On October 21, 2015, I held a telephonic prehearing conference, the substance of which is summarized in my October 22, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order). In compliance with the prehearing submission schedule outlined at the conference, the IG submitted a brief (IG Br.) along with three exhibits (IG Exs. 1-3). Petitioner submitted a brief (P. Br.) and eight exhibits (P. Exs. 1-8). The IG filed a reply brief (IG Reply). Because Petitioner requested to testify in her own defense, I permitted her to submit written direct testimony in the form of an affidavit or declaration, which Petitioner did (P. Affidavit). 42 C.F.R. § 1005.16(b). Petitioner also attached documents marked as Exhibit A to the affidavit.

II. Decision on the Record

Neither party objected to any of the proposed exhibits. Therefore, I admit IG Exs. 1-3 and P. Exs. 1-8 into the record. *See* Order ¶ 3; Civil Remedies Division Procedures (CRDP) § 14(e).

The IG indicated that he did not believe a hearing was necessary in this case and that he did not have any witnesses to offer. IG Br. at 7. Petitioner provided her own testimony in writing; however, the IG declined the opportunity to cross-examine Petitioner. Therefore, I issue this decision based on the written record. CRDP § 19(b), (d).

Although the IG did not wish to cross-examine Petitioner, the IG objected to Petitioner's written direct testimony and the documents marked as Exhibit A as irrelevant because most of it involves collateral attacks on the Licensure Board's revocation decision. As discussed below, I agree with the IG that most of Petitioner's testimony directly or indirectly contests the Licensure Board's revocation proceeding and decision; however, I receive Petitioner's written direct testimony into the record because some of it is relevant. I do not admit Exhibit A into the record as a substantive exhibit because it relates to the testimony involving collateral attacks on the Licensure Board decision.

III. Issue

Whether a state licensing authority revoked Petitioner's medical license for reasons bearing on her professional competence or professional performance.

IV. Jurisdiction

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

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

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

A. There is a basis for Petitioner's exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4)(A), and the IG has proven each required element under the statute.

The IG cites 42 U.S.C. § 1320a-7(b)(4) as the basis for Petitioner's permissive exclusion. IG Ex. 1. The statute provides, in pertinent part:

(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.

Thus, the elements that the IG must prove in this case are: (1) a state licensing authority (2) revoked Petitioner's medical license (3) for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. 42 C.F.R. § 1001.501(a)(1). For the reasons stated below, I find that the IG has proven each of these elements.

1. The Licensure Board is the licensing authority for physicians in the Commonwealth of Kentucky.

By statute, the Kentucky legislature established “an independent board to be known as the State Board of Medical Licensure which shall exercise all medical and osteopathic licensure functions heretofore exercised by the State Board of Health.” Ky. Rev. Stat. Ann. § 311.530. The Licensure Board has broad authority in regard to licensing physicians, which includes: establishing licensing qualifications; administering an examination to new applicants; licensing physicians already licensed in another state; promulgating regulations and a code of conduct for physicians; and “[i]ssu[ing], deny[ing], suspend[ing], limit[ing], restrict[ing], and revok[ing] any licenses or permits that may be issued by the board, and to reprimand or to place licensees on probation.” Ky. Rev. Stat. Ann. §§ 311.565, 311.591(7)(c). Therefore, I conclude that the Licensure Board is a state licensing authority for purposes of 42 U.S.C. § 1320a-7(b)(4).

2. The Licensure Board revoked Petitioner’s license to practice as a physician in Kentucky.

Dr. Boyd was licensed to practice medicine in Kentucky (License No. 40671). IG Ex. 2 at 1, 2; IG Ex. 3 at 1; P. Ex. 3 at 1; P. Affidavit ¶ 1. On December 3, 2012, Dr. Boyd was involved in an automobile accident, which resulted in criminal charges of driving under the influence of alcohol. IG Ex. 2 at 2, 7.

Due to the accident, on July 23, 2013, the Licensure Board issued a complaint charging Dr. Boyd with being a chronic alcoholic and engaging in dishonorable, unethical, and unprofessional conduct. IG Ex. 2 at 2. On October 17, 2013, the Licensure Board issued an amended complaint in which it added charges that Dr. Boyd had pled guilty to the criminal charges related to the automobile accident and that she lied on her application to renew her medical license. IG Ex. 2 at 3. At some point before January 14, 2014, the Licensure Board issued an emergency order suspending Dr. Boyd’s medical license. IG Ex. 2 at 1. On January 14-15, 2014, a Licensure Board hearing officer held a hearing on both the Licensure Board’s charges and emergency suspension order. IG Ex. 2 at 1; P. Ex. 3. On January 23, 2014, the hearing officer upheld the emergency suspension order because there was enough evidence that Dr. Boyd’s violation of law “constituted an immediate danger to the health, welfare, or safety of Dr. Boyd’s patients or the general public.” IG Ex. 2 at 1. On March 17, 2014, the hearing officer signed a decision in which he made findings of fact and conclusions of law, and provided a recommended order. IG Ex. 2. The hearing officer concluded that Dr. Boyd violated the statutory provisions that the Licensure Board charged her with violating and recommended that the Licensure Board “take any appropriate action against [Dr. Boyd’s] license to practice medicine for those violations[.]” IG Ex. 2 at 23-26, 28.

Although on March 31, 2014, Dr. Boyd filed exceptions to the hearing officer's findings, conclusions, and recommendation, on May 20, 2014, the Licensure Board's Hearing Panel B issued an Order of Revocation in which it accepted and adopted the hearing officer's findings, conclusions, and recommendations. IG Ex. 3; Hearing Request, Exhibit B at 28-35. Specifically, the Order of Revocation stated that:

The license to practice medicine held by Briana L. Boyd, M.D., is hereby REVOKED and she may not perform any act which constitutes the "practice of medicine" as that term is defined by [Kentucky Revised Statutes] KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities – in the Commonwealth of Kentucky.

IG Ex. 3 at 1-2. The Order of Revocation notified Dr. Boyd that she had a right to judicial review in the Jefferson Circuit Court, and notified her that the revocation of her license became effective 30 days after Dr. Boyd or Dr. Boyd's counsel received the order. IG Ex. 3 at 3. Petitioner acknowledges that the revocation is in effect. Hearing Request at 3.

Based on these facts, I conclude that for purposes of 42 U.S.C. § 1320a-7(b)(4), the Licensure Board revoked Petitioner's license to practice medicine in Kentucky.

Dr. Boyd asserts that the Licensure Board's revocation is not final and cannot serve as a basis for the IG's exclusion because review of the Order of Revocation is still ongoing in the courts of Kentucky. Hearing Request at 3. It is true that Dr. Boyd did seek judicial review; however, on October 10, 2014, the Jefferson Circuit Court affirmed the Order of Revocation. P. Ex. 8 at 1; Hearing Request, Exhibit B at 17-27, 68-78. Dr. Boyd moved to vacate the Circuit Court's October 10, 2014 Opinion and Order; however, the Circuit Court overruled that motion. P. Ex. 1 at 1-11; P. Ex. 8. Dr. Boyd appealed this matter to the Kentucky Court of Appeals and this appeal is still pending. Hearing Request, Exhibit B at 5-8; Exhibit D.

The IG argues that the Licensure Board's Order of Revocation is a final order and effective regardless as to any pending judicial review of the order. IG Br. at 4. I agree with the IG. The relevant Kentucky statute defines a "Final order" as "an order issued by the hearing panel that imposes one (1) or more disciplinary sanctions authorized by this chapter." Ky. Rev. Stat. Ann. § 311.550(20). Petitioner's revocation is such a disciplinary sanction. *See id.* § 311.565(1)(c). Further, "[e]xcept for final orders denying an application or reregistration for licensure or emergency orders temporarily suspending, limiting, or restricting a physician's license, all final orders of the board affecting a physician's license shall become effective thirty (30) days after notice is given to the

licensee. . . .” *Id.* § 311.593(1). Significantly, the same section of the statute providing this effective date provision for final orders also provides physicians with judicial review rights; however, the statute does not state that the Licensure Board’s final order of discipline will be stayed or otherwise affected pending the outcome of judicial review. *Id.* § 311.593(2).

Petitioner also argues that the Order of Revocation is fundamentally flawed due to significant due process violations that occurred during both the hearing officer and Licensure Board hearing panel levels of administrative adjudication in Dr. Boyd’s revocation case. P. Br. at 2, 6-7; P. Affidavit ¶ 5. Petitioner also asserts that the factual findings of the hearing officer are wrong as to whether Petitioner is a chronic alcoholic or knowingly lied to the Licensure Board, and Petitioner testifies and submits evidence in support of her position that she is not an alcoholic. P. Affidavit ¶¶ 1-4; P. Exs. 4-6.

I am precluded from considering Petitioner’s arguments. As stated in the regulations governing this case:

When the exclusion is based on the existence of . . . 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 [excluded] individual or entity **may not collaterally attack it either on substantive or procedural grounds** in this appeal.

42 C.F.R. § 1001.2007 (emphasis added); *see also Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *Anderson v. Thompson*, 311 F. Supp. 2d at 1128 (D. Kan. 2004). Petitioner has an appeal pending with the Kentucky Court of Appeals. It is that forum, and not this one, that can provide Petitioner with review of the Licensure Board’s proceedings and decision. Should a Kentucky court overturn the license revocation, Petitioner may obtain reinstatement from the IG. 42 C.F.R. § 1001.3005.

3. The Licensure Board revoked Petitioner for reasons bearing on Petitioner’s professional competence or professional performance.

The IG asserts that the Licensure Board’s findings that Petitioner is a chronic alcoholic and that Petitioner falsely indicated in her license renewal application that she had no criminal charges pending against her at a time when she did are sufficient evidence that the Licensure Board revoked Petitioner’s medical license for reasons bearing on her professional competence and professional performance. IG Br. at 5-6. Petitioner disputes that the license revocation bears on her professional competence or performance because: the criminal conduct in this matter involves a motor vehicle accident that does not reflect on her ability to practice medicine; Petitioner is not a chronic alcoholic;

Petitioner's misrepresentation to the Licensure Board about the existence of criminal charges was not knowingly made and, in any event, was negligible because the Licensure Board knew of those charges; and Petitioner has not been previously disciplined, excluding the Licensure Board's revocation. P. Br. at 2-4; P. Affidavit ¶¶ 5, 7.

As indicated above, I have no authority to review the basis for the Licensure Board's revocation decision. As a result, I must discern whether the reasons for revocation have a "bearing" on Petitioner's professional competence or professional performance. I agree with the IG that they do because the actual reasons for revocation need not directly involve actions Petitioner took in relation to being a physician. They merely need to have some relationship to Petitioner's professional competence or professional performance.

The following are relevant excerpts from the Findings of Fact and Conclusions of Law of the Licensure Board's hearing officer:

The Board's charges arose out of an automobile accident that occurred around 5 am on December 3, 2012, when Dr. Boyd's car collided with another automobile on Man o'War Boulevard in Lexington, Kentucky. As a result of the accident she was charged with driving under the influence and with two counts of assault.

The assault charges were filed due to the serious physical injuries suffered by the two occupants of the other automobile involved in the accident.

...

On October 17, 2013, the Board issued the *Amended Complaint* which included the additional charges that Dr. Boyd had pled guilty to criminal charges related to the automobile accident in violation of .KRS 311.595(4), and that she had violated KRS 311.595(1) by lying on her application to renew her medical license.

...

The preponderance of the evidence supports the conclusion that Dr. Boyd has repeatedly made false statements in order to conceal the degree to which she was impaired at the time of the accident and in an effort to diminish her own responsibility for causing the automobile accident.

An early example of Dr. Boyd's refusal to take responsibility for her misconduct was her failure to admit on her application to renew her medical license on December 31, 2012, that criminal charges were pending against her.

Dr. Boyd had signed and submitted her application and answered “no” to the following question: “Since you last registered, to your knowledge, have you become the subject of any criminal investigation or are any criminal charges pending against you?”

There is no dispute that criminal charges were pending against her at the time she submitted the application.

...

The preponderance of the evidence supports the conclusion that Dr. Boyd knowingly presented false information regarding the status of criminal charges when she submitted the application for renewal of her medical license on December 31, 2012.

...

On September 19, 2013, Dr. Boyd pled guilty to Assault, 2nd Degree; Wanton Endangerment, 1st Degree (amended); and Operating a Motor Vehicle While Under the Influence of Alcohol, with Aggravator.

Dr. Boyd was sentenced on October 31, 2013, to imprisonment for a number of years but was released from jail on shock probation on December 23, 2013. She was ordered to pay restitution, is subject to court monitoring, and will remain on probation until 2018.

...

Dr. Boyd violated KRS 311.595(1) by submitting an application for renewal of her medical license on which she knowingly and falsely answered “no” to the question whether she had become the subject of a criminal investigation or had any criminal charges pending against her since she last registered as a physician.

...

Dr. Boyd violated KRS 311.595(4) by pleading guilty to Assault in the second degree, a Class C felony under KRS 508.020(2), and to Wanton Endangerment in the first degree, a Class D felony under KRS 506.080(2).

...

Thus, at the least, Dr. Boyd has violated KRS 311.595(7) engaging in the periodic use of alcohol in an amount that suggests an alcohol use disorder, and her excessive consumption of alcohol on one occasion was the direct cause of the accident and legal proceedings against her.

Pursuant to KRS 311.595(9), a physician is subject to discipline if she has “engaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof.”

Under KRS 311.597(4), dishonorable, unethical, or unprofessional conduct includes “conduct which is calculated or has the effect of bringing the medical profession into disrepute,” which can encompass “any departure from, or failure to conform to the principles of medical ethics of the American Medical Association.”

Under the American Medical Association’s Principles of Medical Ethics a physician is required to be honest in all professional interactions and to respect the law.

Dr. Boyd has violated KRS 311.595(9), as illustrated by KRS 311.597(4), by bringing the medical profession into disrepute and by violating the Principles of Medical Ethics when she lied on her application for renewal of her medical license, when she operated her motor vehicle while under the influence of alcohol and prescription medications, when she caused serious physical injuries to other individuals as a result of her intoxication, and when she was guilty of two felony offenses and one misdemeanor offense for that misconduct.

As summed up by the hearing officer in his conclusions of law, Petitioner's felonious conduct involving the physical harm to others, alcohol abuse, and knowingly falsifying information on a medical license renewal application, all support the conclusion that she engaged in dishonorable, unethical, and unprofessional conduct. This conclusion, by the hearing officer, confirms that the reasons for Petitioner's revocation had a bearing on Petitioner's professional competence and professional performance. *See Gursheel S. Dhillon, M.D.*, DAB CR2633, at 4 (2012). It is also confirmed by the hearing officer's January 23, 2014 decision upholding the Licensure Board's immediate suspension of Dr. Boyd's license for violations of law that "constituted an immediate **danger to the health, welfare, or safety** of Dr. Boyd's patients or the general public." IG Ex. 2 at 1 (emphasis added). Therefore, I conclude that for purposes of 42 U.S.C. § 1320a-7(b)(4), Petitioner's medical license was revoked for reasons bearing on her professional competence and professional performance.

Petitioner testified that she is eligible to reapply for her medical license two years after the Order of Revocation became effective. Petitioner further testified that she intends to reapply and stated that "it is of material and substantial importance that she not be excluded from this program based upon 'professional incompetence, financial integrity or professional performance.'" P. Affidavit ¶ 6. However, the case before me is purely derivative to the Licensure Board's case. I have not found that Petitioner violated any statute or rule. I have merely determined that the actions of the Licensure Board permit the IG to exclude Petitioner. This decision is neither meant to help nor harm Petitioner in any future efforts she may make to regain her medical license.

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

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" Because Petitioner has not asserted that her medical license has been reinstated, I conclude that the period of exclusion is mandated by law under 42 U.S.C. § 1320a-7(c)(3)(E), based on the facts in the record.

VI. Conclusion

I affirm the IG'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).

/s/
Scott Anderson
Administrative Law Judge