

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated October 31, 2006, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act for not less than the period that her license is revoked, suspended, or otherwise lost or surrendered.

Petitioner timely requested a hearing by letter dated November 17, 2006. The case was assigned to me for hearing and decision on November 27, 2006. On January 17, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order of January 18, 2007. The parties agreed during the prehearing conference that this matter may be resolved on the documentary evidence and briefs of the parties and they waived the right to an in-person hearing for the taking of testimony.

The I.G. filed its opening brief (I.G. Brief) and exhibits (I.G. Ex.) 1 through 5 on March 5, 2007. Petitioner filed her response brief (P. Brief) and exhibits (P. Ex.) 1 through 5 on April 20, 2007. On May 9, 2007, the I.G. waived filing a reply brief. No objections have been made to the admission and my consideration of any of the offered exhibits and all are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. Petitioner entered a Consent Agreement with the Ohio Board of Nursing effective March 17, 2000, in lieu of suspension of her nursing license, after admitting that she failed to check a patient's identification band which resulted in the administration of the wrong medication and death of the patient. P. Brief at 3-4.
2. The March 2000 Consent Agreement limited Petitioner's work activities as a Registered Nurse (RN) and required that she inform employers of the agreement. P. Brief at 4.

3. Petitioner entered an Addendum to the Consent Agreement with the Ohio Board of Nursing effective November 19, 2004, in lieu of suspension of her nursing license, after she admitted to previously undisclosed nursing practice violations and to giving false statements to the Ohio Board. P. Brief at 3-4.
4. The Addendum to the Consent Agreement placed additional restrictions on her license and required that she work only under supervision. P. Brief at 4.
5. Petitioner admits that she violated the terms of both the Consent Agreement and the Addendum by failing to notify employers of the Agreement with the Ohio Board of Nursing; by working shifts without supervision; and by failure to report to the Ohio Board. P. Brief at 4.
6. On March 17, 2006, the Ohio Board of Nursing suspended Petitioner's license indefinitely but for no less than three years. P. Brief at 5; P. Ex. 5; I.G. Ex. 5.
7. On October 31, 2006, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act until such time as she regained her Ohio nursing license. P. Ex. 1; I.G. Ex. 1.
8. Petitioner requested a hearing by letter dated November 17, 2006.
9. Petitioner's nursing license was suspended by the Ohio Board of Nursing for reasons bearing upon her professional performance and professional competence.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.
3. Pursuant to section 1128(c)(3)(E) of the Act, the minimum period of exclusion under section 1128(b)(4) is not less than the period during which her state license is revoked, suspended, or surrendered and is presumptively reasonable. *See also* 42 C.F.R. § 1001.501(b)(1).

C. Issues

The Secretary of the Department 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).

D. Law Applicable

Petitioner’s right to a hearing by an Administrative Law Judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner’s request for a hearing was timely filed and I do have jurisdiction.

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. *See also* 42 C.F.R. § 1001.501(a)(1).

E. Discussion

1. There is a basis for Petitioner’s exclusion pursuant to section 1128(b)(4)(A) of the Act.

The I.G. cites section 1128(b)(4) of the Act as the basis for Petitioner’s mandatory exclusion. I.G. Ex. 1, at 1; I.G. Brief at 5. 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 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.

...

The statute permits the Secretary to exclude from participation any individual or entity: (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 the individual's professional competence, professional performance, or financial integrity.

Petitioner concedes that her registered nurse license was suspended by the Ohio Board of Nursing on March 17, 2006. P. Brief at 5; I.G. Ex. 5; P. Ex. 5. However, Petitioner argues that she was not suspended for reasons bearing on her professional performance or competence, thus the I.G. did not have authority to exclude her pursuant to section 1128(b)(4). Petitioner argues that the evidence shows that she was suspended for failure to comply with requirements of a Consent Agreement from 2000 and an Addendum to the consent agreement that she had entered in 2004, both with the Ohio Board as a result of disciplinary proceedings. P. Brief at 5-7. Petitioner also argues that her exclusion pursuant to section 1128(b)(4) of the Act is inconsistent with the legislative intent of the provision, which is to protect against incompetent practitioners and from inappropriate or inadequate care. P. Brief at 7-8. Petitioner's arguments are belied by the language the Ohio State Board used in its Adjudication Order dated March 17, 2006:

However, the Board has determined in its expertise that in order to protect the public Ms. Orafu should be permanently restricted from direct patient care and supervision of direct patient care and certain practice areas based upon Ms. Orafu's demonstrated lack of attention to detail and violations of restrictions placed on her license.

P. Ex. 5, at 1; I.G. Ex. 5, at 1. The language chosen by the Ohio Board clearly shows that Petitioner's suspension was for reasons bearing upon her professional performance and competence and not simply her violation of the consent agreement and addendum. Furthermore, the Board was clearly concerned, as I am, that the public be protected from Petitioner.

I conclude that there is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act and that her exclusion is consistent with the intent of the Act.

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

There is no issue regarding the duration of the exclusion, as section 1128(c)(3)(E) of the Act specifies that the exclusion shall not be less than the period during which her state license to provide health care is revoked, suspended, or surrendered. *See also* 42 C.F.R. § 1001.501(b)(1). The Secretary's regulations provide that the I.G. will consider a request for reinstatement only after the individual obtains a valid license in the state where the individual's license was originally suspended. 42 C.F.R. § 1001.501(b)(4).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective November 20, 2006, 20 days after the October 31, 2006, I.G. notice of exclusion.

/s/

Keith W. Sickendick
Administrative Law Judge