

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kimberly D. Hill
(OI File No. H-12-42852-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-864

Decision No. CR3028

Date: December 11, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Kimberly D. Hill from participation in Medicare, Medicaid, and all other federal health care programs until she regains her nursing license from the Missouri State Board of Nursing (State Board). The I.G.'s Motion and determination are based on section 1128(b)(4)(A) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(A).

The undisputed material facts of this case demonstrate that the I.G. is authorized to exclude Petitioner, and that the length of that exclusion is not unreasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner *pro se* Kimberly D. Hill was first licensed as a nurse by the State Board on September 2, 1992. I.G. Ex. 2, at 2. On June 14, 2006, Petitioner tested positive for cocaine during a pre-employment drug screening. I.G. Ex. 2, at 2. On April 7, 2009, Petitioner entered into a settlement agreement (Settlement Agreement) with the State

Board. I.G. Ex. 2. In the Settlement Agreement, Petitioner acknowledged that her license was subject to discipline pursuant to MO. REV. STAT. § 335.066.2(1) and (14) (2000).¹ I.G. Ex. 2, at 2. The State Board placed Petitioner's nursing license on probation for three years and imposed numerous conditions on Petitioner, including a requirement that she abstain from alcohol. I.G. Ex. 2, at 3-4.

A complaint filed with the State Board on July 14, 2010, alleged that Petitioner had violated one of the terms of the Settlement Agreement. I.G. Ex. 3, at 1. The State Board held a hearing December 2, 2010, to determine whether Petitioner had violated the Settlement Agreement. I.G. Ex. 3, at 1. On December 8, 2010, the State Board issued a disciplinary order to Petitioner in which it also made findings of fact and conclusions of law. I.G. Ex. 3. The State Board found that Petitioner tested positive for a metabolite of alcohol on June 15, 2010, and Petitioner admitted that she had consumed alcohol. I.G. Ex. 3, at 2. The State Board concluded as a matter of law that Petitioner had violated the terms of the Settlement Agreement and ordered her to complete several continuing education classes, as well as to continue to comply with the terms of the Settlement Agreement for the remainder of her probationary period. I.G. Ex. 3, at 2-3.

A complaint filed with the State Board on February 14, 2012, alleged that Petitioner had again violated the terms of the Settlement Agreement. I.G. Ex. 4, at 1. On March 7, 2012, the State Board held a hearing to determine whether Petitioner had violated the Settlement Agreement. I.G. Ex. 4, at 1. The State Board issued a disciplinary order on March 28, 2012, in which it made findings of fact and conclusions of law. I.G. Ex. 4. The State Board found that Petitioner "knowingly consumed alcohol in violation of the terms and conditions of her probation." I.G. Ex. 4, at 4. After concluding that Petitioner violated the Settlement Agreement as a matter of law, the State Board revoked Petitioner's nursing license. I.G. Ex. 4, at 4, 6.

The I.G. sent a notice-of-exclusion letter to Petitioner on March 29, 2013, in which the I.G. informed Petitioner that she was being excluded from participation in all federal health care programs until she regained her nursing license. I.G. Ex. 1. The I.G. relied on the terms of section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A), to exclude Petitioner. I.G. Ex. 1. Proceeding *pro se*, Petitioner sought review of the I.G.'s determination in an undated letter, which the Civil Remedies Division received on June 4, 2013.

I convened a pre-hearing conference in this case by telephone on July 10, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues that the case presents. The details of that conference and the schedule established appear in my

¹ The State Board cited to MO. REV. STAT. § 335.006.2(1) and (14), however, no such provisions exist. This appears to have been a typographical error on the State Board's part. The correct citation is MO. REV. STAT. § 335.066.2(1) and (14) (2000).

Order of July 10, 2013. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on October 23, 2013.

The evidentiary record on which I decide the issues before me contains nine exhibits. The I.G. proffered four exhibits marked I.G. Exhibits 1-4 (I.G. Exs. 1-4). Petitioner proffered five exhibits marked Petitioner's Exhibits 1-5 (P. Exs. 1-5).² In the absence of objection, I have admitted all nine proffered exhibits.

II. Issues

The legal issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

- a. 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)(A) of the Act; and
- b. Whether the length of the proposed period of exclusion is unreasonable.

I decide these issues in favor of the I.G.'s position. Section 1128(b)(4)(A) of the Act supports Petitioner's exclusion from all federal health care programs because the State Board, the State licensing authority, revoked Petitioner's license to practice nursing as a registered professional nurse in Missouri for reasons bearing on her professional competence. The length of this proposed period of exclusion is 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 "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).

An exclusion based on section 1128(b)(4) of the Act is discretionary. If the I.G. exercises his discretion to proceed with the sanction, then the mandatory minimum period of

² Petitioner did not follow the instructions I set forth in my Order of July 10, 2013, regarding the numbering and labeling of exhibits. In consideration of Petitioner's *pro se* status, the staff attorney aiding me in this matter assisted Petitioner by re-numbering and re-labeling Petitioner's exhibits to conform them to my instructions.

exclusion to be imposed under section 1128(b)(4) 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. Although an exclusion based on section 1128(b)(4) of the Act is discretionary, the I.G.’s decision to exercise his discretion and proceed with the sanction is not subject to review. *Donna Rogers*, DAB No. 2381 (2011); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Sheldon Stein, M.D.*, DAB No. 1301 (1992); 42 C.F.R. § 1005.4(c)(5).

The State Board is Missouri’s licensing authority for the practice of nursing by licensed professional nurses, with authority to discipline licensed professional nurses. MO. REV. STAT. §§ 335.036.1(2),(7), 335.046.1 (2013).

IV. Findings and Conclusions

I find and conclude as follows:

1. The State Board first granted Petitioner a license to practice nursing as a registered nurse in the State of Missouri on September 2, 1992. I.G. Ex. 2, at 2.
2. Petitioner entered into a settlement agreement (Settlement Agreement) with the State Board on April 7, 2009, after admitting that her license was subject to discipline. I.G. Ex. 2.
3. The State Board’s basis for disciplining Petitioner concerned her professional competence and professional performance. I.G. Ex. 2, at 2-3.
4. After receiving a complaint against Petitioner on July 14, 2010, the State Board found on December 8, 2010, that Petitioner had violated the Settlement Agreement. I.G. Ex. 3.
5. In its December 8, 2010 disciplinary order, the State Board found that Petitioner tested positive for a metabolite of alcohol and she subsequently admitted consuming alcohol. The State Board concluded that Petitioner’s admission constituted a violation of the Settlement Agreement. I.G. Ex. 3, at 2.
6. The State Board ordered Petitioner to continue with the terms of the Settlement Agreement and imposed additional continuing education requirements on her. I.G. Ex. 3, at 2-3.
7. The State Board received a second complaint against Petitioner on February 14, 2012, due to Petitioner’s second positive test for an alcohol metabolite and convened a hearing on March 7, 2012, to determine whether Petitioner had

violated the Settlement Agreement and whether to impose further discipline upon her. I.G. Ex. 4.

8. The State Board found as fact and concluded as a matter of law that Petitioner had again violated the Settlement Agreement through her positive test for a metabolite of alcohol and subsequent admission that she had consumed alcohol. I.G. Ex. 4, at 4.
9. On March 28, 2012, the State Board revoked Petitioner's license to practice as a registered nurse in Missouri due to her repeated violations of the Settlement Agreement and for reasons bearing on her professional competence and professional performance. I.G. Ex. 4, at 6.
10. Because the State Board revoked Petitioner's license to practice as a registered nurse effective March 28, 2012, for reasons bearing on her professional competence and professional performance, a basis exists for the I.G.'s exercise of authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act. § 1128(b)(4)(A).
11. The I.G.'s exclusion of Petitioner until such time as she regains her license to practice as a registered nurse in the State of Missouri is not unreasonable. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
12. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *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

The exclusion of an individual based on section 1128(b)(4) of the Act, 42 U.S.C. § 1320a-7(b)(4), is a derivative action based on an action previously taken by a court, licensing board, or other agency. In this case the I.G. relies on the State Board's action in revoking Petitioner's nursing license to support Petitioner's exclusion.

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A). First, the I.G. must prove that the license of the individual to be excluded to provide health care has been lost, 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); *Thomas I. DeVol, Ph.D.*, DAB CR1652 (2007); *Sherry J. Cross*, DAB CR1575 (2007); *Michele R.*

Roney, 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. has made the first showing required by section 1128(b)(4)(A). The record shows the State of Missouri first licensed Petitioner to practice as a registered nurse in 1992. I.G. Ex. 2, at 2. The first element required to be shown by section 1128(b)(4)(A) is established by uncontroverted evidence that the State Board summarily revoked Petitioner's nursing license on March 28, 2012. I.G. Ex. 4, at 6-7. Petitioner does not dispute that the State Board revoked her nursing license. P. Br. at 1.

The I.G. has also made the second showing required by section 1128(b)(4)(A), that the State Board revoked Petitioner's nursing license for reasons bearing upon her professional competence or professional performance. The State Board revoked Petitioner's license because she repeatedly violated the Settlement Agreement. I.G. Ex. 4, at 4-5. Petitioner's disregard of the State Board's orders that she refrain from consuming alcohol for the duration of her probation constituted unprofessional conduct. *Gibbs*, DAB No. 2279, at 7. When the State Board revoked Petitioner's nursing license because she disregarded its orders, it acted for reasons bearing on her professional competence or performance. *Id.* The State Board repeatedly justified its actions as necessary in order to protect the public health. *See, e.g.*, I.G. Ex. 4, at 6. An individual whose continued ability to practice nursing endangers the public health cannot be said to demonstrate even the most basic level of professional competence.

Further, when an individual's license is revoked due to violations of previous conditions placed on that license, it is also appropriate, in considering the totality of the circumstances, to look to the underlying reason the licensing agency placed such conditions on the license in the first place. *Tracey Gates, R.N.*, DAB No. 1768, at 6-7 (2001) *citing Roy Crosby Stark*, DAB No. 1746 (2000). The circumstances that led the State Board to place conditions on Petitioner's license can reasonably be viewed as the reasons that the State Board ultimately revoked her license. *Stark*, DAB No. 1746, at 4.

The State Board initially placed Petitioner on probation due to a complaint regarding her substance abuse. I.G. Ex. 2, at 2. Problems with substance abuse directly affect an individual's professional competence within the meaning of section 1128(b)(4)(A). *Lori E. Miller*, DAB CR961 (2002); *Gates*, DAB No. 1768; *Stark*, DAB No. 1746; *John C. Cheek, M.D.*, DAB No. 1738 (2002); *Wilbur D. Hilst, M.D.*, DAB CR621 (1999); *Charles Sutherland, D.O.*, DAB CR561 (1998); *Mary E. Groten*, DAB CR518 (1998); *Richard L. Pflapson, D.C.*, DAB CR132 (1991). In placing Petitioner on probation, the State Board found that cause existed for it to take disciplinary action based, in part, on REV. MO. STAT. § 335.066.2(1) (2000). I.G. Ex. 2, at 2-3. Section 335.066.2(1) permits the State Board to impose discipline when a licensee has "[u]se[d] or unlawful[ly] possess[ed] . . . any controlled substance . . . to an extent that such use impairs a person's ability to perform the work of any professional licensed or regulated . . ." by the State

Board.³ I.G. Ex. 2, at 2-3. Therefore, the State Board's underlying reason for revoking Petitioner's license was her substance abuse, which related directly to her professional competence.

Petitioner does not challenge the I.G.'s contention that the State Board revoked her license for reasons bearing on her professional competence or professional responsibility. *See* P. Br. at 1. Petitioner's only real request in this case is that I "have mercy on [her] and find it in [my] heart to not permanently exclude" her. P. Br. at 1. Petitioner supplements this request by indicating that she is in school, is working towards a degree in medical billing and coding, and is working towards having her nursing license restored. P. Br. at 1. Petitioner's efforts are laudable and she should be encouraged by the hard work she has put forth to further her education, as well as the kind words that officials from her educational institution have about her work. *See* P. Exs. 3-5.

Petitioner should likewise be encouraged by the fact that the I.G. has not sought to permanently exclude her from participation in Medicare, Medicaid, and all federal health care programs. Instead, the I.G. only seeks to exclude her until the State Board restores her nursing license. I.G. Ex. 1. So, while the I.G. has made both showings required to exclude Petitioner under section 1128(b)(4)(A), the I.G.'s actions are not necessarily permanent.

Because the I.G. has established a basis for excluding Petitioner pursuant to section 1128(b)(4)(A) of the Act, section 1128(c)(3)(E), 42 U.S.C. § 1320a-7(c)(3)(E), and 42 C.F.R. § 1001.501(b)(1) require her exclusion until such time as she regains her ability to practice as a licensed registered nurse in the State of Missouri. That period is reasonable as a matter of law, based as it is on 42 U.S.C. § 1320a-7(c)(3)(E) and 42 C.F.R. § 1001.501(b)(1). The terms of 42 C.F.R. § 1005.4(b)(12) authorize summary disposition in this case. Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts, such as are present here. *Gibbs*, DAB No. 2279; *Rosen*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision is issued accordingly.

³ The State Board cited another provision as also justifying its actions, MO. REV. STAT. § 335.066.2(14), which permits discipline for "[v]iolation of the drug laws or rules or regulations of this state, any other state or the federal government." Because this provision also relates to Petitioner's substance abuse, it likewise speaks to Petitioner's professional competence.

