

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gursheel S. Dhillon, M.D.,
(O.I. File No.: H-11-40841-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-645

Decision No. CR2633

Date: September 28, 2012

DECISION

Petitioner, Gursheel S. Dhillon, M.D., appeals the determination by the Inspector General (I.G.) to exclude him from participating in Medicare, Medicaid, and all federal health care programs until he regains his Tennessee medical license and reinstatement from the I.G. I.G. Ex. 1. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) (42 U.S.C. § 1320a-7(b)) of the Social Security Act (Act) and that the duration of his exclusion must be for a period that is at least coterminous with the suspension of his Tennessee medical license.

I. Procedural Background

In a letter dated March 30, 2012, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs because the Tennessee Board of Medical Examiners (State Board) suspended his license for reasons bearing on his professional competence, professional performance, or financial integrity. The letter explained that section 1128(b)(4) of the Act authorizes the exclusion. Petitioner timely requested this review.

The parties have filed briefs (I.G. Br.; P. Br.). The I.G. also filed three exhibits (I.G. Exs. 1-3) and a reply brief. Petitioner did not object to the I.G.'s exhibits, and I admit into evidence I.G. Exs. 1-3. Petitioner filed 19 exhibits (P. Exs. 1-7 and 9-20)¹ and three unmarked exhibits. The I.G. objects to Petitioner's proposed exhibits as irrelevant or immaterial evidence pursuant to 42 C.F.R. § 1005.17(a) and (c) because Petitioner's proposed exhibits are offered in support of his impermissible collateral attack on the underlying State Board's actions. Pursuant to that section, I must exclude immaterial evidence. I agree with the I.G. that Petitioner's exhibits are offered to collaterally attack the underlying proceeding of the State Board. Therefore, I must exclude them as immaterial, but they will remain a part of the case file for review purposes.

Petitioner believes an in-person hearing, including oral argument, is necessary to present the complexities of his case and proposed two witnesses whom he claims would testify about the State Board proceeding. I find the proposed testimony of these witnesses would amount to a collateral attack on the State Board's action, and such an attack is prohibited by 42 C.F.R. § 1001.2007(d). Therefore, because I find that none of the proposed testimony would affect the outcome here, an in-person hearing is not necessary. I agree with the I.G. that this matter may now be resolved on the written record.

II. Issue

The only issue in this case is whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act. If I find that the I.G. is so authorized, Petitioner's exclusion must continue at least until Petitioner regains his license to practice medicine in Tennessee. Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)); 42 C.F.R. § 1001.501(b).

III. Applicable Law

Section 1128(b)(4) of the Act states in relevant part:

(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—

¹ Petitioner references the “Bill of Rights of Patients” in his brief and identifies it as his Exhibit 8, but he did not provide a copy of that exhibit. P. Br. at 5.

(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

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. Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

The regulations governing exclusions, at 42 C.F.R. § 1001.2007(d), limit the scope of an appeal of an exclusion as follows:

§ 1001.2007 Appeal of exclusions.

* * * *

(d) When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by 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.

IV. Finding

The I.G. had a legal basis to exclude Petitioner from participation in Medicare, Medicaid, and other federally funded health care programs because the State Board suspended his medical license for reasons bearing on his professional competence or performance.

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 suspended by the state licensing authority for reasons bearing on the individual's professional competence, professional performance, or financial integrity. Act § 1128(b)(4)(A); 42 C.F.R. § 1001.501(a).

Initially, on March 19, 2008, the State Board entered an Amended Final Order which placed Petitioner's Tennessee medical license on probation. In that order, the State Board determined that certain facts constituted grounds for disciplinary action against Petitioner's medical license for unprofessional, dishonorable, or unethical conduct

pursuant to Tennessee State law. Under the directives of the order, Petitioner was required to submit to a Physician Assessment by the Center for Personalized Education for Physicians and to enroll in, and successfully complete within the first six months of probation, a three-day medical course at Case Western Reserve University. I.G. Ex. 3.

On January 26, 2011, the State Board issued a Final Order indefinitely suspending Petitioner's medical license, effective February 11, 2011, because Petitioner failed to comply with conditions of the State Board's earlier probation order. The State Board's Final Order specifically found facts constituting grounds for disciplinary action against Petitioner's license to practice as a medical doctor in Tennessee because Petitioner engaged in unprofessional, dishonorable, or unethical conduct. I.G. Ex. 2. Both the initial probation order and the final order indefinitely suspending Petitioner also provide that the actions were taken to "protect the health, safety, and welfare" and were "in the best interests and best safety for the welfare of the citizens of the State of Tennessee." I.G. Ex. 3 at 4; I.G. Ex. 2 at 3.

Petitioner contends his license suspension was because he did not comply with the State Board's earlier probation order and that this noncompliance is not a circumstance prescribed in section 1128(b)(4). I disagree. The State Board in both the earlier probation order and then the later final order suspending Petitioner specifically found that Petitioner's actions constituted grounds for disciplinary action against his license to practice as a medical doctor in Tennessee because he engaged in unprofessional, dishonorable, or unethical conduct. I.G. Ex. 2 at 3; I.G. Ex. 3 at 3. Specifically, the originating basis of the State Board's suspension was because Petitioner initiated a treatment course for a patient without adequate documentation of risk stratification and before proper consultations with related medical disciplines. I.G. Ex. 3 at 3. The State Board took action against Petitioner "in order to uphold the standards of care regarding medical record-keeping and interaction between colleagues within the state and to protect the health, safety, and welfare of such citizens." *Id.* at 4.

The orders of the State Board are now final and based on findings that Petitioner engaged in unprofessional, dishonorable, or unethical conduct, which clearly relate to Petitioner's professional competence or performance. The fact that Petitioner did not comply with the terms of the probation order that resulted in his license being indefinitely suspended is the result of his disregard of the State Board's directives. However, it does not negate the State Board's substantive findings in both actions that relate to Petitioner's professional competence or professional performance.

Petitioner's arguments and exhibits attempt to further explain the circumstances underlying the State Board's actions and to show how they were prejudiced against Petitioner. These arguments amount to a collateral attack on the State Board's actions. 42 C.F.R. § 1001.2007(d) prohibits such collateral attacks and prohibits me from considering them. *See, e.g., John W. Foderick, M.D., DAB No. 1125 (1990) (holding*

that the exclusion statute never intended that the party being excluded under section 1128(b)(4) could mount a collateral attack on the state procedure); *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279, at 15-16 (2009) (“[T]he settled rule is that such collateral attacks on the soundness or validity of a state action are impermissible in this forum.”).

Petitioner also contends that the I.G. violated his due process rights when his exclusion became effective prior to the completion of this appeal process. P. Br. at 1. I do not have the authority to address any constitutional challenges Petitioner presents, but the applicable regulations do provide that an exclusion becomes effective 20 days from the date of the I.G.’s notice letter. 42 C.F.R. § 1001.2002(b). Thus, the regulation permits Petitioner’s exclusion to become effective prior to the completion of his appeal to me, and I am bound by that regulation.

V. Conclusion

For the above reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, for a period that lasts at least as long as his medical license is suspended to provide health care in Tennessee. Petitioner’s suspension related to his professional competence or performance, and he is not permitted to collaterally attack that state action here.

/s/
Joseph Grow
Administrative Law Judge