

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christy Nichols Frugia,
(O.I. File No. H-15-4-2625-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-300

Decision No. CR4638

Date: June 21, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Christy Nichols Frugia, from participating in Medicare, State Medicaid, and other federally funded health care programs for a period that is coterminous with her loss of her licenses to provide health care as a registered nurse and a vocational nurse in the State of Texas.

I. Background

Petitioner requested a hearing in order to challenge the I.G.'s exclusion determination. During the pendency of this case I extended the parties' deadlines so that Petitioner could supply the I.G. with additional information concerning her exclusion and the I.G. could consider it. The I.G. declined to withdraw or modify his determination based on what Petitioner submitted. The I.G. then filed a brief in support of the exclusion determination plus three exhibits that are identified as I.G. Ex. 1-I.G. Ex. 3. Petitioner filed a brief in opposition. Neither party requested an in-person hearing. I receive the I.G.'s exhibits into the record.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether section 1128(b)(4)(B) of the Social Security Act (Act) authorizes the I.G. to exclude Petitioner, and whether the length of the exclusion is reasonable.

B. Findings of Fact and Conclusions of Law

Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude anyone who surrenders a license to provide health care to a State licensing authority while a formal disciplinary proceeding was pending that concerned that individual's professional competence, professional performance, or financial integrity.

The facts of this case are unequivocal. On June 3, 2015, Petitioner, who was licensed to provide nursing care in the State of Texas, voluntarily surrendered her licenses as a vocational nurse and a registered nurse to that State's licensing authority, the Texas Board of Nursing (Board), because she wished to avoid exposure to controlled substances. I.G. Ex. 3 at 6. Petitioner's surrender of her licenses culminated a series of proceedings before the Board concerning her professional competence and performance. These proceedings extend back to 2007. Then, she entered into an agreement with the Board in which she promised to abstain from the consumption of alcohol. I.G. Ex. 3 at 25-39. On June 15, 2011, Petitioner voluntarily surrendered her licenses in the face of proceedings before the Board concerning her alleged "intemperate use of alcohol." *Id.* at 20. On May 2, 2012, Petitioner signed a reinstatement order with the Board that conditioned the reinstatement of her licenses on certain conditions and stipulations. *Id.* at 7-17. However, in 2015, the Board found that Petitioner had become noncompliant with two of the conditions of the reinstatement agreement. *Id.* at 3. That finding precipitated Petitioner's June 2015 license surrender.

Petitioner plainly surrendered her nursing licenses while formal disciplinary proceedings were pending against her and these proceedings involved her inability to comply with conditions stemming from her history of substance abuse. As Petitioner admitted in her June 2015 license surrender, she surrendered her licenses because she wished to avoid exposure to controlled substances. The facts of this case satisfy the requirements of section 1128(b)(4)(B) of the Act and the I.G. had authority to exclude Petitioner pursuant to that section.

The I.G. made Petitioner's exclusion coterminous with her loss of her nursing licenses. That is consistent with the Act and regulatory requirements governing exclusions imposed pursuant to section 1128(b)(4)(B), which require that an exclusion under that section will be for a period that is not less than the period of license revocation or suspension. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).

Petitioner does not assert that the I.G. lacked authority to exclude her. Rather, she asserts that the I.G. abused his discretion in excluding her because he failed to take into account nonbinding guidelines that the I.G. published in 1997 that ostensibly established criteria for determining whether to exclude an individual under any of the Act's permissive authorities, including section 1128(b)(4)(B). I have no authority to consider this argument. The I.G.'s determination to exclude Petitioner was an act of discretion. An administrative law judge does not have the authority to review the I.G.'s exercise of discretion to exclude an individual under any of the subsections of section 1128(b) or to determine the scope or effect of any exclusion that the I.G. imposes. 42 C.F.R. § 1005.4(c)(5).

/s/

Steven T. Kessel
Administrative Law Judge