

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
Francisco Pagana,) Date: September 24, 2007
Petitioner,) Docket No. C-07-322
-v.-) Decision No. CR 1654
The Inspector General.)

DECISION

Petitioner, Francisco Pagana, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(4)), effective January 18, 2007. Petitioner is excluded because his license or certificate to practice as a Certified Nurse Assistant (CNA) in the State of California was revoked by the California Department of Health Services, Licensing and Certification (state agency) for reasons bearing upon his professional competence, professional performance, or financial integrity. There is a proper basis for exclusion. Petitioner's exclusion for not less than the period during which his state license is revoked, is required by the Act.¹ Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated December 29, 2006, that he 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 his state license is revoked, suspended, or otherwise lost or surrendered.

Petitioner timely requested a hearing by letter dated January 14, 2007. The case was assigned to me for hearing and decision on March 23, 2007. On April 12, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated April 18, 2007.

The I.G. filed a motion for summary judgment and supporting brief on May 29, 2007 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 8. Petitioner filed an opposition to the motion for summary judgment on August 6, 2007 (P. Brief), with exhibits (P. Exs.) 1 through 4.² The I.G. advised me by letter dated August 20, 2006 that no reply brief would be filed. No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 8, and P. Exs. 1 through 4 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. The state agency notified Petitioner by letter dated July 28, 2006 that his CNA certificate was revoked.

² Petitioner refers to exhibit A, A-1, B, and B-1 in his brief (P. Brief at 3) but the exhibits attached to the brief are not marked. I have marked the exhibits attached to Petitioner's brief as follows:

- P. Ex. 1 – June 20, 2006 letter from the state agency to Petitioner;
- P. Ex. 2 – July 12, 2006 letter from Petitioner's counsel to the state agency;
- P. Ex. 3 – July 26, 2006 letter from the state agency to Petitioner's counsel; and
- P. Ex. 4 – Order of Dismissal dated August 3, 2006.

2. Petitioner's CNA certificate was revoked because he worked as a CNA during a period when his CNA certificate was suspended.
3. Petitioner does not deny that his original suspension and the ultimate revocation of his CNA certificate was based on a pattern of unprofessional conduct.
4. The I.G. notified Petitioner by letter dated December 29, 2006, that he 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 his state license is revoked, suspended, or otherwise lost or surrendered.
5. Petitioner timely requested a hearing by letter dated January 14, 2007.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Summary judgment is appropriate.
3. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.
4. 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 Petitioner's 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 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. Applicable Law

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).

The standard of proof is a preponderance of the evidence and the state agency determination revoking Petitioner's state license is not subject to my review. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

E. Analysis

1. Summary judgment is appropriate in this case.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5).

The ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See e.g.*, Fed. R.

Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also*, *New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. The sole issue argued by Petitioner in the case before me is whether Petitioner's due process rights were violated by the state agency. The issue raised by Petitioner must be resolved against him as a matter of law and summary judgment in favor of the I.G. is appropriate.

2. 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 permissive 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 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.

...

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.

The facts are not disputed. The state agency notified Petitioner by letter dated August 17, 2005, that it proposed to suspend his CNA certificate for 30 days and to place him in a diversion program for 18 months based on a pattern of unprofessional conduct. The state agency advised Petitioner that if he did not take action to accept the proposed 30-day suspension and diversion program, his certificate would be suspended for one year. I.G. Ex. 6. The state agency advised Petitioner by letter dated June 20, 2006, that his CNA certificate was being immediately revoked because he allegedly sexually assaulted a resident and he worked while his CNA certificate was suspended. P. Ex. 1. The state agency advised Petitioner by letter dated July 26, 2006, that it was withdrawing its determination to immediately revoke his CNA certificate based on review of his case file and the fact that the alleged victim refused to testify at Petitioner's appeal hearing. P. Ex. 2. By letter dated July 28, 2006, the state agency notified Petitioner that his CNA certificate was revoked. The cited basis for the revocation was that Petitioner failed to elect the 30-day suspension and diversion program offered in the August 17, 2005 state agency letter and his CNA certificate was thus suspended from September 26, 2005 through September 24, 2006. The state agency determined that Petitioner was employed as a CNA during the period of suspension and that revocation of his certificate was required by the California Health and Safety Code § 1337.9(j). I.G. Ex. 8.

Petitioner does not dispute that his CNA certificate has been revoked by the state agency. Petitioner also does not deny that his original suspension and the ultimate revocation of his CNA certificate was based on a pattern of unprofessional conduct. Rather, Petitioner argues that he was denied due process by the state agency. It is not within my authority to review the state agency action that led to the revocation. 42 C.F.R. § 1001.2007(d). Accordingly, the I.G. motion for summary judgment is granted. If Petitioner ultimately obtains relief from the state agency action in an appropriate forum, Petitioner may seek retroactive reinstatement pursuant to 42 C.F.R. § 1001.3005.

3. 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 Petitioner's 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 surrendered. 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 January 18, 2007, 20 days after the December 29, 2006 I.G. notice of exclusion, and for a period coterminous with his licence revocation.

/s/

Keith W. Sickendick
Administrative Law Judge