

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Mark C. Sorensen, M.D.,)	Date: September 26, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-402
)	Decision No. CR1664
The Inspector General.)	
_____)	

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner *pro se* Mark C. Sorensen, M.D., from participation in Medicare, Medicaid, and all other federal health care programs. The I.G. relies on the discretionary authority to do so conveyed to him by section 1128(b)(4)(A) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4)(A). The predicate for the I.G.'s action is the suspension of Petitioner's license to practice medicine in Pennsylvania. The I.G. has filed a Motion for Summary Affirmance.

The undisputed material facts in this case support the I.G.'s imposition of the exclusion. The I.G. has set the period of exclusion to be concurrent with the period during which Petitioner's license to practice medicine in Pennsylvania remains suspended, the minimum period of exclusion required by law. For those reasons, I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Petitioner *pro se* Mark C. Sorensen, M.D., was licensed to practice medicine in the Commonwealth of Pennsylvania in 1986. Between April 27, 2004 and March 2, 2006, a formal disciplinary proceeding against Petitioner was pending before the State Board of Medicine of the Commonwealth of Pennsylvania, and that disciplinary proceeding concerned Petitioner's professional competence and professional performance.

On March 2, 2006, the State Board of Medicine of the Commonwealth of Pennsylvania found Petitioner subject to disciplinary action because of his inability "to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol," and entered its Final Adjudication and Order suspending Petitioner's license to practice medicine in Pennsylvania for a period of at least five years.

On February 28, 2007 the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until he should regain his license to practice medicine in Pennsylvania, based on the authority set out in section 1128(b)(4) of the Act. Petitioner perfected his appeal of the I.G.'s action by his *pro se* letter of April 23, 2007.

I held the prehearing conference required by 42 C.F.R. § 1005.6(a) on June 6, 2007. The Order of that date summarized the discussions held in the conference and contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. The cycle of briefing and this record closed for purposes of 42 C.F.R. § 1005.20(c) on September 10, 2007, under the circumstances set out in the Order of June 6, 2007.

The evidentiary record on which I decide this case contains 26 exhibits. With his Motion for Summary Affirmance and his Brief in Support of that Motion (I.G. Br.), the I.G. has proffered I.G.'s Exhibits 1-9 (I.G. Exs. 1-9). Petitioner has not objected to the admission of these exhibits, and so all are admitted as designated. Petitioner has proffered Petitioner's Exhibits 1-14 (P. Exs. 1-14), and all are admitted as designated in the absence of objection from the I.G. In addition, Petitioner attached two documents to his Answer Brief (P. Ans. Br.), marked P Attachments 1 and 2 (P. Atts. 1-2), and one document to his Response Brief (P. Resp. Br.), marked P Attachment 3 (P. Att. 3). I have redesignated these as Petitioner's Exhibits 15, 16, and 17 (P. Exs. 15, 16, 17), respectively, and they are admitted with those designations.

II. Issues

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

1. 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
2. Whether the length of the exclusion is unreasonable.

I resolve 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, for his license to practice medicine in Pennsylvania has been suspended for reasons bearing on his professional competence and professional performance. Petitioner's exclusion during the period that his license to practice medicine in Pennsylvania remains suspended is the minimum period established by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), and is therefore 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 or entity "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).

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals in this forum:

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

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

IV. Findings and Conclusions

I find and conclude as follows:

1. Between April 27, 2004 and March 2, 2006, a formal disciplinary proceeding against Petitioner *pro se* Mark C. Sorensen, M.D., was pending before the State Board of Medicine of the Commonwealth of Pennsylvania. I.G. Exs. 2, 3.
2. The disciplinary proceeding described above in Finding 1 concerned Petitioner’s professional competence and professional performance. I.G. Exs. 2, 3.
3. On March 2, 2006, at the conclusion of the disciplinary proceeding described above in Findings 1 and 2, the State Board of Medicine of the Commonwealth of Pennsylvania found Petitioner subject to disciplinary action because of his inability “to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol.” I.G. Ex. 3, at 6.
4. On March 2, 2006, the State Board of Medicine of the Commonwealth of Pennsylvania entered its Final Adjudication and Order suspending Petitioner’s license to practice medicine in Pennsylvania for a period of at least five years, for reasons bearing on his professional competence and professional performance. I.G. Ex. 3, at 11.
5. On February 28, 2007 the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until he should regain his license to practice as a medical doctor in Pennsylvania, based on the authority set out in section 1128(b)(4) of the Act. I.G. Ex. 1.
6. On April 23, 2007, Petitioner perfected this appeal from the I.G.’s action by filing a timely hearing request.

7. Because Petitioner's license to practice medicine in Pennsylvania was suspended for reasons bearing on his professional competence and professional performance, as set out in Findings 1-4 above, a basis exists for the I.G.'s exercise of his discretionary authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.
8. The exclusion of Petitioner during the period that his license to practice medicine in Pennsylvania remains suspended is for the minimum period prescribed by law and is therefore as a matter of law not unreasonable. Act, section 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).
9. There are no remaining disputed issues of material fact and summary disposition is appropriate in this matter. *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

There are two essential elements necessary to support an exclusion based on section 1128(b)(4)(A) of the Act. First, the I.G. must prove that the license to provide health care of the individual to be excluded has been 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. Rodney*, 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).

Petitioner does not deny that his license has been suspended, and does not deny that the Board of Medicine characterized the reasons for its action as bearing on his professional competence and professional performance. P. Ans. Br. at 5. His defense to the proposed exclusion is based on the alleged unfairness of the State Board of Medicine's action and the alleged unsoundness of its findings and conclusions. But regardless of Petitioner's apparent concessions, the IG's evidence establishes both essential elements conclusively: Petitioner's license to practice medicine was suspended by the State Board of Medicine on March 2, 2006, and it was suspended on the explicit basis of proven examples of his frequent lapses into substance abuse and addiction. I.G. Exs. 2, 3. The State Board of Medicine expressly concluded that Petitioner "is unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol."

I.G. Ex. 3, at 6. Moreover, Petitioner's state-court challenge to the suspension of his license was rejected in the Commonwealth Court of Pennsylvania and in the Pennsylvania Supreme Court. I.G. Exs. 7, 8, and 9. The I.G.'s evidence establishes both essential elements.

Petitioner's briefing consistently argues a single theme: that the proceedings against him before the State Board of Medicine reached a flawed, incorrect result because of inaccurate, misunderstood, or disregarded evidence, and because of unfair procedures that, he asserts, deprived him of certain rights. But the components of that theme all share this characteristic: they all constitute collateral attacks on the State Board of Medicine's action, and the settled rule is that such collateral attacks on the soundness or the validity of a state action are impermissible in this forum. *Judy Pederson Rogers and William Ernest Rogers*, DAB No. 2009; *Hassan M. Ibrahim, M.D.*, DAB No. 1613 (1997); *George Iturralde, M.D.*, DAB No. 1374; *Olufemi Okonuren, M.D.*, DAB No. 1319. There is little more to be said: the cases are in perfect harmony with the controlling regulation, 42 C.F.R. § 1001.2007(d).

Two variations on Petitioner's main theme require brief additional mention. The first variation is developed from the allegedly-unfair nature of the proceedings: Petitioner argues that:

The U. S. Constitution's Fifth and Fourteenth Amendments guarantee Petitioner due process. Petitioner has been denied due process by Board Counsel's deliberate (fraudulent) and extraordinary withholding of appeal right information.

P. Resp. Br. at 3.

I am unable to observe a serious Fifth or Fourteenth Amendment argument in that statement, particularly since Petitioner has no constitutionally-protected property interest in participation in the Medicare and Medicaid programs. *Kahn v. Inspector General*, 848 F. Supp. 432 (S.D.N.Y. 1994); *Hillman Rehabilitation Center*, DAB No. 1611 (1997); *Michael J. Rosen, M.D.*, DAB CR1566 (2007); *Edmund B. Eisnaugle, D.O.*, DAB CR1010; *Morton Markoff, D.O.*, DAB CR538 (1998). But if Petitioner has a constitutional argument, it must be raised in another forum. I simply cannot entertain it. *Michael J. Rosen, M.D.*, DAB No. 2096, n. 10; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Susan Malady, R.N.*, DAB No. 1816 (2002).

The second variation on Petitioner's main theme is more subtle. He begins, as before, with the assertion that the disciplinary proceedings were unfair and reached an incorrect result. He then posits that the concept of "discretionary exclusion" embodied in section 1128(b) of the Act obliges the I.G. to exercise his discretion by conducting what would amount to a *de novo* review of the evidentiary and procedural soundness of the State Board of Medicine's decision. P. Ans. Br. at 4-5; P. Resp. Br. at 3-4. But, as the Departmental Appeals Board recently reminded litigants in this forum, the I.G.'s exercise of section 1128(b) exclusionary discretion is embodied in the decision to exclude, and is made manifest in the notice-of-exclusion letter that appears in this record as I.G. Ex. 1. *Michael J. Rosen, M.D.*, DAB No. 2096. The I.G. is not obliged to explain or justify his decision. He need only defend its legal sufficiency and factual predicates within the narrow limits of 42 C.F.R. § 1001.2007(a)(1). And once the I.G. has proven that there is that nexus of fact and law by which Petitioner became subject to exclusion, the ALJ is without jurisdiction to evaluate on any basis whatsoever the propriety of the I.G.'s exercise of discretion in deciding to proceed with imposition of the exclusion. *Michael J. Rosen, M.D.*, DAB No. 2096; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Wayne E. Imber, M.D.*, DAB CR661 (2000), *aff'd*, DAB No. 1740 (2000); *see also* 42 C.F.R. § 1005.4(c)(5).

Section 1128(c)(3)(E) of the Act mandates that 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. Thus, where the I.G. is authorized to impose an exclusion pursuant to section 1128(b)(4), that exclusion is reasonable as a matter of law if it is concurrent with the period during which the individual's license to provide health care is revoked, suspended, or surrendered. *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Julia Maria Nash*, DAB CR1277 (2005); *Maureen Felker*, DAB CR1110 (2003); *April Ann May, P.A.*, DAB CR1089 (2003); *Djuana Matthews Beruk, D.D.S.*, DAB CR950 (2002). That is the period of exclusion the I.G. proposes in this case, and it is reasonable *ipso jure*.

Summary disposition in a case such as this is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous, and support summary disposition as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner *pro se* Mark C. Sorensen, M.D., from participation in Medicare, Medicaid, and all other federal health care programs is SUSTAINED, pursuant to the terms of section 1128(b)(4)(A) of the Act, 42 U.S.C. § 1320a-7(b)(4)(A). That exclusion remains in effect, by operation of section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), while his license to practice medicine in Pennsylvania remains suspended.

/s/

Richard J. Smith
Administrative Law Judge