

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)
In the Case of:)
) Date: December 11, 2007
Toby R. Linebaugh a/k/a Toby Randall)
Linebaugh,)
) Docket No. C-07-614
Petitioner,) Decision No. CR1709
)
-v.-)
)
The Inspector General.)
_____)

DECISION

Petitioner, Toby R. Linebaugh a/k/a Toby Randall Linebaugh, 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 June 20, 2007. Petitioner is excluded because his registration to provide health care as a pharmacy technician in the State of Kansas was revoked by the Kansas Board of Pharmacy (state agency) for reasons bearing upon his professional competence, professional performance, or financial integrity.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, section 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated May 31, 2007, 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, until he regains his license as a pharmacy technician in the State of Kansas.

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.

Petitioner timely requested a hearing by letter dated July 11, 2007. The case was assigned to me for hearing and decision on August 13, 2007. On September 14, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated September 14, 2007. The parties agreed that the case could be heard based on an exchange of briefs accompanied by documentary evidence in lieu of an in-person hearing.

The I.G. filed a brief in support of exclusion on October 12, 2007 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 8. Petitioner filed a response (P. Brief) on November 14, 2007. Petitioner did not file any exhibits. The I.G. filed a reply (I.G. Reply) on November 28, 2007. Petitioner has not objected to the admissibility of any of the proposed I.G. Exhibits and I.G. Exs. 1 through 8 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 “Emergency Agency Order” dated February 17, 2005, that his registration to function as a pharmacy technician in Kansas had been suspended, due to his being caught and admitting to diverting drugs, including controlled substances, from his employer over an extended period of time, and selling the drugs to a third-party who Petitioner knew did not have a prescription for the drugs. I.G. Ex. 6.
2. The state agency notified Petitioner by “Agency Order” dated June 7, 2005, that his registration as a pharmacy technician had been revoked, due to his being caught and admitting to diverting drugs, including controlled substances from his employer over an extended period of time and “self-administered controlled substances without an appropriate prescription order.” I.G. Ex. 3.
3. Petitioner does not deny that his pharmacy technician registration was suspended and revoked because he diverted drugs. Hearing Request; P. Brief; I.G. Exs. 2-6.
4. The I.G. notified Petitioner by letter dated May 31, 2007, 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, until he regains his registration as a pharmacy technician in the State of Kansas.

5. Petitioner timely requested a hearing by letter dated July 11, 2007.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.
3. 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 Health and Human Services (the Secretary) has by regulation limited my scope of review to 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. 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. 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: (1) whose state license to provide health care has been suspended or revoked by a state licensing authority; and (2) where the revocation or suspension is for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

The essential facts of this case are not disputed. Petitioner was a registered pharmacy technician in the State of Kansas. I.G. Ex. 3. In June 2003, Petitioner began working as a pharmacy technician at Walgreens in Wichita, Kansas. I.G. Ex. 4. From approximately August 2003 through December 2004, Petitioner misappropriated medications from the pharmacy where he was employed and sold them to another individual. CMS Ex. 4, 5. Petitioner admitted selling 220 tablets a week of Hydrocodone to a third party who paid

him \$100 a week for the drugs. CMS Ex. 4. On December 3, 2004, Petitioner was arrested for unlawfully forging prescriptions and selling drugs. I.G. Ex. 5. On February 17, 2005, the state agency issued its Emergency Agency Order suspending Petitioner's pharmacy technician registration. I.G. Ex. 6. On June 7, 2005, the state agency revoked Petitioner's pharmacy technician registration.² I.G. Ex. 3. On September 14, 2005, Petitioner entered into an Agreement for Pretrial Diversion, deferring prosecution for 12 months. I.G. Ex. 7. Petitioner successfully completed the diversion program and the charges against him were dismissed. I.G. Ex. 8.

Petitioner does not dispute that his pharmacy technician registration was first suspended and then revoked by the state agency. In his hearing request, Petitioner admits that he "fax[ed] a refill request to a doctors office for a patient that I knew didn't exist" Petitioner argues instead that he should not have been excluded because he did not know that he was registered, took no oath, and lacked an advanced education, and he asserts that mitigating circumstances exist, in that he is a trustworthy individual. Petitioner asks that his exclusion be "reconsidered" or waived. I cannot reconsider or waive Petitioner's exclusion and the arguments he asserts are not relevant to issues that I may consider.

The I.G. had a basis to exclude Petitioner. The suspension and revocation of Petitioner's registration by the state agency constituted a suspension and revocation by a state licensing authority, as the state agency is a state licensing authority with jurisdiction over the registration of pharmacy technicians. I.G. Ex. 3. Thus, the suspension and revocation of Petitioner's registration is tantamount to the suspension and revocation of a state license to practice as a pharmacy technician. Whether or not Petitioner had an advance degree is of no relevance. The Act permits the I.G. to exclude an individual whose license has been revoked or suspended by a State licensing agency, such as the state agency here, where the reason for the revocation or suspension bore on the individuals's professional competence, performance, or financial integrity. Here, Petitioner's

² The Emergency Agency Order stated that Petitioner admitted to diverting drugs, including controlled substances, from his employer over an extended period of time and sold them to a third-party who Petitioner knew did not have a prescription for the drugs. I.G. Ex. 6, at 2. The Agency Order recited that Petitioner had been caught and admitted to diverting drugs, including controlled substances, from his employer over an extended period of time. The Agency Order also recited, however, that Petitioner had self-administered controlled substances without an appropriate prescription order. I.G. Ex. 3, at 2. In his brief filed November 14, 2007, Petitioner asserts that he has "never self-administered controlled substances without the direction of my physician." I need make no finding as to whether Petitioner self-administered controlled substances, because Petitioner does not contest diverting controlled substances. Hearing Request; P. Brief; I.G. Ex. 4.

registration as a pharmacy technician was first suspended and then revoked. Petitioner's license suspension also involved his professional competence, performance, and his financial integrity. The Emergency Agency Order noted his history of diverting drugs, including controlled substances, and selling them to a third party who Petitioner knew did not have a prescription for the drugs. The state agency asserted that this history indicated Petitioner could not be trusted to have access to drugs as a pharmacy technician, and that there was a strong likelihood he would continue to divert drugs, presenting an immediate danger and significant risk to the public health, safety, or welfare. I.G. Ex. 6, at 2. The Agency Order revoking his registration noted that Petitioner would pose a significant danger and significant risk to the public. I.G. Ex. 3, at 2. Thus, the state agency considered that Petitioner's actions involved both his professional performance (diverting drugs) and competence (in diverting drugs he presented a potential danger to the public health, safety, and welfare) and financial integrity (accepting money for the diverted drugs). I agree.

2. 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 suspended or revoked. 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 June 20, 2007, 20 days after the May 31, 2007 I.G. notice of exclusion, and for a period coterminous with his licence revocation.

/s/

Keith W. Sickendick
Administrative Law Judge