

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Chang Goo Yoon,)	Date: October 7, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-503
)	Decision No. CR1852
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Chang Goo Yoon, 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 May 20, 2008. Petitioner is excluded because his license to provide health care as a physical therapist in the State of Colorado was surrendered while a formal disciplinary proceeding was pending before the Colorado Division of Registrations Office of Physical Therapy Licensure for reasons bearing on his professional competence, professional performance, or financial integrity. The I.G. has established that there is a proper basis for exclusion. Petitioner's exclusion for not less than the period during which his state license is surrendered is required by the Act.¹ Act, section 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ When an individual has been excluded under this section, the Inspector General (I.G.) will consider a request for reinstatement in accordance with 42 C.F.R. § 1001.3001 if the individual obtains a valid license in the state where the license was originally surrendered.

I. Background

The I. G. notified Petitioner by letter dated April 30, 2008, 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 is reinstated by the Inspector General and, to be eligible for reinstatement, Petitioner must regain his license as a physical therapist in the State of Colorado.

Petitioner timely requested a hearing. The case was assigned to me for hearing and decision. On July 2, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated July 7, 2008. 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 July 24, 2008 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 and 2. Petitioner filed a response (P. Brief) on September 4, 2008, with one exhibit, P. Ex. 1, consisting of 25 pages. The I.G. filed a reply (I.G. Reply) on September 22, 2008. The parties have not raised any objections to each other's exhibits and the exhibits 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. Petitioner received a license to practice physical therapy in the State of Colorado on July 19, 2001. I.G. Ex. 2.
2. On August 2, 2007, Petitioner entered into a Stipulation and Final Agency Order with the Colorado Division of Registrations Office of Physical Therapy Licensure to resolve two cases "without the necessity of holding a formal disciplinary hearing." I.G. Ex. 2, at 1.
3. In the Stipulation and Final Agency Order, the Director of the Colorado Division of Registrations asserted that she had "reasonable grounds to believe that [Petitioner] had engaged in conduct" that did not "meet generally accepted standards of physical therapy practice" I. G. Ex. 2, at 2.

4. The Director also asserted that she had “reasonable ground to believe” that Petitioner violated the statutes against health insurance fraud and abuse and had “offered, given, or received . . . remuneration for the referral of clients.” I.G. Ex. 2, at 2-3.
5. Under the terms of the agreement between Petitioner and the Colorado Division of Registrations, Petitioner permanently surrendered his license to practice physical therapy in the State of Colorado. I.G. Ex. 2, at 3.

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)(B) of the Act because that section authorizes the Secretary of the Department of Health and Human Services, at his discretion, to exclude an individual who surrendered his license to provide health care while a formal disciplinary proceeding was pending concerning the individual’s professional competence, professional performance, or financial integrity before any State licensing authority. 42 U.S.C. § 1320a-7(b)(4)(B).
3. The Secretary has delegated to the I.G. the authority to determine and impose exclusions under section 1128(b)(4) of the Act. 53. Fed. Reg. 12993 (Apr. 20, 1988).
4. Exclusions pursuant to section 1128(b)(4) of the Act are derivative and based on the action of another governmental body.
5. The I.G.’s decision to exercise his discretion to exclude an individual under section 1128(b) of the Act is not subject to Administrative Law Judge (ALJ) review. 42 C.F.R. § 1005.4(c)(5).
6. 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).
7. The exclusion imposed under section 1128(b)(4) of the Act remains in effect until the excluded individual regains his license in the state where the license was surrendered and is reinstated by the I.G. 42 C.F.R. § 1001.501(b)(4).

C. Issue

The Secretary of Health and Human Services (the Secretary) has by statute and regulation limited my scope of review in license surrender cases to whether there is a basis for the imposition of the exclusion. If I determine that a basis exists then, as a matter of law, the length of the exclusion must be coterminous with the period during which the license is surrendered. Act, section 1128(c)(3)(E); 42 C.F.R. § 1001.501(b).

D. Applicable Law

Petitioner's right to a hearing by an 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)(B) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual who surrendered his license to provide health care while a formal disciplinary proceeding was pending before any state licensing authority and the proceeding concerned the individual's professional competence, professional performance, or financial integrity. *See also* 42 C.F.R. § 1001.501(a)(2).

The standard of proof is a preponderance of the evidence.

E. Analysis

1. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(B) 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 –

(B) who surrendered such a license [to provide health care] while a formal disciplinary proceeding was pending before such a [State licensing] authority and the proceeding concerned the individual's . . . professional competence, professional performance, or financial integrity.

The essential facts of this case are not disputed. Petitioner received a license to practice physical therapy in the State of Colorado on July 19, 2001. I.G. Ex. 2. On August 2, 2007, Petitioner entered into a Stipulation and Final Agency Order with the Colorado Division of Registrations for the Office of Physical Therapy Licensure to resolve two separate pending cases against him without the necessity of holding a formal disciplinary hearing. *Id.* The Director of the Colorado Division of Registrations asserted that she had “reasonable grounds to believe” that Petitioner “engaged in conduct that, if proven at a hearing, would establish violations of the Physical Therapy Practice Act, particularly sections 12-41-115(1)(a), (f), (g), (h)(I), (i), (j) of Colorado Revised Statutes.” I.G. Ex. 2, at 2-3. While the Stipulation and Final Agency Order indicates that Petitioner did not admit that he committed any act in violation of the Act, he agreed to permanently surrender his license to practice physical therapy in Colorado. *Id.*, at 3. He further acknowledged that he understood that the Stipulation and Final Agency Order had the same force and effect as an order entered after a formal disciplinary hearing by the Director. *Id.*

Petitioner does not dispute any of these facts; Petitioner, however, contends that the I.G. cannot rely on the Stipulation and Final Agency Order as a factual or legal basis pursuant to 42 C.F.R. § 1001.2007 because that Stipulation and Final Agency Order simply contains allegations against Petitioner and Petitioner indicated in that Order that he did not admit and specifically denied that he had committed an act in violation of the Colorado Physical Therapy Practice Act.

Petitioner's contentions are legally incorrect. Section 1128(b)(4)(B) of the Act contains two elements: (1) Petitioner must have surrendered his license while a formal disciplinary proceeding is pending; and (2) the pending proceeding must concern the individual's professional competence, professional performance, or financial integrity. Therefore, under the Act, the I.G. must show the existence of these two elements. Frankly, under these specific provisions of the statute, the regulatory provisions prohibiting a petitioner from collaterally attacking an underlying conviction, judgment, or determination upon which an exclusion is based are not applicable. The I.G. needs only to prove that these two elements exist. The I.G. has clearly done so.

The terms of the Stipulation and Final Agency Order state that there were two pending disciplinary actions against Petitioner and it was because of this that Petitioner agreed to the settlement and agreed to surrender his license permanently. P. Brief at 1. Next, the Stipulation and Final Agency Order specifically sets forth that there are reasonable grounds to believe that Respondent engaged in conduct that, if proven at a hearing, would establish violations under six grounds for disciplinary action under the Colorado Physical Therapy Practice Act. Petitioner cannot and does not dispute that these six grounds asserted against him in the pending disciplinary actions concern his professional competence, professional performance, or his financial integrity.²

Moreover, as the I.G. correctly points out, the statutory provisions reflect Congress' clear intent to prevent unfit providers from avoiding exclusion by surrendering their licenses before the state can conclude proceedings against them, and to provide the I.G. with the ability to exclude individuals who have moved away and obtained licenses in other states, before or after the loss, revocation or surrender of a professional license in another state where disciplinary action was pending. S. REP. 100-109, at 7, *as reprinted in 1987 U.S.C.C.A.N.* 682, 688.

Therefore, the I.G. has a legal basis for excluding Petitioner as Petitioner had a license to practice physical therapy which was surrendered while disciplinary proceedings were pending against him, and the pending disciplinary proceedings related to his professional performance, professional competence, and financial integrity.

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

² The grounds for disciplinary action asserted against Petitioner include: that Petitioner committed an act which does not meet generally accepted standards of physical therapy practice or failed to perform an act necessary to meet generally accepted standards of physical therapy; failed to make essential entries on patient records or falsified or made incorrect entries of an essential nature; engaged in ordering or performing without clinical justification unnecessary lab tests or studies or administered unnecessary treatment or ordered an unnecessary service x-ray or treatment contrary to recognized standards; committed abuse of health insurance; committed a fraudulent insurance act; and offered, gave or received commissions, rebates, or other forms of remuneration for referral of clients.

