

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Mary E. Groten,)	Date: February 26, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-295
)	Decision No. CR518
The Inspector General.)	
)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Mary E. Groten, R.N., from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid), until Petitioner obtains a license to practice nursing or provide health care in the State of Connecticut. I base my decision on evidence which proves that Petitioner surrendered her nursing license during the pendency in that State of a formal disciplinary proceeding related to her professional competence, professional performance, or financial integrity. I further base my decision on evidence which proves that Petitioner lost such license, and the right to apply for or renew it, for reasons bearing on her professional competence, professional performance, or financial integrity. Additionally, I find that when an exclusion imposed by the I.G., as here, is concurrent with the remedy imposed by a State licensing authority, then no issue of reasonableness exists and such an exclusion is mandated by law.

BACKGROUND

By letter dated March 20, 1997, the I.G. notified Petitioner that she was being excluded from participating in the Medicare and Medicaid programs. The I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Social Security Act (Act) because Petitioner's "license to practice medicine or provide health care in the State of Connecticut was revoked, suspended, or otherwise lost, or was surrendered while a formal disciplinary proceeding was pending before the licensing authority for reasons bearing on [her] professional competence,

professional performance, or financial integrity." Additionally, the I.G. advised Petitioner that her exclusion would remain in effect until she obtained a valid license to practice nursing or provide health care in the State of Connecticut.

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on written submissions, and that an in-person hearing was not necessary. The parties have each submitted written arguments and proposed exhibits.

The I.G. submitted three proposed exhibits. Petitioner did not object to these exhibits. Petitioner submitted one exhibit with her September 30, 1997 submission. The I.G. did not object to Petitioner's exhibit. In the absence of objection, I am admitting I.G. Exhibits (Exs.) 1 - 3 and P. Ex. 1 into evidence in this case. I base my decision in this case on these exhibits, the applicable law, and the argument of the parties.

APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude "[a]ny 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, or (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity."

Pursuant to section 1128(c)(3)(E) of the Act, as amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub.L.104-191), the length of an exclusion under section 1128(b)(4) "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, or the individual or entity is excluded or suspended from a Federal or State health care program."

Prior to 1996, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is concurrent with the loss, suspension, or revocation of a State license. A concurrent

exclusion, as in Petitioner's case, is the mandated minimum required by law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed by the State of Connecticut to practice as a registered nurse. I.G. Ex. 2 at 1.
2. Petitioner was employed as a registered nurse by Milford Hospital in Milford, Connecticut. P. Ex. 1; I.G. Ex. 1.
3. The State of Connecticut, Department of Consumer Protection, Drug Control Division, issued a report that alleged that on numerous instances in 1993 and in 1994, Petitioner, in her capacity as a registered nurse employed at Milford Hospital, improperly diverted controlled substances from that facility. I.G. Ex. 1.
4. A copy of the Drug Control Division report was sent to the Connecticut Department of Public Health for possible disciplinary action. I.G. Ex. 1, attachment A.
5. The Connecticut Department of Public Health contacted Petitioner and advised her that she was under investigation for reasons bearing on her professional competence and performance. The Connecticut Department of Public Health also informed Petitioner that it would initiate disciplinary proceedings against her based on the investigation's findings. I.G. Ex 1, attachment A; P. Ex. 1 at 29.
6. The Connecticut Department of Public Health filed a petition against Petitioner and, in settlement of the allegations contained in the petition, Petitioner, on January 3, 1996, voluntarily agreed not to renew or apply for reinstatement of her license to practice as a registered nurse in the State of Connecticut, which license had expired on December 31, 1995. In that agreement ("Voluntary Agreement Not to Renew License Affidavit"), Petitioner waived her right to a hearing and further agreed that if she sought a new license or reinstatement or renewal of her license at any time in the future, the allegations contained in the petition shall be deemed to be true. I.G. Ex. 2; P. Ex. 1 at 47, 48.
7. On March 20, 1997, the I.G. notified Petitioner of her exclusion from participation in Medicare and Medicaid.
8. Section 1128(b)(4)(A) of the Act authorizes the I.G. to exclude an individual 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

professional competence, professional performance, or financial integrity.

9. Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who surrenders his or her license to provide health care during the pendency of formal disciplinary proceedings before a State licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

10. Petitioner, as a registered nurse, possessed a license to provide health care within the scope of section 1128(b)(4) of the Act.

11. The agreement dated January 3, 1996, which Petitioner entered into with the Connecticut Department of Public Health, resulted in the loss of her license and the right to apply for or renew her nursing license within the scope of section 1128(b)(4)(A).

12. Petitioner surrendered her nursing license during the pendency of a formal disciplinary proceeding before a State licensing authority, within the scope of section 1128(b)(4)(B) of the Act.

13. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act.

14. Where an exclusion is imposed pursuant to section 1128(b)(4) of the Act, the period of exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Section 1128(c)(3)(E) of the Act.

15. When an exclusion is imposed pursuant to section 1128(b)(4) of the Act and the period of exclusion is coterminous with the loss, revocation, suspension, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

16. The exclusion imposed by the I.G. against Petitioner is for the minimum period mandated by section 1128(c)(3)(E) of the Act.

PETITIONER'S CONTENTIONS

Petitioner does not dispute that the I.G. had the authority to exclude her under section 1128(b)(4) of the Act, but she argues that the scope and length of her exclusion is unreasonable. Specifically, Petitioner maintains that it is unfair to require that her exclusion remain in effect until she obtains a nursing license in the State of Connecticut, as she no longer resides there and has no intent to practice nursing there.

Petitioner also maintains that exclusion is unfair in her case because she was not informed during the Connecticut disciplinary proceeding which resulted in the loss of her nursing license that she could be excluded from participation in Medicare and Medicaid.

DISCUSSION

Petitioner does not dispute that the I.G. had the authority to exclude her under section 1128(b)(4) of the Act and I so find. Clearly, the allegation in the Connecticut disciplinary proceedings that Petitioner, as an employee of Milford Hospital, diverted controlled substances for her own use, relates to her professional competence and professional performance.

The record reflects that a disciplinary proceeding was initiated as a result of an investigative report prepared by the Drug Control Division of the Connecticut Department of Consumer Protection. I find that the loss of Petitioner's nursing license was a direct consequence of that proceeding and, thus, within the scope of section 1128(b)(4) of the Act. Dillard P. Enright, DAB CR138 (1991); John W. Foderick, M.D., DAB CR43 (1989). In entering the "Voluntary Agreement Not to Renew License Affidavit," Petitioner clearly relinquished the permission conferred on her by the State licensing authorities to be a registered nurse. I find such circumstance constitutes a surrender of her license within the scope of section 1128(b)(4)(B) of the Act. John W. Crews, DAB CR509 (1997); William I. Cooper, M.D., DAB No. 1534 (1995). Moreover, I note that the "Voluntary Agreement Not to Renew License Affidavit," entered into by Petitioner with the Connecticut licensing authority precludes Petitioner from renewing or reinstating her nursing license. I find that this agreement equates to a loss of a license or right to apply for or renew a license under section 1128(b)(4)(A) of the Act. Maurice Labbe, DAB CR488 (1997); Cooper.

In my review, I disagree with Petitioner's contention that exclusion is unfair in her case. Specifically, she contends that it is unfair to require that her exclusion remain in effect until she obtains a license as a registered nurse in the State of Connecticut, as she no longer resides there and has no intent to practice nursing there. Petitioner's argument is contrary to the statute. The I.G. has the authority to exclude Petitioner in this case because she surrendered or lost her nursing license within the scope of section 1128(b)(4) of the Act. The Act, as amended at section 1128(c)(3)(E), requires that an individual excluded pursuant to section 1128(b)(4) be excluded for not less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. It is plain from the language of the amendment at section 1128(c)(3)(E) that the minimum length of the exclusion must be coterminous with the

term of revocation, suspension, or surrender of the State license. Since Petitioner surrendered or otherwise lost her license to practice as a registered nurse in the State of Connecticut, the Act requires that the period of the exclusion will not be less than the period during which her license to practice nursing in the State of Connecticut is surrendered or lost. Petitioner is required to obtain from the Connecticut licensing authority the same type of license that she surrendered or lost before she can be considered for reinstatement as a participant in Medicare and Medicaid.

I also find that Petitioner has no right to rely on an exception for early reinstatement pursuant to the regulations at 42 C.F.R. § 1001.501(c). That regulation provides that the I.G. will consider a request for early reinstatement if an individual fully and accurately discloses the circumstance surrounding the exclusion to a licensing authority of a different State and the State grants the individual a new license or takes no significant adverse action as to a currently held license.

I find that this regulation does not apply to Petitioner's case. The regulation was promulgated prior to the amendment to the Act which governs the length of the exclusion in this case. The statute, as amended, clearly and unambiguously requires a minimum mandatory exclusion for individuals excluded pursuant to section 1128(b)(4) of the Act. The statutory language requires that Petitioner's exclusion be at least coterminous with the period of her surrender or loss of her Connecticut nursing license. The Act supersedes the regulations, and it controls.

Although Petitioner contends that the length of her exclusion is not reasonable, it has been held that under section 1128(c)(3)(E) of the Act, "no issue of reasonableness exists" where the exclusion imposed by the I.G. is coterminous with the revocation, suspension, surrender, or loss of a State license. Labbe, at 3. As in Labbe, the exclusion period in this case is controlled by section 1128(c)(3)(E) of the Act. That section requires that Petitioner be excluded for a period no less than the period during which her license is revoked, suspended, surrendered, or lost. The coterminous exclusion imposed by the I.G. in this case is the mandated minimum period required by law.

Petitioner also maintains that exclusion is unfair in her case because she was not informed during the Connecticut disciplinary proceeding which resulted in the loss of her nursing license that she could be excluded from participating in Medicare and Medicaid. Petitioner's contention constitutes a collateral attack on the actions of the State licensing authority. It has been held, however, that such collateral attack on the actions of a State licensing authority are not permitted in the context of an exclusion proceeding under section 1128(b)(4). Jagdish Mangla, M.D., DAB CR470 (1997); John W. Foderick, M.D., DAB No.

1125 (1990); see also Barry Kamen, RPA, DAB CR493 (1997)
(involving section 1128(b)(5)).

CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act. I conclude also that the period of exclusion imposed by the I.G. is the minimum period mandated by section 1128(c)(3)(E) of the Act. Accordingly, I sustain it.

/s/

Joseph K. Riotto
Administrative Law Judge