

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the case of: |) | |
| |) | |
| Robert A. Woolhandler, M.D., |) | DATE: April 15, 1991 |
| |) | |
| Petitioner, |) | |
| |) | Docket No. C-323 |
| - v. - |) | |
| |) | Decision No. CR127 |
| The Inspector General. |) | |
| |) | |

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Robert A. Woolhandler, M.D. (Petitioner) by letter dated October 12 1990, that he would be excluded from participation in the Medicare and three federally-financed state health care programs, for a period of three years.¹ The I.G. further advised Petitioner that his exclusion was due to his state court conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner was informed that exclusions from Medicare and Medicaid programs after such a conviction are authorized by section 1128(b)(3) of the Act.

Petitioner requested a hearing before an Administrative Law Judge (ALJ) to contest his exclusion. I held a prehearing conference in this case on January 3, 1991. During the conference, the parties agreed to have this case decided on the basis of submitted documentary evidence, in lieu of an in-person hearing. Based on the

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX of the Act (Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

evidence in the record and the applicable law, I conclude that an exclusion of three years is reasonable and appropriate.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1990 Supp.). Section 1128(a) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five-year minimum period of exclusion for those excluded under section 1128(a)(1). Section 1128(b) of the Act provides for permissive exclusions after convictions relating to fraud, license revocations, failure to supply payment information, or, as in this case, conviction for a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance under section 1128(b)(3).

II. The Federal Regulations.

The governing federal regulations are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; parts 1001 and 1002 govern the substantive aspects.

ISSUES

The issues in this case are:

1. whether Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.
2. whether Petitioner's conviction "relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance," within the meaning of section 1128(b)(3) of the Act;
3. whether the length of the exclusion imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW^{2 3}

1. At all times relevant to this case, Petitioner was a physician licensed to practice medicine in Pennsylvania. Stip. 8, 9, 10.

2. On or about May 26, 1988, Petitioner was charged in a 15 count Criminal Information with actions including: 1) prescribing drugs not in good faith and not within the scope of the patient relationship; 2) prescribing to drug dependent persons (with the intention that such individuals would fill the prescriptions and then return some portion of the controlled substance to the actor); and 3) possession of controlled substance (as a result of writing prescriptions for individuals with the intention that such individuals would fill the prescriptions and deliver the controlled substance to the actor), all in violation of 35 P.S. Section 780-113(a)(13), 780-113(a)(14), and 780-113(a)(16). I.G. Ex. 2, 5.

3. On July 15, 1988, in the Court of Common Pleas, Allegheny County, Pennsylvania (County Court), Petitioner

² Citations to the record and to Board cases in this Decision are as follows:

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| I.G. Exhibits | I.G. Ex. (number/page) |
| Stipulations | Stip. (number) |
| I.G.'s Br. | I.G. Br. (page) |
| Petitioner's Brief | P. Br. (page) |
| I.G.'s Reply Brief | I.G. Rep. Br. (page) |
| Findings of Fact and Conclusions of Law | FFCL (number) |
| Departmental Appeals Board ALJ decisions | DAB Civ. Rem. (docket no./ date) |
| Departmental Appeals Board Appellate decisions | DAB App. (decision no./date) |

³ Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

pled guilty to 10 counts of the 15 count information. I.G. Ex. 3; Stip. 1.

4. The 10 counts to which Petitioner pled guilty (counts 2,3,5,6,8,9,11,12,14,15) were all misdemeanors. Petitioner did not plead guilty to the felony counts of the Information (counts 1,4,7,10,13). I.G. Ex. 2, 3; Stip. 2, 3.

5. Petitioner was sentenced to 10 years probation, with the special conditions that he: 1) continue in the impaired physician program; 2) surrender his D.E.A. license and not reapply until his 10 year probation was completed; and 3) pay a \$5,000 fine on each count, for a total of \$50,000.00. I.G. Ex. 1, 3; Stip. 4.

6. As a result of Petitioner's conviction, by Order dated March 28, 1990, the Pennsylvania State Board of Medicine (Pa. Board) suspended Petitioner's license to practice medicine for two years. I.G. Ex. 5, 6; Stip. 5, 6.

7. The Pa. Board stayed all but three months of Petitioner's suspension. After three months, Petitioner was to be put on a period of probation to run concurrently with the period of probation ordered by the County Court. Petitioner also had to meet certain conditions of probation, including: 1) continued participation in the Impaired Physicians Program; 2) abstinence from alcohol and controlled substances not prescribed by another physician; and 3) submission to drug and urine screens. I.G. Ex. 5, 6; Stip. 7.

8. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

9. Petitioner was convicted of a criminal offense "relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance," within the meaning of section 1128(b)(3) of the Act. FFCL 3.

10. Pursuant to section 1128(b)(3) of the Act, the Secretary of DHHS (Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid.

11. The Secretary properly delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

12. On October 12, 1990, the I.G. advised Petitioner that he was excluding him from participating in the Medicare and Medicaid programs for three years, pursuant to section 1128(b)(3) of the Act.

13. A purpose of section 1128(b)(3) of the Act is to protect beneficiaries and program funds by excluding individuals or entities who by conduct have demonstrated a risk that they may engage in fraud, substandard services, abuse, or unsafe practices in connection with controlled substances until such time as those excluded can demonstrate that such risk no longer exists. S. REP. No. 109, 100th Cong. 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682.

14. There is no length or period of exclusion mandated by statute for section 1128(b)(3) exclusions. The exclusion provisions of section 1128 of the Act do not establish a minimum or maximum period of exclusion to be imposed and directed in cases where the I.G. has discretion to impose and direct exclusions. Act, section 1128(b)(1)-(14).

15. There are substantial reasons for a lengthy exclusion in this case, including: 1) Petitioner's conviction of serious violations of controlled substance laws; 2) Petitioner's abuse of his position of trust as a physician, and the placement of his patients in a position where serious harm could result to themselves or others who might come into contact with those controlled substances; 3) Petitioner's own addiction to controlled substances, when as a physician he should have known of their potential for harm and eschewed them; 4) the County Court's imposition of a lengthy probationary period and other sanctions on Petitioner; and 5) the Pa. Board's suspension of Petitioner's license and subsequent period of probation of Petitioner's license, coupled with the Pa. Board's restriction of that license.

16. Petitioner has not proven that an exclusion of three years is unreasonable.

17. The I.G.'s determination to exclude Petitioner from participation in the Medicare or Medicaid programs for three years is reasonable. FFCL 1 - 16; See 42 C.F.R. 1001.125(b)(1) - (7).

DISCUSSIONI. Petitioner Was "Convicted" Of A Criminal Offense "Relating To The Unlawful Manufacture, Distribution, Prescription, Or Dispensing Of A Controlled Substance", Within The Meaning Of Section 1128(b)(3) Of The Act.

Section 1128(b)(3) of the Act authorizes the I.G. to exclude from participation in the Medicare and Medicaid programs individuals who have been "convicted" of criminal offenses "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance". On July 15, 1988, Petitioner was convicted of ten counts of violation of the Controlled Substance, Drug, Device and Cosmetic Act, PA. STAT. ANN. tit. 35 section 780-113(a). Petitioner has stipulated to the fact of his conviction. FFCL 2, 3; Stip. 1. Accordingly, Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

Petitioner admits that his crimes were misdemeanors. FFCL 4; Stip. 3. Petitioner argues, however, that there is no statutory or regulatory authority to exclude Petitioner for being convicted of misdemeanor violations of a state drug act. I disagree.

Section 1128(b)(3) of the Act clearly authorizes exclusions from the Medicare and Medicaid programs of "Any individual or entity that has been **convicted**, under Federal or State law, of a **criminal offense** relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Pursuant to section 1128(i), an "individual is considered to have been convicted of a criminal offense - (1) when a judgment of conviction has been entered against the physician or individual by a Federal, State, or local court. . ." Nowhere in the statute or in its legislative history is the term criminal offense, in the context of section 1128(b)(3) violations, limited to refer to convictions for felonies as opposed to misdemeanors. See S. REP. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S. Code Cong. & Admin. News.

Petitioner has stipulated that he was convicted of a criminal offense relating to a violation of controlled substances laws (Stip. 1 - 3). Accordingly, based on the stipulation and the documentary evidence in the record, I find that Petitioner's conviction falls within the purview of criminal offenses enumerated in section 1128(b)(3).

II A Five-Year Exclusion Is Appropriate And Reasonable In This Case.

Since Petitioner has admitted, and I have concluded, that Petitioner was "convicted" of a criminal offense for which the I.G. may impose an exclusion, pursuant to section 1128(b)(3) of the Act, the remaining issue is whether the three-year exclusion is reasonable and appropriate. For the reasons set out below, I conclude that a three-year exclusion is reasonable and appropriate.

As I stated in Lakshmi N. Murty Achalla, M.D., DAB Civ. Rem. C-146 (1990), Thomas J. DePietro, R. Ph., DAB Civ. Rem. C-282 (1991), and Falah R. Garmo, R.Ph., DAB Civ. Rem. C-222 (1990) (citing Victor M. Janze, M.D., DAB Civ. Rem. C-212 (1990) and Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989)) in making a determination regarding the length of an exclusion, I am guided by the purpose behind the exclusion law. Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from impaired and incompetent practitioners and inappropriate or inadequate care. S. REP. No. 109, 100th Cong., 1st Sess.; reprinted in 1987 U.S. Code Cong. & Admin. News 682, 708; Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990). The key term is "protection," the prevention of harm. See Websters II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of individuals and entities. Through the exclusion law, individuals and entities who have caused harm, or may cause harm, to the program or its beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provided to Medicare beneficiaries or Medicaid recipients. Thus, individuals are removed from a position which provides a potential avenue for causing harm to the programs. An exclusion also serves as a deterrent to other individuals and entities against errant or deviant behavior which may result in harm to the Medicare and Medicaid programs or their beneficiaries and recipients.

No statutory minimum mandatory exclusion period exists for section 1128(b)(3) exclusions. The determination of when an individual should be trusted and allowed to reapply for participation as a provider in the Medicare and Medicaid programs is a difficult issue and is one which is subject to discretion; there is no mechanical

formula. The ALJ must give a complete de novo review of the facts in determining the length of exclusions. See Vincent Barratta, M.D., DAB App. 1172 (1990). The federal regulations provide some guidance which may be followed in making this determination. The regulations provide that the length of Petitioner's exclusion may be determined by reviewing: 1) the number and nature of the offenses; 2) the nature and extent of any adverse impact the violations have had on beneficiaries; 3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs; 4) the existence of mitigating circumstances; 5) the length of sentence imposed by the court; 6) any other facts bearing on the nature and seriousness of the violations; and 7) the previous sanction record of Petitioner. See 42 C.F.R. 1001.125(b). These regulations were adopted by the Secretary to implement the Act prior to the 1987 Amendment. The regulations specifically apply only to exclusions for "program related" offenses. To the extent that they have not been repealed, however, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to the cases in which discretionary exclusions are imposed. See Garmo, supra at 10; Leonard N. Schwartz, R.Ph., DAB Civ. Rem. C-62 at p. 12 (1989).

In addition to the factors listed above, given Congressional intent to exclude untrustworthy individuals from participation in Medicare and Medicaid programs, I also consider those circumstances which indicate the extent of an individual's or entity's trustworthiness. Moreover, the legislative history of section 1128 as a whole discusses factors which may be considered in setting the exclusion period. Both the House and Senate reports on the proposed legislation stated:

In the case of all exclusions other than those under 1128(a) and 1128(b)(12), the Committee intends that, in setting the period of exclusion, the Secretary will take into consideration such factors as the seriousness of the offense, the impact of both the offense and the exclusion on beneficiaries, and any mitigating circumstances, such as the availability of alternate providers of needed health care services.

H.R.REP. No. 85, 100th Cong., 1st Sess., Part 1, 12 (1987); S.REP. No. 109, supra, at 12.

By not mandating that exclusions from participation in the Medicare and Medicaid program be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider of items and services to beneficiaries and recipients. A determination of an individual's current and future trustworthiness thus necessitates an appraisal of the crime for which that individual was convicted, the circumstances surrounding it, whether and when that individual sought help to correct the behavior which led to the criminal conviction, and how far that individual has come towards rehabilitation.

Petitioner argues that a three year exclusion is excessive in his case because: 1) Petitioner has some long-time Medicare patients he treats and who would not be willing to be treated by another physician; 2) Petitioner is a recovered drug addict, drug-free since August 1987; 3) Petitioner is in the Impaired Physicians Program of the Pennsylvania Medical Society and gets tested for urine screenings. Petitioner has had no positive test since monitoring began; 4) Petitioner has no D.E.A. license, and cannot write scheduled prescriptions; 5) Petitioner monitors pharmacists with drug problems and does addiction counseling; 6) Petitioner has suffered because of his illness of drug addiction; 7) Petitioner is being selectively excluded from the Medicare program, as a number of physicians convicted of violations of the State drug act, or of Medicare fraud, have not been excluded from the Medicare or Medicaid programs. Petitioner has offered no evidence to support these contentions. The only evidence before me in this case are the exhibits submitted by the I.G. and the stipulations signed by both parties to this action. Petitioner's unsubstantiated arguments cannot be accorded much weight by me in my decision concerning the reasonableness of Petitioner's exclusion as it relates to Petitioner's trustworthiness to participate in the Medicare and Medicaid programs.

The evidence in support of a three year exclusion is that: 1) Petitioner was convicted of serious drug violations; 2) as a physician licensed to prescribe potentially dangerous and addictive controlled substances, Petitioner was in a position of great trust. Petitioner abused that trust when he prescribed controlled substances to drug dependent persons, with the intention that they return some of the controlled substances to him. His means of illegally obtaining controlled substances created the potential for serious harm to his patients or to anyone else who might misuse these controlled substances through them (FFCL 2, 3, 15); 3) Petitioner himself abused controlled substances, even obtaining them from his own patients, although as a trained physician he should have known better than anyone else their potential for harm and addiction (FFCL 15); 4) The County Court imposed a lengthy probationary period in which to monitor Petitioner's conduct, and imposed other conditions of that probation, including continued participation in the impaired physicians program, surrender of Petitioner's D.E.A. license, and a \$50,000 fine (FFCL 5, 15); and 5) the Pa. Board suspended Petitioner's license and only returned it to Petitioner on a probationary period concurrent with Petitioner's court ordered probation, and with conditions relating to Petitioner's enrollment in rehabilitative programs and use of alcohol or controlled substances (FFCL 6, 7, 15).

In this case, I cannot find that the period of exclusion imposed by the I.G. is unreasonable. The County Court and the Pa. Board both determined that it would take ten years of probation in order for Petitioner to prove that he was trustworthy to interact with society in general and his patients in particular in an unsupervised manner. A three year period of exclusion is reasonable in this case in order to protect the Medicare and Medicaid programs, and to give Petitioner the time to show that he can again be trusted to provide items and services to program beneficiaries and recipients. See Barratta supra, and Lakshmi N. Murty Achalla, DAB App. 1231 (1991).

CONCLUSION

Based on the evidence in the record of this case, the arguments of the parties, and federal law and regulations, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for three years is reasonable and appropriate. Therefore, I am entering a decision in favor of the I.G. in this case.

IT IS SO ORDERED

/s/

Charles E. Stratton
Administrative Law Judge