

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Roger O. Littge, M.D.,	)	DATE: February 9, 1994
Petitioner,	)	
- v. -	)	Docket No. C-93-101
The Inspector General.	)	Decision No. CR302

DECISION

The Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner by letter dated July 13, 1993 (Notice) that he was being excluded for a period of three years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.<sup>1</sup>

The I.G. informed Petitioner in the Notice that his three-year exclusion from Medicare and Medicaid was authorized by section 1128 of the Social Security Act (Act) and resulted from his conviction 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.

By letter dated July 23, 1993, Petitioner timely requested a hearing before an administrative law judge (ALJ) and the case was assigned to ALJ Mimi Hwang Leahy for a hearing and a decision. The parties submitted cross-motions for summary disposition, briefs, and exhibits.

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<sup>1</sup> Unless indicated otherwise, I use the term "Medicaid" to represent all State health care programs from which Petitioner has been excluded.

The case subsequently was reassigned to me for a hearing and a decision. I conducted a telephone prehearing conference on December 21, 1993 at which time I admitted into evidence the I.G.'s exhibits (I.G. Ex.) 1 - 4 and Petitioner's exhibits (P. Ex.) 3 and 6.

During the prehearing conference, Petitioner admitted that he 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). The I.G. stated that there were no aggravating factors present and Petitioner conceded that there were no mitigating factors present, as identified in 42 C.F.R. § 1001.401(c). The parties agreed that the only remaining issue is the appropriate length of the exclusion.

I have considered the evidence of record, the parties' arguments, and the applicable law in this case. I find and conclude that Petitioner's three-year exclusion is reasonable.

#### ISSUE

Whether the three-year exclusion the I.G. imposed and directed against Petitioner is reasonable.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully, I make the following Findings of Fact and Conclusions of Law (FFCL):

1. Petitioner was, during the relevant period, a practicing physician in Redding, California. I.G. Ex. 3.
2. On September 30, 1992, Petitioner was found guilty after a jury trial of: three counts of unlawfully prescribing a controlled substance; one count of unlawfully furnishing and administering a controlled substance; one count of unlawfully failing to keep a record of a dispensed controlled substance; one count of unlawfully failing to maintain the inventory of a dispensed controlled substance; and one count of unlawfully concealing a weapon without a license to carry the weapon, all in violation of California law. I.G. Ex. 4.

3. Petitioner was convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. FFCL 2.
4. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).
5. The I.G. has the authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(3) of the Act. FFCL 4.
6. The regulations published on January 29, 1992 establish criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001 (1992).
7. On January 22, 1993, the Secretary published a regulation which directs that the criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon ALJs in reviewing the imposition of exclusions by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617, 5618 (1993).
8. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. § 1001.401.
9. In the July 13, 1992 Notice, the I.G. notified Petitioner that he was being excluded from participation in Medicare and Medicaid for a period of three years.
10. An exclusion imposed pursuant to section 1128(b)(3) of the Act must be for a period of three years, unless the presence of aggravating or mitigating factors as specified in the regulations form a basis for lengthening or shortening the exclusion period. Act, section 1128(b)(3); 42 C.F.R. § 1001.401.
11. There are no aggravating or mitigating factors, as defined by 42 C.F.R. § 1001.401(c), present in this case.
12. Section 1128 of the Act is a civil statute designed to protect government financed health care programs from fraud and abuse by providers and to protect the beneficiaries and recipients of those programs from incompetent, dishonest, and unfit medical providers.

13. Petitioner is an unfit health care provider. FFCL 2, 3, 12.

14. A three-year exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect Medicare and Medicaid and their beneficiaries and recipients from an unfit medical provider. FFCL 13.

15. The three-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. FFCL 1 - 14.

### DISCUSSION

In order for the I.G. to have a basis to exclude an individual or entity under section 1128(b)(3) of the Act, that individual or entity must have (1) been convicted under federal or State law of a criminal offense (2) relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Here, Petitioner admits that he was convicted of a crime relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance within the meaning of section 1128(b)(3) of the Act, and the I.G. has submitted evidence substantiating Petitioner's admission. I.G. Exs. 1 - 4. Accordingly, the I.G. had the authority to exclude Petitioner under section 1128(b)(3) of the Act.

#### I. Petitioner cannot collaterally attack his State court conviction in this administrative proceeding.

Petitioner argues that he was unjustly convicted in State court, based on the evidence presented by the prosecution. However, collateral attacks of State court convictions are impermissible in section 1128 exclusion cases. Zenaida P. Doiranlis, M.D., DAB CR267 (1993). The State court where Petitioner was convicted is the proper forum for any attack of his State court conviction.

#### II. The regulations published on January 29, 1992 govern the disposition of this case.

On January 29, 1992, the Secretary published regulations which effect both procedural and substantive changes with respect to section 1128 exclusion cases. 42 C.F.R. Parts 1001 - 1007; 57 Fed. Reg. 3298 - 3358.

These regulations apply to cases where the I.G.'s Notice was issued after January 29, 1992. Behrooz Bassim, M.D., DAB 1333 (1992). Accordingly, the January 29, 1992 regulations apply in this case, because the I.G.'s exclusion Notice was issued after the effective date of the regulations.

III. By reason of federal law and regulations, Petitioner must be excluded for a period of three years.

Section 1128 of the Act is a civil statute designed to protect government financed health care programs from fraud and abuse by providers and to protect the beneficiaries and recipients of those programs from incompetent, dishonest, and unfit medical providers.<sup>2</sup> An exclusion is also a deterrent to future misdeeds.

The stated purpose of the January 29, 1992 regulations is "to protect program beneficiaries from unfit health care practitioners, and otherwise to improve the anti-fraud provisions of the Department's health care programs . . . ." 57 Fed. Reg. 3298. The January 29, 1992 regulations constitute the Secretary's finding that an individual convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance is unfit to provide items or services to Medicare or Medicaid or the programs' beneficiaries or recipients for a period of three years.

Only if there is evidence of aggravating or mitigating factors as enumerated in section 1001.401(c) of the regulations can an excluded party's period of exclusion be other than three years. See John M. Thomas, Jr., M.D., et al., DAB CR281 (1993). Here, no aggravating or mitigating circumstances have been alleged to exist.

Thus, pursuant to section 1001.401(c) of the January 29, 1992 regulations, Petitioner must be excluded from Medicare and Medicaid for a minimum period of three

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<sup>2</sup> Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law is designed to protect program beneficiaries and recipients from individuals who have demonstrated by their behavior that they threaten the integrity of the programs or that they cannot be entrusted with the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

years, because Petitioner admitted and the I.G. proved that Petitioner was (1) convicted of a criminal offense which (2) relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act, section 1128(b)(3).

CONCLUSION

Based on the law and the evidence submitted by the parties, I conclude that Petitioner's three-year exclusion is reasonable and must stand.

It is so Ordered.

/s/

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Charles E. Stratton  
Administrative Law Judge