DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Grant Appeals Board

Civil Money Penalties Hearing Office

In the Matter of: George G. Griffon, Respondent	**DECISION CR 3** Docket No. C-8 Date: **May 15, 1985**

DECISION AND ORDER

This is a civil money penalties case arising from a determination by the Inspector General of the Department of Health and Human Services (HHS) that the Respondent submitted false Medicaid claims for payment in violation of §1128A of the Social Security Act, as amended, (42 U.S.C. §§1320a - 7a et seq. (Act)) and its implementing regulation, 45 CFR §101.100 et seq. (Regulation).

By letter dated July 3, 1984, the Deputy Inspector General for Civil Fraud notified George G. Griffon, Respondent, of the Inspector General's (IG's) intent to impose civil monetary penalties of $44,000 pursuant to the Act and Regulation. More specifically, the IG's notice of intent was based on a determination by the IG that Respondent presented or caused to be presented to the Louisiana Department of Health and Human Resources (DHHR), a State agency administering the State plan for medical assistance under Title XIX of the Social Security Act (Medicaid), claims for items which Respondent knew were not provided as claimed. The IG charged that from September 1979 through November 1979, Respondent's pharmacy in Baton Rouge, Louisiana, submitted 22 claims for prescriptions filled with brand-name drugs when, in fact, the prescriptions had been filled with generic drugs. The IG alleged that Respondent had defrauded the Medicaid program by instructing his pharmacist employees to fill Medicaid prescriptions with lower priced generic drugs and to charge the program with higher priced brand-name drugs. The IG stated that, based on Respondent's presentation that the prescriptions had been filled with brand-name drugs, the Medicaid program had reimbursed him the higher price of the brand-name drugs. The IG noted that Respondent had been found guilty of Medicaid fraud in violation of Louisiana law

with respect to the 22 claims on which the IG's proposed penalties were based.

By letter dated September 6, 1984, counsel for Respondent requested a hearing before an Administrative Law Judge as provided for in 45 CFR Part 101.

On January 14, 1985, the undersigned conducted a hearing in New Orleans, Louisiana, at which the parties were given the opportunity to present material evidence relevant to the issues, to present and cross examine witnesses, and to present orally their arguments on the facts and the law. Following the hearing, after receipt of the hearing transcript, the parties were given the opportunity to submit written briefs with their proposed findings of fact and conclusions of law.

Issues

The principal issues in this case are: 1/

1. Whether Respondent submitted claims for items that he knew were not provided as claimed, as defined by the Act and Regulation.

2. If Respondent submitted claims in violation of law, whether the amount of the proposed penalties ($44,000) is reasonable and appropriate under the circumstances of this case and within the intent and meaning of the Act and Regulation.

Background

Under the Medicaid program, HHS provides financial assistance to participating states to aid them in furnishing health care to needy persons. In Louisiana, DHHR is responsible for administering the Medicaid program, including the payment of claims for pharmaceutical drugs dispensed to Medicaid beneficiaries.

Pursuant to 42 U.S.C. §1320a - 7a, the Secretary of HHS may impose civil money penalties and assessments against any person who presents or causes to be presented a claim for an item or service, furnished under the Medicaid program, that the person knew or had reason to know was not provided as claimed. The Secretary may impose a penalty of up to $2,000 for each item or service so falsely claimed and an assessment

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1/ These issues subsume those identified in my letter of February 5, 1985.

of up to twice the amount claimed for each item or service. In addition, the Secretary may suspend a person subject to a penalty or assessment from participation in the Medicaid and Medicare (Title XVIII of the Act) programs.

On January 30, 1980, Respondent was indicted by the grand jury of East Baton Rouge Parish on 32 counts of Medicaid fraud in violation of Louisiana Revised Statutes 14:70.1. Joint Ex 1. 2/ Prior to trial, four counts were dismissed. Id. After a trial in the Nineteenth Judicial District Court, Respondent was convicted on March 15, 1982, on 22 counts and sentenced as to each count on June 15, 1982, to serve consecutive one year terms, suspended upon restitution of $2,500 on each count, for a total of $55,000. Additionally, Respondent was ordered to pay a fine of $2,500 on each count. Respondent appealed, and on February 27, 1984, the Supreme Court of Louisiana affirmed the conviction and sentence. Respondent did not seek further review.

As a result of his conviction, Respondent was suspended from participation in the Medicare and Medicaid programs for five years. Respondent did not appeal his suspension.

Findings of Fact and Conclusions of Law

Having considered the entire record, the arguments of the parties, and being advised fully herein, I make the following findings of fact and conclusions of law:

1. During the period September 1979 through November 1979 and at all other times relevant to this proceeding, Respondent George Griffon was part owner and manager of Griffon Drugs in Baton Rouge, Louisiana. Mr. Griffon is a registered pharmacist.

2. Griffon Drugs has participated in the Medicaid program since 1966, and applied for a provider number on October 6, 1975.

3. During the period September 1979 through November 1979, Respondent submitted to DHHR the following claims for prescriptions billed at the rate for brand-name drugs,

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2/ Exhibits admitted into evidence at the hearing are referred to herein as "Joint Ex" (followed by the number) for exhibits introduced jointly; "Resp. Ex" for the Respondent's exhibits; and "IG Ex" for the Inspector General's exhibits. The transcript of the hearing is referred to as "Tr", followed by a page number.

although the pharmacists at Griffon Drugs dispensed lower priced generic drugs to Medicaid recipients to fill the prescriptions:

Approximate Date of Claim	Individual Claim Number	Prescription Number	Date of Prescription	Amount Claimed
a. 9-13-79	9879256128050	118609	8-14-79	$ 4.67
b. 10-15-79	9879288183270	659692	9-4-79	$ 8.84
c. 10-15-79	9879288183530	666831	9-6-79	$ 4.15
d. 10-15-79	9879288180100	120549	9-20-79	$ 5.35
e. 10-15-79	9879288180040	120557	9-20-79	$ 5.08
f. 10-15-79	9879288180570	667705	9-25-79	$14.08
g. 10-15-79	9879288170300	664331	10-1-79	$ 5.68
h. 10-15-79	9879288170320	667958	10-1-79	$ 9.85
i. 10-30-79	9879303064720	120480	10-4-79	$ 4.93
j. 10-30-79	9879303075190	668134	10-4-79	$ 9.71
k. 10-30-79	9879303063730	120244	10-11-79	$ 4.69
l. 10-30-79	9879303177460	668673	10-15-79	$17.34
m. 10-30-79	9879303076130	120707	10-17-79	$ 6.58
n. 10-30-79	9879303075710	666649	10-20-79	$ 4.18
o. 11-5-79	9879309013450	120935	10-22-79	$ 6.10
p. 11-5-79	9879309015340	665328	10-24-79	$13.64
Q. 11-5-79	9879309189870	663385	10-26-79	$10.23
r. 11-5-79	9879309012720	119082	10-29-79	$ 5.83
s. 11-5-79	9879309012740	119313	10-29-79	$10.97
t. 11-5-79	9879309013640	119694	10-26-79	$ 4.55
u. 11-5-79	9879309013700	120976	10-26-79	$ 4.27
v. 11-5-79	9879309012550	121011	10-30-79	$ 4.93

4. Each of the items listed in 3a -- 3v, supra, is subject to a determination that Respondent presented or caused to be

presented a claim with respect to that item and that Respondent knew the item was not provided as claimed, within the scope of 45 CFR § 101.102.

5. After a trial in State court in which Respondent was the defendant and had the opportunity to be heard, Respondent was convicted of having presented a claim for each of the items listed in 3a - 3v, supra, knowing that the item had not been provided as claimed. The conviction was affirmed on appeal and is final.

6. In this civil money penalty proceeding, Respondent is bound by the State court conviction as to each of the 22 items listed in 3a -- 3v, supra.

7. The IG proved by clear and convincing evidence that Respondent knowingly presented false claims as described in Nos. 3 -- 6, supra, so that Respondent could have been rendered liable under the provisions of the False Claims Act, 31 U.S.C. § 3729 et seq. for payment of not less than $44,000. Respondent did not dispute the adequacy of the IG's proof.

8. Respondent did not assert any factors in mitigation of the penalty proposed, nor do I find any.

9. It is an aggravating circumstance that Respondent not only directed employees to fill prescriptions with generic drugs while billing for brand-name drugs, but also personally participated in the transfer of generic drugs into brand-name containers as one method of ensuring that the State Medicaid agency would reimburse at the higher brand-name level. See IG Ex. 1, pp. 637 - 645.

10. It is an aggravating circumstance that since as early as 1974, Respondent made a practice of substituting generic drugs for brand-name drugs and billing for the higher priced brand names. See Joint Ex 3, pp. 8-9.

11. It is an aggravating circumstance that Respondent's practice of filling prescriptions with generic drugs while billing for brand-name drugs was extensive, averaging 50 percent of the approximately 200 prescriptions per day which Griffon Drugs supplied to Medicaid recipients in nursing homes, using 30 to 40 different generic drugs. See IG Ex 3, pp. 923, 951, 968. Respondent was reimbursed slightly over one million dollars for Medicaid claims during the period 1974-1979. See IG Ex. 6.

12. It is an aggravating circumstance that Respondent submitted false claims in which he not only submitted brand names in lieu of the generic drugs actually supplied, but also identified the drugs with the National Drug Code numbers associated with the brand name. See Joint Ex 3, pp. 7, 9.

Discussion

1. The Inspector General proved that Respondent submitted 22 false claims so that Respondent was subject to civil money penalties and assessment, and suspension from the Medicare and Medicaid programs.

The Inspector General proved that Respondent had been convicted by the State of Louisiana of submitting false claims for 22 items with the intent to defraud the State Medicaid program. Respondent did not dispute that his conviction, affirmed on appeal, was a final determination on those 22 false claims and that in this proceeding he was bound by that determination in accordance with 45 CFR §101.114(c). His counsel stated specifically that he was "not contesting the adequacy of proof of those items claimed by the government which correspond to counts of the state indictment upon which Griffon was convicted." March 4, 1985 letter transmitting Respondent's Post-Hearing Brief. 3/ Respondent joined in a stipulation and exhibits attesting to the circumstances of his conviction. Prehearing Memorandum of IG; order dated November 29, 1984; Joint 1-3. The details of Respondent's conviction are set out in these documents and in IG Ex 5, which is a chart identical to one introduced at his State trial.

Upon review of these materials, and in the absence of any argument or showing to the contrary, I conclude that the IG has proved by clear and convincing evidence that Respondent presented Medicaid reimbursement claims for the 22 items on which he was convicted, and that Respondent knew that the 22 items were not provided as claimed. Respondent claimed reimbursement for the cost of brand-name drugs when in fact he knew that lower cost generic drugs had actually been dispensed to Medicaid recipients. For this he could have been liable under the False Claims Act, 31 U.S.C. 3729 et seq. and thus was subject to penalties and an assessment, and suspension from the Medicare and Medicaid programs, all of which could be imposed administratively by HHS.

2. The penalties imposed are appropriate and reasonable.

Having found that Respondent submitted false claims, I am empowered to impose a penalty of not more than $2,000 for each of the 22 items which he knew had not been provided as

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3/ In the letter and in the brief, Respondent raised an issue with respect to items in the original notice of intent which did not correspond to the items on which Respondent was convicted. This issue is discussed at pp. 7-8, infra.

claimed. 45 CFR § 103. In addition, Respondent may be subject to assessment of not more than twice the amount claimed and to a suspension for a period of time.

The IG proposed a penalty of $2,000 for each of the 22 items. The IG did not seek an assessment. HHS imposed a suspension of five years in a separate proceeding and the IG did not propose suspension here.

Respondent did not suggest any mitigating circumstances, nor do I find any. Counsel for Respondent stated specifically that he was not raising any defenses or factors in mitigation, nor was he contesting the propriety of the proposed penalty. March 4, 1985 transmittal letter, supra. There were several aggravating circumstances. See Findings 9-12, supra.

I conclude that a penalty of $2,000 for each of the 22 items -- a total of $44,000 -- is appropriate in this case. The guidelines for determining the amount of the penalty and assessment state that where there are substantial or several aggravating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently close to or at the maximum to reflect that fact. The substantial nature of the aggravating circumstances is well summarized in the findings of the Louisiana Supreme Court that Respondent:

> knew exactly what he was doing and knew the benefit he would reap in utilizing this scheme. . . The scheme to defraud the Medicaid program had been in practice for at least six years, at great cost to the state and the program, all as evidenced by the great volume of prescription business enjoyed by the defendant through those years. . . The seriousness of the crime is that funds which would and could have benefitted needy Medicaid recipients were unlawfully diverted to defendant's own use.

Joint Ex 3, pp. 8, 12.

The IG asserted in the Post Hearing Brief that penalties are meant to be punitive, to deter the wrongdoer and others from engaging in similar fraudulent conduct in the future, are designed to go beyond monetary losses to the government, and are in addition to other penalties that may be prescribed by law. Brief, p. 27. Thus, although Respondent paid restitution of $55,000 and an additional $55,000 in fines to the State of Louisiana, it is reasonable and appropriate to impose another $44,000 in penalties because of the aggravating circumstances and the need for an amount substantial enough to act as a deterrent.

3. Respondent had adequate notice of the basis for the civil money penalties imposed herein and a full opportunity to be heard.

For the first time in his Post Hearing Brief, Respondent asserted that the IG had not proved his case with respect to eight of the 22 claims on the basis of which the IG proposed penalties of $2,000 per claim. Brief, p. 9. Respondent pointed out that 1) four of those claims were counts of the original 32-count indictment, but those four had been dismissed prior to trial; and 2) four other claims were ones on which the Respondent had been found not guilty. The eight claims to which Respondent was referring were on a list of 22 claims attached to the Notice of Intent.

In a reply brief, the IG conceded that the Notice of Intent in error had listed the eight claims discussed above. As a result of this error, the Notice had not listed eight of the claims on which Respondent had been convicted. Reply Brief, p. 2. Accompanying the IG's reply brief was a "Motion to Amend the Notice of Proposed Determination" which in effect proposed to substitute a corrected chart containing only the 22 claims on which Respondent had been convicted for the erroneous chart attached to the original Notice of Intent.

In his opposition to the IG's motion, Respondent asserted that he had not objected to that evidence "relative to counts of the indictment which were not itemized in the notice of determination" because at the time of the hearing such evidence was "irrelevant and immaterial." Respondent contended that the effect of the motion was to make that evidence relevant at a time when no objection could be made. Respondent also contended he was prejudiced because prior to the motion to amend he had relinquished any possible argument that he had relied on incorrect information supplied by the State agency.

By Order of April 11, 1985, I granted the IG's motion but suspended my order for 10 days to permit the Respondent to file a motion to strike or other appropriate pleading. Respondent did not reply.

I conclude that Respondent was not prejudiced by permitting the IG, in effect, to amend the pleadings to conform to the proof. As I noted in my Order, the Notice of Intent itself referred to the 22 claims on which Respondent was convicted as forming the basis for the proposed penalties. In his prehearing conference statement, Respondent also asserts that the basis for the IG's proposed penalties "are the same acts charged in the indictment." At the hearing, counsel for Respondent referred to the indictment as the "spring from which this whole case has eventually sprung" and counsel for the IG declared again that the IG's case was based on the 22 counts on which Respondent was convicted. Tr. 5, 70. It is simply not credible that Respondent was misled to his

prejudice into believing that the IG would base any part of his case on counts of the indictment which had been dismissed or on which Respondent had been found not guilty while omitting counts on which Respondent had been convicted. If there had been any prejudice, Respondent was given an opportunity to present his case, but he chose to remain silent. It is only reasonable to conclude that Respondent's silence confirms the obvious -- Respondent was given adequate notice of the IG's basis and a full opportunity to present his own case.

4. I am not authorized to decide the Respondent's challenge to the validity of the Act and regulations.

Respondent challenged the validity of the Act and regulations as applied to him in this case because the bases for the proposed penalties are actions which took place prior to the 1981 amendment adding the civil money penalties provision to the Act. I do not have the authority to decide upon the validity of federal statutes or regulations; as Administrative Law Judge I make an assumption that the Act and Regulation are valid. Consequently, I make no decision on this issue. 45 CFR § 101.115(c).

5. The testimony of Carolyn Maggio, the exhibit containing the provider manual (Resp. Ex 1) were not considered in this decision.

At the hearing in this case I admitted into evidence the testimony of the only witness and two exhibits, over the objection of counsel for the IG, subject to considering the relevancy of that evidence on the basis of that objection. Tr. 50. The testimony was that of Carolyn Maggio, Assistant Director of the Medical Assistance Division, Office of Family Security, Louisiana Department of Health and Human Resources. Tr. 18-49. The exhibits were 1) the trial testimony of the Respondent (Resp. Ex 3); and 2) selected pages from the Louisiana Medical Assistance Provider Manual (Resp. Ex 1).

The IG objected to this evidence because Respondent was using it to re-argue defenses which he had asserted without success at his criminal trial. The IG contended that Respondent was collaterally estopped from raising those defenses again in this proceeding, citing 45 CFR § 101.114(c) as well as Montana v. United States, 440 U.S. 147, 153 (1979) and other well established case law. Respondent apparently finally agreed, for in his Post Hearing brief he conceded that he was bound by his conviction. See p. 6 of this decision, supra.

Accordingly, I did not consider this evidence in Respondent's defense. Even if I had, Respondent's purpose in using this evidence to support his defense of lack of intent would have been frustrated. The issue in this case is whether he knew; the degree of his intent speaks only to the question of

mitigating or aggravating circumstances. As I noted in discussing that issue, there is ample evidence that Respondent not only knew but intended the unlawful consequences of his actions. See pp. 5-6 supra. Carolyn Maggio's testimony would have supported, not undermined, that conclusion.

ORDER

Penalties of $2,000 for each of 22 items falsely claimed, on which Respondent was convicted in State court, (a total of $44,000) are hereby imposed and Respondent is Ordered to pay this amount.

/s/

Ronald T. Osborn
Administrative Law Judge