DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Vincent Baratta, M.D.,	DATE: January 17, 1990
Petitioner,	
- v. -	Docket No. C-144
	DECISION CR 62
The Inspector General.	

DECISION AND ORDER

Petitioner timely requested a hearing, protesting a determination by the Inspector General (I.G.) to exclude him from participation in the Medicare program, and any State health care programs (such as Medicaid) as defined in section 1128(h) of the Social Security Act (Act), for five years, pursuant to section 1128(b)(4)(A) of the Act. I have considered the parties' arguments, their fact submissions, and applicable law. I conclude that the exclusion imposed by the I.G. in this case is authorized by section 1128(b)(4) of the Act and that it is appropriate for Petitioner to be excluded for a period of three years.

BACKGROUND

On July 11, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. advised Petitioner that he was being

[1] Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section

(continued...)

excluded as a result of the revocation of Petitioner's license to practice medicine in the State of Florida. The I.G. further advised Petitioner that he was being excluded for a period of five years. Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. A telephone prehearing conference was held on September 14, 1989. Petitioner waived his right to an evidentiary hearing and the parties agreed to file motions for summary disposition and submit the case for decision on the basis of documentary evidence.

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., 1989 Supp.). Section 1128(b)(4)(A) of the Act permits the I.G. to exclude from Medicare and Medicaid participation any individual or entity whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). 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 whether:

1. Petitioner's license to provide health care was revoked for reasons bearing on his professional competence, professional performance, or financial integrity;

2. Section 1128(b)(4)(A) of the Act permits an exclusion under the circumstances of this case; and

3. The length of Petitioner's exclusion is appropriate.

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[1](...continued)
1128(h). For the sake of brevity I refer only to Medicaid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. A six-count indictment was filed against Petitioner in the United States District Court for the Eastern District of New York. This indictment alleged that Petitioner had committed crimes with respect to a drug study within the jurisdiction of the Federal Drug Administration (FDA). I.G. Ex. 1.

2. At the time of the indictment, Petitioner was a medical doctor licensed in New York and Florida. I.G. Ex. 1, 4.

3. Counts 2, 3, and 4 of the indictment alleged that Petitioner, along with others, had devised a scheme and artifice to defraud and obtain money and property by means of false pretenses and representations with respect to a study on a new drug, Captopril, and had falsified patient reports relevant to this study. I.G. Ex. 1.

4. Count 5 of the indictment alleged that Petitioner had made a false declaration to a grand jury conducting an investigation into the same drug study of Captopril. I.G. Ex. 1.

5. On May 6, 1985, Petitioner pled guilty to count 5 and was convicted on counts 2, 3, and 4, of the indictment. Petitioner was acquitted on count 1, and count 6 was dismissed. I.G. Ex. 2.

6. Petitioner was sentenced to three years in prison on each count, fined the sum of $26,000, and was required to serve 250 hours of community service. Petitioner's three-year sentences were suspended and he was placed on probation for a period of three years on each count. I.G. Ex. 2.

7. As a result of Petitioner's convictions, the Office of Professional Medical Conduct of the State of New York filed an application for the revocation of Petitioner's license to practice medicine. I.G. Ex. 3.

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[2] The citations to the record in this Decision and Order are designated as follows:

Petitioner's Brief	P. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)

8. The application to revoke was referred to the Regents Review Committee (the Committee) of the University of the State of New York. After a hearing on March 11, 1986, the Committee recommended to the Board of Regents that Petitioner's license be revoked, but that the revocation be stayed and Petitioner be placed on probation for three years. This recommendation was approved by the Board of Regents, the state licensing authority in New York. I.G. Ex. 3.

9. The Committee's recommendation to place Petitioner on probation and allow him to continue to practice medicine was based upon the following considerations:

> a. the misconduct involved a field study for a pharmaceutical company which was not used;
>
> b. there was no harm to any patient [by Petitioner];
>
> c. [Petitioner] had an otherwise unblemished record for approximately 26 years; and
>
> d. it appears that [Petitioner] has learned his lesson and is unlikely to repeat this or any similar misconduct.

I.G. Ex. 3.

10. On November 3, 1987, the Florida Department of Professional Regulation filed an administrative complaint with the Florida Board of Medicine (Board of Medicine). I.G. Ex. 4.

11. The complaint alleged that:

> (1) Petitioner was a physician and was licensed to practice medicine in Florida and New York;
>
> (2) On or about May 5, 1985, Petitioner was convicted of the crimes of mail fraud, use of false documents and making false declarations to a grand jury;
>
> (3) Petitioner's convictions were directly related to Petitioner's ability to practice medicine; and
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> (4) On April 1, 1986, Petitioner's license to practice medicine in the State of New York had been placed on probation as a result of these convictions.

I.G. Ex. 4.

12. On June 15, 1988, the Board of Medicine issued a final order approving, adopting, and incorporating by reference the allegations set forth in the administrative complaint as findings of fact and conclusions of law. I.G. Ex. 6.

13. The Board of Medicine's final order revoked Petitioner's license to practice medicine in the State of Florida. I.G. Ex. 6.

14. The Florida Board of Medicine revoked Petitioner's license for reasons bearing on his professional competence and professional performance within the meaning of section 1128(b)(4)(A) of the Act.

15. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

16. On July 11, 1989, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years pursuant to section 1128(b)(4)(A) of the Act. I.G. Br. 1.

17. The exclusion imposed by the I.G. was authorized by section 1128(b)(4)(A) of the Act. 42 U.S.C. 1320a-7(b)(4)(A).

18. An exclusion of three years is appropriate in this case.

DISCUSSION

I. The Florida Board of Medicine Revoked Petitioner's License to Practice Medicine in Florida For Reasons Bearing on Petitioner's Professional Competence And Performance.

The undisputed facts in this case establish that Petitioner's license to practice medicine in Florida was revoked based on his convictions in New York. Furthermore, Petitioner does not dispute that his license to practice medicine was revoked by the state licensing authority in Florida. P. R. Br. 2-5.

On November 3, 1987, an administrative complaint was filed with the Florida Board of Medicine alleging that Petitioner was a physician licensed to practice medicine in Florida and New York. The complaint further alleged that Petitioner had been convicted of certain crimes in New York and that these crimes directly related to his ability to practice medicine. The final order of the

Board of Medicine incorporated the allegations of the administrative complaint as findings of fact and conclusions of law and revoked Petitioner's license. A specific finding of fact and basis for revocation of Petitioner's license by the Florida Board of Medicine was that Petitioner's convictions were directly related to his ability to practice medicine.

Section 1128(b)(4)(A) of the Act, a federal law, provides that the Secretary (or his delegate) may exclude from participation in the Medicare and Medicaid programs:

> Any individual or entity whose license to provide health care has been revoked or suspended by any State licensing authority,...for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The Board of Medicine concluded that Petitioner's convictions of the crimes of mail fraud, use of false documents, and making false declarations before a grand jury directly related to his ability to practice medicine, and revoked his license. I conclude that this revocation was "for reasons bearing on his professional competence and performance." Accordingly, I conclude that Petitioner's license to provide health care in the State of Florida was revoked by a State licensing authority within the meaning of section 1128(b)(4)(A).

II. The I.G. is Authorized to Exclude Petitioner by Reason of section 1128(b)(4)(A) of the Act.

Petitioner asserts that the circumstances surrounding the revocation of his Florida license were not those contemplated by Congress when it enacted section 1128(b)(4)(A). He also asserts that an exclusion in this case is contrary to the purpose and policy of the federal statute and is therefore not a reasonable exercise of the I.G.'s discretion under this statute. Petitioner requests that I find that the action of the I.G. was an unreasonable and improper application of section 1128(b)(4)(A).

In contrast, the I.G. argues that Petitioner's license was revoked in the State of Florida for reasons bearing on his professional performance and professional competence within the meaning of section 1128(b)(4)(A) and that an exclusion under those circumstances is authorized by section 1128 of the Act.

Petitioner has attempted to distinguish the circumstances surrounding the revocation of his license in Florida from those recited in the legislative history of section 1128 of the Act and argues that because the State in which the

convictions occurred and in which he now practices (New York) did not revoke his license, section 1128(b)(4)(A) should not be applied to this case.

While Petitioner's arguments may be relevant as mitigating circumstances in considering the appropriate length of an exclusion, I conclude that these distinctions are not significant for purposes of determining whether an exclusion is authorized in this case. Section 1128(b)(4)(A) of the Act allows the Secretary (or his delegate, the I.G.) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid, of any individual or entity whose license to provide health care has been revoked or suspended by any State licensing authority, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The language of subsection 1128(b)(4)(A) is without qualifying terms or conditions. Furthermore, as demonstrated by the legislative history, Congress intended to protect Medicare and Medicaid patients from physicians whose license had been revoked by any state licensing authority. It is not necessary that the exact circumstances of Petitioner's case be recited in the legislative history. The language of the statute is clear and needs no legislative history to clarify its application to this case. The State of Florida revoked Petitioner's license for reasons bearing on his professional competence and performance. Whether another state in which Petitioner is licensed to practice medicine also revokes his license and places him on probation after a review of the same circumstances is irrelevant to the interpretation or application of section 1128(b)(4)(A).

While I do have the authority to decide whether the I.G. is authorized by law to exclude an individual or entity under section 1128 of the Act, based on the facts of a particular case, and have done so in this case, I do not have the authority to decide whether the I.G. should or should not exercise that legal power when his discretion is involved. The lawful exercise of the I.G.'s discretion is a matter of policy for the I.G.

III. An Exclusion of Three Years is Appropriate in This Case.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for five years. Since I have decided that the I.G. had discretion to impose an exclusion in this case, I must now decide the appropriate length of exclusion.

The Regulations provide that certain criteria be considered in determining the length of exclusion in this case. 42 C.F.R. 1001.125. Petitioner asserts that an application of these criteria to his case leads to the conclusion that an exclusion of five years is unreasonable. He argues that he has already been excluded for a reasonable period of time, and that it is appropriate that no further exclusion should be imposed. In support of his arguments, Petitioner cites as mitigating circumstances the findings of the New York Board of Regents that there was no adverse impact on patients and that he has had an otherwise unblemished record for approximately 26 years. Petitioner argues that his exclusion should be lessened because: (1) he has no prior Medicare or Medicaid sanctions; (2) there were no program violations, and as a result, no related offenses; and (3) Medicare, Medicaid, and the social services programs were not damaged.

The I.G. argues that the purpose of an exclusion under section 1128(b)(4)(A) is to protect program recipients and beneficiaries, and that Congressional intent with respect to the length of exclusions can be determined by a review of section 1128(a). He asserts that, since Petitioner was convicted of crimes with respect to his practice of medicine, a five-year period of exclusion mandated under section 1128(a)(1) is reasonable.

In order to decide the appropriate length of an exclusion, I must make a de novo determination by making an independent assessment of the seven factors listed in section 1001.125 of the Regulations and consider all of the purposes designated by Congress for the enactment of section 1128 of the Act. Charles J. Burks, M.D. v. The Inspector General, Docket No. C-111 (1989). See also, Steven L. Bickel v. Office of the Inspector General, DHHS OHA/Appeals Council, No. 000-00-0010 (Oct. 28, 1988). The main purposes of an exclusion are to allow for a period of time in which to ensure that Petitioner is trustworthy and that persons helped by these programs are protected. I must consider not only the harm actually caused, but the public harm that could be caused, and the deterrent effect which an exclusion might have on other providers of services. I must look at all relevant factors, such as the crimes for which Petitioner was convicted, and which formed the basis of the revocation of his license to practice medicine in Florida, in determining Petitioner's trustworthiness and ensuring the protection of the beneficiaries and recipients of these programs. Burks, supra.

Petitioner was convicted of giving false testimony before a federal grand jury, a crime which directly relates to Petitioner's trustworthiness. Furthermore, Petitioner's

other crimes involved serious and potentially harmful consequences to patients and others. These crimes involved a scheme to obtain money by filing false reports and making false representations with respect to the study of a new drug within the jurisdiction of the FDA. The harm caused by Petitioner's crimes is not measured solely by a review of the patients involved in this drug study. There is the potential harm to the public at large resulting from these false reports. The FDA was set up to protect the public and is relied on to assure the safety of new drugs. Thus, a potential harm is the undermining of the public's confidence in the safety of new drugs.

It is reasonable to infer, from the length of the sentences and the amounts of the fines imposed against Petitioner, that the crimes for which he was convicted were serious. 42 C.F.R. 1001.125. The absence of prior offenses by Petitioner is not a mitigating factor. Furthermore, Petitioner's lack of a sanction record under Medicare or Medicaid, the fact that there has been no direct damages incurred by these programs, and the fact that Petitioner's convictions did not involve program violations, are not per se mitigating in nature. Rather, their presence would be aggravating factors that might justify an increased sanction.

The I.G. has asserted that Petitioner's license to provide health care was revoked by the State licensing authority in New York. Petitioner asserts that his license to practice medicine in New York was not revoked. He argues that the revocation of his license was stayed and that a stay of the execution is the same as if a revocation never occurred. I disagree with Petitioner's reasoning. I conclude, for purposes of considering aggravating and mitigating circumstances, that Petitioner was placed on probation for three years by the State of New York with respect to his license to practice medicine. This is not the same as no action being taken. Thus, Petitioner's argument, that New York's failure to revoke his license proves that patients in the State of New York are not at risk, is without merit.

Contrary to the I.G.'s assertion in this case, I do not deem it appropriate to use section 1128(a)(1) as a guide in determining a reasonable exclusion under section 1128(b)(4)(A). Section 1128(a)(1) requires the I.G. to exclude petitioners under certain circumstances and sets a mandatory minimum exclusion period of five years. Petitioner was excluded pursuant to section 1128(b)(4)(A). In contrast to section 1128(a)(1), section (b)(4)(A) gives the I.G. discretion in determining the length of exclusion. Thus, I conclude that section 1128(a) is not a reasonable basis for imposing a five-year exclusion in this case.

Trustworthiness is something that is not subject to exact measurement or determination. Although subjective, there is evidence of trustworthiness in this case. The fact that the New York Board of Regents: (1) stayed execution of the revocation of Petitioner's license for a period of three years; (2) stated that it felt Petitioner had learned his lesson; and (3) thought that there would be no further violations by the Petitioner, are important considerations in determining the length of exclusion. I conclude that the I.G. did not accord these considerations the proper amount of weight in imposing a five-year exclusion. Furthermore, I am influenced by the fact that the Board of Regents thought that three years was an appropriate period of time in which to determine whether or not Petitioner is trustworthy, since one of the central purposes of an exclusion is to insure trustworthiness. Accordingly, based on all the facts and circumstances in this case, I conclude that a three-year exclusion is appropriate.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by law. I further conclude that a three-year exclusion is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge