Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Michael D. Reiner, R.M.D.,	DATE: August 8, 1990
Petitioner,	
- v. -	Docket No. C-197
The Inspector General.	DECISION CR 90

DECISION

By letter dated November 9, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare and any State health care program for four years.[1] Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.[2] Petitioner was further advised that his exclusion was authorized by section 1128(b)(1) of the Social Security Act.

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[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 (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

[2] The I.G. previously excluded Petitioner from participation in Medicare and Medicaid for five years, based on his determination that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare, and pursuant to section 1128(a)(1) of the Social Security Act. Petitioner requested a hearing as to that exclusion, and on September 22, 1989, another administrative law judge concluded that the I.G. lacked authority to exclude Petitioner pursuant to section 1128(a)(1). The I.G. then imposed and directed the exclusion at issue in this case.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I held a hearing in Denver, Colorado on April 17 - 18, 1990.

I have considered the evidence introduced by both parties at the hearing, as well as applicable law. I conclude that the four year exclusion imposed and directed against Petitioner by the I.G. is reasonable. Therefore, I sustain the exclusion, except that for reasons stated herein, I modify the exclusion so that Petitioner will be eligible to apply for reinstatement on September 11, 1993.

ISSUE

The issue in this case is whether the four year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who received a license to practice medicine in Colorado in 1984. Tr. at 174.[3]

2. In March, 1986, Petitioner contracted to provide services at the South Routt Medical Center at Oak Creek, Colorado. Tr. at 175.

3. South Routt Medical Center was owned by Kremmling Memorial Hospital. Tr. at 176.

4. Petitioner's oral contract to provide services at South Routt Medical Center provided that all reimbursement received for Petitioner's services would be remitted to Kremmling Memorial Hospital. Tr. at 42.

5. Petitioner's contract further provided that Kremmling Memorial Hospital would pay Petitioner for his services based on a percentage of the dollar amount of the reimbursement claims made for his services. Tr. at 42, 177 - 178.

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[3] The parties' exhibits and the transcript of the hearing will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Exhibit	P. Ex. (number)
Transcript	Tr. at (page)

6. Between the summer of 1986 and January 1987, Petitioner diverted to his own use reimbursement monies for services provided at the South Routt Medical Center. These monies should have been remitted to Kremmling Memorial Hospital. Tr. at 43 - 44, 181 - 182.

7. Petitioner diverted money on several occasions by depositing reimbursement checks to his own account. These checks should have been turned over to Kremmling Memorial Hospital. Tr. at 182.

8. The amount of money which Petitioner diverted to his own use in 1986 exceeded $10,000.00. Tr. 60 - 61, 98, 113; I.G. Ex. 9, 10.

9. Petitioner was addicted to and abused medications in 1986. Tr. at 180.

10. During 1986, Petitioner took medications from South Routt Medical Center, including Demerol, Percocet, and cocaine, and substituted other substances for these drugs. Tr. at 50 - 52, 186.

11. During 1986, Petitioner wrote prescriptions for narcotic medications which he diverted to his own use. Tr. at 54, 186.

12. The prescriptions written by Petitioner included prescriptions written for individuals who kept some of the narcotic medications they obtained pursuant to the prescriptions and returned some of the narcotic medications to Petitioner. Tr. at 55.

13. Petitioner was required by law to maintain a log of narcotic medications dispensed at South Routt Medical Center. Tr. at 46.

14. Petitioner failed to maintain the narcotic medications log. Tr. at 55, 307.

15. Petitioner attempted to conceal his failure to maintain the narcotic medications log from law enforcement authorities by falsifying entries to the log. Tr. at 47 - 48.

16. Petitioner's diversions of reimbursement monies and medications were discovered by officers of Kremmling Memorial Hospital and by law enforcement authorities in January, 1987. Tr. at 41.

17. Petitioner first sought treatment for his addiction to medications in early 1987, after an investigation into

his conduct had been initiated by law enforcement authorities. Tr. at 188.

18. On May 18, 1987, a criminal complaint and information issued against Petitioner from a Colorado state court, charging him with 17 criminal offenses. I.G. Ex. 1.

19. On September 11, 1987, Petitioner pleaded guilty to two criminal offenses, and entered into an agreement whereby judgment of conviction was deferred with respect to two additional criminal offenses. I.G. Ex. 2, 3..

20. The offenses to which Petitioner entered into a deferred adjudication arrangement included: Count I of the complaint and information, as amended, which charged Petitioner with unlawfully and knowingly using money in excess of $300.00 which belonged to Kremmling Memorial Hospital; and Count II of the complaint and information, which charged Petitioner with unlawfully and knowingly obtaining Percocet, a Schedule II controlled substance, by means of a false prescription. I.G. Ex. 1, 2, 3.

21. The offenses to which Petitioner pleaded guilty included: Count XV of the complaint and information, which charged Petitioner with unlawfully and knowingly failing to maintain an accurate record and inventory of narcotics and controlled substances dispensed and controlled by him; and Count XVII of the complaint and information, which charged Petitioner with unlawfully and knowingly stealing drugs, narcotics and controlled substances worth more than $50.00 from the South Routt Medical Center and Kremmling Memorial Hospital District. I.G. Ex. 1, 3.

22. The sentence imposed against Petitioner included a suspended sentence of one year in prison, as well as a term of probation. I.G. Ex. 4.

23. As part of his plea arrangement, Petitioner paid restitution totalling $10,800.00. I.G. Ex. 4, Tr. at 199.

24. Petitioner paid additional restitution to Kremmling Memorial Hospital in an amount between $2,000.00 and $2,500.00. Tr. at 200.

25. Petitioner's initial treatment for substance abuse consisted of outpatient treatment, which included weekly counseling and urine screening three times weekly. P. Ex. 2.

26. In early 1988, Petitioner twice used controlled substances in violation of the terms of his substance abuse treatment. Tr. at 226.

27. One of these episodes consisted of unauthorized use of cocaine by Petitioner. Tr. at 202, 210.

28. These episodes of controlled substance misuse were detected through urine screenings. Tr. at 202.

29. As a consequence of these episodes, Petitioner was hospitalized for treatment for one month beginning in March, 1988. Tr. at 211.

30. During the course of his inpatient treatment, Petitioner accepted the fact that he was a narcotics addict. Tr. at 233.

31. Petitioner has faithfully adhered to prescribed treatment since his discharge from the hospital. Tr. at 237.

32. Petitioner has been regularly subject to urine tests since his discharge from the hospital, with all tests being negative. Tr. at 238.

33. Petitioner has been employed as a physician since his conviction, without further allegations of improper conduct having been made against him. Tr. at 257.

34. Petitioner has not abused a controlled substance since March, 1988. Finding 32.

35. The prognosis for Petitioner to remain free from substance abuse is good, provided that he adheres to the plan of treatment prescribed for him. Tr. at 215.

36. It cannot be determined with assurance at this point in time that Petitioner will not relapse. See Tr. at 215 - 216.

37. Petitioner was convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Findings 6 - 8, 19 - 21; Social Security Act, section 1128(b)(1).

38. Pursuant to section 1128(b)(1) of the Social Security Act, the Secretary of the Department of Health and Human Services (the Secretary) has authority to impose and direct an exclusion against Petitioner from

participating in Medicare and Medicaid. Social Security Act, section 1128(b)(1).

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

40. On November 9, 1989, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs as a result of his conviction of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service.

41. Petitioner was notified that he was being excluded for four years, pursuant to section 1128(b)(1) of the Social Security Act.

42. The exclusion provisions of section 1128 of the Social Security Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions. Social Security Act, section 1128(b)(1) - (14).

43. A remedial objective of section 1128 of the Social Security Act is to protect the integrity of federally-funded health care programs. Social Security Act, section 1128.

44. An additional remedial objective of section 1128 is to protect program beneficiaries and recipients by permitting the Secretary (or his delegate, the I.G.) to impose and direct exclusions from participation in Medicare and Medicaid of those individuals who demonstrate by their conduct that they cannot be trusted to provide items or services to program beneficiaries and recipients. Social Security Act, section 1128.

45. An additional remedial objective of section 1128 is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs, or which threatens the well-being of beneficiaries and recipients of those programs. Social Security Act, section 1128.

46. Petitioner committed serious criminal offenses. Findings 6 - 15, 19 - 21; See 42 C.F.R. 1001.125(b)(1).

47. Petitioner's substance abuse disorder jeopardized the welfare of his patients and posed a threat to the

integrity of the Medicare and Medicaid programs. Findings 9 - 15; See 42 C.F.R. 1001.125(b)(2), (b)(6).

48. Petitioner's unlawful use of reimbursement funds damaged the integrity of a health care provider and that of health care insurers. Findings 6 - 8; See 42 C.F.R. 1001.125(b)(2), (b)(6).

49. Petitioner has not shown that there is no likelihood that he will again abuse controlled substances. See Finding 36.

50. The four year exclusion imposed and directed against Petitioner is reasonable.

ANALYSIS

There is no dispute that Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Social Security Act.[4] By virtue of this conviction, the I.G. had authority to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs. Therefore, the only issue to be resolved in this case is whether the four year exclusion is reasonable. Resolution of that issue depends on analysis of the evidence in light of the exclusion law's remedial purpose.

The exclusion law was enacted by Congress to protect the integrity of federally funded health care programs.

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[4] As is noted above, the I.G. originally excluded Petitioner for five years pursuant to section 1128(a)(1) on the basis that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Medicare and Medicaid programs. The I.G. based his determination on the fact that some of the reimbursement checks Petitioner converted to his use consisted of Medicare and Medicaid reimbursement checks. An administrative law judge for the Office of Hearings and Appeals concluded that the exclusion was not authorized by section 1128(a)(1), notwithstanding Petitioner's conversion of Medicare and Medicaid reimbursement checks. I make no findings based on this decision or on section 1128(a)(1), and I treat this case as a de novo review of an exclusion imposed pursuant to section 1128(b)(1). However, I note that the previous decision would appear to conflict with decisions issued by the Departmental Appeals Board. See Napoleon S. Maminta, M.D., DAB App. 1135 (1990).

Among other things, the law was designed to protect program recipients and beneficiaries from individuals who had demonstrated by their behavior that they threatened the integrity of federally funded health care programs, or that they could not be entrusted with the well-being and safety of beneficiaries and recipients.

There are two ways that an exclusion imposed and directed pursuant to the law advances this remedial purpose. First, an exclusion protects programs and their beneficiaries and recipients from an untrustworthy provider until that provider demonstrates that he or she can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, an exclusion deters providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. See House Rep. No. 95-393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong.& Admin. News, 3072.

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

The hearing is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness of an exclusion is admissible in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner. The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose.

In this case, I admitted evidence from Petitioner relating to his: (1) history of substance abuse problems; (2) motives for engaging in the conduct which resulted in his 1987 criminal conviction; and (3) pre- and post-conviction efforts at rehabilitation. I admitted evidence from the I.G. concerning Petitioner's

substance abuse and conversion of reimbursement checks even though that evidence in part pertained to conduct beyond the narrow scope of conduct for which Petitioner was convicted.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses relating to Medicare and Medicaid). However, they express the Secretary's policy for evaluating cases where permissive exclusions may be appropriate. Thus, the regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases where the Secretary has discretion to impose and direct exclusions. The regulations require the I.G. to consider factors related to the seriousness and program impact of the offense, and to balance those factors against any mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1) - (7).[5]

An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the . . . [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (Jan. 27, 1983). However, based on the law and the evidence, should I determine that an exclusion is unreasonable, I have authority to modify the exclusion. Social Security Act, section 205(b).

I conclude that the four year exclusion imposed and directed against Petitioner is neither extreme nor excessive. The exclusion in this case is justified given the seriousness of the misconduct engaged in by Petitioner, the absence of assurances that he will not at

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[5] There are proposed regulations which, if adopted by the Secretary, would supersede the regulations which presently govern exclusions. See 55 Fed. Reg. 12205 (April 2, 1990). The I.G. urged that I use these proposed regulations as guidelines to evaluate the reasonableness of the exclusion imposed and directed against Petitioner. However, these proposed regulations have not been finally adopted, and it would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption.

some point in the near future resume that misconduct, and the potential for harm should he resume that misconduct.

The evidence establishes that Petitioner is addicted to narcotic drugs, including cocaine. In order to satisfy the needs of his addiction, Petitioner stole narcotics from the medical facility at which he worked and issued false prescriptions for narcotics, which he then diverted to his own use. He also enlisted the assistance of some of his patients to kick back to him some of the narcotics which he had prescribed. Finding 12.

By Petitioner's own admission, his addiction clouded his judgment and caused him to engage in reckless and unlawful conduct. The evidence does not establish that Petitioner converted reimbursement checks in order to support his narcotics addiction. Nevertheless, he converted checks at a time when he was actively abusing narcotics, and it is reasonable for me to infer that this theft was in some respects prompted by or made easier for the Petitioner to rationalize by the effects that narcotics were having on him.

By any measure, the crimes and misconduct committed by Petitioner were extremely serious. Not only did Petitioner jeopardize the financial integrity of the institution with which he contracted, he endangered the welfare of the patients whom he was sworn to protect and treat. The evidence establishes that Petitioner was capable of placing his own need for gratification above that of individuals who placed their welfare and indeed, their lives, in Petitioner's hands.

I conclude that given this history, there is a strong likelihood that individuals in addition to Petitioner would be seriously harmed, should Petitioner suffer a relapse. A margin of safety should therefore be built into any exclusion imposed against Petitioner. The exclusion imposed and directed in this case does not appear to be extreme or excessive in view of the damage Petitioner could cause should he resume his past conduct.

Petitioner testified at length at the hearing of this case concerning his insight into his condition and the efforts he has made to rehabilitate himself. I am convinced that Petitioner was sincere, and that he has made substantial and commendable progress towards recovery. Petitioner's sincerity is underscored by evidence that he has abstained from abusing drugs since March 1988.

However, I cannot find the exclusion in this case to be unreasonable if there is even a slight possibility that Petitioner might relapse, given the seriousness of the offenses committed by Petitioner. No witness to this proceeding, including Petitioner, could state with assurance that Petitioner will not suffer a relapse. Furthermore, the evidence established that Petitioner is a person whose addiction is triggered by emotional stress. In March, 1988, Petitioner did suffer a relapse, brought on by personal pressures and stress.

There are some similarities between this case and others in which I have found exclusions to be excessive. In James E. Keil, M.D., DAB Civ. Rem. C-154 (1990), and Kenneth Behymer, M.D., DAB Civ. Rem. C-140 (1990), I modified exclusions imposed and directed against physicians who had been convicted of criminal offenses related to their abuse of controlled substances. In each case, I found the exclusion to be excessive and I modified it because I was convinced that the petitioner had rehabilitated himself and posed little threat to the integrity of federally funded health care programs and to beneficiaries and recipients of these programs.

The level of rehabilitation attained by Petitioner in this case is similar to that attained by the petitioners in Keil and Behymer. However, there is a significant difference here which distinguishes this case from those two cases.

In both Keil and Behymer, the petitioners' pattern of substance abuse consisted almost entirely of self-destructive conduct.[6] Neither petitioner had enlisted the aid of others to assist him in illegally obtaining drugs. Neither petitioner had, either in conjunction with his addiction, or independently, engaged in financial misconduct. By contrast, Petitioner in this case did involve others in his efforts to obtain drugs, did engage in financial misconduct, and at first sought to conceal his unlawful conduct from investigating authorities. In short, the misconduct engaged in by Petitioner posed a much more serious threat to program integrity and to the welfare of beneficiaries and recipients than that engaged in by the petitioners in Keil and Behymer. The threat posed to programs and to

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[6] Of course, there is the possibility that any health care provider who provides a service while under the influence of a narcotic or other controlled substance might make an error of judgment which is harmful to a patient.

beneficiaries and recipients by a repetition of unlawful conduct therefore is greater in this case than was the case in Keil and Behymer. And, consequently, I was more willing to give the petitioners in those cases the benefit of the doubt than I am here.

Petitioner notes that when he was originally excluded by the I.G. pursuant to section 1128(a)(1), the term of the exclusion was for five years. His exclusion had been effective for more than a year when an administrative law judge found the exclusion to be unauthorized by law. Petitioner asserts that when the term of the present exclusion, four years, is added to the period which predated the previous administrative law judge decision, the total exclusion imposed against him exceeds five years. Petitioner asserts that he has in effect been punished for pursuing his rights with respect to the original exclusion. Had Petitioner done nothing, he would have been eligible to apply for reinstatement as a participating provider in Medicare and Medicaid at an earlier date than will be the case under the present exclusion.

The I.G. responds to this argument by asserting that the current exclusion in effect gives Petitioner credit for the period he was excluded prior to the previous administrative law judge decision. The I.G. notes that the original exclusion commenced on September 11, 1988, and was in effect until the administrative law judge's decision, on September 22, 1989. The present exclusion became effective 20 days from the November 9, 1989 notice letter to Petitioner, and is for a period of four years. Thus, according to the I.G., the total period for which the Petitioner will be excluded is for a few days more than five years.

It appears from the record of this case that the current exclusion, when aggregated with the period for which Petitioner was previously excluded, will result in a total period of exclusion of about five years, two months, and 10 days. I base my conclusion on the facts that the I.G. would have had 60 days to request review of the September 22, 1989 decision and the current exclusion became effective within the 60 day period.

Although I find that the total period of exclusion imposed by the I.G. is not unreasonable, I am sensitive to Petitioner's argument that he has, in effect, been penalized for exercising his rights. Therefore, I order that the enclusion be modified so that Petitioner will be eligible to apply for reinstatement as of the date he

would have been eligible under the terms of the original five year exclusion -- September 11, 1993.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the four year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is reasonable. I sustain the exclusion imposed against Petitioner, and I enter a decision in favor of the I.G., except that I modify the exclusion so that Petitioner will be eligible to apply for reinstatement on September 11, 1993.

/s/

Steven T. Kessel
Administrative Law Judge