Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Carl Marnatti, M.D.,	DATE: September 17, 1990
Petitioner,	Docket No. C-164
- v -	DECISION CR 99
The Inspector General.	

DECISION

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ), to contest a determination by the Inspector General (I.G.) excluding him from participation in the Medicare and Medicaid programs for three years, pursuant to section 1128(b)(5) of the Social Security Act (Act).[1] I conducted a hearing in Pittsburgh, Pennsylvania on June 8, 1990. Based on the evidence introduced at the hearing, the parties' submissions, and applicable law, I conclude that the exclusion imposed by the I.G. should be upheld, but modified to end concurrently with the exclusion imposed by the Pennsylvania Department of Public Welfare (DPW), so that Petitioner will be eligible to apply for re-enrollment in the programs on April 8, 1992.

BACKGROUND

By letter dated August 2, 1989, the I.G. notified Petitioner that he was being excluded on August 22, 1989 from participation in the Medicare and Medicaid programs. The I.G. advised Petitioner that he was being excluded as a result of his exclusion or suspension by DPW for reasons bearing upon his professional competence, professional performance, or financial integrity within

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner is excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

the meaning of section 1128(b)(5) of the Act. The I.G. further advised Petitioner that he was being excluded for a period of three years. Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. I held a telephone prehearing conference in this case on October 25, 1989, and set a briefing schedule. The I.G. submitted a motion for summary disposition on December 12, 1989, to which the Petitioner responded on January 18, 1990. The I.G. submitted a reply brief on February 2, 1990, to which the Petitioner replied on February 28, 1990. I heard oral argument in this case on March 22, 1990. In my Ruling dated May 2, 1990 I denied both the I.G.'s motion for summary disposition and Petitioner's responsive request to dismiss, because there were disputed material facts on the issues before me. I held an evidentiary hearing on June 8, 1990, in Pittsburgh, Pennsylvania. Both parties submitted post-hearing briefs.

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)(5)(B) of the Act permits the I.G. to exclude from Medicare and Medicaid participation any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under a State health care program, 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 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

ISSUES

The issues are whether:

1. Petitioner was "suspended or excluded from participation" in a "state health care program, for reasons bearing on [his] professional competence, professional performance or financial integrity" within the meaning of section 1128(b)(5)(B) of the Act.

2. There are circumstances which preclude an exclusion.

3. The length of Petitioner's exclusion is reasonable and appropriate under the facts of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2][3]

1. Petitioner has been licensed by the Commonwealth of Pennsylvania to practice medicine as a medical doctor since 1962. P.P.H. Br. 1.

2. As of December 16, 1987, Petitioner had been for several years a medical assistance (MA) provider within the meaning of the Pennsylvania Public Welfare Code, 62 P.S. 401 et seq., and 1401 et seq., P.P.H. Br. 1.

3. On December 16, 1987, DPW advised Petitioner that his MA agreement would be terminated in 30 days as a departmental peer review of his billings, record keeping and medical practice had revealed that: (1) Petitioner's pattern of treatment regarding five MA recipients was determined by departmental peers to be of inferior quality and/or medically unnecessary; (2) Petitioner's billing for 88 office visits provided to 27 patients

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[2] 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.

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

Petitioner's Brief	P. Br. (page)
Petitioner's Reply Brief	P.R. Br. (page)
Petitioner's Post-Hearing Brief	P.P.H. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. R. Br. (page)
I.G.'s Post-Hearing Brief	I.G. P.H. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Transcript	Tr. (page)

failed to conform to the standards of practice; and (3) Petitioner failed to maintain records consistent with the standards for medical records for 27 patients. P. Ex. 1.

4. Petitioner did not respond to the factual allegations in the December 16, 1987 letter. Tr. 49, 50.

5. On December 31, 1987, Petitioner advised DPW that he was terminating his MA agreement as of January 30, 1989. P. Ex. 2; I.G. Ex. 10, 2.

6. On January 21, 1988, in response to Petitioner's request, DPW terminated Petitioner's MA enrollment as of January 30, 1988. P.Ex. 3; I.G. Ex. 10, 3-5.

7. On March 8, 1988, Petitioner received a second notice of termination letter from DPW, identical to that of December 16, 1987, stating again that DPW proposed to terminate Petitioner's MA agreement in 30 days, unless Petitioner appealed or sought review of the action. P. Ex. 4; I.G. Ex. 8/8-10.

8. Both the December 16, 1987 and the March 8, 1988 letters informed Petitioner that he must respond in writing to the charges in detail within 15 days or seek review with DPW's Office of Hearing Appeals within 30 days. The letters stated that if Petitioner did not "ADDRESS ANY OF THESE FACTS, YOU WILL BE DEEMED TO HAVE NO DISPUTE WITH THAT FACT." The letters also requested repayment of $878 for medical assistance payments made to Petitioner, which DPW had determined to be ineligible. P. Ex. 2; I.G. Ex. 10/2; P. Ex. 4; I.G. Ex. 8/ 8-10.

9. On July 12, 1988, DPW issued a Final Order excluding Petitioner from the Pennsylvania Medical Assistance Program for four years, effective April 8, 1988, and reiterating the demand in the December 16, 1987 and March 8, 1988 letters that Petitioner pay $878 in restitution. P. Ex. 5, I.G. Ex. 1,2.

10. Petitioner did not respond to either the March 8, 1988 notice of termination letter or the July 12, 1988 Final Order within the time permitted to him to contest the termination of his MA agreement. P.P.H. Br. 2.

11. Petitioner sent a restitution check to the Pennsylvania Medical Assistance Program in the amount of $878, dated August 7, 1988. Tr. 63, 64; P. Ex. 6.

12. On June 2, 1989 Petitioner filed a petition for review in Pennsylvania's Commonwealth Court seeking review of DPW's decision to involuntarily terminate his

MA agreement, as well as other matters not germane to this action. I.G. Ex. 14/2.

13. The Commonwealth Court upheld DPW's motion to quash Petitioner's petition for review of his involuntary termination of his MA agreement. The Court found DPW's letter of March 8, 1988 to be adequate notice to Petitioner of the consequences of its proposed action, notwithstanding Petitioner's contention that the notice failed to meet the requirements of 55 Pa. Code 1701 regarding notices of exclusion. The Court held that the letter, along with a detailed explanation of the serious charges involved and the procedures Petitioner should have taken to challenge the termination belied Petitioner's contention that Petitioner believed the March 8, 1988 letter was a confirmation of Petitioner's earlier voluntary termination of his MA agreement. I.G. Ex. 14/3.

14. On May 16, 1990, the Supreme Court of Pennsylvania, Western District, denied Petitioner's appeal of the Commonwealth Court order.

15. As of April 8, 1989, one year of Petitioner's DPW exclusion had expired. The I.G. gave Petitioner credit for that time in determining to give Petitioner a three year exclusion, which commenced on August 22, 1989. I.G. Ex. 11.

16. The Pennsylvania Medical Assistance program (Medicaid) is a State health care program within the meaning of sections 1128(h) and 1128(b)(5)(B) of the Act.

17. The Secretary of Health and Human Services (the 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. 21662, May 13, 1983.

18. The I.G. is authorized to impose an exclusion against Petitioner by section 1128(b)(5)(B) of the Act. 42 U.S.C. 1320a-7(b)(5)(B).

19. A modification of Petitioner's exclusion to end concurrently with Petitioner's state exclusion is reasonable and appropriate in this case. Petitioner should, thus, be allowed to apply for reinstatement to the Medicare and Medicaid programs on April 8, 1992.

DISCUSSION

I. Petitioner Was Suspended Or Excluded From Participation In A "State Health Care Program, For Reasons Bearing On [His] Professional Competence Or Performance," Within The Meaning Of Section 1128(b)(5)(B).

Section 1128(b)(5)(B) of the Act grants the authority to the DHHS Secretary's delegate, the I.G., to exclude any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under:

> a State health care program, for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity.

On July 12, 1988, DPW issued a Final Order excluding Petitioner from the Pennsylvania Medical Assistance Program for four years, based on a DPW departmental peer review of Petitioner's billings, record keeping, and medical practice. FFCL 3, 9. These findings concerned the care Petitioner rendered to his medical assistance recipients, and fall directly within the ambit of section 1128(b)(5)(B). In that statute, Congress authorized the Secretary to exclude individuals on the basis of the findings and actions of a State health care agency. Thus, in my May 2, 1990 Ruling denying the I.G.'s motion for summary disposition in this case, I concluded that the I.G. had authority to impose an exclusion based on a state Medicaid program sanction without reviewing the underlying merits of that action. I now find and conclude that the I.G. did not abuse its discretion in doing so in this case.

II. The I.G. Has Authority To Exclude Under The Provisions Of Section 1128(b)(5)(B) And There Are No Other Circumstances In This Case Which Preclude Petitioner's Exclusion.

In my Ruling I found narrow issues of fact which bore directly on the reliability of the state sanction as a basis for this federal action. These issues did not involve reopening the merits of the findings of the Pennsylvania DPW. Petitioner had argued that the state action was essentially a default judgment and that the circumstances of the state action had led him to believe that the final order merely confirmed a voluntary settlement of charges against him and prevented him from presenting argument on issues relating to professional

competence or performance. Petitioner also argued that he had been denied an opportunity to present argument on these issues when the Pennsylvania courts had rejected requests to reopen the action.

At the time of my Ruling, I could not find, as a matter of law, that a state action which is equivalent to a default judgment is always a sound basis for an exclusion under section 1128(b)(5). I stated that, to be consistent with minimal due process requirements, a default judgment is only valid if the defaulting party received sufficient and proper notice of the proceeding, its significance, and the response requirements. See Peralta v. Heights Medical Center, 485 U.S. 80 (1988); 47 Am. Jur. 2d Judgments 1174-1178 (1969). In my Ruling, I left open the possibility that the March 8, 1988 letter may not have explained the required response with sufficient clarity to provide notice that a default judgment on those issues might result.

Based on evidence adduced at the June 8 hearing, and in the subsequent briefing, I now find that the state action in this case was more than merely a default judgment. The December 1987 and March 1988 letters from DPW leave no doubt that Petitioner was put on notice that not contesting the charges, brought after an investigation of Petitioner's billing, record keeping, and medical practice, would result in Petitioner's being deemed to have no dispute with that fact. FFCL 8. I agree with the Pennsylvania state courts that Petitioner was given ample time to contest these facts, and chose not to do so. FFCL 13.

At the June 8 hearing before me, Petitioner explained that he saw no need to contest the termination of his MA agreement, because he had already voluntarily terminated that agreement (Tr. 49-50). He testified that he had no desire to continue treating medical assistance patients and would not resume treating them even if he successfully contested the termination of his MA agreement. Tr. 50, 53. However, DPW's March 8, 1988 letter, on its face, provided notice of specific charges related to professional competence and performance, and was not just a confirmation of Petitioner's voluntary termination. It specifically informed Petitioner to, "Please read the Department's analysis of the problem in this letter very carefully....IF YOU DO NOT ADDRESS ANY OF THESE FACTS, YOU WILL BE DEEMED TO HAVE NO DISPUTE WITH THAT FACT." FFCL 8. The attachment to the March 8, 1988 letter also specifically explained the bases upon which DPW was taking action. P. Ex. 4/5-6; I.G. Ex. 8/12-13.

On May 16, 1990, the Supreme Court of Pennsylvania, Western District (Pennsylvania Supreme Court) recognized the adequacy of DPW's notice to Petitioner when it denied Petitioner's petition for appeal of DPW's decision to involuntarily terminate Petitioner's MA agreement. The Pennsylvania Supreme Court relied on a Memorandum Opinion and Order by Senior Judge Wilson Bucher of the Commonwealth Court of Pennsylvania (Commonwealth Court). In it the Commonwealth Court held:

> We find DPW's letter of March 8, 1988 to be adequate notice to the petitioner of the consequences of its proposed action notwithstanding the petitioner's contention that said note fails to meet the requirements of 55 Pa. Code 1701 regarding notices of exclusion. The letter, along with a detailed explanation of the rather serious charges involved and the procedures the petitioner should take to challenge the termination belie any contention that Dr. Marnatti might have believed the letter was a confirmation of his earlier voluntary termination of his MA agreement.

The Commonwealth Court stated that Petitioner's failure to understand the effect of involuntary termination of his MA agreement would not justify an appeal nunc pro tunc. I.G. Ex. 14/3, 4.

I also left open a question in my Ruling concerning whether the July 12, 1988 Final Order itself referenced the charges relating to professional competence and performance. I now hold that it does. FFCL 8, 9. The March 8, 1990 letter stated that if Petitioner did not appeal his termination or otherwise challenge the findings in the letter, the DPW would "enter the attached Final Order." I.G. Ex. 8,9. The Final Order referred to is the same one which DPW entered on July 12, 1988, terminating Petitioner for the reasons stated in the March 8, 1988 letter, even referencing again the $878 owed in restitution by Petitioner. Thus Petitioner should have known that this Final Order concerned the charges relating to Petitioner's professional competence and performance.

I have found that Petitioner's exclusion from the Pennsylvania health care program was for reasons bearing on his professional competence, professional performance or financial integrity. I have also found that the state action was not a default judgment. DPW excluded Petitioner after departmental peers reviewed Petitioner's

billings, records and medical practice. FFCL 3. Petitioner was given ample time to contest these factual findings and chose not to do so, FFCL 10. It is for these reasons, which bear directly on his professional competence, professional performance, and financial integrity, that he was excluded.

III. The length and period of Petitioner's exclusion are not reasonable and appropriate under the facts of this case.

As I held in my Ruling, the length of a permissive exclusion is not fixed by law, but must be based on a discretionary review of the facts in a particular case. To determine whether the length of an exclusion is extreme or excessive, I must make a de novo determination by making an independent assessment of the seven factors listed in 42 C.F.R. 1001.125, and I must consider the Congressional purpose of section 1128. See Vincent Barratta, M.D., DAB Civ. Rem. C-144 (1990); Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989). Determination of the reasonableness of the length of a permissive exclusion may include consideration of the nature and seriousness of the conduct which gave rise to the sanction. Barratta, pp. 8-9.

In this case, the I.G. recommended a three year exclusion, after giving Petitioner a year of credit for what the I.G. considered an extra long period of time in processing Petitioner's exclusion. Tr. 28. The I.G. based his recommendation upon a policy under which no section 1128(b)(5) exclusion shall be less than the period determined by the state agency. Tr. 28.

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. In this case, taking into consideration all of the seven factors listed in 42 C.F.R. 1001.125, I find that a substantial exclusion is reasonable. Petitioner's departmental peers had determined that Petitioner's treatment of some MA patients was potentially harmful and that Petitioner's billing and record keeping functions were inferior or failed to conform to standards of practice. FFCL 3. However, I do find that it is unreasonable that the federal exclusion in this case would run four and a half months longer than the original State exclusion, given the I.G.'s apparent recognition that the I.G.'s exclusion should run concurrent with the original State exclusion.

In Thomas C. Chestney, D.M.D., DAB Civ. Rem. C-53 (1989), I held that in a section 1128(a)(1) mandatory exclusion case the extension of the State's exclusion by several months due to the processing of the federal exclusion could not be reduced. The reason for this was that the Act and the Regulations clearly provided for no discretion for reducing a five year minimum period of exclusion, or for altering the effective dates of that five year period. Similarly, in Samuel W. Chang, M.D., DAB Civ. Rem. C-125 (1989), another section 1128 (a)(1) mandatory exclusion case, I held that in a mandatory exclusion case, to correct mistakes which would impact in such a way as to deny a petitioner due process or fundamental fairness, and to comply with the Act, the exclusion must begin within a reasonable time from the date that the I.G. became aware of the petitioner's conviction. I held that one year was a reasonable period and that the mandated five year exclusion must begin from that date rather than the negligently delayed date of notice. The instant case, however, is different. There is no mandatory period of exclusion demanded under section 1128(b)(5), as such exclusions are permissive. There is no reason in this case to allow the processing time to extend the exclusion, and I, therefore, modify the exclusion imposed by the I.G. to run concurrently with the exclusion originally imposed by DPW. Thus, both exclusions will end April 8, 1992, and Petitioner will be eligible to apply for reinstatement at that time.

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 modification of the exclusion to cause it to end concurrently with the exclusion originally ordered

by the Commonwealth of Pennsylvania's Department of Public Welfare -- April 8, 1992 -- is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge