Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: September 27, 1990
Victor M. Janze, M.D.,	)	
	)	
Petitioner,	)	Docket No. C-212
	)	
- v. -	)	DECISION CR 101
	)	
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.) to exclude him from participation in the Medicare and Medicaid programs for seven years, pursuant to section 1128(b)(3) of the Social Security Act (Act).[1] I conducted a hearing in Scranton, Pennsylvania on June 21, 1990. Based on the evidence introduced at the hearing, the parties' submissions, and applicable law, I conclude that an exclusion of six years is appropriate.

APPLICABLE STATUTE 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.). While section 1128(a) of the Act provides for a minimum five-year mandatory exclusion for (1) convictions of program-related crimes and (2) convictions relating to patient abuse, section 1128(b) of the Act provides for permissive exclusions for convictions, infractions, or undesirable behavior, such as convictions relating to fraud, license revocation,

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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.

failure to supply payment information, or, as in this case, a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance under section 1128(b)(3).

II. The Federal Regulation.

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.

BACKGROUND

By letter dated January 23, 1990, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for a period of seven years. The I.G. advised Petitioner that he was being excluded because of his "conviction" of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance within the meaning of section 1128(b)(3) of the Act. Petitioner, who is appearing pro se in this matter, 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 March 27, 1990. During this conference Petitioner admitted: 1) that he had been "convicted" within the meaning of section 1128 (i) of the Act; 2) that the criminal offense was related to the unlawful prescription of a controlled substance within the meaning of section 1128(b)(3) of the Act; 3) that the sentence resulting from the criminal conviction included incarceration; and 4) that he had lost his license to practice medicine for five years in West Virginia (the location of the criminal misconduct), and for 10 years in Pennsylvania. I held an evidentiary hearing in this case on June 21, 1990, in Scranton, Pennsylvania.

ISSUE

The issue is whether a seven year exclusion is reasonable and appropriate, considering all mitigating and aggravating circumstances.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW [3] [4]

1. At all times relevant to his conviction, Petitioner was licensed to practice medicine in the State of West Virginia, and was engaged in the general practice of medicine at the Wharton Clinic, Wharton, Boone County, West Virginia. I.G. Ex. 7/1.

2. On March 22, 1988, Petitioner was indicted in the United States District Court for the Southern District of West Virginia (District Court) on 24 counts of violating

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[2] In my April 4, 1990 Order and Notice of Hearing, I set out as an issue whether, assuming the ALJ has authority to decide the issue, it is reasonable to exclude Petitioner from program participation in any capacity, including one in which his work is heavily supervised, such as a residency program. During the hearing, Petitioner indicated that he would not be arguing this issue, but would be contesting only the length of the seven year exclusion period. Petitioner indicated, however, that he would like to preserve the issue for appeal. Tr. 9, 10.

[3] Citations to the record in this Decision and Order are as follows:

Petitioner's Exhibits	P. Ex. (number)/(page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)
Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Order and Notice of Hearing	ONH (page)

[4] 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.

21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (distribution of controlled substances). I.G. Ex. 7.

3. The indictment alleged that:

a. Petitioner was authorized by the Drug Enforcement Administration (DEA) to write prescriptions for controlled substances for legitimate medical purposes.

b. Petitioner wrote prescriptions for controlled substances for illegitimate and unlawful purposes not in the course of his professional practice.

c. Petitioner wrote and gave prescriptions of controlled substances to certain individuals in the name of other persons in an effort to fraudulently conceal the identity of the person receiving the controlled substances.

d. Petitioner knew that the persons receiving the written prescriptions were not the persons named on the written prescriptions, and that they were not receiving the prescriptions for a legitimate medical purpose, but with intent to fraudulently present them to be filled for their or others' illegitimate use, consumption and resale of the controlled substances. I.G. Ex. 7/2.

4. Petitioner was tried by jury on these charges, but there was no verdict. Tr. 27, 36.

5. On April 3, 1989 Petitioner pled guilty to Count 16 of the indictment. I.G. Ex. 5.

6. Count 16 charged that on October 17, 1986, Petitioner had knowingly and intentionally dispensed, distributed, and caused to be distributed to an individual, a controlled substance, 30 tablets of Valium, in a false name, not for a legitimate medical purpose, and not in the proper course of professional practice. I.G. Ex. 7/3.

7. The District Court sentenced Petitioner to 18 months imprisonment and five years special parole term, and ordered him to pay an assessment of $50. I.G. Ex. 3.

8. The maximum penalty Petitioner could have received was three years imprisonment and a $250,000 fine. I.G. Ex. 6.

9. Petitioner was convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. FFCL 5, 6.

10. The criminal offense of which Petitioner was convicted is a criminal offense as described in section 1128(b)(3) of the Act.

11. Petitioner admits and I conclude that: 1) he was "convicted" within the meaning of section 1128(i) of the Act; and that 2) the criminal offense was related to the unlawful prescription of a controlled substance within the meaning of section 1128(b)(3) of the Act. ONH, 2.

12. 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, pursuant to section 1128(b)(3) of the Social Security Act.

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

14. Section 1128(b)(3) of the Act permits the I.G. to exclude individuals convicted of criminal offenses "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" from participation in the Medicare and Medicaid programs.

15. There is no length or period of exclusion mandated by statute for section 1128(b)(3) exclusions. The exclusion provisions of section 1128 of the Act do not establish a minimum or maximum period of exclusion to be imposed and directed in cases where the I.G. has discretion to impose and direct exclusions. Act, section 1128 (b)(1)-(14).

16. The major purposes of the exclusion law (section 1128 of the Act) are to: (1) protect Medicare beneficiaries and Medicaid recipients from incompetent practitioners and inappropriate or inadequate care; (2) protect the Medicare and Medicaid programs from fraud and abuse; and (3) deter individuals from engaging in conduct which is detrimental to the Medicare and Medicaid programs and to the respective beneficiaries and recipients of those programs.

17. Program guidance developed for the I.G. after the enactment of the 1987 Amendments to the Act has suggested a base period of exclusion of five years for 1128(b)(3) violations, with a longer or shorter exclusion dependent upon aggravating and mitigating factors. Tr. 18 - 20.

18. The trustworthiness of a Petitioner is a consideration in determining an appropriate period of exclusion.

19. Some indicia of trustworthiness used to determine the length of Petitioner's exclusion are: (1) the number and nature of the offenses, (2) the nature and extent of any adverse impact the violations have had on beneficiaries, (3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs, (4) the existence of mitigating circumstances, (5) the length of the sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of Petitioner. 42 C.F.R. 1001.125(b)(1)-(7).

20. The I.G. determined that Petitioner should be excluded for seven years. I.G. Ex. 2.

21. A hearing in a section 1128(b)(3) exclusion case is, by law, de novo. Act, Section 205(b).

22.. The fact that the sentence resulting from the criminal conviction included incarceration is an aggravating factor considered in determining an appropriate length of exclusion. FFCL 6.

23. The fact that Petitioner's license to practice medicine was revoked in West Virginia for five years and in Pennsylvania for ten years is an aggravating factor considered in determining an appropriate length of exclusion. I.G. Ex. 8,9.

24. Petitioner's presentence report, which states that Petitioner is without a high sense of responsibility is an aggravating factor considered in determining an appropriate length of exclusion. P. Ex. 3.

25. The I.G. did not prove by a preponderance of the evidence that the criminal acts resulting in the conviction were committed over a lengthy period of time, i.e. over one year, and it is not an aggravating factor considered in determining an appropriate length of exclusion. I.G. Ex. 2.

26. Petitioner had several witnesses testify to mitigating factors, which include Petitioner's:

a. Trustworthiness, Tr. 51,52,63,72;

b. Professional competence, Tr. 48,49,57,65,87,99,101;

c. High level of care for his elderly patients, Tr. 50,102;

d. Low fees, Tr. 50,54,66,94,99,101;

e. Willingness to make house calls, Tr. 48,49,54,98;

f. Loss to the community. Tr. 55,67,94,99,102.

27. An exclusion of six years is reasonable and appropriate in this case.

DISCUSSION

I. Petitioner 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) of the Act.

Section 1128(b)(3) of the Act authorizes the I.G. to exclude from participation in the Medicare and Medicaid programs individuals who have been convicted of criminal offenses "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance". On April 3, 1989 Petitioner pled guilty to knowingly and intentionally dispensing, distributing and causing to be distributed a controlled substance. FFCL 2,5,6. Petitioner admits and I find and conclude that his conviction falls within the purview of criminal offenses enumerated in section 1128(b)(3) of the Act. FFCL 10, 11.

II. Six Years Is An Appropriate Length Of Exclusion In This Case.

Since Petitioner has admitted, and I have concluded, that Petitioner was "convicted" of a criminal offense for which the I.G. may impose an exclusion pursuant to section 1128(b)(3) of the Act, the remaining issue is the appropriate length of exclusion to be imposed.

As I stated in Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989), in making this determination, it is helpful to look at the purpose behind the enactment of the exclusion law. Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from incompetent practitioners and inappropriate or inadequate care. See, S.Rep. No. 109, 100th Con., 1st Sess. 1; reprinted 1987 U.S. Code Cong. and Admin. News 682. The key term to keep in mind is "protection," the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of individuals. Through exclusion, individuals who have caused harm, or may cause harm, to the program or its beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provide to Medicare beneficiaries or Medicaid recipients. Thus, individuals are removed from a position which provides a potential avenue for causing harm to the programs. Exclusion also serves as a deterrent to other individuals against deviant behavior which may result in harm to the Medicare and Medicaid programs or their beneficiaries and recipients.

By not mandating that exclusions from participation in the Medicare and Medicaid program be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the period of exclusion allows an excluded individual the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider of items and services to beneficiaries and recipients.

The determination of when an individual should be trusted and allowed to reapply for participation as a provider in the Medicare and Medicaid programs is a difficult issue and is one which is subject to much discretion; there is

no mechanical formula. The Regulations provide some guidance which may be followed in making this determination. The Regulations provide that the length of Petitioner's exclusion may be determined by reviewing: 1) the number and nature of the offenses; 2) the nature and extent of any adverse impact the violations have had on beneficiaries; 3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs; 4) the existence of mitigating circumstances; 5) the length of sentence imposed by the court; 6) any other facts bearing on the nature and seriousness of the violations; and 7) the previous sanction record of Petitioner. See 42 C.F.R. 1001.125(b). These regulations were adopted by the Secretary to implement the Act prior to the 1987 Amendment. They specifically apply only to exclusions for "program related" offenses. To the extent that they have not been repealed or modified, however, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to the cases in which discretionary exclusions are imposed. See Leonard N. Schwartz, R.Ph., DAB Civ. Rem. C-62 at p. 12 (1989).

No statutory minimum mandatory exclusion period exists for section 1128(b)(3) exclusions. However, William Young, the I.G.'s program analyst who prepared the exclusion recommendation in this case, testified that program guidance developed since the enactment of the Medicare - Medicaid Patient Protection Act (MMPPA) indicates a base period of exclusion of five years for 1128(b)(3) violations. Tr. 18-19. This base period might be increased or decreased in a specific case depending upon aggravating and/or mitigating circumstances. The I.G. contends that this policy is set out in a Notice of Proposed Rules, 55 Fed. Reg. 63 (April 2, 1990). Tr. 19-21.

These proposed regulations, however, have not been finally adopted. It would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, if and when these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption. I must make an independent assessment of the reasonableness of the exclusion, taking into consideration all of the factors discussed above.

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 of protecting the Medicare and Medicaid programs and their beneficiaries and recipients from untrustworthy individuals. The hearing is, by law, de novo. FFCL 21. Accordingly, in deciding the appropriate length of an exclusion, I must make 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. See Vincent Baratta, M.D., DAB Civ. Rem. C-144 at 8 (1990); Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989).

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." 48 Fed. Reg. 3744 (January 27, 1983). Thus, based on the law and the evidence, I have the authority to and will modify an exclusion if I determine that the exclusion is not reasonable. Act, section 205(b).

In this case, the I.G. based his determination on aggravating factors which he believed warranted an extra two years exclusion. Specifically, the I.G. relied on two circumstances: (1) the criminal acts resulting in the conviction were committed over a lengthy period of time, i.e., longer than 1 year, and (2) the sentence resulting from the criminal conviction included incarceration. I.G. Ex. 2. During the hearing, the I.G. represented that he would also now consider as an additional aggravating factor the fact that Petitioner lost his licenses to practice medicine in West Virginia and Pennsylvania. Tr. 29.

There are substantial reasons for a lengthy exclusion in this case, including aggravating factors. When Petitioner was authorized to prescribe controlled substances, he was put in a public position of great trust. Petitioner abused that trust when he prescribed those 30 valium, with potentially serious consequences for his patient, or for anyone else who might have received those pills. A lengthy period of exclusion is necessary in order to protect the Medicare and Medicaid programs and to give Petitioner the time to show that he can again be trusted to provide items and services to program beneficiaries and recipients.

Considerable aggravating factors exist in this case. The District Court deemed Petitioner's conduct so grave that it incarcerated him for eighteen months, and then felt it had to monitor him through probation for another five years. FFCL 19. Further, West Virginia revoked for five years Petitioner's license to practice medicine, and Pennsylvania suspended Petitioner's license for ten years. FFCL 20. The licensing authorities of the two states in which Petitioner practiced thus found his conduct so serious that they will not let him practice there for very lengthy periods.

I also find it an aggravating circumstance that Timothy Casey, Senior U.S. Probation Officer, in his presentence report concerning Petitioner, wrote: "Certain information developed during the government's investigation and the defendant's ongoing relationship with a sixteen-year-old girl indicates that Dr. Janze has, if not unnatural, at least a socially unacceptable sexual attraction to underage females. Physicians hold a position of trust in our society. Attendant to that position is a requirement of a high sense of responsibility. Absent in Dr. Janze was that sense of responsibility." P. Ex. 3. Although the I.G. did not introduce evidence to support the statement, the Petitioner himself introduced this statement, and thus does not dispute it. A high sense of responsibility in a physician is <u>essential</u> to ensure that a physician will be a trustworthy provider of goods and services to the Medicare and Medicaid programs. If this sense of responsibility is absent in Petitioner, only a lengthy period of exclusion will provide program protection.

I do not, however, accept as an aggravating factor the period of time over which the offense occurred. The I.G. has sought to justify the length of the exclusion because Petitioner's illegal behavior lasted for more than 14 months. Tr. 28. However, although the indictment alleged a series of criminal acts perpetrated by the Petitioner over a lengthy period of time, Petitioner pled guilty to only one count of the indictment, which referenced Petitioner's prescription of 30 tablets of valium to an individual on only one date, October 17, 1986. FFCL 2, 3, 5. In the absence of a conviction on all of the allegations, there is no basis for determining that Petitioner's illegal behavior lasted for more than 14 months. The I.G. did not offer proof, and mere allegations are not sufficient to make this determination. FFCL 4.

I also find mitigating circumstances, however, which support the Petitioner's trustworthiness. After the events underlying his conviction occurred in West Virginia, but prior to the conviction itself, Petitioner moved to and began practicing medicine in Pennsylvania. Petitioner presented several witnesses who knew him in Pennsylvania and who testified as to Petitioner's trustworthiness, his competence as a physician, his care for his patients, particularly his elderly patients, and his reasonable fees. I was struck by the fact that Petitioner is known as one of the very few physicians who still make house calls, and that his patients who testified asserted that the loss of Petitioner is a real loss to their community. FFCL 22. I conclude from this that Petitioner's witnesses are credible, and that their testimony illustrates that at least in his professional life, Petitioner's behavior since the events leading to his conviction has been of a high order.

Petitioner stated during his hearing that he has learned his lesson. Tr. 108, 113. This is a positive and encouraging sign that Petitioner is making progress toward regaining the trustworthiness he should have to participate in Medicare and federally-financed State health care programs. However, Petitioner also views himself as a naive and gullible physician, schooled in Yugoslavia where he was not trained in drug abuse, going into practice in an endemic drug area, and being manipulated until he could not back himself out. Tr. 104, 105, 113. None of these arguments can be seen as mitigating, however, given the circumstances of this case, or indicative of Petitioner's present ability to be a trustworthy provider of goods and services to the Medicare and Medicaid programs.

The I.G. has proved, and Petitioner has admitted, that Petitioner's conviction falls within the mandate of section 1128(b)(3) and that the conduct underlying his conviction demands a lengthy period of exclusion. My review of the mitigating circumstances, however, and the failure of the I.G. to prove that the criminal acts resulting in the conviction were committed over a lengthy period of time, leads me to conclude that a seven-year exclusion is unreasonable. The circumstances of Petitioner's exclusion, coupled with my observation of him and his witnesses during their testimony, convince me it would be more appropriate to give him the opportunity to apply for reinstatement in February 1996, not February 1997. In other words, I conclude that Petitioner should be excluded for six years, not seven.

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 six year exclusion is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge