Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: March 19, 1991
Keith M. King, M.D.,	)	
	)	
Petitioner,	)	Docket No. C-313
	)	
- v. -	)	
	)	Decision No. CR121
The Inspector General.	)	
	)	

DECISION

On August 1, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded because his license to practice medicine in the State of Kentucky was revoked by the Kentucky Board of Medical Licensure. Petitioner was advised that he would be excluded until he obtained a valid license to practice medicine in the State of Kentucky.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. Petitioner asserted that his revocation had been stayed pending the outcome of an appeal. He argued that, consequently, the I.G. lacked authority to exclude him. During the prehearing conference on November 21, 1990, Petitioner indicated that he would file a motion challenging the authority of the I.G. to exclude him under section 1128(b)(4)(A) of the Social Security Act (Act). Subsequently, Petitioner filed a motion to dismiss or, in the alternative, to stay the action of the I.G. pending

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

resolution of the matter by the court. The I.G. filed an opposition. Neither party requested oral argument.

I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. I conclude that the I.G. did not have authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Act. I therefore vacate the exclusion.

ISSUE

The issue in this case is whether the I.G. had the authority to exclude Petitioner from the Medicare and Medicaid programs for reasons bearing on the revocation of his license by a State licensing authority under section 1128(b)(4)(A) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Prior to January 25, 1990, Petitioner was licensed to practice medicine in the State of Kentucky. I.G. Ex. 1.[2]

2. On January 25, 1990, the Kentucky Board of Medical Licensure (the Medical Board) revoked Petitioner's Kentucky medical license. I.G. Ex. 3.

3. The Medical Board found that Petitioner's conduct, which resulted in the suspension of his privileges at the Highlands Regional Medical Center (the Hospital) in Prestonsburg, Kentucky, involved substandard anesthesia care and was potentially dangerous to his patients and co-workers. I.G. Ex. 3.

4. The Medical Board concluded that Petitioner's conduct was unprofessional in nature. I.G. Ex. 3.

5. On May 2, 1990, the Medical Board issued an order denying Petitioner's request for reconsideration. I.G. Ex. 4.

6. On February 26, 1990, Petitioner appealed the Medical Board's decision to the Jefferson Circuit Court in Louisville, Kentucky.

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[2]The parties' exhibits are cited as I.G. Ex. (number) for the Inspector General's exhibits and P. Ex. (letter) for Petitioner's exhibits.

7. Pursuant to Petitioner's appeal, the court entered an Agreed Order for Temporary Injunction on June 18, 1990. P. Ex. A.

8. The court's order temporarily enjoined the Medical Board from revoking Petitioner's medical license during the pendency of his appeal. P. Ex. A.

9. 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. 21611 (1983).

10. On August 1, 1990, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid until he obtains a valid license to practice medicine in the State of Kentucky, pursuant to section 1128(b)(4)(A) of the Act. I.G. Ex. 7.

11. Petitioner's license to practice medicine has not been revoked within the meaning of section 1128(b)(4)(A) of the Act. Findings 7-8.

12. The I.G. did not have authority to impose or direct an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Act. Findings 7-8.

ANALYSIS

The issue before me on Petitioner's motion to dismiss is whether the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. I conclude that the I.G. did not have such authority, because, as of the date of the exclusion, Petitioner's license to practice medicine in the State of Kentucky was not revoked, suspended, or otherwise lost within the meaning of section 1128(b)(4)(A). Therefore, I enter summary disposition in favor of Petitioner and vacate the exclusion which the I.G. imposed and directed against him.

The relevant material facts in this case are not disputed. Petitioner, a physician, had a license to practice medicine in Kentucky. Petitioner had served on the medical staff of a hospital in Prestonsburg, Kentucky. In 1988, that hospital suspended Petitioner's staff privileges. The reasons for that action included unprofessional conduct, professional incompetence, and malpractice. Subsequently, a complaint was filed against Petitioner before the Kentucky State Board of Medical

Licensure (the Medical Board). On January 25, 1990, the Medical Board revoked Petitioner's Kentucky medical license, concluding that Petitioner had engaged in unprofessional conduct. On May 2, 1990, the Medical Board declined Petitioner's request that it reconsider its January order.

On February 26, 1990, Petitioner filed an appeal of the license revocation in a Kentucky State court. On June 18, 1990, Petitioner obtained a temporary injunction from that court. The injunction order enjoined the Medical Board's license revocation order pending the outcome of Petitioner's appeal. In issuing the injunction, the court found that unless it enjoined the order, Petitioner would be immediately and irreparably harmed by it.[3]

On June 6, 1990, the I.G. sent Petitioner a letter in which he advised Petitioner that he was considering excluding him pursuant to section 1128(b)(4) of the Act. The I.G. sent a notice of exclusion to Petitioner on August 1, 1990, advising Petitioner that he was being excluded pursuant to section 1128(b)(4). That section provides that the Secretary may exclude any individual or entity:

> (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or
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> (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

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[3] The injunction order also recited that Petitioner no longer resided in Kentucky, but had relocated to Arizona. The order stated that Petitioner and the Medical Board agreed that Petitioner would suffer immediate and irreparable harm before a decision could be reached on his appeal "by virtue of the operation of certain federal laws, as well as the operation of laws of other states." I.G. Ex. 6.

Petitioner argues from the foregoing facts that the I.G.'s exclusion determination should be vacated. Petitioner's contention is that, by virtue of the injunction, his license to practice medicine in Kentucky has not been revoked, suspended, or otherwise vacated within the meaning of section 1128(b)(4). Petitioner does not deny that his license to practice medicine in Kentucky was initially revoked by a state licensing authority. He does not dispute that the rationale expressed by the Medical Board in its revocation order pertained to Petitioner's professional competence or performance. Petitioner contends that the Medical Board's revocation order was effectively nullified by the court's order granting a temporary injunction. Petitioner argues that, pursuant to a Kentucky statute, KRS 311.593(4), and the court's injunction, the Medical Board's order was not in effect as of the date the I.G. excluded Petitioner and is not presently in effect.[4]

The I.G. does not deny that the license revocation order was enjoined. He argues that it would be inimical to Congressional intent to permit practitioners whose licenses had been revoked for reasons relating to their competence or performance to evade exclusions by obtaining state court injunctive relief from state medical boards' license revocation orders. The I.G. contends that section 1128 should be interpreted broadly so that Medicare beneficiaries and Medicaid recipients are protected from untrustworthy providers.

The I.G. contends that the court's injunction order was not contested by the Medical Board because Petitioner had moved to Arizona and no longer posed a threat to residents of Kentucky. Therefore, the state authorities no longer had an interest in barring Petitioner from practicing medicine. On the other hand, according to the

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[4] The Kentucky statute provides in relevant part that:

> If the petitioner seeks immediate injunctive relief [from an order by the Medical Board] the court shall not award such relief without providing the [Medical Board] with the reasonable opportunity to be heard. A final order of the [Medical Board] affecting a physician's license shall remain in effect until the court enters an order reversing or enjoining the [Medical Board's] order.

I.G., section 1128 embodies Congressional intent that recipients and beneficiaries receive national protection from individuals and entities who had been determined to be untrustworthy providers of health care in any state. The I.G. argues that this supervening national interest requires that the I.G.'s authority to exclude Petitioner be sustained in this case.

It is not completely clear from the record of this case that Kentucky authorities agreed to the injunction, or that the Kentucky court imposed it, based entirely on the "out of sight, out of mind" rationale asserted by the I.G. However, for purposes of deciding Petitioner's motion, I accept the I.G.'s representations. I conclude that there was no license revocation in effect as of the date the I.G. imposed and directed the exclusion against Petitioner. The I.G. was without authority to exclude Petitioner regardless of the Medical Board's motives in agreeing to the injunction or the court's rationale for issuing it.

I do not disagree with the I.G.'s statement of Congressional intent. In enacting section 1128(b)(4), Congress was concerned that untrustworthy practitioners whose licenses had been suspended or revoked by a state might move to another state, open practices, and continue to treat program beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 7, reprinted in 1987 U.S. Code Cong. & Admin. News 688. Congress' intent in enacting section 1128(b)(4) included giving the Secretary or his delegate, the I.G., the authority to provide national protection to program beneficiaries and recipients from untrustworthy providers whose licenses to provide health care had been revoked by state licensing authorities.

However, the I.G.'s accurate recitation of Congressional intent begs the question of whether he had authority to exclude Petitioner. Congress did not give the Secretary carte blanche authority to exclude individuals or entities who he determined posed a threat to the welfare of program beneficiaries or recipients. The Act specifically delineates those circumstances which either mandate or authorize exclusions. The Secretary does not have authority to exclude an untrustworthy provider absent the presence of at least one of the specifically delineated circumstances described in section 1128. Joel L. Korins, D.P.M., DAB Civ. Rem. C-176 (1990).

The authority to impose an exclusion pursuant to section 1128(b)(4) derives from the actions taken by state authorities. In order for there to be authority to

exclude Petitioner pursuant to section 1128(b)(4), Petitioner's license to practice medicine must have been revoked, suspended, or otherwise lost as of the date of the I.G.'s exclusion determination. There is no question that the Medical Board initially revoked Petitioner's license. However, prior to the imposition of the exclusion, a state court enjoined that license revocation. The consequence of the court's order was to at least temporarily rescind the Medical Board's action. Petitioner was freed by the injunction to resume his practice in Kentucky, if he desired, on the same footing as any physician licensed to practice medicine in that state. The effect of the injunction, therefore, was to erase the license revocation, at least until the conclusion of Petitioner's appeal. I conclude that, given the imposition of the injunction, Petitioner's Kentucky license was not revoked, suspended, or otherwise lost as of the date the I.G. imposed and directed exclusions against Petitioner.[5]

Congress could have specified in enacting section 1128(b)(4) that a license revocation or suspension order authorized the Secretary to impose and direct exclusions regardless whether the order was temporarily enjoined pending an appeal. It did not do so. Furthermore, the legislative history of section 1128 is devoid of any commentary which would support the conclusion that Congress intended to give the Secretary authority to impose and direct exclusions based on enjoined license suspension or revocation orders. I do not find that the Act can be read as expansively as the I.G. asserts, given Congress' silence on this point.

Congress' silence on this question in section 1128(b)(4) stands in contrast to its treatment of the term "convicted" in section 1128(i) of the Act. That section defines the term "convicted" to include circumstances where pleas are accepted by courts but where courts withhold judgments of conviction. Social Security Act, section 1128(i)(4). Congress' definition of "convicted" assures that the Secretary has authority to impose and direct exclusions based on convictions regardless of state procedures which might work to ameliorate the impact of convictions on defendants. Congress did not enact a similarly expansive definition of a license revocation or suspension.

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[5] Should the injunction be vacated and the license revocation order reinstated, then the I.G. would have authority to exclude Petitioner based on the Medical Board's license revocation order.

The I.G. argues that the injunction is fictitious, in that Petitioner does not intend to resume his Kentucky practice. According to the I.G., if Petitioner were to attempt to resume that practice, that would "violate the spirit and intent of the temporary injunction order." I.G.'s Memorandum at 10-11, n. 2. However, there is nothing of record of this case which would support a finding that, notwithstanding the injunction, Petitioner continues to be precluded from returning to Kentucky to practice medicine. On its face, the injunction order permits Petitioner to do precisely that.[6]

CONCLUSION

Based on the undisputed facts and the law, I conclude that the I.G. did not have authority to exclude Petitioner under section 1128(b)(4) of the Act. Therefore, I enter summary disposition in favor of Petitioner and vacate the exclusion imposed and directed against Petitioner by the I.G.

/s/

Steven T. Kessel
Administrative Law Judge

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[6] The I.G.'s argument suggests that, in deciding whether he has authority to impose and direct exclusions, it is appropriate to look behind the language of state actions to determine the intent of the parties and court officials in those actions. There may be cases where state actions are ambiguous. In those cases, some inquiry may be necessary to determine what a state agency or court intended. For example, a party may be convicted of a criminal offense, but the charging document and the conviction itself may not clearly state whether the offense falls within one of the subsections of section 1128 which authorize the imposition of an exclusion. In that case, it may be appropriate to conduct a limited fact inquiry to decide what were the elements of the offense of which the party was convicted. See Thomas M. Cook, DAB Civ. Rem. C-106 (1989). However, the Kentucky court's injunction is not ambiguous in this case. See I.G. Ex. 6.