Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Eugene Shusman, R. Ph.,	DATE: May 24, 1991
Petitioner,	
- v. -	Docket No. C-227
The Inspector General.	Decision No. CR130

DECISION

Petitioner, a registered pharmacist, timely requested a hearing before an Administrative Law Judge (ALJ) to contest a determination by the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) to exclude Petitioner from participation in the Medicare and Medicaid programs, pursuant to section 1128(b)(5)(B) of the Social Security Act (Act).[1] The I.G. stated that Petitioner's federal exclusion was predicated on Petitioner's State preclusion from the Pennsylvania Medical Assistance Program because of improper billings and dispensings. The I.G. informed Petitioner that his federal exclusion was for an indefinite period (until he is reinstated in the Pennsylvania Medical Assistance program). Petitioner argues that the I.G. has no basis to exclude him under section 1128 (b)(5)(B) because his State preclusion was voluntary and without a determination of fault or culpability.

The parties submitted this case on cross-motions for summary disposition, with supporting documentary evidence. Petitioner waived an in-person evidentiary hearing. Based on the documentary evidence, briefs, and

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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.

arguments submitted by the parties, and the applicable law, I conclude that the exclusion imposed by the I.G. is reasonable and appropriate.

BACKGROUND

By letter dated February 6, 1990, the I.G. notified Petitioner that he was being excluded as a result of his preclusion from the Pennsylvania Medical Assistance Program by the Pennsylvania Department of Welfare (DPW) for reasons bearing upon his professional competence, professional performance, or financial integrity within the meaning of section 1128(b)(5)(B) of the Act. The I.G. further advised Petitioner that he was being excluded until he is "re-instated in the Pennsylvania Medical Assistance Program." In his request for a hearing, Petitioner disputed the basis and authority of the I.G. to exclude him. I held a telephone prehearing conference in this case on June 27, 1990, and an oral argument on December 21, 1990. During the prehearing conference and the oral argument, Petitioner waived his right to an in-person evidentiary hearing and the parties agreed to submit the case on the basis of documentary evidence and 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., 1990 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:

1. Whether Petitioner was "suspended or excluded" from participation, or "otherwise sanctioned" under 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. Whether this exclusion violates the ex post facto clause of the Constitution of the United States; and

3. Whether the length of Petitioner's exclusion is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. Petitioner is a registered pharmacist in Philadelphia, Pennsylvania, and was the owner of six pharmacies. P. Br. 2.

2. By an Order to Show Cause (State Order to Show Cause) dated June 16, 1986, Petitioner was notified by the Pennsylvania Department of Public Welfare (DPW) that DPW proposed to terminate Petitioner's provider agreement and

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[2] References to the record and to Departmental Appeals Board cases in this Decision and Order are cited as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Reply Br. (page)
Joint Exhibits	Joint Ex. (letter/page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./ date)
Departmental Appeals Board appellate decisions	DAB App. (decision no./ date)

the provider agreement of three of his pharmacies and to preclude him and his three pharmacies from participation in the Medical Assistance Program, which is the Pennsylvania Medicaid program. Joint Ex. A.

3. DPW alleged that Petitioner or his pharmacies had, among other things, illegally billed for brand name drugs, but supplied generics, at various times in 1984 and 1985. Joint Ex. A.

4. DPW and Petitioner entered into a stipulation (State (Stipulation). On December 13, 1988, the State Stipulation became final and was adopted by DPW. The State Stipulation stated that: (1) Petitioner was precluded from participation in the Pennsylvania Medical Assistance Program for a period from March 28, 1988 through and including March 28, 1992 (four years); (2) the three pharmacies owned by Petitioner (and the subject of allegations in the State Order to Show Cause) were sold by Petitioner effective March 28, 1988; and (3) there was no determination of fault or culpability. Joint Ex. B.

5. By letter dated October 24, 1989, the I.G. informed Petitioner that the DHHS was considering excluding Petitioner from participation in the Medicare and Medicaid programs until he is reinstated in the Pennsylvania Medicaid Program by DPW. Joint Ex. C.

6. By letter dated November 22, 1989, Petitioner responded to the I.G.'s October 24, 1989 letter. Joint Ex. D.

7. By letter dated February 6, 1990, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and Medicaid programs pursuant to section 1128(b)(5)(B) of the Act until he is reinstated in the Pennsylvania Medical Assistance Program by DPW. I.G. Ex. 6.

8. The Pennsylvania Medical Assistance program, which is administered by DPW, is a State health care program, within the meaning of sections 1128(h) and 1128(b)(5)(B) of the Act.

9. Petitioner was "excluded or suspended" or "otherwise sanctioned" under "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.

10. 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.

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

12. This exclusion does not violate the ex post facto clause of the United States Constitution.

13. The exclusion imposed and directed by the I.G. is reasonable and appropriate.

DISCUSSION

I. Petitioner Was "Suspended Or Excluded" From or "Otherwise Sanctioned" Under 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.

Section 1128(b)(5)(B) of the Act grants the authority to exclude any individual who has been:

> ...suspended or excluded from participation, or otherwise sanctioned, under -
>
> . . .
>
> (B) a State health care program, for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity.

Thus, the first question to be resolved here is whether Petitioner was "suspended", "excluded", or "otherwise sanctioned". This question can be resolved by examining the terms of the State Stipulation. There is no dispute that Petitioner agreed to be "precluded" from the Pennsylvania Medical Assistance Program for a period of four years. FFCL 4. Accordingly, I conclude that Petitioner was "excluded," within the meaning of section 1128 (b)(5)(B). Next, under the terms of the State Stipulation, Petitioner agreed that he sold his three pharmacies. FFCL 4. Accordingly, I conclude that Petitioner was "otherwise sanctioned," within the meaning of section 1128 (b)(5)(B).

I conclude that the term "excluded" in section 1128 (b)(5)(B) is synonymous with the term "precluded" in the State Stipulation. Under the terms of the State Stipulation, Petitioner agreed to be "precluded" from participation in the State Medical Assistance Program. The dictionary defines "preclude" as "2. to shut out...: prevent or hinder by necessary consequence or implication : deter action of, access to, or enjoyment of...." Webster's Third New International (unabridged) Dictionary, 1976 edition at 1785. The same dictionary (at p. 793) defines "exclude" as to "bar from participation" or to "shut out." The definition of the term "preclude" is so similar to the term "exclude" as to make the terms synonymous. Thus, the State Stipulation, although entered into without a finding of culpability, shut out or "excluded" Petitioner from the enjoyment of the Pennsylvania Medical Assistance Program, within the meaning of Section 1128 (b)(5)(B) of the Act.

The definition of the word sanction includes "a mechanism of social control that punishes deviancy from or rewards conformance to the normative standards of behavior existing in a society." Webster's Third New International (unabridged) Dictionary, 1976 Edition at 2009. As part of the settlement between Petitioner and DPW, and in the wake of serious charges of wrongdoing, Petitioner sold his three pharmacies. Such a forced sale is a "mechanism of social control." Thus, Petitioner was "otherwise sanctioned", within the meaning of section 1128 (b)(5)(B) of the Act.

Petitioner argues, in effect, that he was not "suspended or excluded" or "otherwise sanctioned" by a State health care program because his was a voluntary preclusion from the Pennsylvania Medical Assistance Program and culpability was not established. P. Br. 5. Petitioner, in effect, asserts that since the findings of DPW in the State Order To Show Cause are only allegations, and since the State Stipulation specifically states that there is no determination of culpability or wrongdoing, I must conclude that Petitioner was not "suspended or excluded" or "otherwise sanctioned." He relies on the case of Joel A. Korins, D.P.M., DAB Civ. Rem. C-176 (1989), and argues, in effect, that individuals who agree to be excluded from or sanctioned by a State Medicaid Program without admitting wrongdoing are not susceptible to section 1128 (b)(5)(B) exclusions.

Korins involved a petitioner who had been indicted in Massachusetts for the criminal offenses of larceny and filing false claims with the Massachusetts Medicaid program. Petitioner there entered into an agreement with

prosecuting authorities which resolved the criminal charges against him. As an element of that agreement, Petitioner agreed to withdraw as a provider from the Massachusetts Medicaid Program, but did not admit that he had violated any laws. ALJ Kessel concluded that no "sanction" had been imposed because no wrongdoing was ever established.

The I.G. argues that Petitioner's federal exclusion is properly based upon a review of the State Stipulation and the State Order To Show Cause, and is authorized by section 1128(b)(5)(B) of the Act. I.G. Br. 3-10. The I.G. attempts to distinguish Korins. The I.G. argues that the State Stipulation here stated that Petitioner was "precluded" from participation, whereas in Korins the agreement stated that Petitioner "withdrew" from participation. Thus, the I.G. argues, under the terms of the State Stipulation itself, Petitioner was excluded from the State Medicaid program by DPW and the central issue of Korins need not be reached (i.e., whether Petitioner was "sanctioned" if no wrong was ever admitted).

The I.G. erroneously tries to distinguish the term "exclusion" from the term "sanction". An exclusion is a sanction; there is no distinction between an exclusion and a sanction under section 1128 (b)(5)(B). Petitioner, in effect, erroneously argues that wrongdoing must be found in order for his State "preclusion" to be held to be a "sanction" under section 1128 (b)(5)(B). I conclude that an individual can voluntarily agree to be excluded or sanctioned without a finding of culpability or wrongdoing. Petitioner correctly argues that such a conclusion requires a departure from the decision in Korins. I disagree with Korins insofar as I conclude that a voluntary preclusion and a sale of three pharmacies during the pendency of charges or allegations of serious wrongdoing, as here, is an "exclusion" and a "sanction."

My findings and conclusions that Petitioner was "excluded" and "otherwise sanctioned" are based on my analysis of the terms of the State Stipulation and State Order to Show Cause. That the State Stipulation may have been entered into voluntarily by Petitioner, and that no determination of fault or culpability was made, does not mean that an exclusion or sanction was not involved. The State Stipulation stated that Petitioner was "precluded from direct and indirect participation in the Medical Assistance Program for the time period March 28, 1988 through and including March 28, 1992." Joint Ex. B/1. The State Stipulation noted that "as a result of

withdrawing the appeals," Petitioner had sold the three pharmacies in question on March 28, 1988, the first day of the preclusion, and had no further ownership interest or involvement in the pharmacies. Joint Ex. B/1. The State Stipulation also stated that Petitioner was acknowledging that he would not engage in specified practices constituting "indirect participation." Joint Ex. B/2. The State Stipulation incorporated the first paragraph of the State Order To Show Cause. Joint Ex. B/2. Finally, the State Stipulation stated that Petitioner was not acknowledging fault or culpability. Joint Ex. B/3.

In addition to the fact that section 1128 (b)(5)(B) does not specifically require a finding of wrongdoing, I am influenced by my belief that Congress did not intend that an individual could automatically evade exclusion under section 1128(b)(5)(B) by simply entering into a stipulation or agreement during the pendency of serious charges of wrongdoing. I conclude that such an outcome is contrary to the legislative intent of section 1128(b)(5)(B). The legislative history states:

> The purpose of the provision is to correct the anomaly in current law whereby individuals or entities found unfit to participate in one Federal health care program, or in one Federally funded State health care program, may continue to participate in Medicare or Medicaid or the other State programs.

S. Rep. No. 109, 100th Cong., 1st Sess., 8, reprinted in U.S. Code Cong. and Admin. News 682, 689 ("Senate Report"). While there is some support for Petitioner's argument in the words "found unfit" above, interpreting the section as Petitioner argues would allow the anomaly Congress sought to correct. The fact is, there would never have been a voluntary preclusion of Petitioner without the charges of wrongdoing by DPW in its State Order To Show Cause.

Korins noted that where Congress intended to mandate or authorize exclusion of parties who voluntarily entered into agreements in order to avoid exclusions, it specifically stated its intent. Korins looked to other parts of section 1128 in which Congress found it necessary to provide explicitly that a plea of nolo contendere constituted a "conviction" and that license surrender pending a disciplinary proceeding constituted a "license revocation" under section 1128.

I do not agree with the analysis of Korins that a parallel provision would be necessary for a voluntary agreement to be considered a "sanction" under section 1128 (b)(5)(B). As the I.G. points out, the terms "convictions" and "license revocations" are specific, whereas the term "otherwise sanctioned" is general. I.G. Br. 9. Hence, it is reasonable to conclude that Congress intended to include voluntary agreements, during the pendency of proceedings involving serious allegations of wrongdoing, within the meaning of the term "sanction" or the term "exclusion," without an explicit statement to that effect.

I also find and conclude that Petitioner's preclusion was for reasons bearing on his "professional competence, professional performance, or financial integrity," within the meaning of section 1128(b)(5)(B) of the Act. The determination of whether or not the State preclusion was for reasons bearing on professional competence, performance, or financial integrity also has to be made by examining DPW's Order to Show Cause and the State Stipulation. These documents reflect that Petitioner was notified that DPW proposed to terminate Petitioner's provider agreement and to preclude him from participation in the program. The State Order to Show Cause alleged that Petitioner had violated the program's regulations by altering prescriptions, dispensing misbranded drugs by using false prescription labels, allowing employees who were neither registered pharmacists nor supervised by registered pharmacists to dispense drugs, dispensing drugs which were not in containers with child-proof caps, and billing DPW for different drugs than those which were actually dispensed to medical assistance recipients. Joint Ex. A/2-4.

Although section 1128(b)(5)(B) does not define the terms "professional competence," "professional performance," or "financial integrity," it is reasonable to conclude that these terms encompass those circumstances where a termination or preclusion proceeding concerns a provider's qualifications and manner of functioning in his profession. DPW's basis for proposing to preclude Petitioner was that he had engaged in the activities described above. Although the parties agree, and the State Stipulation states, that culpability was not established, Petitioner entered into the State Stipulation because of the allegations. Therefore, while the facts were not established by a court, the State Stipulation must be read in the context of the State Order to Show Cause. The allegations in the State Order to Show Cause bear on professional competence, professional performance, and financial integrity.

Petitioner attempts to distance himself from the actions outlined in the State Order To Show Cause. Petitioner states that the actions were those of his employees and, therefore, have no bearing on his professional competence, performance, or financial integrity. A similar argument was rejected in Summit Health Limited, dba Marina Convalescent Hospital, DAB Civ. Rem. C-108 (1989), aff'd DAB App. 1173 (1990). See also, Leonard Harman, D.O., DAB Civ. Rem. C-162 (1990). Petitioner signed the State Stipulation and he agreed to be precluded, not his employees. Moreover, assuming, arguendo, that Petitioner's statements are true, he nevertheless is responsible for the acts of his employees.

Accordingly, the exclusion imposed against Petitioner by the I.G. was authorized by section 1128(b)(5)(B) of the Act.

II. The 1987 Amendments to Section 1128 of the Act Apply To This Case.

Congress amended section 1128 in 1987 (1987 Amendments) to include permissive exclusions, such as this one. Petitioner argues that Congress did not intend to apply the 1987 Amendments to conduct occurring prior to their passage, as in this case. Petitioner then argues that if Congress did intend the 1987 Amendments to apply, this would violate the ex post facto clause of the United States Constitution.

For the same reasons I expressed in the case of Betsy Chua, M.D. and Betsy Chua, M.D., S.C., DAB Civ. Rem. C-139 (1990), aff'd. DAB App. 1204 (1990), I conclude (1) that Congress did intend to apply the 1987 Amendments to final actions occurring after August 18, 1987 (the effective date of the 1987 Amendments), such as the state preclusion here; and (2) that the constitutional prohibition against ex post facto laws does not bar the I.G. from imposing an exclusion in this case.[3] The

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[3] As stated by the Departmental Appeals Board in Jack W. Greene, DAB App. 1078 at 17 (1989), aff'd Greene v. Sullivan 1731 F. Supp. 835 (E.D. Tenn. 1990):

> The ALJ must consider the meaning of the pertinent statutory provision as well as related provisions, relevant legislative history, the effective date of the statute, case law

(continued...)

Board in Chua (at p. 7) stated that section 1128 is a civil remedy, not a penal law, and did not trigger the Constitutional protection from ex post facto laws. Moreover, the State preclusion, which is the predicate for this federal exclusion, took place after the effective date of the 1987 Amendments, i.e., August 18, 1987. See Francis Shaenboen, R.Ph., DAB App. 1249, at 5-6 (1991).

III. The Exclusion Imposed and Directed by the I.G. Is Appropriate In This Case.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs until he is reinstated in the Pennsylvania Medicaid program. His exclusion from the Pennsylvania Medicaid program is until March 28, 1992, less than a year away. Since I have decided that the I.G. had discretion to impose an exclusion in this case, I must now decide if the length of exclusion imposed is reasonable and appropriate.

The Regulations provide that certain criteria be considered in determining the length of exclusion in this case. 42 C.F.R. 1001.125. Although the Regulations do not define what circumstances may be considered as mitigating, I must also consider any mitigating circumstances. See 42 C.F.R. 1001.125(b)(4).

The I.G. argues that the purpose of an exclusion under section 1128(b)(5)(B) is to protect program recipients and beneficiaries. The I.G. argues that the exclusion in this case is reasonable because the State precluded Petitioner for four years and Congress intended that

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[3](...continued)
interpretations, and implementing regulations and policy issuances. It would literally be impossible to apply the issue identified by [42 C.F.R. 1001.128] in a legally correct manner without considering these factors, as appropriate.

Thus, I am empowered to decide how Congress intended the 1987 amendments to apply. In addition, where there is room to decide how to apply the statute, I have a duty to apply it in a manner that is constitutional and valid. See Chua, supra, DAB App. 1204 at 5; Dickerson, The Interpretation and Application of Statutes, Ch. 3 (Little, Brown and Co. 1975).

Petitioner be excluded from Medicare and other state health care programs for the same period.

Petitioner argued that section 1128(b)(5) does not apply here, not that mitigating factors exist for reducing the length of the exclusion. Petitioner presented no argument that the term of the exclusion should be reduced because of mitigating factors. Nevertheless, Petitioner's arguments contain references which could be considered to be of a mitigating nature: that the actions were not committed by Petitioner, but by his employees and without his knowledge.

I conclude that the exclusion here is reasonable and appropriate. My decision is influenced by the fact that Petitioner did not present any evidence to support his assertion that the actions which led to the State preclusion were committed by Petitioner's employees and without Petitioner's knowledge. My decision is also influenced by the fact a shorter exclusion would result in the very anomaly which Congress has sought to remove -- a Petitioner excluded in one state participating in Medicare or Medicaid programs in other states during the period of the exclusion. I do not foreclose the possibility of a different outcome in another case. But in such a case, facts would necessarily have to be established which demonstrate that the provider is trustworthy and that program recipients and beneficiaries would not be harmed by a shorter exclusion. This is not such a case.

IV. It Is Well Settled That Summary Disposition Is Appropriate In Exclusion Cases And That There Is No Need For An Evidentiary Hearing In This Case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Leon Brown, DAB App. 1208 (1990); Surabhan Ratanasen, M.D., DAB App. 1138 at 8 (1990). Also, a petitioner may waive an in-person evidentiary hearing and have his or her case decided on the basis of documentary evidence and briefs, as here.

I have concluded that, based on the undisputed material facts contained in the record of this case, the I.G. properly excluded Petitioner from the Medicare and Medicaid programs, until he is reinstated in the Pennsylvania Medical Assistance Program. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 7-9 (1990); Fed. R. Civ. P. 56.

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 the exclusion is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge