Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
William V. McAbee, D.D.S.,	)	DATE: August 1, 1991
	)	
Petitioner,	)	
	)	Docket No. C-307
- v. -	)	
	)	
	)	Decision No. CR147
The Inspector General.	)	
	)	

DECISION

On September 6, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and any State health care program for five years.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in the Fourteenth Judicial Circuit Court, Walterboro, South Carolina (state court), of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner was advised that exclusion from participation in Medicare and Medicaid of individuals or entities convicted of such an offense is authorized by section 1128(b)(3) of the Social Security Act (Act).

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I held an in-person evidentiary hearing in this case in Atlanta, Georgia on May 10, 1991. Based on the evidence introduced at the hearing, and on applicable law, I conclude that the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

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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-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Therefore, I am entering a decision in this case sustaining that exclusion.[2]

ISSUES

The issues in this case are whether:

1. the I.G. had authority to exclude Petitioner;

2. the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioner is a dentist who was licensed to practice in South Carolina until 1989. I.G. Ex. 4.

2. The Bureau of Drug Control (South Carolina Department of Health and Environmental Control) and the South Carolina Law Enforcement Division conducted an investigation of the prescriptions written by Petitioner between March 28, 1987 and February 2, 1988. I.G. Ex. 14, 16/1-2.

3. The investigation revealed that Petitioner: 1) wrote prescriptions in the names of individuals who never heard of or received the prescriptions; 2) received the prescriptions for his own use; 3) conspired to unlawfully

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[2] On June 5, 1991, I received a letter of May 31, 1991 from A. Cranwell Boensch, Esq., attesting to Petitioner's faithful attendance at the Walterboro Alcoholics Anonymous (A.A.) meetings. On June 10, 1991, I sent the I.G. a letter granting him until June 21, 1991 to file any opposition to my consideration of this letter. As the I.G. has not objected, I am admitting this letter into evidence as P. Ex. 1.

[3] The parties' exhibits, briefs, and transcript of the hearing will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
Petitioner's Exhibits	P. Ex. (number/page)
Transcript	Tr. (page)

dispense controlled substances by writing prescriptions for controlled substances in an individual's name and requesting that the individual return some of the substances to him; and 4) altered a prescription to obtain a controlled substance. I.G. Ex. 14/1-56, 16/2-3.

4. On November 3, 1988 Petitioner was charged with: 1) nine counts of conspiracy to unlawfully distribute a controlled substance; 2) 22 counts of unlawful distribution of a controlled substance; 3) one count of failure to make, keep and furnish records and information on controlled substances; 4) one count of unlawfully obtaining a controlled substance by fraud by altering the refills on a prescription; and 5) one count of breach of trust with fraudulent intent. I.G. Ex. 6/1, 14.

5. On or about March 10, 1989, Petitioner pleaded guilty in state court to 22 counts of unlawful dispensing of a controlled substance, eight counts of criminal conspiracy, one count of obtaining drugs by fraud or deceit, and one count of failing to make, keep, and furnish records on controlled substances. I.G. Ex. 7, 8/1-96.

6. As a result of his conviction, Petitioner was sentenced to five years' imprisonment and a $5,000 fine. The state court suspended the term of imprisonment and then placed Petitioner on five years of probation, with intensive supervision. I.G. Ex. 7/1

7. On August 1, 1989, Petitioner voluntarily surrendered his controlled substances registration privileges to the South Carolina Department of Health and Environmental Control. Petitioner further agreed that his federal Drug Enforcement Administration number could be terminated without any other proceedings. I.G. Ex. 15.

8. On January 2, 1989, the Colleton County Sheriff's Department found Petitioner in his office, very intoxicated and smoking. Petitioner was transported to the Colleton County Emergency Room where a doctor signed a commitment order for Petitioner to be taken to Morris Village, a substance abuse treatment facility. I.G. Ex. 5/1-2, 4/2.

9. On April 29, 1989, the South Carolina Board of Dentistry (Dentistry Board) held a disciplinary hearing concerning Petitioner's license to practice dentistry in South Carolina. At this hearing, Petitioner told the Board that he did not dispute any of the charges brought against him. Petitioner told the Board that he had

received drug counseling and had not taken drugs or alcohol since his release from Morris Village. I.G. Ex. 4/2.

10. On May 29, 1989, the Dentistry Board revoked Petitioner's license, citing both Petitioner's criminal conviction and the incident of January 2, 1989, in which Petitioner was found to be intoxicated. The Dentistry Board also stated that Petitioner's problem with alcohol and drugs was longstanding. I.G. Ex. 4.

11. The Dentistry Board's findings were in part premised on a 1985 agreement between the Dentistry Board and Petitioner in which Petitioner voluntarily agreed to be subject to random, unannounced, blood and urine screenings for drugs and alcohol conducted by investigators assigned to the Dentistry Board. I.G. Ex. 4/1-3.

12. The Dentistry Board stated that Petitioner could re-apply for his license either: 1) at the end of his court ordered five-year probation; or 2) after waiting two years and satisfactorily completing the following requirements. These requirements included: 1) completion of one year of post-graduate training in general dentistry (approved by the Dentistry Board); 2) a showing of exemplary behavior without committing any acts of misconduct or violations; 3) a showing of regular, verified attendance and participation in AA meetings; and 4) obtaining a satisfactory psychiatric examination from a certified Dentistry Board approved psychiatrist. I.G. Ex. 4/3.

13. During a home visit by Petitioner's probation agent on March 8, 1990, Petitioner was found to be highly intoxicated. I.G. Ex. 9/3.

14. On March 9, 1990, Petitioner was arrested for violating his probation. He was charged with failure to: 1) refrain from excessive use of alcohol; 2) carry out all instructions given by his probation agent; 3) comply with special conditions of not consuming alcohol; and 4) comply with special conditions to follow the advice of the Colleton County Alcohol & Drug Abuse Commission (Commission). Petitioner was terminated from the Commission's program on March 9, 1990 for failure to comply with the program's conditions. I.G. Ex. 9/1-3.

15. On April 9, 1990, Petitioner's probation was revoked and he was ordered to serve one year of his original prison sentence. I.G. Ex. 10.

16. Petitioner was incarcerated from April 1990 to November 1990. Tr. 25.

17. Petitioner has a history of abusing controlled substances beginning as early as 1973.

18. On March 9, 1973, Petitioner was found unconscious in his office due to an overdose of amphetamines and/or alcohol. During an investigation of Petitioner by the Narcotic and Drug Control Division (South Carolina Department of Health and Environmental Control) begun on March 12, 1973, Petitioner admitted his alcohol problem, but initially denied abusing amphetamines. Petitioner subsequently admitted use of amphetamines to a limited extent and admitted writing two false prescriptions. I.G. Ex. 11/1-2, 16/2.

19. As a result of this investigation, Petitioner voluntarily surrendered his federal and state registration for all prescriptions except for schedule II and schedule III narcotics, for which he asserted he had a professional need. I.G. Ex. 11/2, 16/2.

20. On April 2, 1973, Petitioner voluntarily surrendered his remaining registration for Schedules II and III narcotics for a period to be determined by the Dentistry Board, in order to show his good faith in any proceedings which might be brought by the Dentistry Board. I.G. Ex. 12.

21. On December 13, 1979, the Dentistry Board recommended that full prescribing privileges be returned to Petitioner. I.G. Ex. 13/1.

22. On January 14, 1980, the Bureau of Drug Control (South Carolina Department of Health and Environmental Control) issued Petitioner a probationary controlled substance registration, subject to the conditions that: Petitioner comply with all applicable provisions of the controlled substances act and regulations and that Petitioner not possess or dispense any controlled substance containing amphetamine or its salts, methamphetamine or its salts, or any other controlled substance in any schedule which could be used as an anorectic drug. I.G. Ex. 13.

23. On August 1, 1989, Petitioner voluntarily surrendered his controlled substances registration number to the Bureau of Drug Control (South Carolina Department of Health and Environmental Control). I.G. Ex. 15.

24. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Finding 5.

25. 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.

26. Pursuant to section 1128(b)(3) of the Act, the Secretary of DHHS (Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid.

27. 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).

28. On September 6, 1990, the I.G. advised Petitioner that he was excluding him from participating in the Medicare and Medicaid programs for five years, pursuant to section 1128(b)(3) of the Act.

29. A remedial objective of section 1128(b)(3) of the Act is to protect beneficiaries and program funds by excluding individuals or entities who by conduct have demonstrated as risk that they may engage in fraud, substandard services, abuse, or unsafe practices in connection with controlled substances until such time as those excluded can demonstrate that such risk no longer exists. Social Security Act, Section 1128; S. Rep. No. 109, 100th Cong. 1st Sess., reprinted in 1987 U.S. Code Cong & Admin. News 682.

30. Petitioner has pleaded guilty to numerous criminal violations of State drug laws. See section 1001.125(b)(1); Findings 3-5.

31. Petitioner's actions could have had a severe adverse impact on the health and safety of his patients. See section 1001.125(b)(2); Findings 3, 8, 13, 14, 17, 18.

32. Petitioner received a lengthy sentence, which after his probation violation included incarceration. See 1001.125(b)(5); Findings 6, 15.

33. Petitioner has a history of alcohol and drug abuse going back at least to 1973. Findings 1-23.

34. Petitioner voluntarily pleaded guilty. Tr. 23; Finding 5.

35. Petitioner has attempted in the past to treat his alcohol and drug addiction, but has relapsed. Findings 1-23.

36. Petitioner has not demonstrated that he will not in the future relapse and again abuse controlled substances. Tr. 23 - 25, 32; P. Ex. 1.

37. Petitioner is still on probation and meets with his probation officer and representatives of Colleton County's drug and alcohol abuse program. Petitioner has not proven that when he is off probation he will no longer abuse controlled substances. Tr. 24 - 27.

38. Petitioner has not been sober for a long enough period of time for me to find that he poses no risk to the Medicare and Medicaid programs or to program beneficiaries and recipients. Findings 1-23, 35-37.

39. Petitioner has not proven that an exclusion of five years is unreasonable.

40. The I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for five years is reasonable. Findings 1-39; See 42 C.F.R. 1001.125 (b).

ANALYSIS

Petitioner is a dentist with a lengthy history of drug and alcohol abuse. In 1989, Petitioner was convicted of numerous offenses relating to unlawful use and dispensing of controlled substances. Based on this 1989 conviction, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, for five years. Petitioner contests both the basis for his exclusion and the reasonableness of the length of his exclusion. Based on the evidence introduced at the hearing and pursuant to applicable law, I find that the I.G. is authorized to exclude Petitioner and that the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

1. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(3).

Section 1128(b)(3) of the Act permits the Secretary to exclude from the Medicare and Medicaid programs any "individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to

the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." For the purposes of the Act, Section 1128(i)(3) defines such "conviction" to mean "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court." For the I.G. to have the authority to exclude Petitioner in this case, the I.G. must first prove that Petitioner: 1) has been convicted of a criminal offense; and 2) the conviction was for an offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner asserted during the November 13, 1990 prehearing conference that his pleas of nolo contendere did not amount to a "conviction" for the purposes of the Act. I disagree. Pleas of nolo contendere, as well as pleas of guilty, are "convictions" within the plain meaning of section 1128(i)(3) of the Act. Furthermore, Petitioner did not plead nolo contendere to the charges against him, but pleaded guilty. Finding 4. Thus, I find that Petitioner was "convicted" for the purposes of the Act.

Petitioner was specifically convicted of 22 counts of unlawfully dispensing controlled substances. Finding 4. Petitioner's conviction is for an offense which is within the plain meaning of section 1128(b)(3) of the Act. Thus I find that as Petitioner was convicted of a criminal offense relating to the unlawful dispensing of a controlled substance, the I.G. had the authority to exclude Petitioner from participating in the Medicare and Medicaid programs..

2. The five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers.

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers

of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives intended by Congress. Punishment, rather than remedy, becomes the end.

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

Therefore, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives.

The hearing in an exclusion case is, by law, de novo. Act, section 205(b). Evidence which is relevant to the reasonableness of the length of an exclusion will be admitted 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. Evidence which relates to a petitioner's trustworthiness or 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 legislative intent. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s exclusion determination so much as it is to decide whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I have authority to modify the exclusion, based on the law and the evidence. Social Security Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. 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 factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1) - (7). In evaluating the reasonableness of an exclusion, I consider as guidelines the regulatory factors contained in 42 C.F.R. 1001.125(b).

The evidence establishes that Petitioner is an alcoholic and drug abuser. Over approximately the last 20 years, Petitioner has been hospitalized for alcoholism and drug addiction, has lost his license to practice dentistry and his state and federal registrations to provide controlled substances, has been convicted of controlled substances violations, and has been incarcerated. Petitioner previously has attempted to rehabilitate his behavior, but always has relapsed.

I find that the five-year exclusion imposed and directed against Petitioner is consistent with the exclusion law's remedial purpose and is reasonable. Petitioner poses a serious risk to the welfare and safety of program beneficiaries and recipients as a consequence of his addiction to and repeated abuse of controlled substances. I base this conclusion on: 1) the serious crimes

Petitioner committed over a lengthy period of time; 2) Petitioner's abuse of the high position of trust placed in him by the state and federal governments when they allowed him to prescribe drugs; 3) the jeopardy in which Petitioner placed his patients; and 4) the lack of assurance that Petitioner will not in the foreseeable future relapse and again abuse controlled substances.

Petitioner's endangering of his patients' welfare coupled with the possibility that he might relapse in the future provides overwhelming justification for the exclusion in this case. A lengthy exclusion is justified to insure that program recipients and beneficiaries are protected from even a slight possibility that they will be exposed to the dangers presented by Petitioner's substance abuse. See Bernard Lerner, M.D., DAB Civ. Rem. C-48 at 9 (1989); Michael D. Reiner, R.M.D., DAB Civ. Rem. C-197 at 9-10 (1990). In his capacity as a dentist, Petitioner is in a position to perpetrate serious harm to patients should he attempt to treat them while intoxicated with controlled substances. Moreover, the evidence in this case establishes that, in the past, Petitioner has enlisted patients in his schemes to unlawfully obtain controlled substances, thereby aggravating whatever problems his patients may have had with medications abuse and endangering their welfare and safety. See Bernard Lerner, supra.

Petitioner now asserts that he is a faithful attendee at A.A. meetings and is not drinking or taking drugs. He has submitted a letter from a fellow A.A. member to support his claim. Tr. 23-25, 32; P. Ex. 1. Petitioner has also stated that he went through a substance abuse program while incarcerated. Tr. 25. I commend Petitioner on his efforts to remain sober. However, Petitioner's newfound sobriety is of short duration, whereas Petitioner's problems with alcohol and drugs are of long duration. As recently as April 1990, Petitioner was incarcerated for violating the terms of his probation due to his inebriation. Findings 13-16. Petitioner has only been sober and out of prison since November 1990. Finding 16. Petitioner is still on probation and is being monitored by state authorities. Tr. 24-27.

I am not prepared to find that Petitioner's attempts to rehabilitate himself justify a finding that the five-year exclusion imposed and directed by the I.G. is unreasonable. Given Petitioner's history, Petitioner has not maintained a long enough period of uncontrolled sobriety for me to be able to say that he has rehabilitated himself to such an extent that he no longer presents a threat to program beneficiaries and recipients

or even to himself. Nor am I prepared to say, based on the record in this case, that Petitioner will in the near future become trustworthy. Petitioner admitted he does not know whether he will ever abuse controlled substances again. Petitioner testified that his only hope for sobriety is to remain in treatment and that A.A. is his therapy to stay alcohol and drug free. He acknowledged that: "I have to stay within those limits. I mean, I am just one drink away . . ." Tr. 32.

My decision is in part influenced by the fact that Petitioner has only recently accepted responsibility for his conduct. In 1973, when questioned about his misuse of controlled substances, Petitioner initially denied abusing them, and only admitted to abusing alcohol. Finding 18. Furthermore, Petitioner continues to attempt to minimize the gravity of his past misconduct. During the proceeding before me, Petitioner attempted to assert that he was not guilty of some counts of the charges to which he voluntarily pleaded guilty. Finding 34. Petitioner's failure to accept full responsibility for his acts and his attempt to minimize the seriousness of his prior misconduct are additional reasons for me to doubt his trustworthiness to treat program beneficiaries and recipients.

A margin of safety must be built into any exclusion imposed against Petitioner. In this case, the five-year exclusion imposed and directed against Petitioner does not appear to be extreme or excessive in view of the damage Petitioner could cause should he resume his past conduct. See Reiner, supra., at 10. Therefore, I affirm it in its entirety.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the five-year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is reasonable. I sustain the exclusion imposed and directed against Petitioner, and I enter a decision in favor of the I.G..

/s/

Steven T. Kessel
Administrative Law Judge