Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
The Inspector General	DATE: February 20, 1992
- v. -	
Barbara K. Johnson, D.D.S., and Barbara K. Johnson, D.D.S., P.C.,	Docket No. C-375 Decision No. CR178
Respondents.	

DECISION

By letter dated March 15, 1991, the Respondents herein, Barbara K. Johnson, D.D.S. and Barbara K. Johnson, D.D.S., P.C., were notified by the Inspector General (I.G.), acting by delegation under the authority conferred by statute on the Secretary of the Department of Health and Human Services, that he proposed to impose upon Respondents, jointly and severally, civil monetary penalties of $33,250.00 and assessments of $6,620.00, based upon their submission of 19 fraudulent Medicaid claims in the amount of $4,067.00 to the District of Columbia government. The I.G. alleged that Respondents violated section 1128A of the Social Security Act (Act) as implemented by 42 C.F.R. § 1003.100 et seq.

Respondents requested a hearing. I conducted such a hearing in Washington, D.C., on September 30, 1991. Based on the entire record before me, I conclude that Respondents unlawfully presented or caused to be presented 19 claims for items or services that they knew, had reason to know, or should have known were not provided as claimed. I impose penalties of $33,250.00 and assessments of $6,620.00 against Respondents, jointly and severally.

Applicable Law

The Civil Monetary Penalties Law (CMPL), section 1128A of the Act (42 U.S.C. § 1320a-7a (1988)) provides, inter

alia, that any person who knowingly causes to be presented to a State Medicaid agency a claim for services that the person knows or should know was not provided as claimed, shall be subject, in addition to any other penalties that may be prescribed by law, to a civil monetary penalty of up to $2,000.00 for each item or service falsely claimed, plus an assessment of up to twice the amount of such claims.

Issue

Whether the penalties and assessments proposed by the I.G. are appropriate to Respondents' circumstances and to the gravity of the infractions committed.

Findings Of Fact And Conclusions Of Law[1]

1. At all times relevant to this case, Barbara K. Johnson, D.D.S. was a licensed dentist and Medicaid provider, practicing in the District of Columbia. "Dr. Barbara K. Johnson, D.D.S., P.C." was the corporate entity under which her practice was conducted. Tr. 13-14.

2. By letter (Notice) dated March 15, 1991, Respondents were notified by the I.G. that there would be imposed upon them a penalties of $33,250.00 and assessments of $6,620.00, based upon their submission to the District of Columbia government of 19 fraudulent Medicaid claims in the amount of $4,067.00 during 1985.

3. Respondents received $1,514.00 in unwarranted Medicaid reimbursement as a result of such fraud.

4. The District of Columbia Medicaid program is a federal-state program providing health care benefits to the medically needy and other eligible individuals. Title XIX of the Act; 42 U.S.C. § 1396 (1988) et seq.; Tr. 18-19; I.G. Ex. 3.

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[1] The documentary record of this case will be cited as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Respondents' Exhibits	R. Ex. (number)
Transcript	Transcript (page)
I.G.'s Post-hearing brief	I.G. Br. (page)

5. When providers file claims for services which have not been performed as claimed, they divert funds that would otherwise be available to provide services for needy individuals. Tr. 36.

6. The I.G.'s Notice alleged that Respondents presented or caused to be presented 19 claims for items or services which were not provided as claimed. Specifically, the false claims were claims for: crowns where the actual service was bonding; an amalgam which was not provided; x-rays which were not provided; and an appliance which was not provided.

7. Both Respondents -- Dr. Johnson and her professional corporation -- were criminally convicted by a jury in the Superior Court for the District of Columbia of Medicaid provider fraud for the identical claims as are involved in this case. The court imposed a fine, restitution of $1,514.00, and probation. I.G. Exs. 32, 33, 72.

8. Dr. Johnson was excluded from Medicare and State health care programs (such as Medicaid) for a period of five years, pursuant to section 1128(a)(1) of the Act, beginning November 13, 1989. Barbara Johnson, D.D.S., DAB CR78 (1990).

9. Respondents, through counsel, admitted to have knowingly and intentionally presented the subject claims for items and services which were not actually provided. Order dated September 16, 1991.

10. The admissions referred to in paragraph 9 satisfy the regulatory requirements that the presentation of false claims be proven by preponderant evidence and that it be proven that the person filing the false claims knew or had reason to know of the fraud. 42 C.F.R. § 1003.102(a)(1); 42 C.F.R. § 1003.114(a).

11. This proceeding is governed by the CMPL, section 1128A of the Act, and the regulations promulgated at 42 C.F.R. Part 1003.

12. Respondents are jointly and severally liable under the CMPL for all 19 claims set forth in the Notice. Stipulation dated July 2, 1991.

13. Section 1128A(a)(1)(A) of the Act authorizes the Secretary to impose a civil monetary penalty and assessment against any person who presents or causes to be presented to an officer, employee, or agent of any State agency, a claim that the Secretary determines is

for a medical or other item or service that the person knows or should know was not provided as claimed.

14. A penalty imposed under the CMPL is in addition to any other penalties imposed by law (emphasis added). 42 C.F.R. § 1003.108.

15. The CMPL provides for the imposition of a penalty of up to $2,000.00 for each item or service which is falsely claimed, and an assessment, in lieu of damages, of up to twice the amount for each item or service which is falsely claimed. Section 1128A(a) of the Act.

16. The statute and regulations set forth five general areas which should be considered in determining the amount of any penalty or assessment: (1) the nature of the claim or request for payment and the circumstances under which it was presented; (2) the degree of culpability of the respondent; (3) the history of prior offenses of the respondent; (4) the financial condition of the respondent; and (5) such other matters as justice may require. 42 C.F.R. § 1003.106(a).

17. A respondent bears the burden of producing and proving the existence of any mitigating factors by a preponderance of the evidence. 42 C.F.R. § 1003.114(d).

18. It is a mitigating circumstance if imposition of the penalty or assessment without reduction will jeopardize the ability of the respondent to continue as a health care provider. The resources available to the respondent will be considered when determining the amount of the penalty and assessment. 42 C.F.R. § 1003.106(b)(4).

19. Respondents have the burden of proving by a preponderance of the evidence that their financial condition would prevent them from being able to pay the proposed penalty and assessment. Corazon C. Hobbs, M.D., DAB CR57 (1989) at 33; 42 C.F.R. § 1003.114(d).

20. Unsupported assertions of financial distress, especially when made by a witness of questionable credibility, do not justify the reduction of a proposed penalty and assessment. See Berney R. Keszler, M.D., et al., DAB CR107 (1990) at 37; Tommy G. Frazier, et al., DAB CR79 (1990) at 27-28.

21. An aggravating circumstance is that Respondents knew the items or services at issue were not provided as claimed. 42 C.F.R. § 1003.106(b)(2); Stipulation dated July 2, 1991; Order dated September 16, 1991.

22. An aggravating circumstance is that the total amount claimed by Respondents was "substantial" within the meaning of the regulations, i.e., more than $1,000.00. 42 C.F.R. 1003.106(b)(1).

23. Dr. Johnson's license to practice dentistry in the District of Columbia was revoked in January 1990 and has not been reinstated. Tr. 122.

24. Respondent is employed as a substitute teacher by the Manatee County (Florida) School Board. Tr. 63; I.G. Ex. 34 at 1. She is not a health care provider. Tr. 122. Imposition of the proposed penalties and assessments would, therefore, not impede Respondents' continuing as a health care provider. 42 C.F.R. § 1003.106(b)(4); Tr. 63, 122; I.G. Ex. 34.

25. Among other assets, Dr. Johnson holds three promissory notes ($130,000.00; $74,000.00; and $20,000.00) representing the sale of her dental practice to Dr. Ann Murray. I.G. Exs. 45-47; Tr. 92-96.

26. The three promissory notes could be sold at a discounted rate on the commercial paper market. Tr. 185-186.

27. According to Dr. Johnson's sworn Financial Statement, as of May 2, 1991, she owned three houses which could be sold for approximately $320,000.00 (the net value of this real estate, after mortgages are taken into account, is approximately $137,000.00). I.G. Ex. 34 at 2; Tr. 62, 68, 187, 190-191.

28. Dr. Johnson, her husband, and her professional corporation owed a total of approximately $50,000.00 in taxes, penalties, and interest as of September 30, 1991. I.G. Ex. 51, 54-58; Tr. 88-91.

29. Respondents have other liabilities (other than mortgages or tax debt) totalling approximately $37,000.00 as of September 30, 1991. I.G. Ex. 37-44; Tr. 76-83.

30. Taking into account all major assets and liabilities, Respondents have a net worth of approximately $270,000.00 as of September 30, 1991.

31. Respondents are financially able to pay the entire proposed penalties and assessments.

32. The government's expenses in its civil prosecution of Respondents (comprised primarily of lawyers' and investigators' salaries) total approximately $22,000.00. I.G. Ex. 74-77.

33. The federal government has the right to be compensated for the damages caused by medical practitioners who have submitted false claims for medical services to the government and the right to penalize such practitioners. Tr. 135-136.

34. The penalties and assessments proposed by the I.G. herein are reasonably related to the government's actual damages and expenses, and thus do not constitute "punishment" in violation of the Double Jeopardy Clause of the Fifth Amendment. United States v. Halper, 490 U.S. 435 (1989).

Discussion

Prior to the hearing, the parties stipulated that Respondents Barbara K. Johnson, D.D.S. and Barbara K. Johnson, D.D.S., P.C. were liable, jointly and severally, under the CMPL, § 1128A of the Act, for all 19 claims as provided in the Notice. Furthermore, during a telephone prehearing conference conducted on September 9, 1991, Respondents admitted that their convictions represented an adjudication that they knew that the items or services were not provided as claimed. Therefore, Respondents represented that they would not contest the issue of knowledge at the hearing. Accordingly, I ruled that the issue of Respondents' knowledge had been fully and completely adjudicated in a prior proceeding and relitigation of that issue would be precluded in the in-person evidentiary hearing held on September 30, 1991. Order dated September 16, 1991.

The assessment and penalty provisions of the Act are designed to implement the remedial purposes of the Act by protecting government financed health care programs from fraud and abuse by providers. To accomplish this, the assessment and penalty provisions of the Act seek (1) to enable the government to recoup the cost of bringing a respondent to justice and the financial loss to the government resulting from the false claims presented by that respondent; and (2) to deter other providers from engaging in the false claims practices engaged in by a

particular respondent. Berney R. Keszler, M.D., et al., DAB CR107 (1990).

The regulations which implement the CMPL provide, at 42 C.F.R. § 1003.114, that the I.G. bears the burden of proving that a respondent knowingly presented or caused to be presented claims for items or services that were not provided as claimed. In the case at hand, though, Respondents, through counsel, admitted having knowingly and intentionally presented the false claims at issue. Order dated September 16, 1991.

Section 1128A(d) of the CMPL states that in determining the amount of any penalty or assessment, it is necessary to consider "the nature of claims and the circumstances under which they were presented, the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims." These guidelines are elaborated upon in the regulations at 42 C.F.R. § 1003.106.

Applying the criteria set forth in 42 C.F.R. § 1003.106 to the instant case, I make the following determinations: (1) As to the nature of the claims and the circumstances under which they were presented, an aggravating factor is that the total amount wrongfully claimed was "substantial," within the meaning of the regulations, i.e., more than $1,000.00. (2) As to the degree of culpability, it is an aggravating circumstance that Respondents knew that the items and services at issue were not provided as claimed. (3) As to prior offenses, there is no evidence of a history of related conduct. (4) With regard to financial condition, the regulation states (i) that it should be considered a mitigating circumstance if imposition of the full penalty or assessment would jeopardize a respondent's ability to continue to provide health care; and (ii) that in all cases, a respondent's financial resources should be considered when determining the amount of penalty and assessment.

In evaluating Respondents' financial resources and ability to pay, relevant guidance is found in prior decisions of this Departmental Appeals Board. It is well established that a respondent bears the burden of proving by a preponderance of the evidence that his financial condition prevents him from being able to pay the proposed penalty and assessment. 42 C.F.R. 1003.114(d); Corazon C. Hobbs, M.D., DAB CR57 (1989). Furthermore, unsupported assertions of financial distress do not justify the reduction of a proposed penalty and assessment. Tommy G. Frazier, et al., DAB CR79 (1990).

The first financial issue to be considered -- whether imposition of the full penalties or assessments would jeopardize Respondents' ability to continue to provide health care -- clearly does not inhibit imposition of the full penalties and assessments. Dr. Johnson's license to practice dentistry in the District of Columbia was revoked in January 1990 and has not been reinstated. She is employed as a substitute teacher by the Manatee County (Florida) School Board. Thus, she does not have any continuing role as a health care provider.

The second consideration is that, in all cases, a respondent's financial resources should be considered when determining the amount of penalty and assessment. I find that here, too, there is no impediment to imposition of the full penalty and assessment. The evidence of record shows that, although Respondents' net worth declined between the time Dr. Johnson completed a financial disclosure form in May 1991, and her hearing in September 1991, Respondents always had sufficient resources to pay the penalty and assessment advocated by the I.G. without rendering Dr. Johnson destitute.

With regard to assets, Dr. Johnson holds three promissory notes ($130,000.00; $74,000.00; and $20,000.00) which were payment for the sale of her dental practice to Dr. Ann Murray. Expert testimony established that the three promissory notes could be sold at a discounted rate on the commercial paper market. Also, according to Dr. Johnson's sworn Financial Statement, as of May 2, 1991, she owned three houses which could be sold for approximately $320,000.00 (the net value of this real estate, after mortgages are taken into consideration, is approximately $137,000.00). Finally, Dr. Johnson, her husband, and her professional corporation owed a total of approximately $50,000.00 in taxes, penalties, and interest as of September 30, 1991. Respondents have other liabilities (other than mortgages or tax debt) totalling approximately $37,000.00 as of September 30, 1991.

Taking into account all major assets and liabilities, Respondents had a net worth of approximately $270,000.00 as of September 30, 1991. Thus, Respondents' assets were six to seven times greater than the proposed penalties and assessments. Noting that it has been held that where a respondent has a net worth of $200,000.00, penalties and assessments totalling $80,500.00 (a ratio of assets to penalty plus assessment of only 2 1/2:1) should not be reduced based on lack of financial resources. George A. Kern, M.D., DAB CR12 (1987). I conclude that the present

Respondents have not shown themselves financially unable to pay the entire proposed penalties and assessments.

Additionally, the Act has been interpreted to permit imposition of penalties and assessments which exceed the amount actually taken by a respondent. Chapman v. U.S. Dep't of Health & Human Services, 821 F.2d 523 (10th Cir. 1987). This reflects the legislative conclusion that activities in violation of the Act result in damages in excess of the actual amount disbursed by the government to the fraudulent claimant. Berney R. Keszler, M.D., et al., DAB CR107 (1990). In the present case, undisputed evidence indicates that the government's expenses in its civil prosecution of Respondents (comprised primarily of lawyers' and investigators' salaries) total approximately $22,000.00. Thus, more than half the proposed penalties plus assessments represents the government's expenses in investigating and prosecuting this case.

These governmental expenses are also relevant to certain constitutional considerations. Inasmuch as the penalties and assessments proposed by the I.G. herein are reasonably related to the government's actual damages and expenses, they do not amount to "punishment" which would be violative of the Double Jeopardy Clause of the Fifth Amendment and which would be, therefore, unlawful. United States v. Halper, 490 U.S. 435 (1989).

Conclusion

I find, in light of the nature of the Respondents' offenses, the aggravating factors attaching to them, their costs to the government, and Respondents' financial and other circumstances, that the full penalties and assessments proposed by the I.G. are appropriate and reasonable.

/s/

Joseph K. Riotto
Administrative Law Judge