Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Seymour H. Rubin, M.D.,	DATE: May 8, 1992
Petitioner,	Docket No. C-439
- v. -	Decision No. CR194
The Inspector General.	

DECISION

By letter dated July 2, 1991, Seymour H. Rubin, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that, pursuant to section 1128(b)(3) of the Social Security Act (the Act), codified as 42 U.S.C. § 1320a-7(b), he would be excluded for a period of five years from participation in the Medicare program and from participation in the State health care programs which are defined in section 1128(h) of the Act (referred to in this Decision as Medicaid). The basis for the exclusion was Petitioner's conviction of an offense relating to the prescription of controlled substances.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge.

The I.G. moved for summary disposition of the case. Petitioner concurred with the request.

STATUTE AND REGULATIONS

Section 1128(b)(3) of the Act deals with permissive exclusions and allows, but does not require, the Secretary of HHS, or his designee, to exclude from the Medicare/Medicaid programs, inter alia, individuals or entities convicted of criminal offenses relating to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances.

The I.G. maintains that the HHS rules on exclusions published on January 29, 1992 (57 Fed. Reg. 3298) are applicable here. In particular, 42 C.F.R. § 1001.401, dealing with the length of exclusions and aggravating and mitigating factors, was said to govern this case. The I.G. notes that the Supreme Court has found that a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice, or there is statutory direction or legislative history to the contrary (Bradley v. School Board of Richmond, 416 U.S. 696 (1974)).

The regulation just cited, 42 C.F.R. § 1001.401, establishes a "baseline" period for exclusions -- which was not present in prior regulations -- of three years, and sets forth aggravating and mitigating factors that can alter the length of exclusion.

The I.G. asserts that applying this regulation to the case at hand would result in no injustice and would effectuate Congressional intent to protect the Medicaid/Medicare programs from drug crime. Therefore, the I.G.'s position is that this regulation is controlling and that it requires the administrative law judge to respect the baseline exclusion. Inasmuch as the I.G. deemed the aggravating factors described in 42 C.F.R. §§ 1001.401(c)(2)(i) & (ii) to be present, he concluded that the facts supported a five-year exclusion.

Petitioner states that the new regulations, published subsequent to the imposition of this exclusion, are not applicable. This is because it would be unjust, he maintains, to judge him on the basis of standards which were unknown when the acts giving rise to the subject proceeding allegedly occurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

1. At all times relevant herein, Petitioner was a physician licensed by the State of Maryland and was a Medicaid provider. I.G. Ex. 4.

2. In 1989, Maryland authorities investigated Petitioner's professional activities. I.G. Ex. 4-8.

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[1] Petitioner and the I.G. both submitted documentary evidence and briefs. These are referred to in this decision as P. Ex...., I.G. Ex...., P. Br...., and I.G. Br....

3. Petitioner was charged and pled guilty in the Maryland Circuit Court, Baltimore City, to a misdemeanor offense of "knowingly and intentionally prescribing controlled substances [for more than five years], outside the course of his professional duties and in violation of the standards of the medical profession." I.G. Ex. 2 & 3; P. Ex. 1.

4. On January 31, 1991, Petitioner was sentenced to two years probation, 300 hours of community service, payment of $37,976.71 (constituting triple damages) in restitution to Medicaid, and a $10,000 fine. I.G. Ex. 1.

5. Section 1128(b) of the Act gives the Secretary of HHS the authority to exclude from participation in the Medicare and Medicaid programs any person convicted of a criminal offense related, inter alia, to controlled substances.

6. The Secretary delegated to the I.G. the duty to direct exclusions pursuant Section 1128. 48 Fed. Reg. 21662 (May 13 1983).

7. By letter dated July 2, 1991, Petitioner was notified by the I.G. that, pursuant to section 1128(b)(3) of the Act it had been decided that he should be excluded for a period of five years because of his conviction of an offense relating the prescription of controlled substances.

8. During the state court proceedings, Petitioner and the prosecution agreed to and signed a document titled Agreed Statement of Facts which stated that if the case had gone to trial, "...the State of Maryland would have called witnesses and introduced documentary and testimonial evidence to establish...[the factual predicate of the charges against Petitioner]." I.G. Ex. 4.

9. The Agreed Statement of Facts constitutes a recitation of provable and accurate facts relating to Petitioner's conduct which led to his conviction and which Petitioner acknowledged. As such, it is credible evidence in the present proceeding.

10. The evidence of Petitioner's conduct adduced by the I.G. (meaning, primarily, the Agreed Statement of Facts and the police investigator's report), being consistent, convincing, largely admitted, and unrebutted by any other factual evidence, constitutes preponderant evidence of the acts underlying Petitioner's conviction.

11. The I.G. committed no error in relying on the evidence adduced in the criminal court, and was not obliged to produce testimony or other new evidence to reprove facts Petitioner previously admitted.

12. Petitioner gave very cursory, or no, examinations but nevertheless wrote multiple prescriptions for powerful anti-anxiety or tranquillizing drugs, for a fee. I.G. Ex. 4 & 5.

13. Petitioner disregarded generally accepted medical practice by prescribing drugs which were inappropriate to a patient's condition, e.g., long-term use of amphetamines and/or anorectics or Ritalin by hypertensive individuals (Edwards; Goines[2]). I.G. Ex. 4.

14. Petitioner disregarded generally accepted medical practice by prescribing drugs which contributed to patients' developing dependencies (Plumley). I.G. Ex. 4.

15. Petitioner disregarded generally accepted medical practice by prescribing for drug abusers potentially addictive substances such as codeine, anti-anxiety drugs, and hypnotics (Richmond; Kopelnick). I.G. Ex. 4.

16. Petitioner disregarded generally accepted medical practice by continuing prescriptions for excessive periods (Edwards; Plumley). I.G. Ex. 4.

17. Petitioner disregarded generally accepted medical practice by writing prescriptions without having recently seen the patient (Chetelat). I.G. Ex. 4.

18. Petitioner falsified records to make it appear that he saw patients (Edwards) far more often than he actually did. I.G. Ex. 4.

19. Petitioner charged patients for consultations and prescriptions (Edwards; Plumley; Howard; Goines), even though the doctor's entire reimbursement was supposed to have come from Medicaid. I.G. Ex. 4.

20. Petitioner's prescribing of drugs was reviewed by the Medical and Chirurgical Faculty of Maryland Committee on Drugs (a statewide professional body) which deemed his practices potentially harmful and concluded that he needed instruction in controlled substances. I.G. Ex. 4.

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[2] The parenthetical references in this and the following six findings refer to particular individuals treated by Petitioner.

21. Petitioner declined an educational program proposed by the Medical and Chirurgical Faculty. I.G. Ex. 4.

22. For a period of at least five years, Petitioner knowingly and intentionally prescribed controlled substances in a manner inconsistent with accepted medical standards and professional responsibilities.

23. Petitioner prescribed drugs that were harmful to his patients, or, at the very least, manifested indifference to their well-being.

24. Petitioner's actions brought him substantial profit, in improper fees from patients and from unlawful payments from Medicaid, thereby harming both the program and its beneficiaries.

25. Petitioner's misconduct is exacerbated by the factors noted: duration of the misconduct, profit, threat to patients' health, and financial harm to the Medicaid program and its beneficiaries.

26. The new HHS regulation codified at 42 C.F.R. § 1001.401 is inapplicable to the instant case.

27. The purpose of section 1128 is remedial in nature -- to protect federally-funded health care programs and their recipients from untrustworthy providers.

28. The provider has the burden of proving that he is no longer a threat.

29. Petitioner's conduct was serious and a significant threat to Medicaid and the program's recipients. Nothing in the record indicates that his misdeeds were the result of unique circumstances which have subsequently changed. Furthermore, Petitioner has expressed no meaningful remorse and has declined the re-education offered him. There is, consequently, no reason to believe him any more trustworthy at this time than he was when he admittedly violated the law.

ARGUMENT

Petitioner argues that, although he entered a guilty plea in the Maryland court, he did not "...admit to all of the facts asserted by the prosecuting attorney." Specifically, Petitioner maintains that, at his court appearance, he did no more than acknowledge that the prosecutor would have introduced certain witnesses and evidence; he did not agree that such evidence would have supported a conviction. His attorney analogized Petitioner's situation to North Carolina v. Alford, 400 U.S. 25 (1970), in which it was held that a defendant may consent to the imposition of a criminal sentence even if he does not admit doing the acts which constitute the crime. In this case, Petitioner explains, he was in poor health and could not withstand the stresses of a trial. Therefore, he chose not to dispute the charges in order to "put the matter behind him."

Next, Petitioner claims that the I.G. has not proven his case. In particular, he deems legally insufficient the I.G.'s relying on the Agreed Statement of Facts, rather than adducing any new or independent evidence to show that a five-year exclusion is warranted. As examples of failures of proof and/or deficiencies in the I.G.'s case, Petitioner notes that the number of times he is claimed to have misprescribed drugs was not established or even alleged; additionally, the charge that he endangered program beneficiaries is unsupported by medical testimony. As to the monetary aspects of the case against him, Petitioner argues that the record is devoid of evidence of financial gain on his part; furthermore, he emphasizes that the restitution he agreed to represented triple damages rather than actual losses to the program.

Petitioner also alleges that the I.G. ignored mitigating evidence which would have benefitted him. This material, which Petitioner introduced as his Exhibit 1, consists of statements indicating that he worked at free clinics, taught medicine, and had been a consultant to the State of Maryland on disability determinations. There were also testimonials of appreciation from colleagues and patients. Lastly, Petitioner asserts that a five-year exclusion is too severe when his circumstances are compared to other cases reviewed by the Departmental Appeals Board, particularly Ralph W. Wilkinson, et al., DAB CR67 (1990); Leonard N. Schwartz, DAB CR36 (1989); Arthur D. Freiberg, D.P.M., DAB CR63 (1990); and Robert A. Woolhandler, DAB CR127 (1991).

The I.G.'s position is that Petitioner was convicted of a serious criminal offense which resulted in harm to the Medicaid program and its participants. This criminal behavior already has resulted in Petitioner's losing his medical license and authorization to prescribe drugs. To ensure Petitioner's trustworthiness and to deter others, the I.G. reasons, a five-year exclusion is entirely appropriate.

The I.G. further argues that Maryland rules require judges, before accepting guilty pleas, to ensure that a factual basis for such pleas exists. Thus, the Agreed Statement of Facts that Petitioner accepted in court should be regarded as an accurate and reliable document.

DISCUSSION

First, I conclude that applying the new HHS regulations to the instant case would be unwarranted. I concur with the precedent established by other judges of this office that the criteria relating to the length of permissive exclusions that are included in such regulations control the I.G. when making the initial decision but are not applicable to de novo administrative reviews of exclusion actions. Charles J. Barranco, M.D., DAB CR187 (1992); Stephen J. Willig, M.D., DAB CR192 (1992).

Next, I find that Petitioner's circumstances satisfy the statutory requirements of section 1128(b)(3) in that he was convicted,[3] pursuant to state law, of a criminal offense which, as the evidence clearly shows, is related to the unlawful prescription of controlled substances.

However, this is not the type of case in which the mere showing that a relevant criminal conviction has occurred terminates the factual inquiry and triggers the imposition of a mandatory sanction. Rather, since any exclusion imposed herein is "permissive," it is necessary to insure that the period of exclusion is reasonably appropriate to Petitioner's conduct and circumstances. To determine this, one must consider all relevant facts, including the actual conduct underlying the criminal

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[3] Even if Petitioner had entered an Alford plea -- which is suggested in one brief, but which is not apparent from the record of the court proceedings -- it would still satisfy the requirement of sections 1128(b)(3) and 1128(i) that there be a "conviction." Daniel B. Salyer, R.Ph., DAB CR106 (1990).

conviction. Sheldon Stein, M.D., DAB CR144 (1991); Joel Davids, DAB CR137 (1991).

In the record of this case, evidence of Petitioner's conduct is found primarily in two places: the investigative report of the Maryland State Police and the Agreed Statement of Facts in which Petitioner and the Maryland prosecutor jointly set forth the facts that resulted in Petitioner's criminal conviction.

With regard to the Agreed Statement of Facts, I conclude that the interpretation of this document now urged by Petitioner is at variance with common sense, well-established criminal procedure, and Maryland law. Petitioner was advised by the state judge that the Agreed Statement of Facts he had signed would be treated as "...an accurate statement of events..." and "...what the witnesses would have testified to had the case gone to trial." Petitioner was then asked "...your signature to that statement of facts indicates it is an accurate statement; is that correct?" Petitioner replied "that is true." Petitioner's attorney also indicated to the state judge that the statement was accurate, declaring that no additions or alterations to such statement were called for.

As to the legal context, the State of Maryland requires that a court receiving a guilty plea to a criminal charge must conduct an inquiry to determine that the defendant understands the nature of the charges and the consequences of his plea, and to ascertain whether there is a factual basis for such plea -- i.e., whether the defendant's acts legally constitute the offense he wishes to plead guilty to. State v. Thornton, 424 A.2d 349 (Md. Ct. Spec. App., 1987). The record makes it clear that the judge presiding over Petitioner's case in the Maryland Court found that a factual basis for the plea was present.

It is evident to me, in light of the transcript evidence and relevant Maryland law, that Petitioner and his counsel were being asked by the Court whether they had any objections to the exposition of substantive facts set forth in the document. It would have been absurd for the judge to have asked a defendant whether a statement of facts was accurate if such statement only purported to reflect the views of the prosecution. In sum, I find that Petitioner, his attorney, and the prosecutor agreed that the Agreed Statement of Facts constitutes a recitation of provable and accurate facts relating to Petitioner's conduct which led to his conviction. As such, it is credible evidence in the present proceeding.

I further conclude that the substantive evidence of Petitioner's conduct adduced by the I.G. herein (meaning, primarily, the Agreed Statement of Facts and the police investigator's report), being consistent, convincing, largely admitted, and unrebutted by any other factual evidence, constitutes preponderant evidence of the acts underlying Petitioner's conviction. I reject Petitioner's argument on appeal that the I.G. was somehow wrong to rely on the evidence adduced in the criminal court or that the I.G. was obliged to produce expert or other testimony, or other new evidence, to independently prove what Petitioner had already admitted.

The police report indicates that an investigator visited Petitioner's office pretending to be a patient. He found that Petitioner gave very cursory, or no, examinations but nevertheless wrote multiple prescriptions for powerful anti-anxiety or tranquillizing drugs, for a fee.

The Agreed Statement of Facts sets forth accounts of several persons who were under Petitioner's care over a number of years. It reveals that, at least since 1985, he disregarded generally accepted medical practice (1) by prescribing drugs which were either inappropriate to a patient's condition, e.g., long-term use of amphetamines and/or anorectics or Ritalin by hypertensive individuals (Edwards; Goines), or which resulted in patients' developing dependencies (Plumley); (2) by prescribing for drug abusers addictive substances such as codeine, anti-anxiety drugs, and hypnotics (Richmond; Kopelnick); (3) by continuing prescriptions for excessive periods (Edwards; Plumley); and (4) by writing prescriptions without having recently seen the patient (Chetelat). Petitioner also (5) by falsifying records to make it appear that he saw patients (Edwards) far more often than he actually did; and (6) by charging patients for consultations and prescriptions (Edwards; Plumley; Howard; Goines), even though the doctor's entire reimbursement was supposed to have come from Medicaid.

The Agreed Statement of Facts further indicates that Petitioner's prescribing of drugs was reviewed by the Medical and Chirurgical Facility of Maryland Committee on Drugs (a statewide professional body), which deemed his practices potentially harmful and determined that he needed instruction in controlled substances. Petitioner, however, declined a proposed educational program.

Thus, the evidence indicates that Petitioner prescribed drugs that were harmful to his patients, or, at the very least, that he was indifferent to patients' well-being,

and that he acted knowingly. (Contrary to Petitioner's contention, it is not essential to this Decision that the exact number of his prescription abuses be established.) The evidence further shows that these actions brought him considerable profit, in improper fees from patients and from unlawful payments from the Medicaid program (the magnitude of this latter sum may be estimated from the $37,976.71 triple-damage reimbursement Petitioner agreed to pay).

Based upon the above facts and reasoning, I conclude that preponderant evidence shows that Petitioner knowingly and intentionally prescribed controlled substances in a manner inconsistent with accepted medical standards.

The gravity of Petitioner's misconduct is exacerbated by the facts that he committed offenses of this nature over a period of at least five years, that he profited substantially from these practices, at the expense of both the Medicaid program and his patients, and that his actions were potentially injurious to the health of the persons under his care.

It must be noted, though, that some patients received devoted care from him[4], for which they are very grateful, and that at least some of his professional colleagues think highly of him.

It is well-established that the purpose of section 1128 of the Act is remedial in nature: to protect federally-funded health care programs and their recipients from untrustworthy providers. It is the provider's obligation to demonstrate that he is no longer a threat. S. Rep. No. 109, 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 682.

In this regard, I find that Petitioner's misdeeds went to the very heart of his professional responsibilities as a doctor in that he used the authority he had been given to prescribe drugs not to cure his patients and enhance their well-being, but rather to further an improper and unlawful scheme in which patients were, or could have been, harmed, in body and purse. Although Petitioner claims he was ill, and grieving over the death of his wife, it is clear that his pattern of abuse was no passing departure from good behavior, but was a continuing course of misconduct that persisted for at

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[4] This was established by written statements from the patients. The I.G. neither objected to nor rebutted this evidence.

least five years, bringing Petitioner profits amounting to thousands of dollars. The good care that some of Petitioner's patients received over the years apparently coexisted with his unlawful behavior and does not demonstrate a change in attitude or behavior indicative of rehabilitation. Lastly, it is significant that Petitioner's abuses did financial harm to the Medicaid program itself, as well as to individual recipients.

Thus, Petitioner's conduct was serious and a significant threat to Medicaid and the program's recipients. Nothing in the record indicates that his misdeeds were the result of unique circumstances which have subsequently changed. Furthermore, Petitioner has expressed no meaningful remorse and has declined the re-education offered him. There is, consequently, no reason to believe him any more trustworthy at this time than he was when he admittedly violated the law.

CONCLUSION

For the reasons stated above, I conclude that, under the facts of this case, the duration of the exclusion imposed by the I.G. comports with legislative intent and is not excessive[5] or unreasonable.

/s/

Joseph K. Riotto
Administrative Law Judge

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[5] The cases cited by Petitioner are too dissimilar in too many respects to the present action to support a finding that the exclusion advocated by the I.G. herein is disproportionately severe when compared with past practice.