Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
George Iturralde, M.D.,	DATE: July 30, 1992
Petitioner,	Docket No. C-399
- v -	Decision No. CR218
The Inspector General.	

DECISION

On April 18, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded because he had been excluded or suspended by a federal or State health care program for reasons bearing on his professional competence, professional performance, or financial integrity. The I.G. advised Petitioner that the authority for the exclusion is contained in section 1128(b)(5) of the Social Security Act (Act). The I.G. further advised Petitioner that he would be excluded until he was reinstated by the Kansas Department of Social and Rehabilitation Services (Kansas Medicaid), the agency that had suspended him.

I held a hearing in this case in Kansas City, Missouri, on February 19, 1992.[2] I have carefully considered the

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

[2] Following this hearing, on April 30, 1992, Petitioner, who had appeared pro se throughout this hearing, obtained an attorney. Through his attorney,

(continued...)

evidence adduced at the hearing in light of applicable law. I conclude that the I.G. had the authority to impose and direct an exclusion against Petitioner under section 1128(b)(5) of the Act. I find that the exclusion which the I.G. imposed and directed against Petitioner is reasonable, and I sustain it.

ISSUES

The issues in this case are whether:

1. The I.G. had the authority to direct and impose an exclusion against Petitioner pursuant to section 1128(b)(5)(B);

2. The length of the exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a psychiatrist, providing psychiatric and other medical services to Medicaid patients. Tr. 49 - 51, I.G. Ex. 14, 15.[3]

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[2] (...continued)
Petitioner filed a motion to reopen the hearing in this case. Petitioner wanted to offer evidence relating to the falsity of the State Medicaid determination underlying his exclusion. In a Ruling of May 21, 1992, I denied Petitioner's motion. I held that Petitioner had had ample opportunity to obtain counsel and to submit evidence relevant to the reasonableness of the length of his exclusion. Therefore, having already conducted an in-person evidentiary hearing, I declined to reopen the record.

[3] Citations to the record in this decision are as follows:

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Posthearing Brief	I.G. Br. (page)
Petitioner Exhibits	P. Ex. (number/page)
Transcript of Hearing	Tr. (page)

(continued...)

2. Following notice to Petitioner and an administrative review, on January 30, 1990, Kansas Medicaid suspended Petitioner's participation to provide services in the Medicaid program. I.G. Ex. 9, 11, 12.

3. Kansas Medicaid found that Petitioner had demonstrated a pattern of submitting billings for a higher level of service than was actually performed and of providing services of an inferior quality that might be harmful to a patient. I.G. Ex. 9.

4. This Kansas Medicaid action followed an on-site review by the Surveillance & Utilization Review Section of Electronic Data Systems Corporation (EDSC) of Petitioner's practice which found three areas of concern relating to Petitioner's billing patterns and medical practice: 1) that Petitioner consistently billed the Medicaid/MediKan program at a higher level of service than his medical record documentation would support; 2) that the medical necessity and quality of psychiatric services provided appeared questionable; and 3) that physical examinations were documented as provided to recipients in an office not equipped for such services. I.G. Ex. 14.

5. Petitioner reimbursed Kansas Medicaid for a reduced amount to satisfy the overpayment documented by EDSC. I.G. Ex. 8, 16; I.G. Br. 9.

6. Petitioner is eligible to apply for reinstatement to the Kansas Medicaid program as of February 19, 1993. I.G. Ex. 9, 13.

7. Kansas Medicaid suspended Petitioner as a participant in the Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity. FFCL 1 - 5; Social Security Act, § 1128(b)(5).

8. The Secretary of the Department of Health and Human Services (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).

9. The I.G. had authority to impose and direct an exclusion against Petitioner. FFCL 7.

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[3] (...continued)
Findings of Fact and Conclusions of Law — FFCL (number)

10. On April 18, 1991, the I.G. imposed and directed the exclusion of Petitioner from participating in Medicare and Medicaid.

11. The exclusion imposed and directed against Petitioner by the I.G. is to last until Petitioner is reinstated by Kansas Medicaid. I.G. Ex. 6.

12. Regulations published on January 29, 1992, establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a)(1) and (2) and (b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330 - 3341 (January 29, 1992).

13. The Secretary did not intend that the regulations contained in 42 C.F.R. Part 1001, and, in particular, 42 C.F.R. § 1001.601, govern my decision in this case.

14. The exclusion provisions of section 1128(b)(5) of the Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions.

15. Section 1128(b)(5) of the Act does not require that the I.G. examine the fairness or propriety of the process which led Kansas Medicaid to exclude Petitioner.

16. Petitioner repeatedly billed Medicaid for a higher level of medical service than his medical record documentation supported, evidencing a lack of financial integrity, within the meaning of section 1128(b)(5)(B) of the Act. I.G. Ex. 8, 14, 15, 16.

17. The medical necessity and quality of psychiatric services provided by Petitioner were questionable, evidencing a lack of professional competence on Petitioner's part, within the meaning of section 1128(b)(5)(B) of the Act. I.G. Ex. 14, 15.

18. Petitioner performed physical examinations in an office not equipped for that purpose, evidencing a lack of professional performance on Petitioner's part, within the meaning of section 1128(b)(5)(B) of the Act. I.G. Ex. 14, 15.

19. A remedial objective of section 1128(b)(5) of the Act is to protect the integrity of federally funded health care programs, and their recipients and beneficiaries, from individuals who demonstrate by their conduct that they cannot be trusted to deal with program funds or to provide items or services to recipients or beneficiaries.

20. The patient records introduced by Petitioner do not support Petitioner's trustworthiness to provide services to the Medicare and Medicaid programs. P. Ex. 1, 2; Tr. 40 - 43.

21. Excluding Petitioner until Kansas Medicaid reinstates him is neither extreme or excessive. FFCL 1 - 20.

RATIONALE

Kansas Medicaid suspended Petitioner from participation as a provider, effective February 19, 1990, due to his pattern of submitting billings for a higher level of service than what was actually performed and of providing services of inferior quality that might cause harm to a patient. FFCL 2, 3. Petitioner is eligible to apply for reinstatement on February 19, 1993. Pursuant to section 1128(b)(5)(B) of the Act, the I.G. has excluded Petitioner until such time as he is reinstated by Kansas Medicaid. In effect, Petitioner argues that the underlying State determination against him was false and that he was not culpable for the actions charged against him.[4] Furthermore, Petitioner asserts that he is trustworthy and that the length of the exclusion imposed and directed against him by the I.G. is unreasonable. I do not agree. Petitioner has not presented credible evidence to show that he would be a trustworthy provider of program services until he is reinstated by Kansas Medicaid. Therefore, I find that the length of the exclusion imposed and directed against Petitioner in this case is reasonable.

1. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(5)(B).

Section 1128(b)(5)(B) of the Act permits the I.G. to exclude from the Medicare and Medicaid programs any individual or entity who has been suspended or excluded from participation, or otherwise sanctioned, under:

> a State health care program, for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity.

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[4] Petitioner made his arguments in his pre-hearing submissions, at the hearing in this case, and in his motion of April 30, 1992. Petitioner has not filed a post-hearing brief.

For an exclusion to be effectuated pursuant to section 1128(b)(5)(B), the Act requires only that two preconditions be met to establish the I.G.'s authority to exclude: 1) the individual or entity must have been suspended or excluded from a State health care program; and 2) the reasons for the party's suspension or exclusion must bear on that party's professional competence, professional performance, or financial integrity.

The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(5)(B) is derivative, i.e., it emanates from a State's exclusion or suspension proceeding. The fairness of a State suspension is irrelevant in determining whether the I.G. has authority to exclude under section 1128(b)(5)(B). It is the fact of the State suspension that provides the I.G. the authority to exclude Petitioner.

The first criteria is that the individual or entity must have been suspended or excluded from a State health care program. The I.G. must establish that the prerequisite sanction has been imposed and that the sanctioning agency is a proper State entity. If the I.G. does this, an excluded individual cannot collaterally attack the process by which the State suspended him. Olufemi Okunoren, M.D., DAB CR150 at 7 (1991), aff'd DAB 1319 at 6 (1992). Petitioner has argued, in effect, that the process by which he was suspended by the Kansas Medicaid program was unfair. Tr. 15 - 20; Petitioner's April 30, 1992 Motion. Petitioner does not deny that Kansas Medicaid is a legitimate State entity and that it, in fact, did suspend him.

The second criteria is that Petitioner's suspension relate to his professional competence, professional performance, or financial integrity. Kansas Medicaid found that Petitioner had engaged in a consistent practice of billing for a higher level of medical service than his medical record documentation would support, and Petitioner had, in fact, reimbursed Kansas Medicaid to satisfy his overpayment. FFCL 5, 16. This finding concerns Petitioner's financial integrity. Kansas Medicaid also found problems with the medical necessity and quality of the psychiatric services Petitioner provided his patients. Petitioner appeared to utilize only three diagnoses, his patient records lacked documentation, and the records showed no indication that many patients receiving psychotherapy for a number of years had achieved any level of improvement. FFCL 17. These findings concern Petitioner's professional competence. Finally, Kansas Medicaid found evidence that

Petitioner performed physical examinations in an office not equipped for that purpose. The office did not contain an examination table, protective paper coverings, or soap in the bathroom. FFCL 18. These findings concern Petitioner's professional performance.

Kansas Medicaid's reasons for suspending Petitioner convince me that Petitioner was excluded from a State health care program for reasons bearing on his professional competence, professional performance, and financial integrity. I find, therefore, that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(5)(B) of the Act.

2. The regulations published by the Secretary on January 29, 1992 are not applicable to this case.

The I.G. sent Petitioner a letter (Notice) informing him of his exclusion on April 18, 1991. Petitioner appealed this exclusion on June 10, 1991, and my office received the appeal on July 5, 1991. Six months from the time I began to hear this case, on January 29, 1992, the Secretary published regulations which, among other things, established criteria to be employed by the I.G. in determining the length of exclusions to be imposed pursuant to sections 1128(a) and 1128(b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330 - 3341. These regulations include a section which establishes criteria to be employed by the I.G. in determining the length of exclusions to be imposed pursuant to section 1128(b)(5). 42 C.F.R. § 1001.601; 57 Fed. Reg. 3333.

The I.G. argues that section 1001.601 does not apply to this case, because his decision to exclude Petitioner until Petitioner was reinstated by the State health care program which suspended him predated publication of the regulations.[5] The I.G. contends, however, that the parts of the new regulations which govern hearings do apply, because the in-person hearing occurred after publication of the regulations. Specifically, the I.G. cites section 1001.2007, which provides in pertinent part that the basis for the underlying determination in a section 1128(b)(5)(B) exclusion, here Kansas Medicaid's termination of Petitioner, is not reviewable and that individuals or entities cannot collaterally attack these determinations. The I.G. also asserts that section 1005.4(c) limits an ALJ's authority, in that the ALJ

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[5] Section 1001.601(b) of the new regulations mandates a three year exclusion absent aggravating or mitigating circumstances.

cannot: 1) review the I.G.'s exercise of discretion to exclude an individual or entity under section 1128(b) of the Act; 2) determine the scope or effect of the exclusion; or 3) set the period of exclusion at zero.

An appellate panel of the DAB recently held in Behrooz Bassim, M.D., DAB 1333 at 5 - 9 (1992), that the I.G.'s interpretation of these regulations on the scope of review and the length of the exclusion is not consistent with past Board decisions and would represent substantive changes in the law. I believe that what the appellate panel held with regard to section 1128(b)(4) in Bassim is equally true here with regard to section 1128(b)(5)(B). In Bassim, the appellate panel held that substantive changes should not be applied retroactively, and that portions of the 1992 regulations which change substantive law may permissibly be applied only to cases in which the I.G.'s Notice of Intent to Exclude, Notice of Exclusion, or Notice of Proposal to Exclude is dated on or after January 29, 1992. In this case, the Notice letter was sent long before the Secretary promulgated new regulations.

Furthermore, I conclude that my review of the reasonableness of the exclusion imposed and directed against Petitioner is not governed by the new regulations' criteria for determining exclusions under section 1128(b)(5) of the Act. The regulations contained in Part 1001 of the new regulations, and 42 C.F.R. § 1001.601 in particular, were not intended by the Secretary to govern my determinations in hearings held pursuant to section 205(b)(1) of the Act in which an issue is the reasonableness of the I.G.'s exclusion determinations. Charles J. Barranco, M.D., DAB CR187 (1992); Syed Hussaini, DAB CR193 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, M.D., DAB CR192 (1992); Sukumar Roy, M.D., DAB CR205 (1992). I am not concluding that the regulations are invalid; only that they apply to the review criteria used by the I.G in determining the appropriate length of exclusion in certain specified circumstances. The right to a hearing for review of the I.G.'s action, which is granted to Petitioner under section 205(b)(1) of the Act, permits consideration of factors in addition to those specified in the new regulations.

3. The exclusion directed and imposed against Petitioner by the I.G. is reasonable.

I have found that the new regulations do not apply to this case. Therefore, in deciding whether or not an exclusion under section 1128(b)(5)(B) is reasonable, I

look to DAB decisions issued prior to the enactment of the new regulations in reviewing evidence of Petitioner's trustworthiness. See, e.g., Joel Davids, DAB CR137 (1991); Roderick L. Jones, DAB CR98 (1990); and Frank J. Haney, DAB CR81 (1990).

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have demonstrated by their behavior that they threaten the integrity of federally funded health care programs or that they can not be entrusted with the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682.

An exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. The principal purpose is to protect programs and their beneficiaries and recipients from untrustworthy providers by excluding them for a period of time, or until they meet a specific requirement, designed to demonstrate that they can be trusted to deal with program funds and to properly serve beneficiaries and recipients. As an ancillary benefit, the exclusion deters other providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. See H. R. Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S.C.C.A.N. 3072.

Deterrence cannot be a primary purpose of imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes a civil remedial purpose, but punishment becomes the end result. Such a result has been determined by the Supreme Court to contravene the Constitution and to be beyond the purpose of a civil remedy statute. United States v. Halper, 490 U.S. 448 (1989).

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(5)(B), nor does the statute require that a provider be excluded until he is reinstated by the State health care program which excluded him. However, an exclusion until a provider is reinstated is not per se unreasonable.

By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance." An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

This hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. I do not, however, substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983).

It is difficult to determine when an individual will regain sufficient trustworthiness to be allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs. It involves consideration of multiple factual circumstances. The appellate panel in Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327 (1992) provided a listing of some of these factors, which include:

> the nature of the offenses committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Matesic at 12.

It is evident that, in using these factors, I must attempt to balance the seriousness and program impact of Petitioner's conduct which led to his Kansas Medicaid suspension with any existing factors which may demonstrate his trustworthiness. In assessing the reasonableness of the I.G.'s permissive exclusion, it is incumbent upon me to consider all these matters in effecting the remedial purposes of the Act.

In this case, Kansas Medicaid found serious deficiencies in Petitioner's medical practice which bore directly on Petitioner's financial integrity, professional performance, and professional competence. Specifically, Kansas Medicaid, following an investigation initiated as a result of a complaint from a recipient assigned to Petitioner as a patient, found three areas of concern with respect to Petitioner's practice. These included: 1) Petitioner consistently billed the Medicaid/MediKan program a higher level of service than his medical record documentation would support; 2) the medical necessity and quality of psychiatric services provided appeared questionable; and 3) physical examinations were provided to recipients in an office not equipped for such service. FFCL 4, 16 - 18. Based on these deficiencies, Kansas Medicaid terminated Petitioner from the Kansas Medicaid program, and, based on the Kansas Medicaid action, the I.G. in effect excluded Petitioner from the Medicare and Medicaid programs.

In response, Petitioner relies on two patient records (P. Ex. 1 and 2) which he contends demonstrate the completeness of his examinations and support his trustworthiness to be a provider of services to the Medicare and Medicaid programs. Tr. 39 - 41. However, I do not find that Petitioner's exhibits support his contentions. These two patient records were both considered by Kansas Medicaid during its on-site review of Petitioner's practice, and they were among the files listed by Kansas Medicaid. Tr. 40 - 42; I.G. Ex. 16, 17, 18. Furthermore, my review of these two files indicates that Kansas Medicaid's findings that Petitioner's records in general lacked treatment plans, goals, direction, assessment, prognosis, and psychiatric terminology, were fully justified. Petitioner's progress notes did not reflect that his services were effective in relieving his patients' underlying problems. In addition, Petitioner was provided an in-person hearing where he was given the opportunity to demonstrate his trustworthiness to be a

program provider.[6] Much of the evidence he adduced related to his belief that he was treated unfairly and did not minimize the significance of the conduct which led to his Kansas Medicaid suspension.

Petitioner's actions have had 1) a negative financial impact on the Medicare and Medicaid programs, by his billing for a higher level of services than he provided; and 2) a grave potential for mental or physical harm to beneficiaries or recipients of the programs as regards problems with his professional performance and professional competence. Petitioner does not seem to realize the gravity of his actions. Petitioner has sought to blame Kansas Medicaid or Kansas' medical licensing authority, the Kansas Board of Healing Arts, for his problems, and does not seem to be able to discern that there could be problems with himself and his practice of medicine. Petitioner has made absolutely no attempt to rehabilitate himself, either by taking continuing medical education courses, by asserting that he is working to change his practice methods, or by availing himself of psychiatric or other medical help.

The I.G. has excluded Petitioner until the Kansas Medicaid program reinstates him. He is eligible for reinstatement by Kansas Medicaid in less than one year. Petitioner has not asserted a desire to practice in any jurisdiction other than Kansas, and Kansas Medicaid is in the best position to determine, as of that time, whether or not Petitioner is trustworthy enough to provide services to the Medicaid program. Given the serious nature of the charges which led to Petitioner's exclusion from the Medicare and Medicaid programs, and my own examination of Petitioner's medical records, I do not find that Petitioner's exclusion is unreasonable.

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[6] Petitioner appeared pro se at the hearing. Given that he lacked the assistance of counsel, I gave him wide latitude in challenging the reasonableness of the I.G.'s exclusion.

CONCLUSION

Based on the applicable law and evidence, I find that the I.G. was authorized to impose and direct an exclusion against Petitioner under section 1128(b)(5) of the Act. Further, I find that the exclusion, which is to last until Petitioner is reinstated by Kansas Medicaid, is reasonable.

/s/

Edward D. Steinman
Administrative Law Judge