Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Roniel Rodriguez, III, M.D.,	DATE: March 18, 1994
Petitioner,	Docket No. C-93-124
- v. -	Decision No. CR307
The Inspector General.	

DECISION

On August 26, 1993, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs for three years.[1] The I.G. told Petitioner that he was being excluded under section 1128(b)(3) of the Social Security Act (Act), based on Petitioner's conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. On October 7, 1993, I held a prehearing conference by telephone. At that conference, the parties agreed to stay the hearing in this case. The parties agreed also that the issues in this case are, in substance, identical to the issues in Jose Ramon Castro, M.D., DAB CR259 (1993), which had been appealed to United States District Court. Petitioner acknowledged that the decision by the District Court in Castro might control the outcome of this case. Therefore, Petitioner requested that the hearing be stayed until Castro was decided, and the I.G. agreed with Petitioner's request. On October 13, 1993, I issued an

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[1] I use the term "Medicaid" hereafter to represent all programs other than Medicare from which Petitioner was excluded.

order staying the hearing of this case pending the District Court's review of Castro.

On February 23, 1994, I conducted a status conference with the parties by telephone. At that conference, the I.G. stated that an agreement in principle had been reached to settle Castro and that it was unlikely that the District Court would issue a decision in the case. Petitioner expressed an interest in obtaining a decision in this case based on stipulated facts and conclusions of law. On February 25, 1994, I issued an order containing a summary of the stipulations arrived at between the parties during the February 23, 1994 conference. That February 25, 1994 order recited the parties' agreement that, given their stipulations, there was no need to brief the issues in this case. Instead, the parties requested that I issue a decision based on their stipulations. I gave the parties ten days from their receipt of my February 25, 1994 order to object to the summary of their stipulations. I advised them also that, at the conclusion of the ten-day period, I would close the record and proceed to issue a decision.

Neither Petitioner nor the I.G. has objected to my February 25, 1994 order. I have carefully considered the parties' stipulations and the applicable law. Based on these, I conclude that the I.G. was authorized to exclude Petitioner under section 1128(b)(3) of the Act. I conclude further that regulations require that I sustain the three-year exclusion imposed and directed against Petitioner by the I.G.

ISSUES

The issues in this case are whether:

1. The I.G. was authorized to impose and direct an exclusion against Petitioner by section 1128(b)(3) of the Act; and

2. Regulations require that I sustain the three-year exclusion which the I.G. imposed and directed against Petitioner.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance

within the meaning of section 1128(b)(3) of the Act. Stipulation, Par. 1; Act, section 1128(b)(3).[2]

2. The Secretary of the United States 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. 21,662 (1983).

3. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(3) of the Act. Findings 1, 2.

4. 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) and (b) of the Act. 42 C.F.R. Part 1001.

5. The regulations published on January 29, 1992 include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128(b)(3) of the Act. 42 C.F.R. § 1001.401.

6. On January 22, 1993, the Secretary published a regulation which directs that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon administrative law judges, appellate panels of the Departmental Appeals Board (Board), and federal courts in reviewing the imposition of exclusions by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617 - 5618 (1993).

7. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. § 1001.401. Finding 6.

8. An exclusion imposed pursuant to section 1128(b)(3) of the Act must be for a period of three years, unless aggravating or mitigating factors form a basis for lengthening or shortening the period. 42 C.F.R. § 1001.401(c)(1).

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[2] Any fact findings which I make in this case are based entirely on the parties' stipulations, which are contained in my February 25, 1994 order. I refer in this decision to the stipulations as "Stipulation, Par. (paragraph number)" and these references correspond to the stipulation paragraphs as they appear in my February 25, 1994 order. No exhibits were admitted into evidence in this case.

9. In this case, the I.G. did not impose an exclusion of more than three years based on the presence of aggravating factors. See 42 C.F.R. § 1001.401(c)(2)(i) - (iv).

10. There exist no mitigating factors in this case which could be a basis for my finding that the three-year exclusion imposed and directed by the I.G. against Petitioner is unreasonable. Stipulation, Par. 2; see 42 C.F.R. § 1001.401(c)(3)(i) - (ii).

11. In the absence of aggravating or mitigating factors, regulations require that the three-year exclusion imposed and directed by the I.G. against Petitioner be sustained. Findings 1 - 10; 42 C.F.R. § 1001.401(c).

RATIONALE

There are no disputed issues of material fact in this case. Petitioner acknowledges that he was convicted of a criminal offense within the meaning of section 1128(b)(3) of the Act. Petitioner does not assert the presence of any of the mitigating factors which I may consider under 42 C.F.R. § 1001.401(c)(3) as a possible basis for reducing his exclusion below the three-year benchmark required by 42 C.F.R. § 1001.401(c)(1).

The issues in this case are essentially identical to those I considered in my Castro decision.[3] Stipulation, Par. 3. I will not repeat verbatim what I said in that decision. However, in order to provide a complete decision here, I reiterate my principal conclusions in Castro.

Board appellate panels and administrative law judges delegated to hear cases under section 1128 of the Act have held consistently that section 1128 is a remedial statute. Prior to January 22, 1993, administrative law judges and Board appellate panels held that exclusions imposed pursuant to section 1128 were reasonable only insofar as they were consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992). The Act's remedial purpose

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[3] A difference between this case and Castro is that the petitioner in Castro alleged the presence of a mitigating factor identified in the regulations. I found that the petitioner had not met his burden of proof to establish the presence of the alleged mitigating factor. Castro, DAB CR259, at 16 - 19.

was identified as being to protect program beneficiaries and recipients from providers who are not trustworthy to provide care. Id.

In Matesic, a Board appellate panel discussed the kinds of evidence which should be considered by administrative law judges in hearings as to the reasonableness of exclusions. That evidence included evidence which related to:

> 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.

Id. at 12.

Administrative law judges and Board appellate panels found that excluded parties' rights under section 205(b) of the Act to de novo hearings regarding the reasonableness of their exclusions meant that those parties had the right to present at hearings any evidence which was relevant to their trustworthiness to provide care and which comported with the factors identified in Matesic. Bernardo G. Bilang, M.D., DAB 1295 (1992); Eric Kranz, M.D., DAB 1286 (1991). This meant that excluded parties were permitted to offer evidence at hearings which related to their trustworthiness to provide care, even if that evidence had not been considered by the I.G. in making her exclusion determination. These standards for adjudication of the reasonableness of exclusions were found to apply in all cases where exclusions had been imposed and directed pursuant to section 1128(b) of the Act.

On January 29, 1992, the Secretary published regulations which, at 42 C.F.R. Part 1001, established criteria for the I.G. to apply in determining to impose and direct exclusions pursuant to section 1128 of the Act. In decisions issued subsequent to the publication of these regulations, administrative law judges held consistently that the regulations did not establish criteria to be used by them in adjudicating the reasonableness of exclusions. Castro, DAB CR259, at 9 (see decisions cited therein). In Bertha K. Krickenbarger, R.Ph., DAB CR250 (1993), I held specifically that 42 C.F.R. § 1001.401, which governs the I.G.'s exclusion determinations under

section 1128(b)(3) of the Act, did not apply in administrative hearings concerning such exclusions.

The administrative law judges' decisions which considered the applicability of these regulations to administrative hearings concluded further that, if the Part 1001 regulations were found to govern administrative hearings, then the regulations would conflict with the Act in the following respects:

- They would direct that minimum exclusions be sustained in some cases without permitting consideration of the remedial criteria for determining exclusions found to be implicit in the Act in Matesic. Castro, DAB CR259, at 11.

- They would strip parties of their statutory right to a de novo review of evidence as to their trustworthiness to provide care. Id.

However, these administrative law judges' decisions concluded that the Part 1001 regulations were not intended to govern administrative hearings. The decisions concluded further that the Secretary did not intend to apply regulations in a way which conflicted with the Act's requirements. Support for this conclusion was found in the following:

- The Part 1001 regulations neither stated nor suggested that they governed administrative hearings. Id. at 12.

- There was nothing in the Part 1001 regulations or the commentary to those regulations which either stated or suggested that the Secretary intended to overrule the Board's interpretations of the Act, including the Board's decision in Matesic. The Board is delegated to make final interpretations of law on behalf of the Secretary. Had the Secretary intended to supersede the Board's previous appellate decisions, then the Secretary would have said so explicitly. Id.

- If the Part 1001 regulations were found to govern administrative hearings, they would conflict with or render meaningless other regulations adopted by the Secretary on January 29, 1992, contained in 42 C.F.R. Part 1005, which govern administrative hearings held to adjudicate the reasonableness of exclusions imposed pursuant to section 1128 of the Act. Id. at 12 - 13.

o The Part 1001 regulations could be construed reasonably as codifying I.G. policy without governing administrative adjudications. Id. at 13.

However, on January 22, 1993, the Secretary published new regulations. These regulations direct explicitly that the criteria contained in 42 C.F.R. Part 1001 govern all adjudications of the reasonableness of the length of an exclusion, including hearings before administrative law judges, reviews by Board appellate panels, and appeals to federal courts. 42 C.F.R. § 1001.1(b).

The regulations now require that, in the case of an exclusion imposed pursuant to section 1128(b)(3) of the Act, a minimum exclusion of three years must be sustained, absent the presence of some mitigating circumstance which might serve as a basis for reducing the length of the exclusion. 42 C.F.R. § 1001.401(c)(1), (3).[4] Mitigating circumstances may consist only of those factors identified specifically by 42 C.F.R. § 1001.401(c)(3)(i) - (ii). Evidence which does not fall within one of the identified mitigating factors may not be considered to be mitigating, even if it conforms to the statutory criteria identified in Matesic.[5]

Petitioner concedes that he has no evidence to offer in this case which conforms to the mitigating factors identified in 42 C.F.R. § 1001.401(c)(3)(i) - (ii). I am precluded from receiving evidence which Petitioner might seek to offer concerning his trustworthiness to provide care which does not conform to these mitigating factors. Therefore, I must sustain the three-year exclusion imposed and directed against Petitioner by the I.G.

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[4] This regulation permits an exclusion to exceed three years if any of several specified aggravating factors are found to exist. 42 C.F.R. § 1001.401(c)(2).

[5] The only factors which may be considered to be mitigating under 42 C.F.R. § 1001.401(c)(3) are the following: (i) the excluded party's cooperation with federal or State officials resulted in others being convicted or excluded from Medicare or Medicaid or led to the imposition of a civil money penalty against others; or (ii) alternative sources of the type of health care items or services furnished by the excluded party are not available.

CONCLUSION

I conclude that the I.G. is authorized to exclude Petitioner, based on Petitioner's conviction of a criminal offense within the meaning of section 1128(b)(3) of the Act. I conclude further that the three-year exclusion which the I.G. imposed and directed against Petitioner is mandated by 42 C.F.R. § 1001.401.

/s/

Steven T. Kessel
Administrative Law Judge