

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Cherlyn J. Parrish, M.D.,)	Date: December 14, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-209
)	Decision No. CR560
The Inspector General.)	
)	
)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Cherlyn J. Parrish, M.D. (Petitioner) from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid¹), until Petitioner obtains a license to practice medicine in the State of Georgia. I base my decision on evidence which proves that Petitioner's license to practice medicine was revoked by the Georgia licensing authority for reasons bearing on her professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(A) of the Social Security Act (Act). Additionally, I find that when an exclusion imposed by the I.G. pursuant to section 1128(b)(4)(A) of the Act is coterminous with the term of revocation, suspension, or surrender of the excluded provider's State license, then no issue of reasonableness exists and an exclusion for at least that length is mandated by law.

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In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

BACKGROUND

By letter dated September 12, 1997, the I.G. notified Petitioner that she was being excluded from participating in Medicare and Medicaid. The I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Act because Petitioner's "license to practice medicine or provide health care in the State of Georgia was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the State licensing authority for reasons bearing on [Petitioner's] professional competence, professional performance, or financial integrity." Additionally, the I.G. advised Petitioner that her exclusion would "remain in effect as long as that license is revoked, suspended, or otherwise lost."

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on their written submissions and that an in-person hearing was not necessary. On July 9, 1998, I issued an order setting forth a schedule for the parties to submit briefs and supporting evidence.

The I.G. submitted a brief and two proposed exhibits identified as I.G. Ex. 1 - 2. Petitioner did not object to these exhibits. Petitioner submitted a brief and supporting documentation. For administrative convenience, I renumbered the exhibits submitted by Petitioner so that they were in chronological order and they did not skip numbers. I identified Petitioner's exhibits as P. Ex. 1 - 32. The I.G. did not object to Petitioner's exhibits and she declined to file a reply brief. In the absence of objection, I admit I.G. Ex. 1 - 2 and P. Ex. 1 - 32 into evidence in this case. In deciding this case, I have considered the exhibits, the applicable law, and the arguments of the parties.

APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude "[a]ny individual or entity - (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or (B) who surrendered such

a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity."

Pursuant to section 1128(c)(3)(E) of the Act, as amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191), the length of an exclusion under section 1128(b)(4) "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program." This provision affecting the length of exclusions became effective on January 1, 1997.

Prior to 1996, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is coterminous with the period of revocation, suspension, or surrender of a State license. A coterminous exclusion, as in Petitioner's case, is the mandated minimum required by law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice medicine in the State of Georgia in 1978. She was licensed to practice medicine in the State of Kentucky in 1988. I.G. Ex. 1 at page (p.) 5.

2. On October 20, 1994, the Kentucky licensing authority revoked Petitioner's license to practice medicine. This decision was based on findings by the Kentucky licensing authority that Petitioner engaged in serious acts of gross incompetence, gross ignorance, gross neglect or malpractice involving numerous patients as well as instances of unprofessional, unethical, and dishonest conduct. I.G. Ex. 1 at p. 5.

3. On January 13, 1995, the Georgia licensing authority suspended Petitioner's license to practice medicine in the State of Georgia pursuant to an Order of Summary Suspension. I.G. Ex. 1 at p. 6.

4. On February 9, 1995, the Georgia licensing authority held an expedited hearing regarding the suspension of Petitioner's license. I.G. Ex. 1 at p. 6.

5. On April 20, 1995, a hearing officer of the Georgia licensing authority issued an initial decision recommending that Petitioner's license to practice medicine in Georgia be revoked. The hearing officer concluded that the revocation of Petitioner's license to practice medicine in the State of Kentucky, in and of itself, created sufficient grounds for revocation of Petitioner's license to practice medicine in the State of Georgia. I.G. Ex. 1 at p. 16.

6. The hearing officer found also that Petitioner's treatment of a patient (A.H.) in the State of Georgia failed to conform to minimal standards of acceptable and prevailing medical practice and that it constituted grounds for revocation of Petitioner's Georgia medical license. In addition, the hearing officer found that Petitioner made misleading, deceptive, untrue or fraudulent representations in the practice of medicine in Georgia. I.G. Ex. 1 at pp. 16 - 17.

7. Petitioner filed an application for review of the initial decision of the hearing officer. A hearing was held, and on August 2, 1995, the Georgia licensing authority issued a Final Order in which it adopted the findings of the hearing officer and revoked Petitioner's license to practice medicine in the State of Georgia. I.G. Ex. 1 at pp. 1 - 2.

8. Petitioner's license to practice medicine in the State of Georgia has not been reinstated.

9. On September 12, 1997, the I.G. notified Petitioner of her exclusion from participation in Medicare and Medicaid.

10. Section 1128(b)(4)(A) of the Act authorizes the I.G. to exclude an individual whose license to provide health care has been revoked or suspended by any State licensing authority, or

who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

11. Petitioner possessed a license to provide health care within the scope of section 1128(b)(4)(A) of the Act.

12. The Final Order dated August 2, 1995 issued by the Georgia licensing authority constituted the revocation of Petitioner's medical license within the scope of section 1128(b)(4)(A) of the Act.

13. Petitioner's medical license was revoked for reasons bearing on her professional competence, professional performance, or financial integrity within the scope of section 1128(b)(4)(A) of the Act.

14. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

15. Where an exclusion is imposed pursuant to section 1128(b)(4)(A) of the Act, the period of exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Act, section 1128(c)(3)(E).

16. When an exclusion is imposed pursuant to section 1128(b)(4)(A) of the Act and the period of exclusion is coterminous with the revocation, suspension, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

17. The exclusion imposed by the I.G. against Petitioner is for the minimum period mandated by section 1128(c)(3)(E) of the Act.

PETITIONER'S CONTENTIONS

Petitioner does not dispute that her medical license was revoked as that term is used in section 1128(b)(4)(A) of the Act for reasons bearing on her professional competence or professional performance as those terms are used in section 1128(b)(4)(A) of the Act. Instead, she raises a number of challenges on

collateral issues related to actions taken by the Georgia licensing authority. First, she asserts that her license revocation in Georgia is not final. In this regard, she maintains that such revocation was based on the revocation of her medical license in the State of Kentucky and that such revocation is on appeal in that state. She also raises a number of challenges concerning the propriety of the charge against her and the fairness of the revocation proceedings before the State licensing authority. Petitioner denies that she engaged in unprofessional or incompetent conduct as alleged in the licensing revocation action. She asserts that the charges are baseless and the result of a personal vendetta against her.

Finally, Petitioner asserts that the 1996 amendments to the Act are "ex post facto and therefore barred. Due to laches and the Statute of Limitations, the proposed sanctions [by the I.G.] should not and cannot be applied." Petitioner brief at p. 1.

DISCUSSION

The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. The evidence establishes that Petitioner's medical license was revoked by the Georgia licensing authority for reasons bearing on her professional competence and professional performance.

The record shows that Petitioner's medical license was revoked in a formal proceeding following findings by both a hearing officer and the reviewing body of the Georgia licensing authority that Petitioner failed to adequately comply with Georgia's minimal standards of acceptable and prevailing medical practice; that she made misleading, deceptive, untrue or fraudulent representations in the practice of medicine in Georgia; and that her Kentucky medical license had been revoked because of her incompetent treatment of patients. I.G. Ex. 1. Based on these findings, the Georgia State licensing authority issued a Final Order revoking Petitioner's license to practice medicine on August 2, 1995.

Petitioner's license was revoked pursuant to findings that she failed to treat a patient in accordance with minimal acceptable standards for the practice of medicine. There were findings that Petitioner kept inadequate patient records, administered unnecessary tests, and took incomplete medical histories. There

is no question that these findings directly relate to Petitioner's professional competence and performance. In Milan Kovar, M.D., DAB CR550 (1998), the administrative law judge upheld the exclusion where the petitioner's medical license had been revoked on similar grounds, and an appellate panel declined to review this decision.

Petitioner contends that her license revocation is not final and therefore is not a valid basis for exclusion under the Act. She asserts that the basis of the revocation of her medical license in the State of Georgia is the revocation of her medical license in the State of Kentucky, and she argues that the Georgia revocation action is not final because the Kentucky revocation action is on appeal. I find that the evidence of record does not support Petitioner's claim. The record reflects that after Petitioner filed a request for review of the Georgia licensing authority's initial decision dated April 20, 1995, a Final Order was issued on August 2, 1995 affirming the Board's initial findings and sustaining the revocation of her Georgia medical license. Clearly, the Georgia revocation is final. Moreover, the findings of fact of the initial decision of the hearing officer dated April 20, 1995 were adopted in the Final Order. A review of these factual findings reflects that the Georgia licensing authority's revocation determination was based upon Petitioner's incompetence and lack of professional performance concerning her treatment of a patient in Georgia. On this basis, it cannot be said that the Georgia proceeding is dependent on proceedings initiated against Petitioner in Kentucky.

Petitioner also contends that the license revocation proceedings in her case were unfair and improper and she raises a number of challenges in this regard. She asserts that she did not provide inappropriate care to her patients, but that the State proceedings were biased against her. All of Petitioner's contentions on this issue constitute a collateral attack on the actions of the State licensing authority, and as such, are not relevant to the issue of the I.G.'s authority to exclude Petitioner. The I.G.'s authority to exclude an individual pursuant to section 1128(b)(4)(A) of the Act derives from the State proceeding against the individual, and the proceeding's outcome, and not from the evidence on which the proceeding is based. It has been held that such collateral attacks on the actions of the State licensing authority are not permitted in the

context of an exclusion proceeding under section 1128(b)(4) of the Act. Jagdish Mangla, M.D., DAB CR470 (1997); John W. Foderick, M.D., DAB CR43 (1989).

Petitioner also contends that the 1996 amendments are "ex post facto and therefore barred." It appears that Petitioner is arguing that it is impermissible to apply the statutory provisions of section 1128(c)(3)(E) of the Act, which were enacted in 1996 and which became effective on January 1, 1997, to her case, as her license was originally revoked in 1995. Petitioner's objections to application of the exclusion provision to this case on ex post facto grounds is necessarily premised on the assertion that Congress intended the imposition of the exclusion to be a punishment. It is well-established that exclusions are remedial in nature and not punitive. Mannocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992). Therefore, the civil remedy of exclusion does not trigger the protections afforded by the Constitution which are applicable to criminal laws.

Petitioner also asserts that it is unfair that the I.G. delayed in implementing her exclusion and that such action is barred by "laches and the Statute of Limitations." I find no merit in this claim. The I.G. has discretion to determine when to impose an exclusion. Laurence Wynn, M.D., DAB CR344 (1994). It is clear that an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Act, section 1128(c)(1); 42 C.F.R. section 1001.2002. This means that Petitioner's exclusion must take effect 20 days from the date of the September 12, 1997 exclusion letter. Neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual has become subject to exclusion. Chander Kachoria R.Ph., DAB No. 1380 (1993). I therefore find that the time which elapsed between the revocation of Petitioner's medical license and the issuance of the exclusion letter does not violate her due process rights.

CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. I conclude also that the period of exclusion imposed by the I.G. is the minimum mandatory period mandated by section 1128(c)(3)(E) of the Act. Accordingly, I sustain it.

/s/

Joseph K. Riotto
Administrative Law Judge