

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	
Chester A. Bennett, M.D.,)	DATE: January 24, 1990
)	
Petitioner,)	
)	Docket No. C-133
- v. -)	
)	DECISION CR 64
The Inspector General.)	
)	

DECISION AND ORDER

On June 16, 1989, the Inspector General (the I.G.) notified Chester A. Bennett, M.D. (Petitioner) that he was being excluded from participation in the Medicare program and any State health care program, pursuant to section 1128 of the Social Security Act (Act).^{1 2} The I.G. told Petitioner that his exclusion was due to the fact that Petitioner surrendered his license to practice medicine in the State of Virginia while a formal disciplinary proceeding was pending before the Virginia State Board of Medicine (Board of Medicine). Petitioner was advised by the I.G. that in the event he obtained a valid license to practice medicine from the State of Virginia, he would have the right to apply for reinstatement to the Medicare and Medicaid programs.

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 Section 1128 of the Act is codified at U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988).

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for a hearing and decision. I conducted a prehearing conference by telephone on September 13, 1989. During that prehearing conference, the I.G. stated that he intended to move for summary disposition in this case and the parties agreed to submit the case to me for a decision based upon documentary evidence. I issued a Prehearing Order on September 15, 1989, which established a schedule for filing submissions. The I.G. timely filed a motion for summary disposition and Petitioner responded and requested that the I.G.'s exclusion be summarily overruled.

I have considered the arguments contained in the I.G.'s motion for summary disposition, Petitioner's response and request, the undisputed material facts, and the applicable law and Regulations. I conclude that an exclusion by the I.G. is authorized by section 1128(b)(4)(B) of the Act and that it is appropriate and reasonable under the circumstances of this case to exclude Petitioner for an indefinite period of time.

ISSUES

The issues in this case are whether:

1. Summary disposition is appropriate in this case;
2. Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending which concerned his professional competence, professional performance, or financial integrity within the meaning of Section 1128(b)(4)(B) of the Act; and
3. The exclusion imposed against Petitioner is appropriate and reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

1. Petitioner is a doctor of medicine. I.G. Ex. 1/1.
2. Petitioner held a license to practice medicine in the State of Virginia. I.G. Ex. 1/1.
3. The Board of Medicine is the State agency responsible for the licensing of, and, if necessary, the imposition of discipline, against physicians in Virginia. P. Ex. 1/1.
5. On March 24, 1988, a letter (Notification) was sent to Petitioner notifying him that an informal conference would be held on April 27, 1988, by an informal conference committee composed of three members of the Virginia Board of Medicine. The Notification advised Petitioner that the conference was concerning his ability "to practice medicine with reasonable skill and safety to patients". I.G. Ex. 4/1.
6. The Notification stated that Petitioner had admitted prescribing a Schedule II controlled substance outside a bona fide physician-patient relationship, without accepted therapeutic purpose, and contrary to sound medical judgment. I.G. 4/1.
7. By letter dated March 27, 1988, Petitioner informed the Board of Medicine that he had retired from the practice of medicine and moved to the State of Ohio. Petitioner also advised the Board of Medicine that, in lieu of the informal conference, it was his desire to voluntarily surrender his license. I.G. 1/2.
8. On May 31, 1988, Petitioner entered into a consent order with the Board of Medicine, in which he voluntarily surrendered his license to practice medicine in the State of Virginia. I.G. Ex. 1/2-3.

³ The parties' exhibits and memoranda will be cited as follows:

Petitioner's Exhibit	P. Ex. (number)/(page)
Petitioner's Memorandum	P. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
I.G.'s Memorandum	I.G. Br. (page)

9. The May 31, 1988 consent order recites that the purpose for the April 27, 1988 conference was to receive and act upon evidence that Petitioner may have violated certain laws relating to the practice of medicine in Virginia. I.G. Ex. 1/1.

10. The April 27, 1988 conference concerned Petitioner's professional competence and professional performance, within the meaning of section 1128(b)(4)(B) of the Act.

11. Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending, within the meaning of section 1128(b)(4)(B) of the Act.

12. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct federal exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

13. On June 16, 1989, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs. I.G. Ex. 2/1.

14. Petitioner's exclusion is effective until such time as his license to practice medicine in Virginia is restored, he applies to the I.G. for reinstatement to the Medicare and Medicaid programs, and he is reinstated as a provider. I.G. Ex. 2/2.

15. Petitioner's exclusion is based upon section 1128(b)(4)(B) of the Act. I.G. Ex. 2/2.

16. There do not exist disputed issues of material fact in this case; therefore, summary disposition is appropriate. See Rule 56, Federal Rules of Civil Procedure (F.R.C.P.).

17. The I.G. had discretion to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Section 1128(b)(4)(B) of the Act.

18. The exclusion imposed by the I.G. is appropriate and reasonable under the circumstances of this case. Section 1128(b)(4)(B) of the Act.

DISCUSSION

The basis asserted by the I.G. for Petitioner's exclusion is Petitioner's voluntary surrender of his license to practice medicine in Virginia. The I.G. asserts that the documentary evidence proves that Petitioner surrendered his license while a formal disciplinary proceeding was pending against Petitioner which concerned his professional competence. Therefore, according to the I.G., Petitioner's case falls within the provisions of section 1128(b)(4)(B) of the Act, and the I.G. has discretion to exclude Petitioner from participation in the Medicare and Medicaid programs. The I.G. states that the indefinite length of the exclusion imposed in this case is justified by the purpose of the exclusion law.

I. Summary Disposition Is Appropriate In This Case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Jack W. Greene v. The Inspector General, appeal docketed DAB No. 89-59, Decision No. 1078 (1989); See Rule 56, F.R.C.P.

There are no disputed issues of material fact in this case. Petitioner did not contest the appropriateness or reasonableness of the length of exclusion. Rather, he argues that he did not surrender his license during the pendency of a "formal disciplinary proceeding" within the meaning of section 1128(b)(4)(B) of the Act. I conclude that the documentary evidence submitted by the parties eliminates any question of material fact. Thus, this case presents issues of law, not fact, and summary disposition is an appropriate mechanism to decide these issues.

II. Petitioner Surrendered His License To Practice Medicine Within The Meaning Of Section 1128(b)(4)(B) Of The Act.

I conclude that the actions of the informal committee of the Board of Medicine constituted a "formal disciplinary proceeding" pertaining to Petitioner's professional competence or performance within the meaning of section 1128(b)(4)(B) of the Act. I also conclude that Petitioner's surrender of his professional license to the Board of Medicine was a surrender of a license while a formal disciplinary proceeding was pending concerning Petitioner's professional competence or performance. Therefore, the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act.

Section 1128(b)(4)(B) provides that the Secretary may impose and direct exclusions against any individual or entity who:

surrendered . . . a license . . . [to provide health care] while a formal disciplinary proceeding was pending before . . . [any State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

Although section 1128(b)(4)(B) does not define the term "formal disciplinary proceeding," it is reasonable to conclude from the face of the statute, and from the legislative history, that the law refers to a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in a license suspension or revocation. John W. Foderick, M.D. v. The Inspector General, Docket No. C-113 (1989) appeal docketed, DAB No. 89-205, Decision No. 1125 (1990). This interpretation is consistent with the purpose of the law to protect Medicare beneficiaries and Medicaid recipients from individuals and entities who are untrustworthy.

The undisputed facts of this case are that the Board of Medicine received a complaint concerning Petitioner. On March 24, 1988, a letter (Notification) was sent to Petitioner notifying him that a conference would be held on April 27, 1988, by a committee composed of three members of the Board of Medicine. This Notification advised Petitioner that the conference concerned his ability "to practice medicine with reasonable skill and safety to patients". I.G. Ex. 4/1. The Notification also stated that Petitioner had:

by his own admission indiscriminately prescribed and administered 3/10 cc of Morphine, a Schedule II controlled substance twice a day to an individual since on or about October 1982 through October 8, 1987 outside a bona fide physician/patient relationship and without accepted therapeutic purpose, contrary to sound medical judgment. I.G. 4/1.

Thus, I conclude that the April 27, 1988 conference concerned Petitioner's professional competence and professional performance.

Petitioner asserts that the April 27, 1988 conference was not a "formal disciplinary proceeding" within the meaning

of 1128(b)(4)(B) of the Act. He argues that the only power that the Committee had was to dismiss the charges that had been brought against him, or to reprimand, censure, or place him on probation, and require him to furnish them certain information. Petitioner also argues that Foderick is not applicable to his case because the Committee could not have revoked or suspended his license, but could only have presented its findings to the Board of Medicine. The Board of Medicine could then have commenced a formal hearing to revoke or suspend Petitioner's license. P. Br. pp. 1-2.

If section 1128(b)(4)(B) required that I find that Petitioner had surrendered his license during the pendency of a formal hearing, his arguments would have some validity. However, the language of the statute is much broader. Although it is not specifically defined, it is reasonable to conclude that "during a formal disciplinary proceeding" encompasses more than just a hearing on the matter. A proceeding "entails a succession of events taking place," rather than just one event, such as a hearing. Webster's Third New International Dictionary, 1976 Unabridged Edition.

The proceeding in Petitioner's case began when the conference was scheduled. By state statute, the Committee's responsibilities were to investigate and receive evidence with respect to a complaint that had been made. P. Br. 2. At the time the conference was scheduled, Petitioner's license was "put in jeopardy." Foderick, supra.

The Committee's findings would have been referred for formal hearing to the Board of Medicine, which had the authority to revoke Petitioner's license to practice medicine. P. Br. 2. Thus, the events which could have led to the revocation of Petitioner's license had been set in motion when the Committee initiated the informal conference.

Petitioner has also pointed out that this conference is referred to as an "informal" conference. That this conference is referred to as an "informal conference" is not definitive or meaningful in interpreting section 1128(b)(4)(B). This case is governed by federal law and the interpretation of a federal statute or regulation is a question of federal, not state, law. United States v. Allegheny County, 322 U.S. 174, 183 (1944). In making my determination in this case, I am guided by the intent of Congress in interpreting section 1128(b)(4)(B) of the Act, and my task is to interpret the words of this

section in light of the purposes that it was designed to serve.

Congress intended to prevent physicians from circumventing 1128(b)(4)(B) by surrendering their licenses before a state could conclude its proceedings. Inherent in this statute is the premise that there is some truth in the allegations that have been made, if a physician does not contest them but surrenders his license instead. Whether that premise is true in Petitioner's case is irrelevant. The proper forum in which to contest the allegations was the Board of Medicine.

The Board of Medicine's Notification advised Petitioner of the charges against him and set forth procedural safeguards. He was allowed to have an attorney present and to defend against these charges. Instead, Petitioner chose to voluntarily surrender his license at the time he received the Notification. I conclude that Petitioner's surrender of his license to the Board of Medicine constitutes a "surrender of his license" within the meaning of section 1128(b)(4)(B).

III. An Indefinite Exclusion Is Appropriate and Reasonable In This Case.

The I.G. asserts that his exclusion determination in this case is consistent with Congress' intent to prevent practitioners from treating Medicare and Medicaid patients during any period in which they are no longer permitted to practice medicine in any state. I.G. Br. 9. The I.G. also asserts that this is a matter of law and can be decided by summary disposition. The issue is a question of law in this case because Petitioner did not file any submissions on this issue and did not argue that the period of exclusion was inappropriate or that the I.G. acted unreasonably in imposing it.

The purpose of an exclusion is to protect those persons that are helped by these programs and to ensure that a provider is trustworthy. Whether an exclusion is reasonable is a fact issue to be determined after a review of the circumstances of a case. Since Petitioner did not contest the period of exclusion imposed by the I.G. in this case, I conclude that the exclusion imposed by the I.G. is reasonable under the circumstances of this case.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by section 1128(b)(4)(B) of the Act. I conclude further that the length of the exclusion is appropriate and that the I.G. acted reasonably in imposing it.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge