

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	
Joel L. Korins, D.P.M.,)	DATE: February 8, 1990
)	
Petitioner,)	
)	
- v. -)	Docket No. C-176
)	
The Inspector General.)	DECISION CR 66
)	

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On October 27, 1989, the Inspector General (the 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 or otherwise sanctioned by a federal or state health care program for reasons bearing on his professional competence, professional performance, or financial integrity. Petitioner was advised that the authority for the exclusion is contained in section 1128(b)(5) of the Social Security Act.

Petitioner timely filed a request for a hearing, and requested an expedited hearing in his case. In his hearing request, Petitioner asserted that he had never been excluded, suspended or otherwise sanctioned by a state health care program for any reason. He argued that the I.G.'s exclusion determination had denied Petitioner due process, and that the duration of the exclusion was unreasonable.

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.

I conducted a prehearing conference on November 21, 1989, at which the I.G. advised me that he intended to move for summary disposition in the case. Subsequently, the I.G. moved for summary disposition and Petitioner moved for an evidentiary hearing. I held oral argument on the motions on February 6, 1990. At the beginning of the argument, I advised the parties that I intended to treat the request for summary disposition as a joint request for summary disposition on the issue of whether the I.G. had authority to impose an exclusion against Petitioner pursuant to section 1128(b)(5) of the Social Security Act.

I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. I conclude that the I.G. did not have authority to impose an exclusion against Petitioner pursuant to section 1128(b)(5) of the Social Security Act. I therefore enter summary disposition in favor of Petitioner.

ISSUE

The issue in this case is whether Petitioner was suspended or excluded from participation, or otherwise sanctioned, under a state health care program, within the meaning of section 1128(b)(5) of the Social Security Act.²

² Petitioner raised additional issues in his motion for an evidentiary hearing. He contended that the I.G.'s exclusion determination violated his due process rights, because Petitioner was not afforded a pre-determination hearing. He asserted that he was not given adequate notice of the grounds on which he was excluded. Petitioner asserted that no regulations had been adopted implementing section 1128(b)(5), and he argued that the section could not be fairly applied in individual cases absent implementing regulations. He also argued that the Secretary's failure to adopt regulations violated the Administrative Procedure Act, 5 U.S.C. 553 et seq. Petitioner also argued that the length of the exclusion imposed against him by the I.G. is unreasonable. I make no findings or conclusions with respect to any of these arguments, because my decision that the I.G. had no statutory authority to exclude Petitioner under section 1128(b)(5) disposes of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In July, 1988, Petitioner was indicted under Massachusetts law for the offense of larceny over \$250, and on ³22 counts of filing false Medicaid claims. I.G. Ex. 9.³
2. Petitioner subsequently entered an Agreed Upon Disposition and Settlement Agreement with the Attorney General of the Commonwealth of Massachusetts. I.G. Ex. 6, 7.
3. The parties agreed that Petitioner would be placed on six months unsupervised probation, with the larceny indictment against Petitioner to be dismissed at the end of that period. I.G. Ex. 6.
4. The parties agreed that Petitioner would pay the sum of \$430.00 as settlement, based on the larceny indictment. I.G. Ex. 6.
5. The parties agreed that Petitioner would pay the sum of \$5,000.00 to the Massachusetts Department of Public Welfare in lieu of commencement against Petitioner of a formal civil action for civil damages. I.G. Ex. 7.
6. The parties agreed that, effective August 8, 1989, Petitioner would voluntarily and permanently withdraw as a provider from the Massachusetts Medicaid program, and that Petitioner would not reapply for either individual or group provider status in the Massachusetts Medicaid program. I.G. Ex. 7.
7. Petitioner did not admit that he had violated any laws or Medicaid rules or regulations. I.G. Ex. 7.
8. The parties agreed that Petitioner's payment as settlement of the larceny indictment against him did not constitute an admission by Petitioner that he had violated any laws, rules or regulations. I.G. Ex. 7.
9. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to

³ The exhibits attached to the I.G.'s motion for summary disposition will be cited as: I.G. Ex. (number).

section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

10. On October 27, 1989, the I.G. excluded Petitioner from participating in Medicare and directed that Petitioner be excluded from participating in Medicaid. I.G. Ex. 4.

11. The asserted basis for the exclusion was that Petitioner had been excluded or suspended or otherwise sanctioned by a federal or state health care program for reasons bearing on his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(5) of the Social Security Act. I.G. Ex. 4; Social Security Act, section 1128(b)(5).

12. Petitioner has not been excluded, suspended, or otherwise sanctioned by a federal or state health care program, within the meaning of section 1128(b)(5) of the Social Security Act. Findings 1-8; Social Security Act, section 1128(b)(5).

13. The I.G. did not have authority to impose or direct an exclusion against Petitioner pursuant to section 1128(b)(5) of the Social Security Act.

ANALYSIS

There are no disputed issues of material fact in this case. The undisputed facts establish that Petitioner was indicted in Massachusetts for the criminal offenses of larceny and filing false claims with the Massachusetts Medicaid program. Petitioner entered into an agreement with prosecuting authorities which resolved the criminal charges against him. As an element of this agreement, Petitioner agreed to withdraw as a provider from the Massachusetts Medicaid program, and to never again apply for provider status. Petitioner did not admit that he had violated any laws, rules, or regulations. No finding was made that Petitioner had violated any laws, rules, or regulations.

The I.G. imposed an exclusion against Petitioner from participating in Medicare and Medicaid pursuant to section 1128(b)(5) of the Social Security Act, which provides for the exclusion of:

Any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned under -- . . .

(B) a State health care program,

for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity. (Emphasis added)

The I.G. does not contend that Petitioner was suspended or excluded from participation under the Massachusetts Medicaid program. The I.G. asserts that Petitioner was "otherwise sanctioned under" the Medicaid program when he agreed to permanently withdraw from participating in that program as partial consideration for having the criminal indictments against him dismissed. Petitioner asserts that no sanctions have been imposed against him. He argues that his voluntary withdrawal as a participant cannot be construed to constitute a circumstance where he was "otherwise sanctioned" within the meaning of section 1128(b)(5).

The issue which must be resolved in this case is whether a voluntary withdrawal by a provider as a participant in a state health care program, as partial settlement of pending criminal charges against that provider, is a "sanction" within the meaning of section 1128(b)(5). I conclude that it is not.

The term "otherwise sanctioned" is not defined. There is no legislative history which would shed light on what Congress intended the term to mean. In the absence of a statutory definition and legislative history, the words "otherwise sanctioned" must be applied consistent with their common and ordinary meaning and in pari materia with other language in that section and other sections in the exclusion law.

"Sanction" is defined in Webster's Third New International Dictionary 1969 Edition as:

3: the detriment, loss of reward, or other coercive intervention that is annexed to a violation of a law as a means of enforcing the law and may consist in the direct infliction of injury or inconvenience (as in the punishments of crime) or in mere coercion, restitution, or undoing of what was wrongly accomplished (as in the judgments of civil actions)

. . . 10: a restrictive measure used to punish a specific action or to prevent some future activity

"Sanctioned" is defined as

3: to annex a sanction or penalty to the violation of (as a right, obligation or command)

These definitions connote that a "sanction" consists of a punishment or remedy imposed against a person to correct a wrong. Under section 1128(b)(5), a person is "otherwise sanctioned" when he is either punished or a remedy is imposed against him to correct a wrong.

This interpretation of the term "otherwise sanctioned" is consistent with the language of the rest of section 1128(b)(5). The section permits exclusions of persons who have been "suspended or excluded from participation, or otherwise sanctioned " Both the terms "suspended" and "excluded from participation" define circumstances where remedies are imposed against a person.

My interpretation is also consistent with the manner in which the word "sanction" is employed in other parts of section 1128. Section 1128(b)(8) is captioned "Entities Controlled by a Sanctioned Individual." This section authorizes the I.G. to exclude entities controlled by individuals who: have been convicted of certain criminal offenses; have had civil monetary penalties imposed against them pursuant to section 1128A of the Social Security Act; or have been excluded from participation under Medicare or Medicaid. As with section 1128(b)(5), section 1128(b)(8) also employs the word "sanctioned" to identify parties who have had punishments or remedies imposed against them.

The facts of this case do not establish that Petitioner's withdrawal from participation in Medicaid was either a punishment or a remedy which was imposed against Petitioner. Petitioner's termination as a participant in Medicaid was not imposed against him. He voluntarily agreed to withdraw from participation as an element of a bargain he made with the prosecutor to have the charges against him dismissed. Nor do the facts establish that Petitioner's voluntary withdrawal as a Medicaid participant was done to correct a wrong. Petitioner admitted to no wrongful act, and no finding was made that a wrongful act was committed by Petitioner. It is true

that Petitioner was indicted for criminal offenses. However, the indictments against Petitioner are only accusations, and do not establish that Petitioner committed any wrongful acts.

The I.G. argues that the exclusion law was intended by Congress to enable the Secretary to exclude those persons whose conduct threatened the integrity of the Medicare and Medicaid programs. He argues that, if section 1128(b)(5) is not interpreted to authorize Petitioner's exclusion, then parties might be able to thwart the intent of the law by negotiating agreements such as those entered into by Petitioner.

I agree that the exclusion law was designed to protect the integrity of the Medicare and Medicaid programs. However, the law was not intended to give the Secretary carte blanche authority to exclude those parties whom the Secretary saw as jeopardizing the integrity of these programs. The law specifically delineates those circumstances which either mandate or authorize those exclusions. There are two categories of offenses under section 1128(a) which mandate exclusion, and fourteen categories of offenses, actions or failures to act under section 1128(b) which permit exclusion. Conduct which does not fall within those delineated categories does not create grounds for imposition of an exclusion.

Nor do I conclude that Congress impliedly intended that section 1128(b)(5) authorize exclusions of parties who agree to surrender their participation status as settlement of pending criminal charges. A reading of the entire section 1128 establishes that, where Congress intended to mandate or authorize exclusion of parties who voluntarily entered into agreements in order to avoid imposition of remedies or penalties against them, it specifically stated its intent.

There are two parts of section 1128 which provide for exclusions in such circumstances. Section 1128(b)(4)(B) authorizes the Secretary to exclude a party who surrenders his or her license to practice health care while a formal disciplinary hearing was pending against that party. Section 1128(i) defines "conviction" of a criminal offense to include nolo contendere pleas, and entry by a party in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. This section, therefore, defines "conviction" in a manner which

includes a variety of voluntary arrangements which do not encompass a finding or admission of guilt.

My conclusion that the I.G. is not authorized to exclude Petitioner pursuant to section 1128(b)(5) of the Social Security Act means that the exclusion imposed against Petitioner must be vacated. However, I make no finding as to whether the I.G. may have authority to exclude Petitioner pursuant to some other part of section 1128. Furthermore, this decision does not serve to reinstate Petitioner as a participant in the Massachusetts Medicaid program. I make no finding as to the facts upon which Petitioner's criminal indictments were based.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G. did not have authority to exclude Petitioner pursuant to section 1128(b)(5) of the Social Security Act. Therefore, I vacate the exclusion imposed against Petitioner by the I.G.

/s/

Steven T. Kessel
Administrative Law Judge