

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
Departmental Appeals Board  
Civil Remedies Division

In the Case of:	)	
Leonard P. Harman, D.O.,	)	DATE: March 5, 1990
Petitioner,	)	
- v. -	)	Docket No. C-162
The Inspector General.	)	DECISION CR 72

**DECISION AND ORDER**

Petitioner timely requested a hearing before an Administrative Law Judge, to contest a determination by the Inspector General (I.G.) to exclude him from participation in the Medicare and Medicaid programs for four years, pursuant to section 1128(b)(5) of the Social Security Act (Act).<sup>1</sup> I conducted a hearing in Philadelphia, Pennsylvania on December 7, 1989. Based on the evidence introduced at the hearing, the parties' submissions, and applicable law, I conclude that an exclusion of one year is appropriate.

BACKGROUND

By letter dated July 27, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and Medicaid programs. The I.G. advised Petitioner that he was being excluded as a result of his exclusion or suspension by the Pennsylvania Department of Welfare (DPW) for reasons bearing upon his professional competence, professional performance, or

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<sup>1</sup> The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner is excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

financial integrity within the meaning of section 1128(b)(5)(B) of the Act. The I.G. further advised Petitioner that he was being excluded for a period of four years. Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. I held a telephone prehearing conference in this case on October 25, 1989 and an evidentiary hearing on December 7, 1989, in Philadelphia, Pennsylvania.

### APPLICABLE STATUTES AND REGULATIONS

#### I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(b)(5)(B) of the Act permits the I.G. to exclude from Medicare and Medicaid participation any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under a State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

#### II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

### ISSUES

The issues are whether:

1. Petitioner was "suspended or excluded from participation" in a "State health care program, for reasons bearing on his professional competence, professional performance, or financial integrity" within the meaning of section 1128(b)(5)(B) of the Act;
2. Section 1128(b)(5)(B) of the Act permits an exclusion under the circumstances of this case; and
3. The length of Petitioner's exclusion is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>2</sup>

1. Petitioner is a doctor of medicine, having received a Doctor of Osteopathy degree in 1972 from the Philadelphia College of Osteopathic Medicine. Tr. 90.
2. On June 27, 1988, Petitioner was notified by the Pennsylvania Department of Public Welfare (DPW) that DPW proposed to terminate Petitioner's provider agreement and exclude him from participation in the Medical Assistance Program. The Notice of Termination and Restitution Demand (Notice of Termination) also advised Petitioner that restitution was being sought. I.G. Ex. 1.
3. The DPW found that Petitioner had billed contrary to medical assistance regulations in that from April 1, 1986, to January 1, 1987, he had billed for services:
  - a. provided by an uncertified physician assistant and that Petitioner was not registered by the Osteopathic Board of Medical Examiners to supervise a physician assistant;
  - b. in which an uncertified physician assistant prescribed drugs for patients using blank prescription forms which had been signed in advance by Petitioner;
  - c. rendered by an inactive provider in the Medical Assistance program; and
  - d. in which patient records did not conform to standards of practice.
4. Petitioner did not answer the Notice of Termination. I.G. Ex. 2.

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<sup>2</sup> The citations to the record in this Decision and Order are designated as follows:

Petitioner's Brief	P. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Transcript	Tr. (page)

5. On October 20, 1988, the DPW ordered that Petitioner: (1) be excluded from participation in the Pennsylvania Medical Assistance Program for a period of four years, (2) be prohibited from receiving any payments from the DPW for any services arranged, rendered, supervised, prescribed or ordered by Petitioner, and (3) pay restitution in the amount of \$1,414.50. I.G. 2.

6. Petitioner did not appeal the decision of the DPW. I.G. Ex. 3; Tr. 92, 93.

7. By letter dated May 2, 1989, the I.G. informed Petitioner that the Department of Health and Human Services (DHHS) was considering excluding Petitioner from participation in the Medicare and Medicaid programs for four years due to his exclusion from the Pennsylvania health care program. I.G. Ex. 4.

8. By letter dated June 19, 1989, Petitioner responded to the I.G.'s May 2, 1989 letter. I.G. Ex. 11.

9. by letter dated July 27, 1989, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and Medicaid programs for a period of four years pursuant to section 1128(b)(5)(B) of the Act. I.G. Ex. 6.

10. The Pennsylvania Medical Assistance program (Medicaid) is a State health care program within the meaning of sections 1128(h) and 1128(b)(5)(B) of the Act.

11. Petitioner was excluded or suspended from a State health care program for reasons bearing on his professional competence and professional performance within the meaning of section 1128(b)(5)(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 exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

13. The I.G. was authorized to impose an exclusion against Petitioner by section 1128(b)(5)(B) of the Act. 42 U.S.C. 1320a-7(b)(5)(B).

14. There are mitigating circumstances in this case which the I.G. did not consider or accord the proper weight:

- a. Petitioner practices in a neighborhood in which the majority of the persons are elderly Medicare

beneficiaries and often homebound. Petitioner is one of the few doctors in the area who makes house calls and the loss of his services will harm these patients. Tr. 147, 148. 64-66.

b. Petitioner has an excellent reputation for trustworthiness. Tr. 60, 64, 101.

c. Petitioner has no prior Medicare or Medicaid sanctions and has never been disciplined by the Pennsylvania licensing medical board. Tr. 139; P. Br. 28.

d. Petitioner's practice will be economically devastated by the Medicare exclusion. Tr. 137-139, 147-149; P. Ex. 27, 28.

15. The I.G. did not consider any mitigating circumstances and the four-year period of exclusion imposed by the I.G. is unreasonable under the circumstances of this case.

16. An exclusion of one year is appropriate in this case.

#### DISCUSSION

I. Petitioner Was Suspended Or Excluded From Participation In A "State Health Care Program, For Reasons Bearing On [His] Professional Competence And Performance," Within The Meaning Of Section 1128(b)(5)(B) Of The Act.

Section 1128(b)(5)(B) of the Act grants the authority to the DHHS Secretary's delegate, the I.G., to exclude any individual or entity which 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.

Petitioner argues that he was not suspended or excluded from a State health care program for "reasons bearing on [his] professional competence or professional performance", because his "errors or omissions were not significant or substantial breaches" and thus do not fall within the purview of section 1128(b)(5)(B). Petitioner

asserts that the findings of the DPW are allegations and that testimony and documentary evidence introduced at his hearing in this case demonstrate that these findings are inaccurate. Furthermore, Petitioner contends that the I.G. must perform an independent investigation of the facts upon which the DWP based Petitioner's exclusion.

The I.G. argues that Petitioner's exclusion was based upon a review of the findings and exclusion Order of the DPW and that this was authorized by section 1128(b)(5)(B) of the Act. He asserts that he is not required by the Act to perform an independent investigation of the factual basis for Petitioner's exclusion and cites John W. Foderick, M.D., DAB Civ. Rem. C-113 (1989) in support of his argument that the I.G.'s authority to impose exclusions emanates from the actions taken by the State. Most importantly, the I.G. also argues that Petitioner cannot collaterally attack the state agency's findings in this proceeding.

I conclude that Petitioner was suspended or excluded from "a State health care program for reasons bearing on his professional competence and professional performance." I also conclude that section 1128(b)(5)(B) intended that the I.G. rely on the State's actions in imposing exclusions, and did not intend that the I.G. examine the fairness or propriety of the process which led to the actions of the State. See John W. Foderick, M.D., DAB App. 1125 at 10 (1989).

As I indicated during the December 7, 1989 hearing in this case, the determination of whether or not certain conduct affects professional competence or performance has to be made by examining the face of the DPW's Notice of Termination and Order excluding Petitioner from participation as a provider. Tr. 72.

These documents reflect that on June 27, 1988, Petitioner was notified that the DPW proposed to terminate Petitioner's provider agreement and exclude him from participation in the program. I.G. Ex. 1. The DPW found that Petitioner had violated the program's regulations by billing for services which had been (1) provided by an uncertified physician assistant, (2) rendered by an inactive provider in the program, and (3) in which an uncertified physician assistant had prescribed drugs to patients by using blank prescription forms which had been signed by Petitioner in advance.

The DPW also found that Petitioner had not been registered by the Osteopathic Board of Medical Examiners to supervise a physician assistant and had billed the

program for services in which the corresponding patient records did not conform to standards of practice. I.G. Ex. 1. On October 20, 1988, the DPW ordered that Petitioner be excluded from participation in the program for a period of four years and pay restitution in the amount of \$1,414.50. I.G. 2.

Although section 1128(b)(5)(B) does not define the terms "professional competence" or "professional performance," it is reasonable to conclude that these terms encompass those circumstances where termination proceedings concern a provider's qualifications and manner of functioning in his profession.

The DPW's basis for terminating Petitioner as a provider was that he had violated the program's regulations by conducting himself in a manner in which he was not qualified by supervising a physician assistant. Furthermore, the DPW found that Petitioner had violated standards of practice in failing to keep accurate patient records and by signing blank prescription forms and giving them to his physician assistant. These findings bear on Petitioner's competence or legal qualifications to practice his profession and concern the essence of Petitioner's performance in his profession as a physician.

Petitioner did not respond to the DPW's Notice of Termination nor did he appeal its October 20, 1988 Order, and Petitioner cannot use this administrative proceeding to collaterally attack the DPW's determination. Accordingly, I conclude that Petitioner was excluded from participation under a "State health care program, for reasons bearing on his professional competence and professional performance" within the meaning of section 1128(b)(5)(B) of the Act.

## II. The I.G. Is Authorized to Exclude Petitioner By Section 1128(b)(5)(B) Of The Social Security Act.

The Secretary of DHHS 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. On July 27, 1989, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of four years pursuant to section 1128(b)(5)(B) of the Act. I.G. Ex. 6.

Petitioner contends that, under section 1128(b)(5)(B), the Secretary must make a finding that Petitioner was excluded from a State health care program for one of the

statutorily identified reasons, and then must exercise discretion and make an independent determination of whether an exclusion from Medicare is appropriate and warranted under the facts and circumstances of a case.

The I.G. asserts that in determining whether to exclude Petitioner, the I.G. relied on the findings of the State agency, the I.G.'s policy implementing the 1987 Amendments to the Act, and the seven factors contained in the Regulations in effect prior to the passage of the 1987 Amendments. The I.G. argues that his reliance on these factors is reasonable and that the exclusion was properly imposed.

While Petitioner's arguments may be relevant as mitigating circumstances in considering the appropriate length of an exclusion, I conclude that his distinctions are not significant for purposes of determining whether an exclusion is authorized in this case. Section 1128(b)(5)(B) of the Act allows the Secretary (or his delegate, the I.G.) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid, of "any individual or entity which 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." While I do have the authority to decide whether the I.G. is authorized by law to exclude an individual or entity under section 1128 of the Act, based on the facts of a particular case, I do not have the authority to decide whether the I.G. should or should not exercise that discretion. Thus, the exclusion imposed against Petitioner by the I.G. was authorized by section 1128(b)(5)(B) of the Act. 42 U.S.C. 1320a-7(b)(5)(B).

### III. An Exclusion Of One Year Is Appropriate In This Case.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for four years. Since I have decided that the I.G. had discretion to impose an exclusion in this case, I must now decide if the length of exclusion imposed is appropriate.

The Regulations provide that certain criteria be considered in determining the length of exclusion in this case. 42 C.F.R. 1001.125. Petitioner asserts that an application of these criteria to his case leads to the conclusion that an exclusion of four years is unreasonable. He argues that under the particular facts

of this case he has already been excluded for a reasonable period of time, and that it is appropriate that no further exclusion should be imposed. In support of his arguments, Petitioner cites mitigating circumstances and argues that his exclusion should be lessened because: (1) he has no prior Medicare or Medicaid sanctions; (2) the exclusion from Medicaid is an adequate remedy for his errors, (3) that he provides specialized services to the community that would suffer if he is excluded for four years, (4) a four-year exclusion would force Petitioner to cease practicing medicine and cause financial hardship to his family, and (5) he is a trustworthy and extremely competent physician.

The I.G. argues that: (1) the purpose of an exclusion under section 1128(b)(5)(B) is to protect program recipients and beneficiaries, (2) a four-year exclusion in this case is reasonable, and (3) in the alternative, if a four-year exclusion is unreasonable, I should determine de novo the appropriate length of exclusion.

At the December 7, 1989 hearing in this case, Robert Taylor, a program analyst employed by the I.G., testified. Petitioner's exclusion was based upon Robert Taylor's recommendation. Mr. Taylor testified that he: (1) had relied on the DPW's findings contained in the Notice of Termination and the October 20, 1988 Order, (2) did not independently investigate the findings contained in the Notice of Determination, (3) used an I.G. policy to determine the length of Petitioner's exclusion; and (4) did not consider any mitigating factors in determining the length of Petitioner's exclusion.

In order to decide the appropriate length of an exclusion, I must make a de novo determination by making an independent assessment of the seven factors listed in section 1001.125 of the Regulations and consider all of the purposes designated by Congress for the enactment of section 1128(b)(5)(B) of the Act. In making that de novo determination, much weight is accorded to a determination of whether the four-year period of exclusion imposed by the I.G. is reasonable. The main purposes of an exclusion are to allow for a period of time in which to ensure that Petitioner is trustworthy and that persons helped by these programs are protected. I must look at all relevant factors in determining Petitioner's trustworthiness and ensuring the protection of the beneficiaries and recipients of these programs. Although the Regulations do not define what circumstances may be considered as mitigating, I must also consider any mitigating circumstances. See 42 C.F.R. 1001.125(b)(4).

During the December 7, 1989 hearing, Petitioner offered testimony which established that he has practiced medicine for approximately 18 years, has no prior Medicaid or Medicare sanctions, and has never been sanctioned by the State medical licensing board. See, 42 C.F.R. 1001.125(b)(7). Petitioner also established that a Medicare exclusion for a period of four years would economically devastate his practice and be a hardship to many of his patients. Most importantly, Petitioner demonstrated that he is held in high esteem by his patients, has a reputation for competence and trustworthiness, and is well respected by other physicians in the area.

At the hearing in this case, Dr. Herbert Secoular testified on behalf of Petitioner. Dr. Secoular testified that he had known Petitioner for 19 years and that Petitioner's reputation for professional competence and trustworthiness was excellent. Moreover, Dr. Secoular testified that Petitioner had covered for him when he had to be away from his own practice, and that he had referred his patients to Petitioner when Dr. Secoular moved his practice away from the neighborhood. Tr. 63-66.

Dr. Secoular also confirmed that Petitioner practices in a neighborhood in which a majority of the persons are elderly Medicare beneficiaries, many of whom are homebound, and that Petitioner is one of the few physicians who makes house calls to these elderly patients. Tr. 65, 66.

The evidence demonstrates that Petitioner is a competent and compassionate physician who truly cares about the well-being of his patients. Petitioner has practiced in the same neighborhood in Philadelphia since 1974 and serves many elderly patients, most of whom are Medicare beneficiaries, who would suffer a hardship by the loss of Petitioner's medical services.

Petitioner testified on his own behalf. In addition to the information he provided as to the circumstances of the events which resulted in his exclusion, he demonstrated by his demeanor and statements that he has become fully aware of his responsibilities to the Medicare and Medicaid programs. I found his testimony to be credible and convincing.

The I.G. abused his discretion in refusing to consider any mitigating circumstances. My review of the mitigating circumstances leads me to conclude that a

four-year exclusion is unreasonable. The circumstances of Petitioner's exclusion, coupled with my observation of him during his testimony, convince me that it would be more appropriate for the I.G. to have the opportunity to consider him for reinstatement in mid-August 1990 rather than mid-August 1993. In other words, I conclude that Petitioner should be excluded for one year, not four.

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 law. I further conclude that a one-year exclusion is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

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Charles E. Stratton  
Administrative Law Judge