

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Roosevelt A. Striggles)	DATE: January 11, 1991
Petitioner,)	
- v. -)	Docket No. C-301
The Inspector General.)	Decision No. CR114

DECISION

On September 12, 1990, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and any State health care program.¹ The I.G. told Petitioner that his exclusion was due to the fact that Petitioner's Ohio pharmacist license had been revoked. Petitioner was advised that he could reapply for reinstatement in Medicare and Medicaid at such time as he obtained a valid pharmacist license from the State of Ohio.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I scheduled a hearing in the case. However, prior to the scheduled hearing date, the I.G. moved for summary disposition. Petitioner timely filed a reply to the motion. I have considered the I.G.'s motion, Petitioner's reply, the undisputed material facts, and applicable law and regulations. I conclude that the exclusion is authorized by section 1128(b)(4)(A) of the Social Security Act (the Act) and is reasonable. Therefore, I conclude that summary disposition is appropriate and no evidentiary hearing is necessary.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

ISSUES

The issues in this case are whether:

1. Petitioner's pharmacist license was revoked by a state licensing authority for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity;
2. the correctness or fairness of the decision revoking Petitioner's pharmacist license is a relevant question of material fact on which I should receive evidence;
3. summary disposition is appropriate in this case;
4. the exclusion imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed as a pharmacist in the State of Ohio. I.G. Ex. 2/7.²
2. On March 8, 1989, the Ohio State Board of Pharmacy (Pharmacy Board) revoked Petitioner's pharmacist license. I.G. Ex. 2/20.
3. The Pharmacy Board concluded that Petitioner was guilty of a felony and gross immorality. I.G. Ex. 2/20.
4. The Pharmacy Board concluded that Petitioner had committed acts constituting dishonesty and unprofessional conduct in the practice of pharmacy. I.G. Ex. 2/20.
5. The Pharmacy Board found that Petitioner unlawfully sold or offered to sell controlled substances. I.G. Ex. 2/7-19.
6. Among the controlled substances which the Pharmacy Board found that Petitioner unlawfully sold or offered to sell were Schedule II controlled substances consisting of Percodan, Demerol, and Percocet. I.G. Ex. 2/7-19.

² The I.G.'s exhibits will be cited as "I.G. Ex. (number/page)."

7. The Pharmacy Board found that Petitioner knowingly possessed false or fraudulent prescriptions for controlled substances, including Dexedrine, Preludin, Demerol, and Percodan, Schedule II controlled substances. I.G. Ex. 2/13, /17, /18.

8. The Pharmacy Board found that Petitioner knowingly and unlawfully sold a dangerous drug to a consumer without a prescription. I.G. Ex. 2/19.

9. The Pharmacy Board found that Petitioner unlawfully failed to keep records of all controlled substances which he had received or dispensed. I.G. Ex. 2/14.

10. The Pharmacy Board revoked Petitioner's pharmacist license for reasons bearing on Petitioner's professional competence or performance. Findings 2-9.

11. The Secretary of the Department 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.

12. On September 12, 1990, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(b)(4)(A) of the Act. I.G. Ex. 1.

13. Petitioner's exclusion is effective until such time as his pharmacist license is restored by the State of Ohio and his participation in Medicare and Medicaid is reinstated. I.G. Ex. 1.

14. Petitioner's assertion that the Pharmacy Board acted incorrectly or improperly in revoking his license is not a relevant ground on which to argue that the I.G. lacked authority to exclude Petitioner. See Social Security Act, section 1128(b)(4)(A).

15. There are no disputed material facts in this case and summary disposition is appropriate.

16. The I.G. had authority to exclude Petitioner from participating in Medicare and to direct that he be excluded from participating in Medicaid. Finding 10; Social Security Act, section 1128(b)(4)(A).

17. The exclusion imposed and directed against Petitioner by the I.G. is reasonable. Social Security Act, section 1128(b)(4)(A).

ANALYSIS

The Pharmacy Board revoked Petitioner's Ohio pharmacist license based on findings that Petitioner had committed felonies related to the unlawful sale of controlled substances and that he had engaged in dishonest and unprofessional conduct. Subsequently, the I.G. imposed an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Social Security Act. This section permits exclusion of any individual or entity:

(W)hose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity. . . .

The exclusion imposed and directed by the I.G. is indefinite in duration. Petitioner may request reinstatement as a provider in Medicare and Medicaid when his license is restored.

Petitioner does not deny that his pharmacist license was revoked by the Pharmacy Board. He disputes that it was revoked for reasons bearing on his professional competence or performance. Petitioner argues that the Pharmacy Board's findings in his case are incorrect. He asserts that the Pharmacy Board is presently being sued for making false charges against a pharmacy and from this I infer that Petitioner seeks to challenge the probity and integrity of the Pharmacy Board.

Petitioner does not contend that he has or seeks a pharmacist license in any state other than Ohio, and he does not assert that he wishes to be a participant in Medicare and Medicaid in any status other than as a pharmacist.

1. Petitioner's pharmacist license was revoked by a state licensing authority for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity.

The Pharmacy Board decided that Petitioner was guilty of a felony and of gross immorality. It concluded that Petitioner had committed acts constituting dishonesty and unprofessional conduct in the practice of pharmacy. Findings 3, 4. It based these conclusions on findings that Petitioner had unlawfully: sold controlled substances, including Schedule II controlled substances;

possessed prescriptions which he knew to be false or forged; and failed to keep records of his receipt and sale of controlled substances. Findings 4-9.

I conclude that the reasons expressed by the Pharmacy Board for revoking Petitioner's license bear on Petitioner's professional competence and performance. An essential part of Petitioner's professional performance of his pharmacist's duties was to dispense controlled substances in compliance with law and in a manner which would not endanger the health and safety of his customers. The Pharmacy Board unequivocally found that he had willfully violated this obligation. This finding falls squarely within that which is covered by section 1128(b)(4)(A).

Petitioner argues that the Board did not revoke his license for reasons bearing on his professional competence or performance because it made no finding that Petitioner violated any federal law. However, the terms "professional competence" and "professional performance" in section 1128(b)(4)(A) are not linked to performance of duties in compliance with federal law. An action by a state licensing board to revoke a party's license will fall within section 1128(b)(4)(A) if the reasons expressed for that action bear on the party's professional competence or performance. Such reasons might relate to a violation of federal law, but they might also relate to violations of other laws, or to errors or omissions which are not unlawful, but which bear on competence or performance.

2. The correctness or fairness of the Pharmacy Board's decision revoking Petitioner's pharmacist license is not a relevant question of material fact on which I should receive evidence.

Petitioner argues that the findings made by the Pharmacy Board are incorrect. In his reply to the I.G.'s motion for summary disposition, Petitioner asserts that there exist facts which would substantially refute the Pharmacy Board's findings. Petitioner also seems to be arguing that the license revocation proceedings in his case are tinged with dishonesty by asserting that the Pharmacy Board has been charged with dishonesty in a lawsuit. I infer from these contentions that Petitioner is arguing that the proceedings which resulted in the revocation of his license were defective, and that the I.G.'s exclusion determination is invalid because it is based on defective proceedings.

A petitioner's argument concerning the correctness or fairness of a state licensing board's license revocation proceeding is irrelevant to the issue of whether the I.G. has authority to impose and direct an exclusion based on the board's order revoking that petitioner's license. Andy E. Bailey, C.T., DAB App. 1131 (1990); John W. Foderick, M.D., DAB App. 1125 (1990). The Departmental Appeals Board held in Foderick that:

The authority given to the I.G. to impose and direct exclusions . . . is based on actions taken by state licensing boards. The statute clearly intended that the I.G. was to rely on the state board actions, and did not intend that the I.G. examine the fairness or propriety of the process which led to the actions of the state boards.

Thus, Petitioner's assertions about the correctness or fairness of the Pharmacy Board's decision are irrelevant to the hearing and deciding of this case.³

3. 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. Foderick, at 5-12. There are potential questions of fact which may arise in an exclusion hearing brought to challenge exclusions imposed and directed pursuant to section 1128(b)(4)(A). I have carefully considered this case in terms of those potential fact questions, and I conclude that there exist no disputed issues of material fact with respect to any of them.

The first potential issue of fact is whether Petitioner's license was revoked for reasons bearing on his professional competence or professional performance. There are no disputed material facts as to the reason the Pharmacy Board revoked Petitioner's license because Petitioner has not disputed those facts offered by the I.G. which establish that the Pharmacy Board's decision bears on Petitioner's professional competence or performance. Petitioner made collateral arguments concerning the fairness of the Pharmacy Board's action which I have concluded are not relevant to this case.

³ I make no findings as to whether Petitioner has any rights to appeal the Pharmacy Board's decision to revoke his license.

Petitioner has not asserted that the license revocation order (I.G. Ex. 2), which establishes the Pharmacy Board's decision and the basis for it, is inaccurate or incomplete.

The next potential issue of fact is whether it is reasonable to exclude Petitioner until his Ohio pharmacist license is restored. The exclusion imposed and directed by the I.G. is indefinite. Petitioner may not apply for reinstatement as a Medicare or Medicaid provider until such time as his license is restored; there is nothing in the Pharmacy Board's decision which suggests how long it may take for Petitioner to be relicensed or what criteria would be employed to evaluate a request by Petitioner to have his license restored. Furthermore, the exclusion applies in all jurisdictions where Medicare and Medicaid items or services are reimbursed and it applies to all types of items or services (not limited to pharmacy items or services) for which Petitioner might seek reimbursement. Walter J. Mikolinski, Jr., DAB App. 1156 (1990).

The Departmental Appeals Board (the Appeals Board) has decided that in some circumstances where a license has been revoked Congress intended section 1128(b)(4) to authorize the I.G. to impose and direct exclusions until such time as the license is restored. Foderick at 11.

The petitioner in Foderick surrendered his license to practice medicine to a state licensing board rather than participate in a state license revocation hearing. As in this case, the I.G. excluded Petitioner until such time as Petitioner succeeded in having his license reinstated. I concluded that, under the facts of the case, the exclusion was per se reasonable. I entered summary disposition in favor of the I.G. sustaining the exclusion. The Appeals Board affirmed this decision. It held that the Act was:

designed to ensure that health care providers who lose their licenses for reasons related to their professional competence be prohibited from participating in Medicare and Medicaid in all states until they reacquire their licenses and demonstrate their trustworthiness.

Foderick at 11 (Emphasis added). The Appeals Board therefore concluded that an indefinite exclusion under section 1128(b)(4) -- that is to say, an exclusion whose duration is tied to restoration of a license by the state board which revoked that license -- is within the intent of Congress and is ordinarily per se reasonable.

Subsequently, the Appeals Board identified an exception to this general principle. In Mikolinski, the Board held that an exclusion imposed pursuant to section 1128 applied to all forms of reimbursement that a provider might claim under Medicare or Medicaid. The petitioner in Mikolinski was a pharmacist whose license had been suspended by a state licensing authority for reasons bearing on his professional competence or performance. The I.G. imposed an exclusion whose duration was conditioned on restoration of the petitioner's pharmacist license. Mikolinski was also a nursing home operator. He contended that an exclusion as to his nursing home operation conditioned on restoration of his pharmacist license was not reasonable.

The Appeals Board held that an exclusion could not differentiate among the various items or services for which the petitioner claimed reimbursement. Mikolinski at 5-16. It held, however, that the petitioner's assertions as to the items or services he provided raised the issue of whether an indefinite exclusion whose duration was tied to restoration of petitioner's pharmacist license was reasonable. The Appeals Board held that the petitioner's assertions raised an issue of fact which would not justify a finding that the indefinite exclusion was per se reasonable. The Board found that:

Subsection 1128(g)(2) of the Act does not require that an exclusion based on license suspension under subsection 1128(b)(4)(A) be effective until the excluded individual regains a valid license.

Id. at 22. It remanded the case to the administrative law judge with directions to take additional evidence as to the reasonableness of the length of the exclusion.

On its face, this finding would appear to be inconsistent with the Appeals Board's decision in Foderick.⁴ However, the apparent inconsistency of the two holdings vanishes when Mikolinski is considered in the context of its unique facts. The facts which distinguish Mikolinski from Foderick are that in Mikolinski, the petitioner asserted that he provided items or services other than those which were within the scope of his suspended license. No such assertion was made by the petitioner in Foderick. The Mikolinski decision stands for the rule

⁴ The Appeals Board did not discuss the Foderick case in its Mikolinski decision.

that where such assertion is made, it may raise a disputed issue of material fact concerning the reasonableness of the exclusion.

That issue arises by virtue of the overall remedial purpose of section 1128. The exclusion provisions are not intended to punish providers who lose their professional licenses. They are intended to protect the integrity of federally-financed health care programs and the welfare and safety of beneficiaries and recipients of those programs from parties who have demonstrated that they are untrustworthy. An exclusion is reasonable if it fairly addresses that remedial purpose. It is not reasonable if it bears no rational relationship to the remedial purpose of the Act.

The Foderick decision holds that Congress made a legislative finding that parties who lose their licenses to provide health care should under most circumstances be deemed untrustworthy until they regain such licenses. The Mikolinski decision addresses the exception to this rule, that being the circumstance where the criteria for relicensure bear no rational relationship to the provider's trustworthiness to furnish items or services which are not related to those items or services that are within the scope of the license. Under that unique circumstance, an exclusion as to all programs may not be reasonable, if its duration is tied to relicensure for one class of items or services.⁵ The Mikolinski decision therefore constitutes an exception to the general rule legislated by Congress and affirmed by the Appeals Board in Foderick.⁶

⁵ The Mikolinski decision does not hold as a matter of law that such exclusions are unreasonable. Rather, it identifies a fact question which may arise in those cases where a party asserts that is providing items or services which are beyond the scope of those covered by his health care license. In that circumstance, an exclusion as to all programs whose duration is tied to restoration of the license may be unreasonable, but it may also be reasonable, depending on the facts.

⁶ The facts within the Mikolinski holding may not be the only exception to the general rule. There may exist other circumstances where an exclusion whose duration is tied to restoration of a professional license is not per se reasonable. For example, a provider of health care may have his or her license revoked by a state for reasons bearing on his or her professional competence or performance. That provider may relocate to

Petitioner has not contended that he provides items or services other than those which were within the scope of his pharmacist license.⁷ Therefore, Petitioner has not raised the fact issue which distinguishes Mikolinski from Foderick. I conclude that the material fact as to the reasonableness of the length of the exclusion in this case is that Petitioner's Ohio pharmacist license has been revoked. This is uncontested. Therefore, summary disposition is appropriate in this case.

4. The exclusions imposed and directed against Petitioner are reasonable.

The facts of this case are on all fours with the facts in Foderick. Petitioner's Ohio pharmacist license was revoked by the Pharmacy Board. The exclusion imposed and directed by the I.G. is effective until such time as the license is restored. This exclusion complies with Congressional intent. Therefore, it is reasonable.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from the Medicare program, and to direct that Petitioner be excluded from participating in Medicaid, was authorized pursuant to section 1128(b)(4)(A) of the Act and is reasonable. Therefore, I enter summary disposition in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge

another state and apply for a health care license in that state. That state's licensing authority may grant a license after a rigorous scrutiny of the provider's qualifications to provide health care, including the circumstances which resulted in loss of license in the first state. In that situation, it may not be per se reasonable to conclude that the exclusion must continue in effect until such time as the provider returns to the state which revoked his or her license, reapplies for licensure in that state, and reacquires the license.

⁷ Nor has Petitioner contended that he has a pharmacist license in any jurisdiction other than Ohio.