

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	
Leonard R. Friedman M.D.,)	DATE: April 10, 1991
)	
Petitioner,)	
)	
- v. -)	Docket No. C-269
)	
The Inspector General.)	Decision No. CR125
)	

DECISION

Petitioner requested a hearing to contest a determination by the Inspector General (I.G.) to exclude Petitioner from participation in the Medicare program and certain federally-assisted State health care programs.¹ Petitioner was advised by the I.G. that he was being excluded from participation in the Medicare and Medicaid programs due to the revocation of his license to practice medicine in the State of New York by the Office of Professional Discipline of the State Education Department of New York. The I.G. alleged that the exclusion was authorized by section 1128(b)(4)(A) of the Social Security Act (Act). The exclusion was to remain in effect until Petitioner obtains a valid license to practice medicine in the State of New York.

Petitioner timely requested a hearing, and the case was assigned to Administrative Law Judge (ALJ) Charles E. Stratton for a hearing and decision. Judge Stratton conducted a prehearing conference by telephone. During the telephone conference, the I.G. stated his intention to move for summary disposition. Thereafter, the I.G.

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

filed a motion for summary disposition. Petitioner filed a timely response in the form of a counter motion for summary judgment. Petitioner requested oral argument on the motion, and oral argument was scheduled. The case was subsequently assigned to me to conduct any further proceedings and for decision. I held oral argument in Boston, Massachusetts, on March 22, 1991.

I have considered the arguments contained in both parties' motion for summary disposition, the undisputed material facts, and applicable law and regulations. I conclude that the exclusion imposed and directed by the I.G. is authorized by section 1128(b)(4)(A) of the Social Security Act and is reasonable. I am, therefore, deciding this case in favor of the I.G.

ISSUES

1. Whether Petitioner's license to provide health care was revoked by any state licensing authority for reasons bearing on his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(A) of the Act;
2. Whether section 1128(b)(4)(A) of the Act permits an exclusion under the circumstances of this case; and
3. Whether the period of Petitioner's exclusion is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician specializing in forensic psychiatry and held a valid license to practice medicine in the State of Massachusetts prior to June 24, 1987 and in the State of New York prior to November 29, 1989. Inspector General's Exhibit 2/12.²

² The citations to the record in this Decision are designated as follows:

Inspector General's Exhibits	I.G. Ex. (number)
Inspector General's Brief	I.G. Br. (page)
Petitioner's Exhibits	P. Ex. (number)
Petitioner's Brief	P. Br. (page)

2. On or about June 24, 1987, the Massachusetts Board of Registration in Medicine issued a Final Decision and Order whereby Petitioner's license to practice medicine in Massachusetts was revoked. The Board found that Petitioner, a psychiatrist, engaged in sexual activity with one of his patients, during one or more office visits made by the patient. The Board concluded that Petitioner committed "gross misconduct in the practice of medicine". I.G. Ex. 4.

3. The Massachusetts Board of Registration in Medicine concluded that Petitioner's conduct in engaging in sexual activity with his patient during one or more office visits demonstrated a lack of good moral character and undermined public confidence in the integrity of the medical profession. I.G. Ex. 4.

4. The Massachusetts Board of Registration in Medicine is the duly authorized professional disciplinary agency of that state. I.G. Ex. 2 and 4.

5. In November, 1989 the New York State Education Department revoked Petitioner's license to practice medicine. I.G. Ex. 2.

6. The New York State revocation was based on its findings that:

[Petitioner] has been found guilty, after an administrative hearing in the State of Massachusetts, of improper professional practice and professional misconduct by a duly authorized professional disciplinary agency of another state, which conduct would, if committed in New York State, constitute professional misconduct under New York Education Law section 6509(9) in conjunction with 8 NYCRR section 29.1(b)(5) and 8 NYCRR section 29.4(a)(5)(i) -- conduct in the practice of a profession which evidences moral unfitness to practice the profession and which conduct includes any physical contact of a sexual nature between physician and patient -- as set forth in the statement of charges and the record herein.

I.G. Ex.2.

7. The New York State Education Department is a state licensing authority within the meaning of section 1128(b)(4)(A).

8. Physical conduct of a sexual nature between physician and patient is a professional activity and is related to Petitioner's professional competence and professional performance. Findings 2-6.

9. Petitioner's license was revoked by the Massachusetts' Board for reasons bearing on his professional competence and professional performance. Findings 2-4.

10. Petitioner's license was revoked by the New York State Department of Education for reasons bearing on his professional competence and professional performance within the meaning of section 1128(b)(4)(A) of the Act. Findings 5-6.

11. By letter dated July 5, 1990, the I.G. notified Petitioner that he would be excluded from the Medicare and Medicaid programs until he obtained a valid license to practice medicine in New York. I.G. Ex. 1.

12. The I.G. subsequently modified his position and gave notice to Petitioner that he would be excluded from the Medicare and Medicaid programs until he obtained a valid license to practice medicine in either New York or Massachusetts. I.G. Reply Br. p.4.

13. Section 1128(b)(4)(A) authorizes the Secretary of Health and Human Services (and his delegate, the I.G.), to impose and direct exclusions of individuals whose license to provide health care has been revoked by any State licensing authority for reasons bearing on professional competence or professional performance. 42 U.S.C. 1320a-7(b)(4)(A).

14. The I.G. had authority to exclude Petitioner under section 1128(b)(4)(A) of the Act.

15. The I.G.'s exclusion of Petitioner until he obtains a valid license to practice medicine in either New York or Massachusetts is reasonable.

ANALYSIS

1. The New York State Department of Education revoked Petitioner's license to practice medicine in New York for reasons bearing on Petitioner's professional competence and professional performance.

It is undisputed that Petitioner's license to provide health care in New York was revoked by the New York State Department of Education and that this body is a State

licensing authority within the meaning of section 1128(b)(4)(A) of the Act. There is also no dispute that Petitioner's license revocation was based on Petitioner's conduct while treating a patient in the State of Massachusetts.

The misconduct in question involved that of a psychiatrist engaging in sexual activity with a patient while in the purported treatment of that patient. The conduct was found to have violated the standards of medical practice by the state licensing body in two separate jurisdictions. Both the states of New York and Massachusetts revoked Petitioner's license for professional misconduct. Petitioner's conduct constituted an abuse of his privileges as a physician.

I find that Petitioner's license was revoked for reasons bearing on both his competence and his performance as a physician.

2. The I.G. is authorized to exclude Petitioner by section 1128(b)(4)(A) of the Act.

a. Arguments pertaining to the fairness of the proceedings which led to the revocation by the Massachusetts and New York state licensing authorities are not relevant to the exclusion proceeding.

Petitioner has presented numerous challenges to the validity of the revocation action taken by the State of New York. Considering all the arguments as a whole, Petitioner seems to contend that the I.G. may not rely on the decision by the New York licensing authority because both that decision and the decision by the Massachusetts licensing authority, upon which New York relied, are legally flawed. Petitioner contends that he was denied basic due process fairness, or was otherwise deprived of his constitutional rights, by both bodies. However, as the I.G. has noted, the issues raised by Petitioner in his challenges to the actions of these two licensing authorities are extraneous to this proceeding. Claims of impropriety in state license revocation proceedings are not relevant to deciding whether the I.G. acted properly to impose and direct exclusions pursuant to section 1128(b)(4)(A). See John W. Foderick, M.D., DAB App. 1125 (1990); Andy E. Bailey, C.T., DAB App. 1131 (1990); and Frank Waltz, M.D., DAB Civ. Rem. C-86 (1989). It was held in those cases that the I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(A) emanates from the actions taken by state licensing boards and that the law did not intend that the Secretary

examine the fairness of the process which led to the state boards' decisions. I agree. An exclusion may not be used by Petitioner to mount a collateral attack on the state boards' decisions. If Petitioner thinks that there are serious flaws in either or both decisions, he should challenge them in the proper forum.³

b. Section 1128(b)(4)(A) is not being applied retroactively by the I.G. in this case.

Petitioner further argues that the I.G. was not authorized to exclude his participation in the Medicare and Medicaid programs under section 1128(b)(4)(A) because the conduct which formed the basis for the revocation of his license in Massachusetts and New York occurred prior to the effective date of the statute. I have taken this argument to mean that the I.G. has unlawfully given retroactive effect to section 1128(b)(4)(A). The I.G. states that he based exclusion on the fact of revocation of license by the State of New York, which revocation occurred in November 1989, well after the effective date of the statute; therefore, there is no retroactive application.

I find no merit to Petitioner's contention and hold that the exclusion based on section 1128(b)(4)(A) is appropriate in this case.

Section 1128(b)(4)(A) of the Act, which was enacted on August 18, 1987 but which became effective September 1, 1987, provides that the Secretary (or his delegate, the I.G.) may exclude from participation in the Medicare and Medicaid programs:

Any individual or entity whose license to provide health care has been revoked or suspended by any State licensing authority,

³ The evidence shows that Petitioner did, in fact, challenge the decision of the Massachusetts licensing authority on the grounds that his right to due process was violated. He appealed to the Massachusetts Supreme Judicial Court. His appeal was heard first by a single justice of the court and then by four justices. In the two decisions issued by that court, dated November 14, 1989 and December 18, 1989, the court affirmed the license revocation action taken by the Massachusetts Board. It held that Petitioner had not been denied due process before the revocation of his license. See I.G. Exs. 5 and 6.

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

I have already determined that Petitioner's license was revoked by a state licensing authority (New York) for reasons bearing on his professional performance and competence, within the meaning of section 1128(b)(4)(A) of the Act.

The language of subsection 1128(b)(4)(A) is without qualifying terms or conditions. Furthermore, as demonstrated by the legislative history, Congress intended to protect Medicare and Medicaid patients from physicians whose license had been revoked by any state licensing authority. Moreover, in providing the Secretary with discretion to exclude based on revocation by any state licensing authority occurring immediately or shortly after enactment (September 1, 1987), Congress had to know that the underlying reason for the revocation would likely be conduct which had occurred prior to the effective date. Thus, by logical inference, Congress intended the 1987 amendments to apply even in those cases where the misconduct or other act which led to revocation occurred prior to August 18, 1987.

The preceding interpretation of the language of section 1128(b)(4)(A) is supported by the recent decision of The United States District Court for the Northern District of New York. In the case of William A. Baker, M.D. v. Louis Sullivan, Secretary, F. Supp., U. S. Dist. Lexis 15492 (N.D.N.Y., Nov. 1990), District Court Judge Neal P. McCurn reviewed the legislative history of section 1128(b)(4)(B).⁴ That case involved Petitioner's alleged surrender of his license in December 1987 after investigation of his alleged professional misconduct which had occurred in 1982. The I.G. had excluded the petitioner on the grounds that he had "surrendered" his license while a formal disciplinary proceeding concerning his professional competence was pending before a state licensing authority. The petitioner contended that the I.G. was giving retroactive application to section 1128(b)(4)(B) because the conduct in question had occurred in 1982. Judge McCurn wrote that the legislative history showed that the amendments to 42

⁴ The court cited the "Historical and Statutory Notes" section relating to the amendments of 42 U.S.C.A. section 1320a-7, p.40 (1990 Supplementary Pamphlet).

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)(A) of the Act. I conclude further that the term of the exclusion is reasonable.

/s/

Constance T. O'Bryant
Administrative Law Judge