

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

|                           |   |                    |
|---------------------------|---|--------------------|
| In the Case of:           | ) |                    |
| Richard L. Pflepsen, D.C. | ) | DATE: June 4, 1991 |
| Petitioner,               | ) |                    |
| - v. -                    | ) | Docket No. C-345   |
| The Inspector General.    | ) | Decision No. CR132 |
|                           | ) |                    |

DECISION

On September 21, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.<sup>1</sup> The I.G. told Petitioner that he was being excluded because his license to provide health care in the State of Iowa had been revoked. Petitioner was advised that the Secretary of the Department of Health and Human Services (the Secretary) was authorized under section 1128(b)(4)(B) of the Social Security Act (Act) to exclude parties whose licenses to provide health care had been suspended or revoked or who had surrendered their licenses to provide health care, for reasons relating to such parties' professional competence, performance, or financial integrity. The I.G. further advised Petitioner that he would be eligible to apply for reinstatement as a provider of Medicare and Medicaid items or services when he obtained a valid license to provide health care from the State of Iowa.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The I.G. moved to dismiss Petitioner's hearing request on the ground that Petitioner had not timely filed it. On April 25, 1991, I

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<sup>1</sup> "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.

issued a Ruling denying the I.G.'s motion. The I.G. then moved for summary disposition. I advised Petitioner that he would have until May 20, 1991 to file a response to the motion. Petitioner has not filed a response.

I have considered the facts alleged by the I.G. in connection with his motion for summary disposition. I have also considered the I.G.'s arguments and applicable law. I conclude that the I.G. established that he has authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. I also conclude that, based on the undisputed material facts adduced by the I.G., the exclusion imposed and directed against Petitioner is reasonable. Therefore, I enter summary disposition in favor of the I.G.

#### ISSUES

The issues in this case are whether the:

1. I.G. has authority to impose and direct an exclusion against Petitioner under section 1128(b)(4)(B) of the Act; and

2. length of the exclusion which the I.G. imposed and directed against Petitioner is reasonable.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a chiropractor who has practiced in the State of Iowa. I.G. Ex. 1, 2.<sup>2</sup>

2. On May 9, 1990, the Iowa Board of Chiropractic Examiners (Board of Examiners) notified Petitioner that a disciplinary hearing had been scheduled concerning his license to practice as a chiropractor in the State of Iowa. I.G. Ex. 1.

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<sup>2</sup> The I.G. submitted two exhibits with his motion for summary disposition. These exhibits are separated by cover pages marked "1" and "2." On May 23, 1991, the I.G. filed proposed exhibits for introduction into evidence at a hearing in this case. These exhibits included I.G. Ex. 1 and 2, which are identical to exhibits "1" and "2" attached to the I.G.'s motion. The proposed exhibits were also accompanied by a declaration of authenticity. For purposes of deciding the motion for summary disposition, I am admitting into evidence I.G. Ex. 1 and 2 and will refer to them in my Findings of Fact and Conclusions of Law.

3. The Board of Examiners told Petitioner that the hearing would address the issue of whether or not disciplinary action should be taken against Petitioner's license as a result of alleged violations by Petitioner of the Board of Examiners' rules concerning: habitual intoxication or addiction to drugs; inability to practice chiropractic with reasonable skill and safety by reason of a mental or physical impairment or chemical abuse; and violating a lawful order of the Board of Examiners, previously entered against Petitioner in a disciplinary hearing. I.G. Ex. 1.

4. The Board of Examiners told Petitioner that allegations against him included allegations that he had continued to use drugs since 1988 and failed to comply with an order to advise the Board of Examiners of any initiation or final disposition of any charge or allegations against him by any agency. I.G. Ex. 1.

5. On August 19, 1990, Petitioner entered into a settlement agreement with the Board of Examiners. I.G. Ex. 2.

6. Pursuant to the settlement agreement, Petitioner's license to practice as a chiropractor in Iowa was revoked. I.G. Ex. 2.

7. The settlement agreement precluded Petitioner from applying for reinstatement of his license for at least one year from the date of the agreement. I.G. Ex. 2.

8. The settlement agreement conditioned Petitioner's eligibility for reinstatement on his providing evidence of successful completion of a substance abuse program, including submitting any records or information that the Board of Examiners deemed necessary. I.G. Ex. 2.

9. The settlement agreement further conditioned Petitioner's eligibility for reinstatement on his submitting to any additional substance abuse evaluations deemed necessary by the Board of Examiners, at Petitioner's expense, including submitting to witnessed blood or urine testing. I.G. Ex. 2.

10. The settlement agreement further conditioned Petitioner's eligibility for reinstatement on his providing evidence of completion of the appropriate number of continuing education hours as required by Iowa regulation. I.G. Ex. 2.

11. Petitioner surrendered his license to practice as a chiropractor in Iowa to the Board of Examiners, a state licensing board, while a formal disciplinary proceeding was pending before that board. Findings 2, 5, 6.

12. The Board Examiners proceeding against Petitioner concerned his professional competence or performance. Findings 3, 4.

13. 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.

14. On September 21, 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)(B) of the Act.

15. Petitioner's exclusion is effective until such time as he receives a valid license to practice health care in the State of Iowa.

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

17. The I.G. had authority to exclude Petitioner from participating in Medicare and to direct that he be excluded from participating in Medicaid. Findings 11, 12; Social Security Act, section 1128(b)(4)(B).

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

#### ANALYSIS

There are no disputed material facts in this case. The I.G. offered exhibits consisting of copies of the official records of the Board of Examiners. Petitioner did not challenge the authenticity or contents of the exhibits. The exhibits establish that Petitioner is a chiropractor who was licensed to practice in the State of Iowa. In May 1990, the Board of Examiners notified Petitioner that a disciplinary hearing had been scheduled concerning his license. Petitioner was notified that possible grounds for disciplinary action against him included: habitual intoxication or addiction to drugs; inability to practice chiropractic with reasonable skill and safety by reason of a mental or physical impairment or chemical abuse; and violation of a Board of Examiners' order previously entered against Petitioner in a

disciplinary hearing. Petitioner was advised that these possible grounds for discipline were the result of allegations that he had continued to use drugs since 1988 and failed to advise the Board of Examiners of the initiation or final disposition of allegations against him by another agency.

In August 1990, Petitioner and the Board of Examiners entered into a settlement agreement. The terms of the agreement included revocation of Petitioner's license to practice as a chiropractor in Iowa. The agreement provided that, after one year, Petitioner would be eligible to apply to the Board of Examiners for reinstatement. However, reinstatement would be conditioned on Petitioner providing evidence that he had successfully completed a program of treatment for substance abuse. Reinstatement was further conditioned on Petitioner agreeing to submit to tests for substance abuse as determined to be necessary by the Board of Examiners. Finally, the Board required Petitioner, as a condition for reinstatement, to provide evidence of completion of continuing education courses as required by state regulation.

The I.G. imposed and directed an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. This section permits exclusion of any individual or entity:

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

The term of the exclusion imposed and directed by the I.G. against Petitioner is coterminous with Petitioner's license revocation. Petitioner will be eligible to apply to the I.G. for reinstatement as a provider of Medicare and Medicaid upon reinstatement of his Iowa license to practice as a chiropractor.<sup>3</sup> The effect of the

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<sup>3</sup> The precise wording of the exclusion notice is that the "exclusion will remain in effect until . . . [Petitioner] obtain[s] a valid license to provide health care in the State of Iowa." Arguably, this could be read to condition Petitioner's eligibility for reinstatement on his obtaining any health care license from the State of Iowa, including a license to provide care other than

exclusion is to bar Petitioner from receiving payment for any Medicare items or services for which he might claim reimbursement. The duration of the exclusion is indefinite. Although Petitioner may be eligible to apply for reinstatement of his license to practice as a chiropractor as early as August 19, 1991, his eligibility for reinstatement is also conditioned on his satisfying the other terms of the settlement agreement, including proving that he has successfully completed a program of treatment for substance abuse and that he has met Iowa's continuing education requirements. There is no guarantee that Petitioner will meet these requirements by August 1991, or that he will ever meet them.

Petitioner did not file a response to the I.G.'s motion for summary disposition. In his hearing request, Petitioner contended that the Board of Examiners' disciplinary proceeding against him did not concern his professional competence or performance. Petitioner did not deny that he had surrendered his license while a formal disciplinary proceeding was pending against him. Nor did Petitioner assert that the term of the exclusion, assuming the I.G. had authority to exclude him, was unreasonable. Petitioner does not contend that he has or seeks a license to provide chiropractic services in any state other than Iowa, and he does not assert that he wishes to be a participant in Medicare and Medicaid in any status other than as a chiropractor.

1. The I.G. has authority to impose and direct an exclusion against Petitioner under section 1128(b)(4)(B) of the Act.

The notice sent to Petitioner by the Board of Examiners shows that the proceeding against him constituted formal disciplinary proceedings which concerned his professional competence or performance. Petitioner was specifically notified by the Board of Examiners that it had scheduled a disciplinary hearing concerning his license to provide health care. It advised Petitioner that the possible grounds for action concerning his license included

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chiropractic services. However, in his motion for summary disposition, the I.G. asserts that "the length of the Petitioner's exclusion has been set to coincide with the duration of the suspension of his license by the State." I.G.'s Motion at 6. It is evident that the intent of the exclusion, as distinguished from the imprecise wording of the notice, was to make the exclusion coterminous with Petitioner's suspension from practice as a chiropractor in Iowa.

Petitioner's habitual intoxication or addiction to drugs and inability to practice chiropractic with reasonable skill and safety by reason of a mental or physical impairment or chemical abuse.

Although the terms "professional competence" and "professional performance" are not defined in section 1128(b)(4), the plain meaning of these terms encompasses the ability to practice a licensed service with reasonable skill and safety. Thus, the basis for the Board of Examiners' disciplinary proceeding against Petitioner fell squarely within the meaning of section 1128(b)(4)(B).

In his hearing request, Petitioner asserted that the basis for the Board of Examiners' proceeding against him did not concern his professional competence or performance. Petitioner averred that the proceedings related to a criminal charge for fraud filed against him in 1990 by the State of Iowa concerning an application which Petitioner had filed for a credit card application.

I do not find that the Board of Examiners' notice to Petitioner proves that the proceedings were in any respect related to a criminal charge of fraud. See I.G. Ex. 1. The Notice did include allegations concerning Petitioner's failure to report to the Board of Examiners the initiation or final disposition of criminal charges, including a conviction for theft and an arrest for an undisclosed offense. Arguably, Petitioner's asserted failure to report these events could concern his financial integrity. However, it is unnecessary for me to make findings on this issue because the Board of Examiners' proceedings so plainly concerned Petitioner's professional competence and performance.

2. The length of the exclusion which the I.G. imposed and directed against Petitioner is reasonable.

As I note above, Petitioner has not contended that the indefinite exclusion imposed and directed by the I.G. is unreasonable. I conclude that the exclusion is on its face reasonable and I sustain it in the absence of any allegation that it is not reasonable.

Section 1128 is a civil remedies statute. The purpose of any exclusion imposed and directed pursuant to this section is remedial. The remedial purpose of the exclusion law is to enable the Secretary to protect federally-funded health care programs from misconduct, including fraud or theft. It also includes neglectful

or abusive conduct against program recipients and beneficiaries. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. & Admin. News 682.

The remedial purpose of section 1128(b)(4) encompasses protection of program funds and beneficiaries and recipients from providers who have been determined by state licensing authorities either to be dishonest, or to lack the competence or professional ability to provide services consistent with the requirements for licensure. The remedy also extends to protect the program funds and beneficiaries and recipients from providers who, when faced with disciplinary action by state licensing authorities concerning their professional competence, performance, or financial integrity, elect to surrender their licenses in lieu of completing a formal disciplinary process.

Petitioner and the Board of Examiners agreed to a revocation of Petitioner's license to provide health care and stipulated the conditions which would qualify him for reinstatement of his license. Those conditions related to the basis for the disciplinary proceeding that had been initiated against Petitioner. The notice of hearing which the Board of Examiners sent to Petitioner evidences a concern that Petitioner, by virtue of possible abuse of drugs, was unable to practice chiropractic with reasonable skill and safety. From the face of the settlement agreement, it is apparent that the Board of Examiners found that the key prerequisite to license reinstatement was that Petitioner prove that he was not continuing to engage in substance abuse. Petitioner agreed to this prerequisite and to the other elements of the settlement agreement.

The I.G. addressed the same remedial considerations embodied in the settlement agreement and the terms of Petitioner's license revocation by making the exclusion imposed against Petitioner coterminous with the license revocation. The terms for restoration of licensure, and by extension, for reinstatement as a Medicare and Medicaid provider, are plainly intended to assure that Petitioner not be entrusted to treat program beneficiaries and recipients until he has established that he is no longer engaging in substance abuse. The one-year minimum period of exclusion does not appear to be unreasonable given the allegations made against Petitioner and his acceptance of the settlement agreement. Thus, the conditions of the exclusion are on their face reasonably related to the remedial considerations embodied in section 1128.

I find that the I.G.'s exclusion determination is reasonable in the absence of any fact allegations which would call into doubt its relation to the remedial purpose of section 1128. This conclusion does not mean that Petitioner could not have raised questions of material fact in the context of this proceeding which would have called into question the reasonableness of the exclusion and which would require an in-person hearing to resolve. Lakshmi N. Murty Achalla, M.D., DAB App. 1231 (1991). While an indefinite exclusion, such as that imposed here, may be reasonable under section 1128(b)(4)(B), it is not mandated by that section. Achalla at 9.

In Achalla, for example, the petitioner's state licenses to practice medicine had been revoked by the States of Florida and Pennsylvania and had been placed in "inactive" status by the State of Georgia. The petitioner had subsequently relocated to New York, acquired a license to practice medicine, and had established a practice there. The I.G. had imposed an indefinite exclusion against the petitioner, with eligibility for reinstatement conditioned on the petitioner having his Florida license to practice medicine restored. The administrative law judge who heard that case conducted an in-person hearing and held that, based on the evidence adduced at the hearing, the terms of the exclusion imposed and directed by the I.G. were not reasonable. He modified the exclusion to a term of three years, and the Departmental Appeals Board sustained this decision.

What distinguishes Achalla from this case is that, in Achalla, the petitioner alleged that there were facts that called into question the remedial necessity for the I.G.'s indefinite exclusion determination. A central allegation was the petitioner's argument that the remedial purposes of the Act would not be satisfied by compelling him to have his Florida license restored as a necessary precondition for reinstatement as a Medicare or Medicaid provider.

There may be circumstances in any case under section 1128(b)(4)(B) which would raise disputed material fact issues concerning the reasonableness of an exclusion. The Achalla case provides an example. However, no disputed issue of material fact was raised by Petitioner in this case concerning the reasonableness of the exclusion imposed and directed against him by the I.G. Petitioner has not asserted that the exclusion is unfair. There exists no need for me to hold an in-person hearing to resolve issues that have not been raised, given the

fact that the exclusion in this case is on its face reasonably related to the remedial purpose of the Act. Andy E. Bailey, C.T., DAB App. 1131 (1990); John W. Foderick, M.D., DAB App. 1125 (1990).

#### 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)(B) of the Act and is reasonable. Therefore, I enter summary disposition in favor of the I.G. in this case.

/s/

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Steven T. Kessel  
Administrative Law Judge