

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:

Laurence Wynn, M.D.,

Petitioner,

- v. -

The Inspector General.

DATE: November 21, 1994

Docket No. C-93-062

Decision No. CR344

DECISION

On February 12, 1993, the Inspector General (I.G.) notified Petitioner that he was being excluded from participating in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services. The I.G. stated that the exclusion was authorized by section 1128(b)(5) of the Social Security Act (Act). The I.G. told Petitioner that he was being excluded for a period of five years.

Petitioner requested a hearing. The case was assigned to Administrative Law Judge Charles Stratton for a hearing and a decision. At Petitioner's request, Judge Stratton agreed to stay the case pending the outcome of administrative proceedings in New York State concerning Petitioner's participation in that State's Medicaid program. Eventually, a New York State administrative law judge issued a decision in that proceeding.¹ The parties agreed to proceed to disposition of this case.

The parties agreed that an in-person hearing was not necessary to decide the issues in this case. On June 9, 1994, Judge Stratton issued an order which established a schedule for the parties to file proposed exhibits and briefs. Subsequently, the case was reassigned to me due to the death of Judge Stratton.

¹ Petitioner has appealed that decision to New York State authorities.

I have considered the parties' briefs and exhibits, as well as the applicable law.² I conclude that the five-year exclusion which the I.G. imposed against Petitioner is reasonable. I sustain the exclusion.

I. Issues, findings of fact, and conclusions of law

The I.G. excluded Petitioner pursuant to section 1128(b)(5) of the Act, a section which authorizes the Secretary of the Department of Health and Human Services (or her delegate, the I.G.) to exclude an individual where that individual has been suspended, excluded from participation, or otherwise sanctioned by a State health care program for reasons bearing on that individual's professional competence, professional performance, or financial integrity.³ Petitioner has not asserted that the I.G. lacks authority to exclude him pursuant to section 1128(b)(5). There is no dispute in this case that New York State authorities excluded Petitioner from participation in the New York Medicaid program, a State health care program within the meaning of section 1128(b)(5). Nor is there any dispute that Petitioner was excluded from participating in the New York Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity.

What is disputed in this case is whether the five-year exclusion which the I.G. imposed against Petitioner is reasonable. As to this issue, I make the following findings of fact and conclusions of law. In setting forth these findings and conclusions, I cite to relevant portions of my decision, at which I discuss my findings and conclusions in detail.

1. Under applicable regulations, an exclusion imposed pursuant to section 1128(b)(5) of the Act must be for three years, unless aggravating factors exist which justify an exclusion of more than three years, or unless

² The I.G. submitted five proposed exhibits (I.G. Exs. 1 - 5). Petitioner submitted 11 proposed exhibits (P. Exs. 1 - 11). Neither party objected to the admission into evidence of the other party's proposed exhibits. I admit all of the exhibits into evidence.

³ This section also authorizes an exclusion where an individual has been suspended, excluded from participation, or otherwise sanctioned by any federal program involving the provision of health care.

mitigating factors exist which justify an exclusion of less than three years. Page 5.

2. There are no mitigating factors in this case. Pages 5 - 6.

3. The I.G. proved the presence of an aggravating factor, in that Petitioner was excluded from participating in the New York Medicaid program for more than three years. Page 7.

4. The I.G. proved the presence of an additional aggravating factor, in that the conduct which caused Petitioner's exclusion from the New York Medicaid program had or could have had an adverse impact on that program or program recipients. Pages 7 - 9.

5. The seriousness of the conduct which caused Petitioner's exclusion from the New York Medicaid program establishes Petitioner to be an untrustworthy provider of care and justifies an exclusion of five years. Page 10.

6. Because the two aggravating factors proved by the I.G. establish that a five-year exclusion is reasonable, it is not necessary for me to decide whether Petitioner's exclusion by the New Jersey Medicaid program is an additional aggravating factor. Pages 9 - 10.

7. I do not have the authority to decide Petitioner's argument that the I.G.'s exclusion determination deprived Petitioner of his rights under the Fifth Amendment of the United States Constitution. Pages 10 - 11.

II. Discussion

The following facts are undisputed. Petitioner was excluded from participating in the New York Medicaid program based on findings -- in administrative proceedings in New York State -- that he had engaged in improper record keeping, that he had ordered and claimed reimbursement for unnecessary services, and that these practices resulted in substantial overpayments to him. Petitioner challenged these findings. They were largely sustained, based on the record adduced at the New York State administrative hearing. The undisputed facts also are that Petitioner was suspended from participating in the New Jersey Medicaid program based entirely on the determination in New York to exclude him from participating in the New York Medicaid program.

Petitioner is a physician who has practiced in both New York and New Jersey. On July 2, 1990, the New York State Department of Social Services (DSS) advised Petitioner that it had determined that he had engaged in unacceptable practices, causing the New York Medicaid program to make overpayments for Medicaid services or supplies which Petitioner ordered or for which he claimed reimbursement. I.G. Ex. 1 at 1. DSS determined that Petitioner had failed to maintain medical records necessary to fully disclose the need for, and the nature and extent of, the care which Petitioner claimed to have provided to Medicaid recipients. Id. DSS determined further that Petitioner had furnished or ordered medical care and services and supplies that were substantially in excess of Medicaid recipients' needs. Id. DSS determined to exclude Petitioner from participating in the New York Medicaid program for a period of five years. Id. at 2.

Petitioner requested a hearing regarding DSS' determination to exclude him from participating in the New York Medicaid program. An administrative hearing was conducted by a New York State administrative law judge. On March 23, 1994, a decision was rendered sustaining the State Medicaid exclusion. I.G. Ex. 5. The decision concluded that Petitioner engaged in unacceptable record keeping practices. Id. at 5. It concluded also that Petitioner provided excessive services to Medicaid recipients. Id. Finally, it concluded that Petitioner had caused DSS to make overpayments in the amount of \$223,867. Id.

The decision was based on evidence obtained from an audit of Petitioner's patient records which proved that, in a number of cases, Petitioner had failed to document: the need for the treatments that he had provided, the drugs which he prescribed to Medicaid recipients, or, in some instances, the services for which he claimed reimbursement. I.G. Ex. 5 at 11 - 20. The decision was based also on evidence obtained from an audit of Petitioner's reimbursement claims and Petitioner's records of the services for which the claims ostensibly were made. That audit found that Petitioner had claimed reimbursement for providing comprehensive services to Medicaid recipients when, in fact, he had provided less extensive services to those recipients. Id. at 20 - 27. The finding of an overpayment was based on a review of a sample of the reimbursement claims to the New York Medicaid program for Petitioner's services and those which he had ordered, extrapolated as a percentage of the total number of those claims. Id. at 27 - 28.

On December 13, 1990, the New Jersey Department of Human Services advised Petitioner that it had determined to suspend him from participating in the New Jersey Medicaid program. I.G. Ex. 2 at 1. This determination was based on the determination to exclude him from participating in the New York Medicaid program. Subsequently, a hearing was held before a New Jersey State administrative law judge. The evidence adduced at that hearing was limited to the July 2, 1990 notice of exclusion that had been sent to Petitioner by DSS concerning his participation in the New York Medicaid program. *Id.* at 8 - 9. At the hearing, debarment was sought as a remedy. The administrative law judge found that a suspension, and not debarment, was the appropriate remedy. On review, the Director of the New Jersey Department of Human Services Division of Medical Assistance and Health Services modified this ruling to impose the remedy of debarment. *Id.* at 2 - 6. This decision was appealed to the Appellate Division of the Superior Court of New Jersey, which modified the director's decision to conform with the decision of the administrative law judge. *Id.* at 7 - 14.

A. The presence of aggravating factors

Regulations which govern the length of exclusions imposed pursuant to section 1128(a) and (b) of the Act are contained in 42 C.F.R. Part 1001. The specific regulation governing exclusions imposed pursuant to section 1128(b)(5) is 42 C.F.R. § 1001.601. The regulation provides that an exclusion imposed pursuant to section 1128(b)(5) will be for a term of three years in the absence of any factors defined as either aggravating or mitigating. 42 C.F.R. § 1001.601(b)(1).

An exclusion under section 1128(b)(5) may be for more than three years where aggravating factors exist that are not offset by mitigating factors. An exclusion may be for less than three years if there exist mitigating factors which are not offset by aggravating factors. The factors which may be aggravating consist of the following:

- (i) The acts that resulted in the exclusion, suspension or other sanction under the Federal or State health care program had, or could have had, a significant adverse impact on Federal or State health care programs or the beneficiaries of those programs or other individuals;

(ii) The period of exclusion, suspension or other sanction imposed under the Federal or State health care program is greater than three years; or

(iii) The individual or entity has a prior criminal, civil or administrative record.

42 C.F.R. § 1001.601(b)(2)(i) - (iii).

Factors which may be mitigating are set forth in 42 C.F.R. § 1001.601(b)(3)(i) - (iii). Petitioner concedes that there are no mitigating factors present in this case. Petitioner's Brief at 7.

The presence of aggravating factors in a particular case is not in and of itself an automatic basis for excluding a party for more than the three-year benchmark established by the regulation. Section 1128 of the Act is a remedial statute whose purpose is to protect federally financed health care programs and their beneficiaries and recipients from individuals and entities who are not trustworthy to provide care. The presence of an aggravating factor in a given case may establish that a party is sufficiently untrustworthy so as to require a lengthier exclusion than the benchmark period. But, that is not necessarily so. The evidence which establishes the presence of aggravating factors must be evaluated in order to determine whether it shows a party to be so untrustworthy as to merit a lengthier exclusion than the benchmark period. William F. Middleton, DAB CR297, at 11 (1993).⁴

The I.G. argues that there are three aggravating factors present here. First, she asserts that the conduct for which Petitioner was excluded from the New York Medicaid program had or could have had a significant adverse impact on that program or on program recipients. 42 C.F.R. § 1001.601(b)(2)(i). Second, she contends that Petitioner was excluded from a State health care program, New York Medicaid, for a period of more than three years (five years in this case). 42 C.F.R. § 1001.601(b)(2)(ii). Finally, she argues that Petitioner's suspension from the New Jersey Medicaid

⁴ The Middleton case involved an exclusion imposed under section 1128(a)(1) of the Act, rather than under section 1128(b)(5). However, the principal identified in Middleton -- that an exclusion must comport with the Act's remedial purpose in order to be reasonable -- is applicable equally in this case.

program is a prior administrative sanction record. 42 C.F.R. § 1001.601(b)(2)(iii).

Petitioner concedes that the aggravating factor identified at 42 C.F.R. § 1001.601(b)(2)(ii) is present in this case. He acknowledges that he was excluded from participating in the New York Medicaid program for more than three years, although he notes that he continues to appeal that exclusion in New York State court. He contends, however, that the length of the State exclusion was not reasonable and, therefore, should be given little weight.

Petitioner disputes that the aggravating factor identified at 42 C.F.R. § 1001.601(b)(2)(i) is applicable to his case. Petitioner argues that the findings in the State proceeding resulting in his exclusion from the New York Medicaid program do not establish that his conduct had or could have had an adverse impact on program recipients. Petitioner argues that the State findings should be given no weight, because the evidence underlying the administrative decision in the New York State hearing as to his exclusion is not conclusive. Petitioner's Brief at 8. Petitioner asserts that the majority of the medications which he prescribed and which are the basis for findings concerning his failure to justify the treatments he provided to Medicaid recipients, were prescribed only for minor ailments. Id. From this, Petitioner argues that, even if he prescribed unnecessary treatments, the treatments caused no harm to patients. Furthermore, Petitioner argues that the amount of the overpayment found in his case, \$223,867, was de minimis in comparison to the total New York Medicaid budget. Id.

Lastly, Petitioner disputes that his suspension from the New Jersey Medicaid program is a "prior administrative record" within the meaning of 42 C.F.R. § 1001.601(b)(2)(iii). Petitioner argues that the New Jersey suspension could not constitute a prior administrative record, because it postdated the action in New York and, indeed, was based on the record of the New York exclusion action.

I conclude that the record in this case establishes the presence of two aggravating factors. The record of the New York exclusion proceeding establishes that Petitioner's conduct harmed, or could have harmed, the New York Medicaid program and its recipients. That is an aggravating factor within the meaning of 42 C.F.R. § 1001.601(b)(2)(i). Furthermore, the exclusion imposed in New York against Petitioner exceeded three years in

length, and thus, is an aggravating factor within the meaning of 42 C.F.R. § 1001.601(b)(2)(ii). For reasons which I discuss below, it is not necessary for me to decide whether a third aggravating factor, consisting of a prior administrative sanction, is present here.

The findings in the New York State administrative decision to exclude Petitioner from that State's Medicaid program are not necessarily dispositive as to the presence or absence of aggravating factors in this case. Those findings are evidence which I must evaluate along with other evidence which the parties may offer as to the presence or absence of aggravating factors. Bernardo G. Bilang, M.D., DAB 1295, at 10 - 13 (1992). Moreover, although the New York State decision is not conclusive proof of the presence of aggravating factors in this case, I am entitled to infer that the findings in that decision are accurate, in the absence of some meaningful challenge to their accuracy by Petitioner. Id. at 12.

I have read closely the New York State decision. That decision's findings are buttressed by a careful analysis of both the exhibits offered by the parties to the case, and the testimony of witnesses, including the expert called by Petitioner. I.G. Ex. 5 at 12 - 19.

Petitioner has not pointed to any evidence which would refute the findings in that decision. He argues that I should not rely on that decision without offering a convincing reason for his argument. Moreover, the one specific argument that he makes concerning some of his practices which were at issue in the New York case -- his documentation of the basis for prescribing medication to Medicaid recipients -- is the same argument that he made in the New York case. He argues here, as he did in that case, that a reasonable person could infer from his treatment records why he prescribed a particular medication in a given case. Petitioner's Brief at 8; I.G. Ex. 5 at 12. That argument was rejected in the New York case because it failed to address the question of whether Petitioner's treatment records conformed to applicable regulations governing maintenance of treatment records in Medicaid cases. I.G. Ex. 5 at 12. Petitioner has offered nothing here which would suggest that that conclusion is incorrect.

In the absence of probative evidence to the contrary, I conclude that the decision in the New York State

proceeding establishes by the preponderance of the evidence the following facts:

- Petitioner was excluded from participating in the New York Medicaid program for five years.
- Petitioner prescribed unnecessary treatments and medications to Medicaid recipients.
- Petitioner caused the New York Medicaid program to make overpayments of \$223,867 for services improperly billed or ordered by Petitioner.

I must next evaluate these facts to decide whether they meet the definition of aggravating factors under 42 C.F.R. § 1001.601(b)(2).

These facts plainly establish the presence of two aggravating factors in this case. As Petitioner concedes, the five-year exclusion from the New York Medicaid program is an aggravating factor. Furthermore, I conclude that Petitioner's prescribing of unnecessary treatments and medications and his improper claims resulting in substantial overpayments are also proof of an aggravating factor under 42 C.F.R. § 1001.601(b)(2)(i).

I disagree with Petitioner's argument that his prescribing of unnecessary treatments and medications and his improper claims do not establish either harm or the potential to harm the New York Medicaid program or its recipients. The fact that Petitioner prescribed medications under circumstances where the need for those medications was not documented certainly posed at least the potential for harming recipients. As for the overpayment, I do not find it to be de minimis as Petitioner contends it to be. The amount involved was substantial. It constituted a sum which could have been devoted to other, legitimate purposes by the New York Medicaid program had it not been expended to pay for services improperly billed or ordered by Petitioner.

There is no need for me to make findings here as to whether Petitioner's suspension from the New Jersey Medicaid program is a prior administrative sanction and an aggravating factor. The presence of two aggravating factors authorizes me to consider whether an exclusion of more than three years is reasonable. The I.G. did not rely on this alleged additional aggravating factor as a basis for imposing the five-year exclusion originally. Moreover, even if I were to find the New Jersey suspension to constitute an aggravating factor, I would

not find that it added anything to my conclusions as to Petitioner's trustworthiness to provide care. The New Jersey suspension was based on the action taken against Petitioner in New York. No new evidence was adduced in the New Jersey suspension action.

B. The basis for the five-year exclusion

I conclude that the evidence relating to the two aggravating factors which have been established provides ample grounds for me to conclude that Petitioner is so untrustworthy as to necessitate a five-year exclusion. The findings in the New York administrative proceeding establish that Petitioner engaged in a pattern of improper documentation of the treatments and services he provided and the medication he prescribed. They establish also that Petitioner systematically claimed reimbursement for services which he had not provided. The amount of the overpayment in this case is strong evidence that Petitioner poses a threat of substantial harm to the financial integrity of federally financed health care programs. The fact that New York felt it necessary to impose a five-year exclusion against Petitioner is additional proof that he is untrustworthy and that a five-year exclusion is needed here.

C. Petitioner's constitutional and due process arguments

Petitioner asserts that the I.G.'s exclusion determination was made in violation of his right to due process under the Fifth Amendment of the United States Constitution. Petitioner asserts that the I.G.'s actions have unconstitutionally deprived him of a protected liberty interest. He asserts also that the I.G.'s delay in imposing an exclusion against him deprived him of his right to due process of law.

I do not have the authority to find invalid either federal statutes or regulations. 42 C.F.R. § 1005.4(c)(1). It is unclear from Petitioner's argument whether he is asserting that he has been deprived of a liberty interest as an inevitable consequence of the I.G.'s application of the Act and regulations. If so, that is, in effect, a challenge to the constitutionality of the Act and regulations, which I do not have authority to decide.

On the other hand, it appears that Petitioner may be asserting that the I.G.'s discretionary act -- the determination to exclude him -- deprived him of a liberty interest. If that is so, I also do not have the

authority to decide this assertion because I do not have authority to review the I.G.'s exercise of discretion. 42 C.F.R. § 1005.4(c)(5).

I am certain that Petitioner's challenge to the timing of the exclusion is a challenge to the I.G.'s exercise of discretion. The determination to impose an exclusion in a given case and at a given point in time is an act of discretion by the I.G. which I have no authority to review. 42 C.F.R. § 1005.4(c)(5).

CONCLUSION

I conclude that the five-year exclusion which the I.G. imposed in this case is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge