

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Milan Kovar, M.D.,)	Date: October 15, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-312
)	Decision No. CR550
The Inspector General.)	
)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Milan Kovar, M.D., from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid), for a period coterminous with the revocation of his license to practice medicine or provide health care in the State of New York. I base my decision on evidence which proves that Petitioner's license to practice medicine was revoked by the State of New York Department of Health Administrative Review Board for Professional Medical Conduct, New York State's professional licensing agency. I further base my decision on evidence which proves that Petitioner lost such license, and the right to apply for or renew it, for reasons bearing on his professional competence, professional performance, or financial integrity. Additionally, I find that when an exclusion imposed by the I.G., as here, is concurrent with the remedy imposed by a State licensing authority, such an exclusion is mandated by law.

I. Background facts and procedural history

The facts and law which I recite here are not disputed by the parties.

By letter dated April 30, 1998, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and State health care programs, including Medicaid. The I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Social Security Act (Act) because Petitioner's "license to practice medicine or provide health care in the State of New York was revoked, suspended, or otherwise lost, or was surrendered while a

formal disciplinary proceeding was pending before the licensing authority for reasons bearing on [his] professional competence, professional performance, or financial integrity."

Additionally, the I.G. advised Petitioner that his exclusion would remain in effect "as long as [his] license is revoked, suspended, or otherwise lost."

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on written submissions, and that an in-person hearing was not necessary. The parties have each submitted written arguments and proposed exhibits.

The I.G. submitted three proposed exhibits (I.G. Exhibits (Exs.) 1 - 3). Petitioner did not object to these exhibits. Petitioner submitted four documents with his August 10, 1998 submission which I have designated as Petitioner's Exhibits 1 through 4 (P. Exs. 1-4). Petitioner's Exhibit 1 is a June 16, 1993 letter to Petitioner from the New York Department of Health; Petitioner's Exhibit 2 is one page from the medical records of Patient H.C.; Petitioner's Exhibit 3 is a signed Stipulation and Order in a matter before the New York Department of Health to determine the action to be taken with respect to Petitioner; and Petitioner's Exhibit 4 is an undated letter from Petitioner. The I.G. did not object to Petitioner's exhibits. In the absence of objection, I am admitting I.G. Exs. 1 - 3 and P. Exs. 1 - 4 into evidence in this case. I base my decision in this case on these exhibits, the applicable law, and the argument of the parties.

II. Issue raised

The issue before me is whether Petitioner's license to practice medicine or provide health services was revoked, suspended, or otherwise lost for reasons bearing on his professional competence, professional performance or financial integrity.

III. Findings and discussion.

I make findings of fact and conclusions of law (Findings) which address the issue in this case below. I state each Finding as an italicized heading.

1. Section 1128(b)(4) of the Social Security Act authorizes the I.G. to exclude an individual whose license to practice health care has been revoked or suspended by a State licensing authority, or otherwise lost, for reasons bearing on that individual's professional competence, professional performance, or financial integrity. The minimum term of exclusion of an individual who is excluded pursuant to section 1128(b)(4) of the Act must be coterminous with the term of loss, suspension, or revocation of that individual's license to provide health care.

Section 1128(b) of the Act authorizes the Secretary of Health and Human Services to exclude individuals and entities from receiving payment for services that would otherwise be

reimbursable under Medicare and other state health care programs. 42 U.S.C. § 1320a-7(b). Section 1128(b)(4) of the Act permits the Secretary, acting through her Inspector General, to exclude:

[a]ny individual or entity - (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

Congress amended the Act in 1996 with passage of section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is concurrent with the loss, suspension, or revocation of a State license. A concurrent exclusion, as in Petitioner's case, is the mandated minimum required by law.

2. Petitioner's license to provide health care and his right to apply for or renew such license was revoked on March 21, 1997 by the New York State licensing authority.

Petitioner was licensed to practice medicine in the State of New York. I.G. Ex. 1. He worked as a physician at St. Johnsville Nursing Home and, during his employment there, allegations were made regarding Petitioner's competency as a physician. Specifically, it was alleged that he was grossly incompetent and grossly negligent in his treatment of two patients, negligent on more than one occasion, incompetent on more than one occasion and that he failed to maintain accurate patient records. I.G. Exs. 1 and 2. Petitioner was notified of the nature of the allegations in a Notice of Hearing by the State of New York Department of Health State Board for Medical Conduct.

Petitioner appeared at a formal administrative hearing before a Hearing Committee of the State Board for Medical Conduct on October 24 and 25, 1996. I.G. Exs. 1 and 2. After hearing testimony from both Petitioner and the State of New York regarding the allegations, the Hearing Committee issued a written decision finding that Petitioner was grossly negligent, grossly incompetent and that Petitioner failed to keep adequate patient records. I.G. Ex. 1. The Hearing Committee made its determination as to the penalty based upon consideration of the full spectrum of penalties available pursuant to statute and determined, by unanimous vote, that the most appropriate sanction was to revoke Petitioner's license to practice medicine in New York State.

Petitioner appealed the Hearing Committee's determination to the Department of Health Administrative Review Board for Professional Medical Conduct. The Administrative Review Board conducted a full administrative review of the Hearing Committee's determination and,

on March 21, 1997, issued a written determination, sustaining the Hearing Committee's determination as to the findings against Petitioner and sustaining the Hearing Committee's penalty determination to revoke Petitioner's medical license in the State of New York. I.G. Ex. 3. Petitioner's license to practice medicine in New York was revoked, effective March 21, 1997, and has not been reinstated.

3. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act because Petitioner's license to provide health care has been revoked and his right to apply for or renew such license lost for reasons bearing on his professional competence, professional performance, or financial integrity.

The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act. The record before me clearly reflects that Petitioner's license to provide health care was revoked and the determination to revoke that license was for reasons bearing on his professional competence and professional performance.

Both a Hearing Committee of the New York State Board for Professional Medical Conduct and its Administrative Review Board determined, after a full administrative review of the matter, that Petitioner's treatment of two patients was grossly negligent and grossly incompetent and that Petitioner's patient records were inadequate. There is no question that these findings directly relate to Petitioner's professional competence and performance. Moreover, the Administrative Review Board, in sustaining the Hearing Committee's determination to revoke Petitioner's medical license, did so because it agreed that Petitioner's "serious deficiencies in skill and judgment pose[d] a continuing danger for [Petitioner's] patients." I.G. Ex. 3 at 6.

Petitioner raised several arguments by which he sought to challenge the I.G.'s authority to exclude him. He asserted that he did not provide inappropriate care to his patients, that State proceedings were biased against him and that he was not competently represented in State proceedings. I have considered these arguments. They are an effort to collaterally attack the actions of the State licensing authority and, as such, are not relevant to the issue of the I.G.'s authority to exclude Petitioner. The I.G.'s authority to exclude an individual pursuant to section 1128(b)(4) of the Act derives from the State proceeding against the individual, and the proceedings's outcome, and not from the evidence on which the proceeding is based. Moreover, it has been held that such collateral attacks on the actions of a State licensing proceeding are not permitted in the context of an exclusion proceeding under section 1128(b)(4). Mary E. Groten, DAB CR518 (1998); Jagdish Mangla, M.D., DAB CR470 (1997); John W. Foderick, M.D., DAB No. 1125 (1990).

4. The length of the exclusion imposed against Petitioner is mandated by statute and the mandated minimum period required is that the exclusion period be coterminous with the revocation or loss of Petitioner's license to practice medicine in New York.

The Act, as amended at section 1128(c)(3)(E), requires that an individual excluded pursuant to section 1128(b)(4) of the Act be excluded for not less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. It is plain from the language of the amendment at section 1128(c)(3)(E) that the minimum length of the exclusion must be coterminous with the term of the revocation, suspension, or surrender of the State license. Since Petitioner's license to practice medicine was revoked in the State of New York, the Act requires that the period of exclusion from participation in Medicare and State health care programs, including Medicaid, will not be less than the period during which his license to practice medicine in the State of New York is revoked, surrendered, or lost. The coterminous exclusion imposed by the I.G. in this case, which is of indefinite length, is the mandated minimum period required by law. Thus, the indefinite exclusion from participation in Medicare and State health care programs is authorized given the section 1128(c)(3)(E) requirement that the I.G.'s exclusion period be coterminous with the State licensing authority's sanction period.

/s/

Steven T. Kessel
Administrative Law Judge