

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:

Charles Sutherland, D.O.,

Petitioner,

- v. -

The Inspector General.

Date: December 22, 1998

Docket No. C-98-291

Decision No. CR561

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Charles Sutherland, D.O., from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid), until Petitioner obtains a license to practice medicine in the State of Illinois. I base my decision on evidence which proves that Petitioner's Physician and Surgeon's licence (license to practice medicine or medical license) was suspended for reasons related to his professional competence and professional performance. 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, then no issue of reasonableness exists and such an exclusion is mandated by law.

**BACKGROUND**

By letter dated February 27, 1998, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and Medicaid programs. 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Security Act (Act) because Petitioner's "license to practice medicine or provide health care in the State of Illinois was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the licensing authority for reasons bearing on [his]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 that license is revoked, suspended, or otherwise lost."

Petitioner requested a hearing<sup>1</sup> and the case was assigned to me for decision. The parties agreed that the case could be decided based on their 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. Ex. 1-3). Petitioner did not object to these exhibits. Petitioner submitted three proposed exhibits (P. Ex. 1-3). The I.G. did not object to Petitioner's exhibits. Thus, in the absence of objection, I am admitting I.G. Ex. 1-3 and P. Ex. 1-3 into evidence in this case. I base my decision in this case on these exhibits, the applicable law, and the arguments of the parties.

#### APPLICABLE LAW

Section 1128(b)(4) of the Act provides that the I.G. may 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, or (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

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<sup>1</sup> In his request for hearing dated April 20, 1998, Petitioner complains that the I.G.'s February 27, 1998 letter notifying him of his exclusion (notice letter) was vague. He asserts that the notice letter failed to identify the actions involved that related to section 1128(b)(4) of the act and that he was left to guess that the exclusion was based upon a Consent Order entered into with the Department of Professional Regulation State of Illinois (DPRSI) because, in a letter dated August 5, 1997, Petitioner had been given an opportunity to provide information to the I.G. related to that Consent Order. Further, the notice letter failed to identify which of the three factors -- professional competence, professional performance, or financial integrity -- were related to the suspension of Petitioner's medical license. I find no merit in Petitioner's complaint. The I.G.'s allegations are sufficiently specific to put Petitioner on notice of the basis for the I.G.'s action. Further, the parties have been afforded a briefing schedule in this proceeding in which the I.G. was able to fully set forth the basis for her action and Petitioner was given a full opportunity to respond to the I.G.'s allegations.

Section 1128(c)(3)(E) of the Act (which was contained in section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191) and amended section 1128(c)(3) of the Act) became effective on January 1, 1997. Section 1128(c)(3)(E) provides that the length of an exclusion under section 1128(b)(4) "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program." Prior to the 1996 amendment, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4)(A) or (B). After the 1996 amendment, however, 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 minimum required by law.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was licensed as a physician and surgeon in the State of Illinois. I.G. Ex. 1, at 1.
2. Petitioner's license to practice medicine in the State of Illinois was placed on Probation Status, subject to a Consent Order entered between Petitioner and the Department of Professional Regulation of the State of Illinois (DPRSI) on March 2, 1993. I.G. Ex. 2.
3. The terms of Petitioner's probation, mandated by the DPRSI, the agency having jurisdiction over the issuance of professional licenses, prohibited Petitioner from ingesting any controlled substances that were not prescribed or approved by his treating physician. I.G. Ex. 2, at 4.
4. On or about July 23, 1996, Petitioner ingested a controlled substance, Fiorinal, which had not been prescribed or approved by his treating physician. I.G. Ex. 1, at 1.
5. As a result of this violation of the Consent Order, Petitioner appeared at an informal conference before the DPRSI on November 7, 1996. I.G. Ex. 1, at 1.
6. At this conference, Petitioner admitted ingesting Fiorinal without his treating physician's prescription. I.G. Ex. 1, at 2.
7. Ingestion of the Fiorinal without a prescription from his treating physician violated the terms of the March 2, 1993 Consent Order which had placed Petitioner's license on probation status.

8. As a result of this admission, Petitioner's medical license was indefinitely suspended, by means of another Consent Order entered into by Petitioner and the DPRSI on January 30, 1997. I.G. Ex. 1.

9. Petitioner's Illinois medical license has not been reinstated.

10. On February 27, 1998, Petitioner was notified of his indefinite exclusion from participation in the Medicare and Medicaid programs pursuant to section 1128(b)(4) of the Act.

11. Section 1128(b)(4)(A) of the Act authorizes the I.G. to exclude an individual 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 professional competence, professional performance, or financial integrity.

12. Petitioner, as a licensed physician, possessed a license to provide health care within the scope of section 1128(b)(4) of the Act.

13. Petitioner's medical license was suspended by a State licensing authority, within the scope of section 1128(b)(4)(A) of the Act.

14. The suspension of Petitioner's medical license was for reasons bearing on his professional competence and professional performance within the scope of section 1128(b)(4) of the Act.

15. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

16. Where an exclusion is imposed pursuant to section 1128(b)(4) of the Act, the period of exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Act, section 1128(c)(3)(E).

17. When an exclusion is imposed pursuant to section 1128(b)(4) of the Act and the period of exclusion is concurrent with the loss, suspension, revocation, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

18. The exclusion imposed by the I.G. against Petitioner, which will remain in effect until Petitioner obtains a valid license to practice medicine in Illinois, was authorized under sections 1128(b)(4)(A) and 1128(c)(3)(E).

**PETITIONER'S CONTENTIONS**

Petitioner does not contest that his medical license in Illinois was suspended by a State licensing authority. But, he contests the I.G.'s assertion that such suspension occurred for reasons bearing on his professional performance or professional competence. He asserts that he used Fiorinal on one occasion when he injured his back while on vacation and that a relative gave him three Fiorinal tablets for the pain. He concedes that such conduct is a violation of the 1993 Consent Order, but maintains that such conduct does not affect his professional competence or performance, as the conduct occurred on vacation, not at work, and was an isolated incident.

In support of his claims, Petitioner asserts that in the 1997 suspension order the DPRSI did not make any finding concerning his professional performance or professional competence. Rather he maintains that any such finding was unnecessary as it was a violation of the 1993 Consent Order simply for him to use such medication except on the prescription of his treating physician. He asserts that, as DPRSI did not specifically assert that his suspension bore on his professional competence or performance it is improper for the I.G. to go beyond that determination to assert that his license loss was for reasons bearing on his professional performance or professional competence. Petitioner also notes that while the 1993 Consent Order recognized that he suffered from an addiction, State licensing authorities allowed him to continue his practice of medicine for almost four years, indicating that such authorities did not consider that his addiction impacted on his professional practice. In this regard he also notes that he was granted a medical license by the State of Missouri after Illinois officials suspended his license and with full disclosure to Missouri officials of the circumstances of the loss of his Illinois license. He maintains that Missouri officials, by issuing him a medical license, concluded that his conduct did not adversely impact upon his professional performance or professional competence.

Petitioner also asserts that, as he is presently licensed in the State of Missouri, and he received this license prior to the I.G.'s notice letter, he need not be excluded. In this regard, he cites 42 C.F.R. § 1001.501(c)(1) which provides that, prior to the date of the I.G.'s notice letter, where an individual has obtained the same type of medical license in another State after full disclosure of the circumstances of the prior loss of a health care license, the exclusion may be for a period of time less than the period during which the individual's license is revoked, suspended, or otherwise not in effect.

### DISCUSSION

Petitioner concedes that his medical license has been suspended by State licensing authorities and I find that such has occurred. Petitioner also has not disputed that his license to practice medicine is a license to provide health care within the scope of section 1128(b)(4) of the Act. Petitioner claims, however, that his license was not suspended for reasons bearing on his professional performance or professional competence. I disagree.

The record establishes that Petitioner's license was suspended on account of his substance abuse problems and that those problems related to his professional competence and professional performance. The record establishes that Petitioner's substance abuse resulted in the DPRSI's 1993 Consent Order in which his license to practice medicine was placed on probation for seven years. I.G. Ex. 2, at 3. In addition to placing Petitioner's medical license on probation, the DPRSI also imposed several restrictions on Petitioner. These included monitoring his behavior regarding his use of such substances through urine tests, indefinitely suspending his controlled substance license, and precluding him from performing anesthesiology. Petitioner's use of a controlled substance on or about July 23, 1996, in violation of the Consent Order, led to the DPRSI's decision to suspend his license to practice medicine in the State of Illinois.

On the basis of these facts, I find that it is clear that the DPRSI had strong reservations about Petitioner's competence to practice medicine in view of his substance abuse problems. Because of those substance abuse problems, the DPRSI, in the Consent Order, placed restrictions on Petitioner's ability to practice his profession by, for example, restricting his right to prescribe medication. Such restrictions, and ultimately Petitioner's license suspension, reflect the belief of the DPRSI that Petitioner was not competent to prescribe medications either because of the danger that he himself might abuse them or because his substance abuse might impair his judgment as a physician. I find that these concerns are in fact self-evident from the actions of the DPRSI in initiating the procedure that ultimately resulted in the suspension of Petitioner's medical license. I do not therefore find that in reaching this conclusion I have, as Petitioner alleges, gone beyond the determination of State licensing officials. Instead, I find that their concern about his competency due to his substance abuse problems was inherent in their first putting on probation and then suspending his medical license.

Petitioner also asserts that the fact that he was permitted to practice from 1993 until 1997 under the Consent Order, and the fact that he was subsequently granted a medical license in Missouri, prove that his professional competence and professional

performance were not at issue. I cannot reach such a conclusion. I find it obvious that the DPRSI had such concerns about Petitioner's professional competence and performance as a physician because otherwise that agency would not have found it necessary to enter a Consent Order with Petitioner which limited his ability to fully practice his profession. The fact that DPRSI felt obliged to provide Petitioner with an opportunity to overcome his substance abuse problems through treatment while permitting him to retain his medical license cannot be construed as a finding that such agency had no concerns regarding his performance and competence as a physician. Similarly, his receipt of a medical license in Missouri in no way nullifies the Illinois proceeding and, moreover, is irrelevant to this proceeding.

I find that prior DAB (Departmental Appeals Board) decisions support the I.G.'s exclusion of Petitioner. I have found that Petitioner's medical license was suspended pursuant to allegations that he had a substance abuse problem. It has been determined that a substance abuse problem adversely impacts a person's professional competence and professional performance, as those terms are used in section 1128(b)(4) of the Act. Mary E. Groten, DAB CR518 (1998); Richard L. Pflapson, D.C., DAB CR132 (1991). Petitioner has argued that the Groten and Pflapson cases are distinguishable from his case. Petitioner argues that in his case, unlike in Groten, there was no diversion of drugs. In Pflapson, Petitioner argues that the petitioner in that case did not file a response and that the issue of the petitioner's ability to practice with reasonable skill and safety was raised specifically. Petitioner's arguments, however, do not overcome the findings in these cases that a substance abuse problem adversely affects the individual's professional competence or performance, nor do they overcome my finding that the DPRSI made evident in its Consent Order that Petitioner's problems with controlled substances amounted to doubts about Petitioner's competence and performance as a physician.

I also disagree with Petitioner's contention that exclusion is not proper in his case because he has obtained a medical license in Missouri after full disclosure to officials there of the circumstances of the loss of his Illinois medical license. Petitioner's argument is contrary to the Act. The I.G. has the authority to exclude Petitioner in this case because his medical license was suspended within the scope of section 1128(b)(4)(A) of the Act. The Act, at section 1128(c)(3)(E), now requires that an individual excluded pursuant to section 1128(b)(4) 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 section 1128(c)(3)(E) that the minimum length of the exclusion must be coterminous with the term of revocation, suspension, or surrender of the State license. Since Petitioner's medical license was

suspended in the State of Illinois, the Act requires that the period of the exclusion will not be less than the period during which his license to practice medicine in the State of Illinois is suspended. Petitioner is required to obtain from the Illinois licensing authority the same type of license that such officials suspended before he can be considered for reinstatement as a participant in Medicare and Medicaid. See Groten, DAB CR518, *supra*.

I also find that Petitioner has no right to rely on exceptions to the length of exclusions at 42 C.F.R. § 1001.501(c). This regulation does not apply to Petitioner's case. The regulation was promulgated prior to the amendment to the Act which governs the length of the exclusion in this case. The Act, as amended, now clearly and unambiguously requires a minimum mandatory exclusion for individuals excluded pursuant to section 1128(b)(4) of the Act. The statutory language requires that Petitioner's exclusion be at least coterminous with the period of the suspension of his Illinois medical license. The Act supersedes the regulations and it controls. See Natural Resources Defense Council v. United States Environmental Protection Agency, 25 F.3d 1063, 1070 (D.C. Cir. 1994).

#### CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. I conclude also that the term of exclusion imposed by the I.G. is mandated by section 1128(c)(3)(E) of the Act.

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Joseph K. Riotto  
Administrative Law Judge