Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Michael A. Fuentes, M.D.,	DATE: June 13, 1995
Petitioner,	
- v. -	Docket No. C-95-017 Decision No. CR382
The Inspector General.	

DECISION

On September 20, 1994, 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. advised Petitioner that she had determined that the exclusion was authorized by section 1128(b)(4) of the Social Security Act (Act). The I.G. informed Petitioner that the exclusion was based on a decision by the Virginia Board of Medicine to revoke Petitioner's license to practice medicine or provide health care in the State of Virginia, for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. The I.G. also told Petitioner that he would not be eligible to apply for reinstatement to the programs until he obtained a valid license to practice medicine or provide health care in Virginia.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. I held two prehearing conferences. In addition, I received numerous items of correspondence from Petitioner. I concluded that there may not exist disputed issues of material fact requiring an in-person hearing. I afforded the I.G. the opportunity to file a motion for summary disposition. I afforded Petitioner the opportunity to respond to the I.G.'s motion.

The I.G. moved for summary disposition and Petitioner responded to the I.G.'s motion. I have carefully considered the facts alleged by the parties, their arguments, and the law. I conclude that no disputed material facts exist in this case. I conclude also that the I.G. had authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner. Finally, I conclude that, under the regulations which govern exclusions imposed under section 1128(b)(4) of the Act, the exclusion in this case must remain in effect until Petitioner obtains a valid license to provide health care in the State of Virginia. Therefore, I sustain the exclusion imposed against Petitioner by the I.G.

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

There are two issues in this case. The first issue is whether the I.G. had authority to exclude Petitioner under section 1128(b)(4) of the Act. The second issue is whether the length of the exclusion -- coterminous with Petitioner's loss of his license to practice medicine in Virginia -- is reasonable.

In concluding that the I.G. had authority to exclude Petitioner and that the length of the exclusion is reasonable, I make the following findings of fact and conclusions of law. After each finding or conclusion, I state the page or pages of this Decision at which I discuss the finding or conclusion in detail.

1. Petitioner's license to practice medicine in Virginia was revoked by that State's licensing authority for reasons bearing on his professional competence and performance. Pages 5-6.

2. Petitioner may not successfully challenge the authority of the I.G. to exclude him on the grounds that the revocation of his license by the Virginia Board of Medicine denied him due process of law, was unreasonable, or was otherwise improper. Pages 6-8.

3. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. Pages 4-6.

4. Regulations which govern the length of exclusions imposed pursuant to section 1128(b)(4) of the Act generally require that an exclusion imposed pursuant to that section must be for the same length of time as the State revocation, suspension, surrender or other loss of a license to provide health care which is the basis for the exclusion. Pages 3-4.

5. Petitioner has not established a basis for reducing the exclusion imposed in this case to a period that is less than coterminous with his loss of his license to practice medicine in Virginia. Pages 5-8.

6. The exclusion which the I.G. imposed against Petitioner is reasonable. Pages 5-8.

II. Analysis of the law and evidence

A. Analysis of the law

The I.G. excluded Petitioner pursuant to section 1128(b)(4) of the Act. This section authorizes the Secretary (or her delegate, the I.G.) to exclude an 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, ...

The Secretary has published a regulation which governs the length of exclusions which are imposed pursuant to section 1128(b)(4) of the Act. 42 C.F.R. § 1001.501. This regulation provides, generally, that an exclusion imposed pursuant to section 1128(b)(4) will be for the same length of time as the State revocation or suspension of a license to provide health care which is the basis for the exclusion. 42 C.F.R. § 1001.501(b)(1).

The regulation permits an exclusion to be for less than a coterminous period only in the limited circumstances described in 42 C.F.R. § 1001.501(c)(1). That subsection permits a less than coterminous exclusion to be imposed if, prior to the date of the I.G.'s notice of exclusion to the excluded individual or entity:

> the licensing authority of a State (other than the one in which the individual's or entity's license had been revoked, suspended, surrendered or otherwise lost), being fully apprised of all of the circumstances surrounding the prior action by the licensing board of the first State, grants the individual or entity a license or takes no significant adverse action as to a currently held license, ...

Neither the Act, nor the regulations which govern exclusions imposed pursuant to section 1128 of the Act, allocate to a specific party the burden of persuasion on the issues of whether an exclusion is authorized or whether the length of an exclusion is reasonable. Regulations which govern a hearing in an exclusion case under section 1128 provide that the administrative law judge shall have the authority to allocate the burden of persuasion as is appropriate. 42 C.F.R. § 1005.15(c).

Generally, administrative law judges allocate to the I.G. the burden of proving that an exclusion is authorized and that it is reasonable. However, the burden usually shifts to the petitioner where the petitioner advocates an affirmative exception to a general rule governing the length of an exclusion. The guiding principal is that the party which is most likely to be in possession of evidence which would establish a contested fact bears the burden of persuasion as to that fact.

The I.G. has the burden of proving that an exclusion is authorized under section 1128(b)(4) of the Act. In this case, the elements of that burden consist of proving, in accordance with the requirements of section 1128(b)(4)(A), that Petitioner's license to practice medicine in Virginia was revoked by the Virginia Board of Medicine, and of proving also that Petitioner's license was revoked for reasons bearing on his professional competence, professional performance, or financial integrity.

Pursuant to section 1128(b)(4)(A) of the Act, the authority to exclude an individual or entity derives from the suspension or revocation by the State licensing authority of that individual's or entity's State license to provide health care. In deciding whether the State licensing authority has suspended or revoked a license to provide health care for one of the reasons set forth under section 1128(b)(4)(A), the underlying merits of the case which led to the State action are not at issue. Thus, in an administrative hearing concerning an exclusion imposed under section 1128(b)(4), an individual may not successfully challenge the exclusion on the ground that he or she did not, in fact, engage in the conduct asserted by the State licensing authority as the basis for revoking or suspending that individual's license. Nor may that party successfully challenge an exclusion imposed under section 1128(b)(4) on the ground that the State license revocation or suspension proceeding was not conducted fairly.[1]

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[1] If an excluded party is successful in reversing or vacating a State license revocation or suspension action through an appeal of that action, then the I.G. will reinstate that party retroactive to the effective date of the exclusion. 42 C.F.R. § 1001.3005(a)(2).

Although the I.G. has the burden also of proving that the length of the exclusion is reasonable, that burden is met in a case involving an exclusion imposed pursuant to section 1128(b)(4), which is coterminous with a State license revocation or suspension. The I.G. must simply prove that the authority exists to exclude an individual or entity. This is because a coterminous exclusion is presumed to be reasonable under 42 C.F.R. § 1001.501(b)(1), assuming that authority to exclude is established. An excluded party may rebut that presumption only by proving that an exception exists under 42 C.F.R. § 1001.501(c)(1). In this case, the I.G. meets her burden of proving that the coterminous exclusion is reasonable by proving that Petitioner's license to practice medicine and surgery in Virginia was revoked for one of the reasons stated in section 1128(b)(4)(A).

B. <u>Analysis of the evidence</u>

Summary disposition sustaining Petitioner's exclusion is appropriate. I have no basis to conduct an in-person hearing. The undisputed material facts of this case establish that the I.G. was authorized to exclude Petitioner for a period which is coterminous with the loss of his Virginia license to practice medicine. Petitioner's license to practice medicine in Virginia was revoked by that State's Board of Medicine for reasons bearing on his professional competence or performance. Although Petitioner has alleged serious allegations of wrongdoing on the part of individuals on the Pennsylvania and Virginia Boards of Medicine, as I explained above, I may not consider such allegations here.

Petitioner has not alleged facts which might establish that the Virginia Board of Medicine's determination may be disputed legitimately. Nor has Petitioner alleged facts which might suggest that this case qualifies for an exception to the requirement stated in 42 C.F.R. § 1001.501(b)(1) that the exclusion be coterminous with the loss of his license to practice medicine in Virginia.

The undisputed material facts of this case are as follows. On December 21, 1993, the Virginia Board of Medicine suspended Petitioner's license to practice medicine and surgery in that State. I.G. Ex. 1 at 3.[2]

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[2] The I.G. submitted one exhibit, I.G. Ex. 1. Petitioner has not objected to the admission into evidence of I.G. Ex. 1 and I hereby admit it into evidence.

The decision to suspend Petitioner's Virginia license was based on a summary suspension by the Connecticut Medical Examining Board of Petitioner's license to practice medicine and surgery in Connecticut. Id. Petitioner requested the Virginia Board of Medicine to reinstate his Virginia license. Id. at 1. On June 9, 1994, a formal hearing was held on this request. Id at 1. Petitioner did not appear at this hearing. Id. On June 28, 1994, the Virginia Board of Medicine revoked Petitioner's license to practice medicine in Virginia. Id. at 6.

The Virginia Board of Medicine found that, in October, 1993, the Connecticut Medical Examining Board suspended Petitioner's license to practice medicine and surgery in Connecticut. I.G. Ex. 1 at 2-3. In deciding to revoke Petitioner's Virginia license, the Virginia Board of Medicine restated some of the findings made by the Connecticut Medical Examining Board concerning Petitioner's license to practice medicine and surgery in Connecticut. The Virginia Board of Medicine found that the Connecticut licensing authority had suspended

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Shortly after Petitioner submitted his request for a hearing, the I.G. sent to the Departmental Appeals Board offices in Washington D.C. a package of documents consisting of correspondence between the I.G. and Petitioner, and correspondence between Petitioner and the Executive Director of the Virginia Board of Medicine. The I.G. has not requested that any of these documents be made exhibits and has not made any arguments based on these documents. I have not reviewed these documents, nor are any of my findings based on these documents, because they do not appear to be material to this case and I am returning them to the I.G.

Petitioner submitted eleven exhibits and twenty-three attachments with his response to the I.G.'s motion for summary disposition. I have designated Petitioner's attachments as P. Ex. 12. At various times during the course of these proceedings, Petitioner submitted documents, in the form of letters, statements, and telegrams. Petitioner did not formally designate these submissions as exhibits. These documents were forwarded to the I.G., and include the following: letters from Petitioner dated December 4, 1994 and December 23, 1994, an envelope received on January 4, 1995, a telegram received on February 28, 1995. See January 9, 1995 letter from Ms. McKessy to Robert Drum, Assistant Regional Counsel. I have designated them as exhibits P. Ex. 13-16. The I.G. has not objected to my admitting into evidence any of the exhibits and other documents submitted by Petitioner. I hereby admit into evidence P. Ex. 1-16.

Petitioner's license in that State, based on information that Petitioner suffered from an emotional disorder or mental illness, which prevented him from practicing medicine and surgery with reasonable skill and safety. Id.

The Virginia Board of Medicine found also that, in September and December, 1993, the Commonwealth of Pennsylvania State Board of Medicine had filed orders to show cause against Petitioner. I.G. Ex. 1 at 2. It found that these orders to show cause made allegations against Petitioner which included the allegation that Petitioner was unable to practice medicine with reasonable skill and safety to his patients by reason of illness. Id.

It is apparent from the foregoing undisputed facts that the Virginia Board of Medicine revoked Petitioner's license for reasons bearing on Petitioner's professional competence and performance. Although not stated specifically in the Virginia Board of Medicine's order, it is evident that the Virginia Board of Medicine was persuaded that Petitioner, by reason of illness, was unable to practice medicine in Virginia with reasonable skill and safety to his patients.

Petitioner has not denied that his license to practice medicine and surgery was revoked in Virginia. Petitioner has not denied that the Virginia Board of Medicine revoked his license to practice medicine in that State for reasons bearing on his professional competence or performance. Petitioner has not asserted that the length of the exclusion, if authorized, is unreasonable.

Petitioner argues that it would be unfair to exclude him based on the action taken by the Virginia Board of Medicine. He asserts that he must be afforded an in-person hearing so that he may offer evidence to prove that he is the subject of unfair or biased actions by Virginia authorities, and by authorities in other jurisdictions as well. The allegations that Petitioner seeks to have heard include allegations that:

- The actions of the Virginia Board of Medicine were based on lies, perjured testimony, and a wrongful diagnosis of Petitioner's medical problems.

- The Virginia Board of Medicine's determination to suspend Petitioner's license was in retribution for Equal Employment Opportunity complaints and antitrust lawsuits which he filed.

- Petitioner was denied due process of law by the Virginia Board of Medicine.

o Petitioner has been diagnosed incorrectly to be suffering from a mental illness, when in fact, his illness is pernicious anemia, which mimics mental illness.

o Petitioner's illness is the consequence of his inability to purchase medicine or food due to the wrongful suspension of reimbursement for Medicare items or services that he had provided.

o Due to Petitioner's inability to afford legal counsel, he had to represent himself while he was ill, and therefore, had ineffective assistance of counsel.

o Petitioner has been denied fair treatment by State licensing authorities and the federal government because of his status as an ethnic minority.

o Petitioner has been entrapped by federal authorities.

o Petitioner's privileged communications with his former attorney and his former physician were intercepted unlawfully by federal authorities.

I do not have authority to hear Petitioner's assertions, nor are they material to this case. In effect, Petitioner concedes that the decision by the Virginia Board of Medicine meets the criteria in section 1128(b)(4)(A) of the Act authorizing the I.G. to impose an exclusion based on a license revocation or suspension. His assertions address the truth of the facts which underlie the actions taken by the Virginia Board of Medicine. Petitioner's arguments concerning the actions taken by the Virginia Board of Medicine do not raise an issue that I may hear and decide. The I.G.'s authority to exclude under section 1128(b)(4) derives from a State licensing authority's determination, and does not depend on proving the truth of the facts which may underlie that determination.[3] John W. Foderick, M.D., DAB CR43 (1989), aff'd, DAB 1125 (1990); Anthony Cerrone, D.M.D., DAB CR373 (1995).

I conclude that the I.G. has shown that the length of the exclusion is reasonable. An exclusion which is coterminous with the revocation of Petitioner's license

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[3] I can not address Petitioner's assertion that he was not reimbursed for one-year of Medicare services which he rendered, as this issue is not within the scope of my authority. I may decide only the issues of whether: the I.G. is authorized to exclude Petitioner, and the length of the exclusion is reasonable.

to practice medicine and surgery in Virginia is presumptively reasonable under 42 C.F.R. § 1001.501(b)(1). Petitioner has made no contentions of fact or arguments which might rebut that presumption of reasonableness.

III. Conclusion

I conclude that there are no disputed issues of material fact in this case. Summary disposition is appropriate. The exclusion imposed by the I.G. is authorized under section 1128(b)(4)(A) of the Act and is reasonable. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge