Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Hassan M. Ibrahim, M.D.,	)	DATE: November 20, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-008
	)	Decision No. CR445
The Inspector General.	)	
	)	

DECISION

I decide that the Inspector General (I.G.) is authorized to exclude Petitioner, Hassan Ibrahim, M.D. (Petitioner), from participating in Medicare and State health care programs, including Medicaid, pursuant to section 1128(b)(5) of the Social Security Act (Act). I decide also that the five-year exclusion imposed by the I.G. is not reasonable. I modify the exclusion so that Petitioner may apply to the I.G. for reinstatement after three years, or upon his reinstatement by the New York State Department of Social Services (Department of Social Services) to participate in the New York Medicaid program, whichever date occurs first.

I. Background

On September 20, 1995, the I.G. notified Petitioner that he was being excluded from participating in Medicare and State health care programs, including Medicaid. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(b)(5) of the Act, because Petitioner had been excluded or suspended by a federal or State health care program for reasons bearing on his professional competence, professional performance, or financial integrity. The I.G. advised Petitioner that she was excluding Petitioner for five years in light of the fact that Petitioner had been excluded by the Department of Social Services from participating in the New York Medicaid program for a period of five years. Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

I held a prehearing conference in the case. At that prehearing conference, I gave the I.G. the opportunity to file a brief asserting that summary disposition should be issued in favor of the I.G. on the issue of the I.G.'s authority to exclude Petitioner. I established a schedule for the exchange of briefs and proposed exhibits. The parties complied with this schedule. Shortly after the parties completed their submissions, they advised me that they were attempting to settle the case. I stayed the case while the parties attempted to settle it. However, in October 1996, the parties advised me that they were unable to settle the case, and they requested that I decide it based on their submissions.

The I.G.'s motion asserts that the case can be decided dispositively based on the I.G.'s arguments and exhibits. I interpret the I.G.'s motion as a request that I decide not only the I.G.'s authority to exclude Petitioner, but also whether the exclusion imposed by the I.G. is reasonable. It is apparent that Petitioner interpreted the I.G.'s motion in this way, because, in Petitioner's brief, Petitioner addressed the issue of whether the exclusion was reasonable. I conclude, therefore, that the parties have asked me to decide all of the issues in this case based on their submissions, and not just whether the I.G. has the authority to exclude Petitioner. I base my decision in this case on the parties' submissions and on the applicable law.[1]

II. Issues, findings of fact and conclusions of law

The issues in this case are whether the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(5) of the Act, and whether the five-year exclusion imposed by the I.G. is reasonable. I make the following findings of fact and conclusions of law (Findings) to support my decision that the I.G. is authorized to exclude Petitioner, but that the exclusion must be modified. I discuss each of my Findings in detail, below.

> 1. Pursuant to section 1128(b)(5) of the Act, the I.G. may exclude an individual who has been suspended or excluded from participation, or otherwise sanctioned, under any federal or State health care program, for reasons bearing on that individual's professional

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[1] The I.G. submitted 11 proposed exhibits (I.G. Exs. 1 - 11). Petitioner submitted 2 proposed exhibits (P. Exs. 1 - 2). Neither party objected to my receiving any of these proposed exhibits into evidence. Therefore, I am receiving as evidence I.G. Exs. 1 - 11 and P. Exs. 1 - 2.

competence, professional performance, or financial integrity.

2. An individual who withdraws voluntarily from participating in a federal or State health care program in order to avoid the imposition of a formal sanction against that individual, is "otherwise sanctioned" within the meaning of section 1128(b)(5) of the Act.

3. Prior to July 1996, section 1128(b)(5) of the Act did not establish a minimum or a maximum term of exclusion for an individual who was excluded pursuant to that section. Implementing regulations established a benchmark exclusion of three years for an individual who was excluded under section 1128(b)(5), unless the presence of an aggravating factor or factors established a basis for an exclusion of more than three years, or unless the presence of a mitigating factor or factors established a basis for an exclusion of less than three years.

4. The Department of Social Services determined to exclude Petitioner from participating in the New York Medicaid program for a period of five years.

5. Petitioner requested a hearing from the determination to exclude him from the New York Medicaid program. Petitioner then agreed with the Department of Social Services to settle his case by withdrawing voluntarily from participating in the New York Medicaid program. The agreement permitted Petitioner to provide care to Medicaid recipients as a salaried employee of a hospital. The agreement also permitted Petitioner to request reinstatement to the New York Medicaid program at any time.

6. The determination to exclude Petitioner from the New York Medicaid program made by the Department of Social Services was for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity.

7. Petitioner was "otherwise sanctioned" by the Department of Social Services, and the I.G. had authority to exclude Petitioner from participating in Medicare and Medicaid.

8. The I.G. did not prove the presence of aggravating factors in this case.

9. Petitioner proved the presence of a mitigating factor, in that he was not excluded or suspended from participating in a State health care program.

10. The five-year exclusion which the I.G. imposed against Petitioner is not reasonable.

11. It is reasonable to modify the exclusion so that Petitioner may apply to the I.G. for reinstatement after three years, or on the date that Petitioner is reinstated in the New York Medicaid program, whichever date occurs first.

III. Discussion

A. Governing law (Findings 1 - 3)

1. The I.G.'s authority to exclude pursuant to section 1128(b)(5) of the Act (Findings 1 - 2)

The I.G. excluded Petitioner pursuant to section 1128(b)(5) of the Act. This section authorizes the Secretary of the United States Department of Health and Human Services (Secretary) or her delegate, the I.G., to exclude any individual or entity that is suspended or excluded from participation, or otherwise sanctioned, under any federal health care program or any State health care program, for reasons bearing on that individual's or entity's professional competence, professional performance, or financial integrity.

The I.G.'s authority to impose an exclusion pursuant to section 1128(b)(5) of the Act derives from an action taken by a federal health care program or a State health care program. In any case where the I.G. imposes an exclusion under section 1128(b)(5), the issue of the I.G.'s authority to exclude will be decided based on the following questions. First, was the excluded individual or entity suspended, excluded from participation, or otherwise sanctioned by a federal health care program or a State health care program? Second, if the individual was excluded, suspended, or otherwise sanctioned, was the adverse action against that individual taken for reasons bearing on that individual's professional competence, professional performance, or financial integrity?

The answers to these questions lie in the actions taken by the federal health care program or State health care program because the authority to exclude under section 1128(b)(5) derives from those actions. The I.G. is not required to look behind the action taken by a federal health care program or a State health care program in order to determine whether the

actions were fair to the excluded individual, or supported by evidence of misconduct.

Neither the Act nor the implementing regulations define the statutory terms "excluded" or "suspended." These terms have plain meanings. They describe circumstances in which a federal health care program or a State health care program takes an adverse action against an individual's privilege of doing business with, or pursuant to, such a program. Nor does the Act define the term "or otherwise sanctioned." However, that term is defined in implementing regulations. The term "or otherwise sanctioned" is defined to mean:

> all actions that limit the ability of a person to participate in the program at issue regardless of what such an action is called, and includes situations where an individual or entity voluntarily withdraws from a program to avoid a formal sanction.

42 C.F.R. § 1001.601(a)(2).

As I shall discuss in more detail, below, there is an issue in this case of whether Petitioner's voluntary withdrawal from providing some, but not all, services covered by the New York Medicaid program, in order to avoid the imposition of a suspension or an exclusion by that program, meets the regulation's definition of "or otherwise sanctioned." I conclude that the regulation's definition of "or otherwise sanctioned" encompasses that circumstance. An agreement by an individual to limit his or her participation in a State health care program in order to avoid the imposition of a more encompassing exclusion is an action that limits the ability of the individual to participate in the State health care program, within the meaning of 42 C.F.R. § 1001.601(a)(2).

> 2. The basis for determining the length of an exclusion imposed pursuant to section 1128(b)(5) of the Act (Finding 3)

Prior to July 1996, section 1128(b)(5) of the Act did not mandate a minimum period of exclusion for any individual whom the I.G. determined ought to be excluded pursuant to that section. Regulations established a framework for determining the length of any exclusion to be imposed pursuant to section 1128(b)(5). The regulations established a benchmark exclusion period of three years for any exclusion imposed pursuant to section 1128(b)(5). 42 C.F.R. § 1001.601(b)(1). The I.G. was authorized to impose an exclusion for more than three years if any of the aggravating factors described in 42 C.F.R. § 1001.601(b)(2) were present in a case. The I.G. was

authorized to impose an exclusion for less than three years if any of the mitigating factors described in 42 C.F.R. § 1001.601(b)(3) were present in a case.

On July 31, 1996, Congress amended section 1128. The amendments are not on their face retroactive, and, therefore, do not govern this case. The amendments include an amendment to section 1128(c)(3) of the Act which mandates that, in the case of any exclusion imposed pursuant to either sections 1128(b)(4) or 1128(b)(5), the period of exclusion shall not be less than the period during which the excluded individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or entity is excluded or suspended from a federal or State health care program. Congressional Record -- House H9491 (July 31, 1996).

B. The relevant facts (Findings 4 - 5)

Petitioner is a physician. Currently, Petitioner resides in, and practices medicine in, Shreveport, Louisiana.

On July 18, 1991, the Department of Social Services advised Petitioner that it proposed excluding him from participating in the New York Medical Assistance program, the New York State Medicaid program, for a period of five years. I.G. Ex. 2 at 1 - 2. The Department of Social Services based its proposal to exclude Petitioner on allegations that Petitioner: submitted false reimbursement claims; failed to maintain records necessary to fully disclose the medical necessity for and the nature and extent of the medical care, services, and supplies that Petitioner had furnished; furnished or ordered medical care, services, or supplies that were substantially in excess of the needs of Medicaid recipients; and, furnished medical care, services, or supplies that failed to meet professionally recognized standards of health care, or which were beyond the scope of Petitioner's professional qualifications or license. Id. at 1. The Department of Social Services advised Petitioner that its allegations were based on an audit of services that Petitioner had provided to Medicaid recipients. Id. at 2; see I.G. Ex. 1.

On August 16, 1991, Petitioner submitted a response to the audit on which the Department of Social Services had proposed to exclude Petitioner. I.G. Ex. 9. His responses generally countered the findings made in the audit. Id.; see I.G. Ex. 1.

On April 22, 1994, the Department of Social Services sent a notice to Petitioner in which it advised Petitioner that he was being excluded from participating in the New York

Medicaid program for a period of five years. I.G. Ex. 3. The Department of Social Services advised Petitioner that it had reviewed Petitioner's response to the 1991 audit that had been conducted of Petitioner. I.G. Ex. 3 at 2. The Department of Social Services advised Petitioner that it had revised its findings, based on Petitioner's response to the 1991 audit, and it provided Petitioner with the revised findings. I.G. Ex. 3 at 2; see I.G. Ex. 4.

The Department of Social Services notice of exclusion essentially adopted all but one of the findings of misconduct which were stated in the preliminary notice of intent to exclude that the Department of Social Services had sent to Petitioner. See I.G. Ex. 3 at 1 - 2. The Department of Social Services informed Petitioner that its determination to exclude Petitioner was based on findings that Petitioner: submitted a false claim; failed to maintain necessary or required medical records; and furnished medical care, services, or supplies that failed to meet professionally recognized standards for health care, or which were beyond the scope of Petitioner's professional qualifications or license. I.G. Ex. 3 at 1 - 2. However, the Department of Social Services did not exclude Petitioner based on a finding that Petitioner had provided unnecessary services, as was alleged in the preliminary notice.

Eventually, the Department of Social Services and Petitioner entered into an agreement which supplanted the exclusion that had been imposed by the Department of Social Services. I.G. Ex. 8. The agreement was signed by Petitioner on August 14, 1995, and on behalf of the Department of Social Services on December 18, 1995. Id. at 2. The agreement recited that Petitioner had requested a hearing from the State exclusion. It stated further that Petitioner agreed to voluntarily withdraw from participating in the New York Medicaid program. Id. at 1. Petitioner agreed that he would not bill the program for services, nor would he cause orders or prescriptions to be paid by the New York Medicaid program. Id. Petitioner did not agree to having engaged in any practices which the Department of Social Services might find to be unacceptable. Id.

I infer from the terms of the agreement that it permits Petitioner to continue providing New York Medicaid items or services as a salaried employee of a hospital, so long as Petitioner gives the Department of Social Services notice of his employment by that hospital. The Department of Social Services agreed not to prohibit reimbursement to an "Article 28 facility" employing Petitioner as a salaried employee for Medicaid items or services provided by Petitioner, providing that Petitioner gave the Department of Social Services notice of his employment at an "Article 28 facility." I.G. Ex. 8 at

1. The agreement does not define what is meant by an "Article 28 facility." Petitioner avers that an "Article 28 facility" is a hospital, and the I.G. has not disputed this assertion. Petitioner's brief at 1. For purposes of this decision, I accept as correct Petitioner's assertion that an "Article 28 facility" is a hospital.

I infer that the agreement enables Petitioner to apply to the New York Medicaid program at any time for reinstatement. The agreement provides that Petitioner is eligible to apply for reinstatement to the New York Medicaid program. I.G. Ex. 8 at 1. The agreement states no minimum period during which Petitioner must not participate in the New York Medicaid program.

C. The I.G.'s authority to exclude Petitioner (Findings 6 - 7)

Petitioner withdrew from participating in the New York Medicaid program after the Department of Social Services had determined to exclude Petitioner for reasons bearing on Petitioner's professional competence, professional performance, and financial integrity. The determination of the Department of Social Services that Petitioner had submitted a false claim for Medicaid services plainly relates to Petitioner's financial integrity. The determination of the Department of Social Services that Petitioner violated record keeping requirements on its face relates to Petitioner's professional performance as a physician. The determination of the Department of Social Services that Petitioner provided services which did not comply with professionally recognized standards of health care or which were beyond the scope of Petitioner's license relate both to Petitioner's professional competence and to his professional performance.

Petitioner argues that the Department of Social Services determination to exclude him may be distinguished from State determinations in other cases in that, in this case, the Department of Social Services allegedly did not find Petitioner to have committed any fraud against the New York Medicaid program. In fact, the Department of Social Services found that Petitioner had submitted a false claim, which, arguably, is a fraud against the New York Medicaid program. But, even if Petitioner's purported distinction is accurately stated, it begs the question of whether the Department of Social Services made a determination to exclude Petitioner for any of the reasons enumerated in section 1128(b)(5) of the Act. As I find above, the determination plainly was premised on reasons that authorize exclusion under section 1128(b)(5).

Petitioner's central argument seems to be that he was not really excluded by the Department of Social Services. Petitioner asserts that the agreement he ultimately entered into with the Department of Social Services does not exclude him from participating in the New York Medicaid program in its entirety or for a fixed period of time. Rather, according to Petitioner, he has only resigned voluntarily from participating in that program as a fee-for-service provider. Petitioner notes that he may work as a salaried employee of a hospital, which can bill for Petitioner's services rendered through the New York Medicaid program.

Although Petitioner's assertions of the terms of his agreement with the Department of Social Services are correct, they do not establish that the I.G. lacks authority to exclude Petitioner pursuant to section 1128(b)(5) of the Act. Petitioner would never have entered into his agreement with the Department of Social Services had the Department of Social Services not determined to exclude Petitioner for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity.

Petitioner's voluntary withdrawal from the New York Medicaid program to avoid an exclusion from that program establishes that Petitioner was "otherwise sanctioned" within the meaning of section 1128(b)(5) of the Act and 42 C.F.R. § 1001.601(a)(2). It does not matter that the agreement permitted Petitioner to continue to participate in the New York Medicaid program in a limited way, as a salaried employee of a hospital. As I discuss above, the regulation's definition of "otherwise sanctioned" encompasses the situation where an agreement entered into to avoid imposition of a State exclusion permits the sanctioned individual to continue to engage in limited, but not full, participation in a State health care program.

The agreement between Petitioner and the Department of Social Services was signed by Petitioner on August 14, 1995, prior to the date that the I.G. excluded Petitioner. It was not accepted by the Department of Social Services until December 18, 1995, after the date of the I.G.'s exclusion of Petitioner. I.G. Ex. 8. The I.G.'s September 20, 1995 notice of exclusion was predicated on the Department of Social Services' April 22, 1994 determination to exclude Petitioner, which determination predated the settlement agreement between Petitioner and the Department of Social Services. I.G. Ex. 6; see I.G. Ex. 3. The exclusion notice, therefore, does not recite as a basis for excluding Petitioner, that Petitioner was "otherwise sanctioned." However, the I.G. made the argument in her brief that she had authority to exclude Petitioner on the ground that Petitioner was "otherwise sanctioned."

The I.G. was not remiss in failing to assert in her notice of exclusion that Petitioner was "otherwise sanctioned." The I.G.'s notice to Petitioner reflects accurately the state of events as of the date of the notice. As of the date of the notice, September 20, 1995, Petitioner was excluded from participating in the New York Medicaid program.

Petitioner has not argued that he has been prejudiced by the I.G.'s failure to provide him with a notice which states accurately the basis for excluding Petitioner, premised on the settlement agreement that postdates the I.G.'s original notice of exclusion. Notwithstanding, I have considered whether the I.G.'s failure to provide Petitioner with a revised notice of exclusion denies Petitioner adequate notice of the reasons for his exclusion. I conclude that it does not.

Petitioner had adequate notice of the I.G.'s argument that Petitioner was "otherwise sanctioned" within the meaning of 42 C.F.R. § 1001.601(a)(2). The I.G. provided Petitioner with notice in her brief of her revised theory of authority to exclude Petitioner. Petitioner had the opportunity to respond to that theory or to argue that he had not received adequate notice of it. Petitioner did not argue that he had received inadequate notice of the I.G.'s revised theory of authority.

D. Whether the exclusion is reasonable (Findings 8 - 11)

The regulation which implements section 1128(b)(5) of the Act provides that, in the absence of aggravating or mitigating factors, an exclusion of three years will be imposed. 42 C.F.R. § 1001.601(b). The I.G.'s determination to exclude Petitioner for five years, two years more than the three-year benchmark, is based on the April 22, 1994 Department of Social Services determination to exclude Petitioner for five years. I.G. Ex. 6; see I.G. Ex. 3. A State exclusion of more than three years is an aggravating factor which may justify an exclusion by the I.G. of more than three years. 42 C.F.R. § 1001.601(b)(2)(ii).

The premise for the five-year exclusion no longer exists. After the I.G. imposed her exclusion, Petitioner and the Department of Social Services entered into an agreement which requires no term of exclusion, and which permits Petitioner to apply at any time to the Department of Social Services for reinstatement in the New York Medicaid program. Thus, although an aggravating factor arguably was present as of the date that the exclusion was imposed by the I.G., that aggravating factor is no longer present.

Indeed, Petitioner's agreement with the Department of Social Services establishes the presence of a mitigating factor that did not exist at the time that the I.G. imposed her exclusion. A mitigating factor exists where a State suspends or excludes an individual for less than the three-year benchmark period. 42 C.F.R. § 1001.601(b)(3)(i). The settlement agreement between Petitioner and the Department of Social Services effectively rescinds Petitioner's exclusion from the New York Medicaid program. Petitioner is not presently excluded from that program, although he is an "otherwise sanctioned" individual.

The regulations do not specifically address how an administrative law judge should evaluate the reasonableness of an exclusion under section 1128(b)(5) of the Act where an aggravating factor which might justify a lengthier exclusion than the benchmark three-year period is present as of the date that the exclusion is imposed, but no longer is present as of the date of the hearing and decision of the case. Nor do the regulations deal with the emergence of a mitigating factor at the time of adjudication, which is not present at the date of the exclusion.

I interpret the 42 C.F.R. Part 1001 regulations, which implement section 1128 of the Act, to require generally that the administrative law judge adjudicate the reasonableness of an exclusion based on the presence or absence of aggravating or mitigating factors at the time of adjudication. The regulations in 42 C.F.R. Part 1001 are not intended to deprive an excluded individual of the de novo hearing that is guaranteed to that individual under section 205(b) of the Act. The hearing is not intended to be an appellate review of the I.G.'s exclusion determination.

Therefore, the posture of this case is that there now exists a mitigating factor which did not exist at the time of the I.G.'s exclusion of Petitioner. There is no State exclusion of Petitioner, although Petitioner is an "otherwise sanctioned" individual. No aggravating factors are present at this time.

The five-year exclusion that the I.G. imposed against Petitioner is unreasonable, when it is evaluated in the context of the present posture of this case. There is no basis for me to sustain an exclusion of more than three years, given the absence of any aggravating factors. Indeed, the presence of a mitigating factor is evidence supporting an exclusion which may run for less than three years.

In imposing her five-year exclusion of Petitioner, the I.G., in effect, concluded that it was reasonable to rely on the Department of Social Services determination that Petitioner

would not be trustworthy to provide care to program recipients, for a period of five years. The I.G. has adduced no evidence to show that her exclusion is reasonable independent of that which the Department of Social Services relied on. Now, however, the Department of Social Services has stipulated that Petitioner may, in fact, be considered to be trustworthy to provide care at any time. Given that the I.G. is not relying on anything other than the findings of the Department of Social Services, I conclude that Petitioner's exclusion ought to be modified to be consistent with what the Department of Social Services has agreed to do in Petitioner's case.

I modify Petitioner's exclusion to permit him to apply to the I.G. for reinstatement upon his reinstatement to the New York Medicaid program. That is consistent with the terms of Petitioner's settlement agreement. However, I also impose a three-year limit on the I.G.'s exclusion of Petitioner. I do that because there exist no aggravating factors in this case, and in light of the possibility that Petitioner might not be reinstated to the New York Medicaid program within three years.

I have considered the Congressional policy embodied in the 1996 amendments to section 1128 of the Act, even though those amendments are not binding in this case. My modification of the exclusion is not inconsistent with that policy. The 1996 amendments require that an exclusion imposed under section 1128(b)(5) be for a period that is not less than the federal or State suspension or exclusion upon which the I.G.'s exclusion is based. Here, there is no federal or State suspension or exclusion on which the I.G. may premise an exclusion. Petitioner was not suspended or excluded, but is an "otherwise sanctioned" individual. In any event, the exclusion, as modified, will last at least as long as Petitioner's resignation from the New York Medicaid program, up to the three-year benchmark established by 42 C.F.R. § 1001.601.

The consequence of my modification of the I.G.'s exclusion is that Petitioner may apply to the I.G. for reinstatement upon his reinstatement to the New York Medicaid program. However, in view of the absence of any aggravating factors, Petitioner may apply to the I.G. for reinstatement at the end of three years, if he has not been reinstated by the New York Medicaid program by then.

My modification of the exclusion establishes only the circumstances under which the I.G. must consider Petitioner's application for reinstatement. It does not direct reinstatement at any time. The I.G. is not obligated to accept Petitioner's application for reinstatement. 42 C.F.R.

§ 1001.3002. A determination by the I.G. not to accept an application for reinstatement is not reviewable. 42 C.F.R. § 1001.3004. The I.G. is not required to reinstate Petitioner even if he has been reinstated to participate in the New York Medicaid program. And, the I.G. is not required to reinstate Petitioner at the end of three years.

IV. Conclusion

I conclude that the I.G. has authority, pursuant to section 1128(b)(5) of the Act, to exclude Petitioner. I conclude further that the five-year exclusion imposed by the I.G. is not reasonable. I modify the exclusion so that Petitioner may apply to the I.G. for reinstatement at the end of three years or upon his reinstatement to participate in the New York Medicaid program, whichever occurs first.

/s/

Steven T. Kessel
Administrative Law Judge