Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
David R. Warden,	DATE: April 10, 1992
Petitioner,	Docket No. C-92-028
- v. -	Decision No. CR190
The Inspector General.	

DECISION

By letter dated November 4, 1991, David R. Warden, M.D., the Petitioner herein, was notified by the Inspector General (I.G.) of the Department of Health and Human Services (HHS) that he was being excluded for a five-year period from participation in the Medicare program and from State health care programs defined in section 1128(h) of the Social Security Act (the Act), which are referred to collectively as Medicaid. The I.G. informed Petitioner that his exclusion, which arose out of Petitioner's conviction for a criminal offense related to the abuse or neglect of patients, was mandated by section 1128(a)(2) of the Act.

Petitioner then filed this action for review of the decision to exclude him. The I.G. moved for summary disposition. Inasmuch as there are no disputed issues of material fact, summary disposition is appropriate. 42 C.F.R. § 1005.4(b)(12).

Law

Section 1128(a)(2) of the Act makes it mandatory for the Secretary of HHS, or his designee, to exclude from the Medicare/Medicaid programs any person who has been convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of health care.

Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for an offense of this nature is five years.

Applicable Regulations

The I.G. argues that the "new" regulations, published at 57 Fed. Reg. 3329 (Jan. 29, 1992), govern this proceeding, even though Petitioner initiated the action prior to the date the new regulations took effect. The I.G. states that the general rule is that "[a] court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).

In the present case, it is not necessary to decide whether the new regulations are applicable. Even if adopted, they would have no effect on the outcome since they merely codify principles that have long been established from statutory interpretation and case precedent.[1]

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[1] I realize that this position may, at first glance, be viewed as contrary to ALJ Edward D. Steinman's decision in Charles J. Barranco, DAB CR187 (1992). However, Barranco dealt with the application of the new regulations to a permissive exclusion imposed for a license suspension or revocation under section 1128(b)(4)(B) of the Act, whereas this case deals with a mandatory exclusion under section 1128(a)(1). As Judge Steinman noted, "the regulations pertaining to license revocation and suspension, section 1001.501, substantially alter the de novo hearing rights of a petitioner..." Barranco at 21. In the instant case, the new regulations, even if applicable, do not alter either the hearing rights or the factors to be considered in determining whether an exclusion under sections 1128(a)(1) and (2) should be imposed.

Findings of Fact and Conclusions of Law[2]

1. Petitioner is a physician with a medical practice in Kaysville, Utah. I.G. Ex. 3.

2. On February 26, 1988, Petitioner was convicted by a jury in the Utah Second Circuit Court of negligent homicide arising out of the death of a premature newborn infant who had been in Petitioner's care. I.G. Ex. 1.

3. Petitioner was sentenced to a fine of $2,000 and was placed on probation for a term not specified in the record. I.G. Ex. 3/2.

4. The Utah Division of Occupational and Professional Licensing imposed a five-year period of probation on Petitioner's practice of medicine, based upon its finding that the care he had rendered did not comport with recognized standards. I.G. Ex. 3.

5. On January 13, 1989, the I.G. excluded Petitioner from participation in the Medicare/Medicaid programs, pursuant to section 1128(a)(2), the same statutory authority relied upon in the instant case. I.G. Ex. 2.

6. Petitioner's conviction was reversed by the Utah Court of Appeals on November 22, 1989. I.G. Ex. 5.

7. Based upon the reversal of Petitioner's conviction, on January 24, 1990, the I.G. reinstated Petitioner in the Medicare/Medicaid programs, retroactive to February 1, 1989. I.G. Ex. 6.

8. The Utah Supreme Court reversed the Court of Appeals' decision and reinstated the jury verdict on June 4, 1991.

9. On November 4, 1991, the I.G. again excluded Petitioner.

10. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

11. Section 1128(a)(2) of the Act mandates the exclusion, for a minimum period of five years, of any

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[2] The record of this case consists of exhibits submitted by the I.G. (referred to as I.G. Ex. (number)) and briefs submitted by both parties. Counsel for the parties also argued certain matters by telephone on March 20, 1992.

person who has been convicted of a criminal offense relating to the neglect or abuse of patients.

12. Petitioner's conviction of the crime of negligent homicide, which resulted in the death of one of his patients, satisfies the statutory requirement of section 1128(a)(2) that there was a conviction of a criminal offense relating to neglect or abuse of patients.

13. The statute requires that violators of section 1128(a)(2) be excluded for a minimum period of five years; the administrative law judge cannot waive or modify this minimum sanction.

14. The fact that the I.G., by letter of January 24, 1990, reinstated Petitioner "retroactively" to February 1, 1989, did not make Petitioner whole or truly nullify the effects of the first period of exclusion.

15. Petitioner must be credited for the time he was previously excluded for this offense (i.e., the approximately 12 month period between the initial January 12, 1989 exclusion pursuant to his February 26, 1988 conviction and his subsequent reinstatement on January 20, 1990 after the intermediate appellate court reversed his conviction on November 22, 1989) so that his total exclusion does not exceed five years.

Argument

Petitioner maintains (a) that, notwithstanding the fact that his conviction for negligent homicide was upheld by the Utah Supreme Court, he was not guilty because his actions were all within applicable medical standards; (b) that he intends to continue to appeal the Utah Supreme Court's reinstatement of the trial court's guilty verdict; (c) that the persons most hurt by his exclusion from Medicaid and Medicare are his patients, who have remained loyal to him and are now denied the freedom to choose a physician and are denied assistance with their medical bills; and (d) that, if he is to be excluded, then the previous period of suspension -- between his conviction in the trial court and the intermediate court's reversal thereof -- should be credited as part of the penalty already served.

Discussion

As the Utah Supreme Court noted, the trial adduced sufficient evidence to establish that Petitioner's

actions grossly deviated from ordinary standards of care and that the treatment he rendered his patient was such as to cause a substantial and unjustifiable risk of death. Thus, his conviction of the crime of negligent homicide clearly qualifies as a conviction under section 1128(i) and satisfies the statutory requirement under section 1128(a)(2) that Petitioner was convicted " ... of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

This section of the Act is invoked by the mere fact of conviction. Dewayne Franzen, DAB 1165 (1990). Petitioner cannot utilize the present proceeding to collaterally attack such criminal conviction by arguing that he was, in fact, not guilty. Richard G. Philips, D.P.M. DAB CR133 (1991)

Once section 1128(a)(2) is determined to be applicable, the statute requires that the guilty individual be excluded for a minimum period of five years. There is no authority in law or regulation for an administrative law judge's waiving or reducing this minimum sanction. Section 1128(c)(3)(B); 42 C.F.R. 1001.2007(a)(2).

Lastly, it has been held that an administrative law judge has no authority to alter the agency-designated effective date of a period of exclusion. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, M.D., DAB CR119 (1991). This principle, however, does not encompass the situation presented herein where Petitioner is merely seeking to be credited for the period of exclusion that had been previously imposed upon him for the same conviction.

I conclude that, in this respect, Petitioner's position has merit. Both periods of exclusion arose out of the same criminal conviction and were imposed by the same government official under the same legal authority. The I.G.'s letter to Petitioner stated that a five-year exclusion was appropriate. It would be grossly inequitable to transform it, de facto, into a six-year exclusion wholly as a consequence of Petitioner's having exercised his right to appeal in the state courts.[3]

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[3]In the alternative, should the I.G. now suggest that a six-year exclusion is warranted, I would find that Petitioner's offense and circumstances justify no more that the statutory minimum exclusion of five years.

I further conclude that Petitioner's 1989 retroactive reinstatement did not make him whole or truly nullify the effects of the first period of exclusion. The I.G. argues that, following reinstatement, Petitioner was entitled to submit bills to Medicare/Medicaid covering treatment he rendered during the first period of exclusion, but I find that it is unrealistic to assume this would put him in the same position as if he had not been excluded.

Petitioner maintained during the telephone conference the parties participated in on March 20, 1992, that he did not treat Medicare patients during the period of time he was excluded initially (January 13, 1989, until January 20, 1990, the date he was reinstated). It is reasonable to conclude, as Petitioner related through counsel during the conference, that he did not treat patients during that time because he feared that neither he nor his patients would be compensated by Medicare, and that other patients would not come to his office because they believed that Medicare would not reimburse them. Petitioner should therefore be given credit for the 12 months he was excluded after his conviction was initially reversed.

Finally, I conclude that crediting Petitioner for his prior exclusion would not violate the rule enunciated in Chang. This is not a case where an administrative law judge attempts to dictate the effective date of an exclusion (or to reduce a mandatory exclusion to less than five years in contravention of 42 C.F.R. § 1001.2007 (a)(2)). It was the I.G. who determined the dates on which both exclusions would commence. I merely hold that the length of the exclusion must be reduced by the approximately twelve-month exclusion Petitioner was already subjected to for this offense, so that his total exclusion does not exceed five years.

Conclusion

Petitioner's conviction of a criminal offense involving patient neglect mandates his exclusion from the Medicare and Medicaid programs. However, the present exclusion -- meaning the exclusion invoked by the I.G. on November 4, 1992 -- must be reduced by the length of time Petitioner was previously excluded for this offense (January 13, 1989 - January 24, 1990), so that his total exclusion does not exceed the five-year period required by the Act and proposed by the I.G.

/s/

Joseph K. Riotto
Administrative Law Judge