Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Barry Kamen, RPA,	)	Date: September 17, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-131
	)	Decision No. CR493
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Barry Kamen, R.P.A., from participating in Medicare and State Health care programs, including State Medicaid programs, for a period of four years. I find the exclusion to be authorized by the version of section 1128(b)(5) of the Social Security Act (Act) that was in effect as of the date of the I.G.'s exclusion determination. I find to be reasonable the four-year term of the exclusion.

On December 18, 1996, the I.G. notified Petitioner of her determination to exclude him. Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. I held a hearing, by telephone, on April 29, 1997. The I.G. offered into evidence, and I received from the I.G., four exhibits (I.G. Ex. 1 - 4). Petitioner offered into evidence, and I received from Petitioner, two exhibits (P. Ex. 1 - 2). The I.G. called no witnesses to testify at the hearing. Petitioner testified on his own behalf. Both the I.G. and Petitioner submitted posthearing and reply briefs.

Petitioner submitted two exhibits with his posthearing brief. Petitioner designated the first of these additional exhibits "Exhibit I." I have redesignated the exhibit as P. Ex. 3. The exhibit is a voluminous document. Petitioner asserts that P. Ex. 3 is a transcription of notes that Petitioner maintained on a computer disc, which he purportedly discovered after the April 29, 1997 hearing.

Petitioner's posthearing brief at 1 - 2. Petitioner designated the second of these additional exhibits as "Exhibit II." The exhibit is a copy of the document I already admitted into evidence at the hearing as P. Ex. 2. Given that this is a copy of an exhibit already in evidence, I conclude that Petitioner intended to submit this document as an attachment to his brief for my convenience. Accordingly, I designate this document as Attachment I.

The I.G. objected to my receiving into evidence P. Ex. 3. I.G.'s reply brief at 2 - 3. I sustain the I.G.'s objection. I do not receive into evidence P. Ex. 3. Petitioner did not offer the exhibit timely, and has offered no explanation for why he was not aware of the existence of his own notes until after the April 29, 1997 hearing. The I.G. would be prejudiced by my receiving P. Ex. 3 into evidence, to the extent that it may contain relevant evidence. Due to Petitioner's late presentation of P. Ex. 3, the I.G. is unable to offer evidence to challenge the authenticity of the exhibit, to cross-examine Petitioner concerning its alleged significance or the manner in which it was created, or offer rebuttal evidence.

The I.G. submitted one exhibit with her reply brief which she designated as I.G. Ex. 5. I do not receive P. Ex. 5 into evidence because the I.G. did not offer the exhibit timely.

The issues in this case are: (1) whether the I.G. is authorized to exclude Petitioner under the version of section 1128(b)(5) of the Act that governed the I.G.'s exclusion determination; and (2) whether the four-year exclusion that the I.G. imposed against Petitioner is reasonable.

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below, as an italicized heading, followed by a discussion of each Finding.

> ***1. The version of section 1128(b)(5) of the Act which governs this case authorizes the I.G. to exclude an individual who has been suspended, excluded from participation, or otherwise sanctioned, under a State health care program for reasons bearing on the individual's professional competence, professional performance, or financial integrity.***

The I.G. excluded Petitioner pursuant to the version of section 1128(b)(5) of the Act that was in effect as of the date of the exclusion determination. As of December 18, 1996, the date when the I.G. sent notice to Petitioner of her determination to exclude him, section 1128(b)(5) authorized the Secretary of the

United States Department of Health and Human Services (the Secretary) and her delegate, the I.G., to exclude an individual who was suspended, excluded from participation, or otherwise sanctioned, under a State health care program for reasons bearing on that individual's professional competence, professional performance, or financial integrity. Act, section 1128(b)(5)(B).

On July 31, 1996, Congress adopted amendments and revisions to section 1128 of the Act. These amendments and revisions are contained in legislation known as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. 104-191 (104th Congress, 2nd Session); 110 Stat. 1978, Title II, Secs. 201, 211 - 213. HIPAA was signed into law on August 21, 1996. The amendments and revisions became effective on January 1, 1997. Pub.L. 104-191, section 218. The amendments and revisions include changes which affect the length of exclusions that are imposed pursuant to section 1128(b)(5). The amendments and revisions do not apply in this case, in light of the fact that the I.G.'s exclusion determination predated the effective date of the revisions and amendments to section 1128.

Under either the pre-HIPAA version of the Act or under HIPAA, the I.G.'s authority to impose an exclusion under section 1128(b)(5) derives from the action taken by a State. The State action is determinative in deciding whether the I.G. has authority to exclude. An excluded individual may not establish that the I.G. is without authority to exclude under section 1128(b)(5) by proving that the underlying State action is unlawful, or that the individual did not engage in the conduct on which the State action is based.

The principal difference between the version of section 1128(b)(5) that was in effect prior to the effective date of HIPAA and HIPAA is that the pre-HIPAA version of section 1128(b)(5) did not mandate an exclusion of a particular length in a case, whereas HIPAA requires that an exclusion imposed pursuant to section 1128(b)(5) be for a period which is at least coterminous with that which is imposed under the State exclusion or suspension from which authority to exclude is derived. If this case were heard under the amendments and revisions that became effective on January 1, 1997, I would be obligated to sustain an exclusion that is at least coterminous with any State-imposed exclusion, assuming that I found that the I.G. was authorized to exclude Petitioner.

The version of section 1128(b)(5) which applies to this case gives the Secretary and the I.G. discretion to impose an exclusion where authority exists to impose one. The Act established no mandatory minimum or maximum period of

exclusion for an exclusion imposed under the version of section 1128(b)(5) which applies here. The controlling statutory criterion for determining the length of an exclusion under the version of section 1128(b)(5) which applies to this case is the excluded individual's trustworthiness to provide care.

2. The I.G. is authorized to exclude Petitioner under the pre-HIPAA version of section 1128(b)(5)(B) of the Act.

Petitioner is a registered physician's assistant in the State of New York. Under New York law, a registered physician's assistant is authorized to provide medical care under the direction and supervision of a physician. Tr. at 23. From March, 1991 until March, 1994, Petitioner was employed by a physician, Dr. Stephen Klein. Tr. at 36.

In a letter signed August 28, 1995, the New York State Department of Social Services (Department of Social Services) advised Petitioner that he was being excluded from the New York Medical Assistance program. I.G. Ex. 1. I take notice that the New York Medical Assistance program is the New York State Medicaid program, and is a State health care program. The Department of Social Services cited as its general reason for excluding Petitioner that Petitioner had engaged in unacceptable practices. Id. at 1. Specifically, the Department of Social Services found that Petitioner had engaged in the following unacceptable practices:

- Unacceptable record keeping. This was defined to be failure by Petitioner to maintain records necessary to fully disclose the medical necessity for and the nature and extent of the medical care, services or supplies furnished, or to comply with other parts of the law governing the New York Medicaid program. Id.

- Excessive services. This was defined to be the furnishing or ordering of medical services or supplies by Petitioner that were substantially in excess of the needs of New York Medicaid clients. Id.

The Department of Social Services advised Petitioner that it based its determination on an audit report of Petitioner's records. The final audit report was attached to the Department of Social Services notice to Petitioner. I.G. Ex. 1 at 2; I.G. Ex. 2.

The audit report consisted of a written review of the records of 20 patients of Dr. Klein. I.G. Ex. 2. The audit report concluded that, although Dr. Klein had supervised Petitioner, Petitioner was responsible for the findings contained in the audit report. Id. at 2. The audit report concluded that, in general, Petitioner never did an adequate history or an adequate physical examination of a patient. Id. at 3. It found that Petitioner made some of his diagnoses of a patient's condition based on past visits by the patient, which may have occurred years previously. Id. At other times, it was unclear from a patient's record on what Petitioner based his working diagnosis of the patient. Id.

The audit report found that the medical charts that were attributed to Petitioner consisted of inadequate notes and repeated laboratory tests. I.G. Ex. 2 at 3. It found that there was nothing in the records to substantiate that Petitioner had provided adequate evaluation of, or treatment to, his patients. Id. It found that, aside from evidence that Petitioner had ordered repeated medical tests, there was nothing in the charts to show that Petitioner had attempted to improve the health of his patients. Id. The report concluded that Petitioner's failure to do so was especially bad, inasmuch as many of Petitioners' patients had serious conditions, such as diabetes mellitus and heart disease. Id. Finally, the report concluded that there was no evidence that Petitioner actually was being supervised by a physician. Id.

The Department of Social Services determined to exclude Petitioner from participating in the New York Medicaid program for a period of five years. I.G. Ex. 1 at 2. It advised Petitioner that he had a right to request an administrative hearing to challenge the exclusion determination. Id. Petitioner did not request a hearing.

The aforesaid evidence establishes that the I.G. is authorized to exclude Petitioner. The evidence proves that Petitioner was excluded from participating in a State health care program. That exclusion became administratively final by virtue of Petitioner's not requesting an administrative hearing from the Department of Social Services' determination to exclude him. The evidence proves also that Petitioner was excluded for the reasons stated in section 1128(b)(5) of the Act. At the very least, the reasons for excluding Petitioner relate to his professional competence or professional performance as a physician's assistant.

The Department of Social Services excluded Petitioner because it found that he engaged in unacceptable record keeping and in ordering excessive services. As is made clear by the audit report that was accepted by the Department of Social Services and made part of its exclusion determination, Petitioner's unacceptable record keeping included failure to write adequate medical histories and the results of physical examinations of his patients. These findings of dereliction of care plainly relate to Petitioner's professional competence or professional performance. The finding that Petitioner ordered unnecessary or excessive medical tests for his patients relates also to his professional competence or performance. Furthermore, the finding that Petitioner neglected the welfare of his patients who suffered from diabetes mellitus or heart disease, as is evidenced by his record keeping practices, relates to Petitioner's professional competence or performance.

At the April 29, 1997 hearing, Petitioner averred repeatedly that he was not derelict in providing care to his patients. Petitioner denied engaging in inadequate record keeping. Tr. at 49 - 50. He denied ordering excessive medical tests. Id. According to Petitioner, other individuals were responsible for any improper care that may have been given to Petitioner's patients. See Tr. at 49 - 50.

Petitioner's assertions amount to a repudiation of the findings made by the Department of Social Services. I have considered these assertions in evaluating whether the exclusion imposed against Petitioner by the I.G. is reasonable. Findings 4 - 6. However, these assertions are not relevant to my decision that the I.G. is authorized to exclude Petitioner. As I hold above, at Finding 1, the I.G.'s authority to exclude Petitioner derives from action taken by a State authority, in this case, the Department of Social Services. The I.G. is authorized to impose an exclusion against an individual if the State authority acts against that individual for the reasons stated in the Act. The I.G.'s authority to exclude, based on the State action, may not be challenged by looking behind that action to question the action's validity.

> ***3. The criteria for determining the length of an exclusion imposed under the pre-HIPAA version of section 1128(b)(5) of the Act are stated at 42 C.F.R. § 1001.601.***

As I find above, at Finding 1, the statutory criterion for measuring the reasonableness of an exclusion that is imposed under the pre-HIPAA version of section 1128(b)(5) of the Act is the trustworthiness of the excluded individual to

provide care to beneficiaries and recipients of federally-funded health care programs. An exclusion will be found to be reasonable if it is for a period that is reasonably calculated to protect program beneficiaries and recipients from an untrustworthy provider of care.

The Secretary published regulations that implemented the pre-HIPAA version of section 1128 of the Act. These are contained at 42 C.F.R. Part 1001. The regulation which governed exclusions that were imposed under the pre-HIPAA version of section 1128(b)(5) is contained at 42 C.F.R. § 1001.601.

The regulation provides that, absent the presence of either an aggravating or a mitigating circumstance, an exclusion imposed under the pre-HIPAA version of section 1128(b)(5) shall be for a benchmark period of three years. 42 C.F.R. § 1001.601(b)(1). An exclusion may be for more than three years, if aggravating circumstances are established that are not offset by mitigating circumstances. Id.; see 42 C.F.R. §§ 1001.601(b)(2); (b)(3). An exclusion may be for less than three years, if mitigating circumstances are established that are not offset by aggravating circumstances. Id.

The regulation describes the sole circumstances which may be found to be aggravating or mitigating. 42 C.F.R. §§ 1001.601(b)(2); (b)(3). The circumstances which the regulation identifies to be aggravating or mitigating function as the Secretary's rules of evidence on the issue of an excluded individual's trustworthiness. Evidence which does not relate to an aggravating or a mitigating circumstance is not relevant to the issue of the excluded individual's trustworthiness to provide care, and may not be considered in deciding whether an exclusion of a particular length is reasonable.

The regulation does not attach any weight to any of the identified aggravating or mitigating circumstances. An exclusion of a particular length is not directed by the presence of an aggravating circumstance or circumstances, or by the presence of a mitigating circumstance or circumstances. In order to decide whether an exclusion of a particular length is reasonable in a given case, the evidence which relates to any aggravating or mitigating circumstance that is established must be considered carefully to see what it shows about the excluded individual's trustworthiness or lack of trustworthiness to provide care.

4. The I.G. proved the presence of two aggravating circumstances.

The I.G. proved the presence of two aggravating circumstances. These are as follows.

As a first aggravating circumstance, the I.G. proved that the acts engaged in by Petitioner could have had a significant adverse impact on the health of program recipients. 42 C.F.R. § 1001.601(b)(2)(i). The Department of Social Services audit report concluded that Petitioner's failure to make efforts to improve the health of his patients may have endangered those patients who suffered from serious conditions such as diabetes mellitus and heart disease. I.G. Ex. 2 at 3. I find this evidence to be persuasive evidence that Petitioner engaged in conduct that potentially endangered the health of his patients.

Petitioner now asserts that he did nothing to endanger the health of his patients. According to Petitioner, he was diligent in providing his patients with good medical care. If anyone was derelict in providing care to these individuals, according to Petitioner, it was other individuals who worked for Dr. Klein, or perhaps, even Dr. Klein. See Tr. at 49 - 50.

I find Petitioner's assertions to be self-serving and not credible. I base my conclusion partly on the fact that Petitioner did not avail himself of the opportunity to offer evidence at a State administrative hearing to rebut the audit report which was the basis for the Department of Social Services exclusion determination.

Furthermore, Petitioner did not present evidence at the hearing which I conducted which credibly rebutted the results of the audit report. Although Petitioner denied generally the conclusions of the audit report, he did not attempt to rebut the specific findings of the report that were based on 20 specific treatment records. See I.G. Ex. 2 at 4 - 23. Petitioner averred that he did not have a specific recollection of the care that he provided to the patients whose records were the basis for the audit report. Tr. at 56 - 60. Petitioner did not offer, nor did he ask me to assist him to obtain, the records which are the basis for the audit report. Petitioner could have asked that I issue subpoenas for these records, either to the Department of Social Services or to Dr. Klein. He did not do so.

Furthermore, I find Petitioner's assertions that he was the victim of the actions of other individuals, and not responsible for improper practices, to be unpersuasive, in light of the fact that Petitioner continued to engage in remunerative employment with Dr. Klein while knowing that his employer was engaging in improper activities. Petitioner worked for Dr. Klein from about March, 1991 until March, 1994. By his own admission, Petitioner knew that he was involved in an enterprise that, at the least, was engaged in improprieties. Tr. at 33 - 38. Yet, Petitioner persisted in his employment with that enterprise because it suited his self-interest to do so.

The I.G. proved the presence of a second aggravating circumstance. The I.G. proved that the Department of Social Services excluded Petitioner for more than the benchmark period of three years. 42 C.F.R. § 1001.601(b)(2)(ii). In this case, the State exclusion is for five years.

5. Petitioner did not prove the presence of any mitigating circumstances.

Petitioner offered no credible evidence to prove the presence of any of the mitigating circumstances that are described in 42 C.F.R. § 1001.601(b)(3). In his posthearing brief, Petitioner asserted that there existed "tremendous" mitigating factors in this case. Petitioner's posthearing brief at 1. These alleged mitigating factors include Petitioner's assertions that he: (1) was nothing more than an employee of Dr. Klein and is not responsible for any of the actions that are attributable to Dr Klein; (2) withdrew voluntarily from the New York Medicaid program; and, (3) provided cooperation into an ongoing investigation of Dr. Klein. Additionally, Petitioner asserts that he cared greatly about the welfare of his patients. Petitioner's posthearing brief at 2 - 3.

Petitioner's alleged lack of responsibility for the findings of dereliction of care that were made by the Department of Social Services is not a mitigating circumstance. These assertions, if true, would rebut the evidence that the I.G. offered to support its case for aggravating circumstances. However, I have concluded that Petitioner's assertions of non-responsibility are not credible. Finding 4. The fact that Petitioner may have withdrawn voluntarily from participation in the New York Medicaid program also is not a mitigating circumstance.

Arguably, Petitioner would establish the presence of a mitigating circumstance if he proved that his cooperation with State authorities led to the administrative sanctioning of other individuals, including Dr. Klein. See 42 C.F.R. §

1001.601(b)(3)(ii). However, Petitioner has merely alleged providing cooperation with State authorities concerning an investigation of Dr. Klein. He has offered no evidence that his asserted cooperation led to action being taken against Dr. Klein. Therefore, I find that Petitioner did not establish a mitigating circumstance within the meaning of 42 C.F.R. § 1001.601(b)(3)(ii).

6. The four-year exclusion of Petitioner is reasonable.

The I.G. excluded Petitioner for a period of four years, which is one year less than the term of the State-imposed exclusion of Petitioner. I find this exclusion to be reasonable. It takes into account evidence that, for a period of nearly three years, Petitioner worked willingly in an environment which encouraged him to be derelict in providing care to his patients. It reflects Petitioner's serious failures to document the care that he provided. It reflects also the fact that Petitioner's conduct potentially endangered the welfare and safety of his patients. And, it reflects the fact that the State of New York concluded Petitioner to be a highly untrustworthy individual.

/s/

Steven T. Kessel
Administrative Law Judge