**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Scott Christie, Psy.D.
(OI File No. H-12-42635-9)

Petitioner,

v.

The Inspector General.

Docket No. C-14-88

Decision No. CR3201

Date: April 15, 2014

# DECISION

Petitioner, Scott Christie, Psy.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(5) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(5)), effective August 20, 2013, based upon his exclusion from participation in the Maine Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity. There is a proper basis for exclusion. Petitioner Christie's exclusion for the period during which he is excluded from participation in the Maine Medicaid program (MaineCare) is mandated by section 1128(c)(3)(E) of the Act (42 U.S.C. § 1320a-7(c)(3)(E)) and 42 C.F.R. § 1001.601(b)(1).[1]

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[1] References are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of determination to exclude Petitioner, unless otherwise indicated.

## I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated July 31, 2013, that he was excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(5) of the Act. The I.G. advised Petitioner that his exclusion was effective 20 days from the date of the notice letter and that the exclusion would continue until such time as Petitioner is reinstated by the Maine State Department of Health and Human Services (the state agency). The basis cited for Petitioner's exclusion was his exclusion from MaineCare for reasons bearing on his professional competence, professional performance, or financial integrity. I.G. Exhibit (Ex.) 1.

Petitioner requested a hearing on October 3, 2013, with a supporting brief (RFH) and attachments A, B, C, D, E, F, G, H, I, K, L, and M. The case was assigned to me for hearing and decision on October 25, 2013. A prehearing telephone conference was convened on November 21, 2013, the substance of which is memorialized in my order dated November 22, 2013. During the prehearing conference, the I.G. agreed that there is no issue of timeliness of the request for hearing or jurisdiction. Petitioner declined to waive an oral hearing. The I.G. requested the opportunity to file a motion for summary judgment and I established a briefing schedule.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Br.) on January 6, 2014, with I.G. Exs. 1 through 5. On February 19 and 20, 2014, Petitioner filed his responses to the I.G.'s motion for summary judgment (P. Br.) with Petitioner's Exhibits (P. Exs.) 1 through 6, and 8 through 13.[2] On March 5, 2014, the I.G. filed a

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[2] Petitioner filed two separate responses to the CMS motion for summary judgment by e-File. Petitioner subsequently filed a motion to correct references in his first response or to have his first response deleted from the e-File system. Petitioner filed a second motion requesting to withdraw his first motion to the extent he requested deletion of the response filed first. Documents filed by e-File are not removed once filed but remain part of the record. However, as requested by Petitioner, I have considered the response he filed first with the corrections noted in his motion. "P. Br." citations in this decision are to the pages of the response Petitioner filed first.

reply brief. Petitioner has not objected to my consideration of I.G. Exs. 1 through 5, and they are admitted as evidence. The I.G. did not object to my consideration of P. Exs. 1 through 6, and 8 through 13, and they are admitted. Attachment (att.) F to the RFH is also admitted as it is the most recent version of a similar document admitted as I.G. Ex. 4.[3]

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[3] There are two different versions of the state agency's August 21, 2012 letter in the record. The version submitted by the I.G. as "I.G. Ex. 4" states:

> As a result of the Notice of Sanction dated June 3, 2010, and the Final Informal Review Decision dated August 15, 2011, we are terminating your participation in, and reimbursement from, all medical assistance programs administered by the Maine Department of Health and Human Services (Department), effective upon receipt of this letter.

The version submitted by Petitioner with his hearing request states:

> As a result of the Notice of Sanction dated June 3, 2010, and the Final Informal Review Decision dated August 15, 2011, which are resolved by a settlement agreement of the approximate date of this letter, we are terminating your participation in, and reimbursement from, all medical assistance programs administered by the Maine Department of Health and Human Services (Department), effective upon receipt of this letter.

RFH att. F. Although there is little substantive difference in the letters, I conclude that the version submitted by Petitioner as RFH att. F, is the latest and final version of the state agency's August 21, 2012 letter, because it specifically refers to a settlement agreement to be executed which is in evidence as I.G. Ex. 5. The remaining attachments to the RFH are not admitted as evidence because they were not offered by Petitioner as evidence in support of his response to the motion for summary judgment and they duplicate or are cumulative of evidence offered by the parties.

## II. Discussion

### A. Applicable Law

Section 1128(b)(5) of the Act provides:

> (b) Permissive Exclusion.—The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> ****
>
> (5) Exclusion or suspension under federal or state health care program.—Any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under—
>
> (A) any Federal program, including programs of the Department of Defense or the Department of Veterans Affairs, involving the provision of health care, or
>
> (B) a State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.601(a)(1).

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

### B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). Whether the length of exclusion is unreasonable is not an issue in this case, as the period is specified by Congress and the Secretary. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.1001(b).

### C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

**1. Petitioner's request for hearing was timely, and I have jurisdiction.**

**2. Summary judgment is appropriate in this case.**

Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2, 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. Pro. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997) (holding in-person hearing is required where the non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. There is no dispute that Petitioner was excluded by the State of Maine from MaineCare for his failure to properly retain or disclose records of services provided to MaineCare members and related payment records. I.G. Ex. 4. Petitioner does not deny that he was excluded from MaineCare. Rather, Petitioner wants to challenge the validity of the state exclusion and the evidence presented by the I.G. related to the state exclusion. However, I may not

review the underlying state action and Petitioner may not collaterally attack that action before me. 42 C.F.R. § 1001.2007(d). This case must be resolved against Petitioner as a matter of law because the state action provides a basis for permissive exclusion and the period of exclusion is fixed by law. I do not have authority to review the I.G.'s exercise of discretion to exclude pursuant to section 1128(b), if I conclude that there is a basis for exclusion. 42 C.F.R. § 1005.4(c)(5). Petitioner's arguments raise no genuine dispute of material facts, that is, facts that could affect the outcome of this case. Accordingly, summary judgment is appropriate.

### 3. There is a basis to exclude Petitioner pursuant to section 1128(b)(5) of the Act.

The state agency notified Petitioner by letter dated August 21, 2012, that his participation in the MaineCare program would be terminated for an indefinite period effective upon his receipt of the letter. I.G. Ex. 4; RFH att. F. The state agency letter advised Petitioner that its determination to exclude Petitioner was based on findings that Petitioner failed to retain or disclose contemporaneous records of services provided to MaineCare members and related payment records, in violation of the MaineCare Benefits Manual. I.G. Ex. 4 at 1; RFH att. F at 1.

On August 22, 2012, the state agency and Petitioner executed a settlement agreement. The agreement recites that the state agency alleged that Petitioner was indebted to MaineCare for $538,577.57 for violations of the MaineCare Benefits Manual; Petitioner was excluded from MaineCare on August 21, 2012; Petitioner denied any violations or that he was indebted to MaineCare; and the parties agreed to compromise the claim. The agreement required Petitioner to: (1) pay $165,000 to the state agency; (2) not challenge or appeal the August 21, 2012 exclusion from MaineCare and not seek reinstatement to MaineCare; and (3) release certain financial records. The state agency agreed to release Petitioner from any related civil or administrative monetary cause of action. I.G. Ex. 5 at 1-3. The agreement specifically states that Petitioner understood that his exclusion "excludes his participation from all medical assistance programs administered by [the state agency] and from Medicare." I.G. Ex. 5 at 2.

Pursuant to section 1128(b)(5) of the Act, the Secretary may exclude from participation any individual or entity: (1) suspended or excluded from participation in any federal or state health care program; (2) for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity. In this case, there is no dispute that MaineCare, the Maine Medicaid program, is a state health care program within the meaning of section 1128(h) of the Act. There is no dispute that Petitioner was excluded from MaineCare. I.G. Exs. 4, 5; RFH att. F; P. Br. at 4, 9-10. It is undisputed that the state agency's notice of exclusion shows that Petitioner was excluded from MaineCare for reasons bearing on his professional competence, professional performance, or financial integrity. The notice of exclusion states the

exclusion was for failure to retain, disclose, or make available to the state agency records of services provided to MaineCare members and records of related payments. I.G. Ex. 4 at 1; RFH att. F at 1. Petitioner waived any right to challenge the exclusion or the stated bases for the exclusion as part of his settlement agreement. I.G. Ex. 5 at 2. The stated basis for the exclusion clearly relates to Petitioner's professional performance as a practitioner participating in MaineCare and his financial integrity to the extent that he did not retain, disclose, or make available to the state agency records related to payments from MaineCare for services rendered to MaineCare beneficiaries.

Accordingly, there is a basis for the exclusion of Petitioner pursuant to section 1128(b)(5) of the Act. When there is a basis for exclusion pursuant to section 1128(b) of the Act, I have no authority to review the I.G.'s exercise of discretion to exclude an individual or entity. 42 C.F.R. § 1005.4(c)(5).

Petitioner argues that he should have a "continued right" to litigate the state agency's allegations as part of this administrative appeal. P. Br. at 3, 25-26. Petitioner asserts that for an "exceptional" case such as his, an ALJ should examine the underlying state investigation. P. Br. at 4, 9. Petitioner is in error. I have no jurisdiction to review the underlying state action:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). Therefore, Petitioner is prohibited from collaterally attacking the state agency action before me and I am specifically prohibited from reviewing that action. I am required to follow the law. 42 C.F.R. § 1005.4(c)(1).

Petitioner also raises a constitutional claim, contending that his exclusion has placed him in a position of involuntary servitude, in violation of the Thirteenth Amendment of the U.S. Constitution. Specifically, Petitioner argues that the state and federal governments have coerced him into providing services, such as production of patient records, for free, when these services are eligible for reimbursement from the government. P. Br. at 22-24, 26. I have no authority to review Petitioner's constitutional claims. My authority to decide these and other cases involving the I.G. is limited to that which has been delegated to me by the Secretary. I am bound by applicable laws and regulations and have no authority to declare a federal statute or regulation unconstitutional or to review whether

or not state action is constitutional. *See 1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Sentinel Med. Labs., Inc.*, DAB No. 1762 (2001), *aff'd sub nom., Teitelbaum v. Health Care Fin. Admin.*, No. 01-70236 (9th Cir. Mar. 15, 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002). I also note that Petitioner agreed to produce certain records as part of his settlement with the state agency. I.G. Ex. 5 at 2.

**4. The period of Petitioner's exclusion is not unreasonable as a matter of law.**

In this case, there is no issue as to the reasonableness of the period of exclusion, as it is fixed by the Act and regulations. The Act and regulations mandate that the period of exclusion under section 1128(b)(5) will be not less than the period of exclusion from the state health care program.[4] Act § 1128(c)(3)(E); 42 C.F.R. § 1001.601(b)(1).

I also note that the settlement agreement with the state agency that Petitioner signed on August 22, 2012, specifically stated:

> Dr. Christie agrees to not challenge or appeal the Exclusion dated August 21, 2012 . . . and to not seek reinstatement from the Exclusion. Dr. Christie agrees that this prohibition on seeking reinstatement is never-ending and understands that this Exclusion excludes his participation from all medical assistance programs administered by [the state agency] and from Medicare.

I.G. Ex. 5 at 2. Therefore, Petitioner clearly agreed to what is effectively a permanent exclusion from both MaineCare and the federal Medicare program.

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[4] Petitioner's reinstatement in Medicare or other federal programs is not automatic. If Petitioner is reinstated into MaineCare, he must apply to the I.G. for reinstatement. 42 C.F.R. §§ 1001.3001-.3004.

## III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs, effective August 20, 2013, 20 days after the July 31, 2013 I.G. notice of exclusion. The period of exclusion is not less than the period during which Petitioner is excluded from a state or federal healthcare program.

/s/
Keith W. Sickendick
Administrative Law Judge