

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
Frank Waltz, M.D.)	DATE: SEP 1, 1989
)	
Petitioner,)	
)	
- v. -)	Docket No. C-86
)	DECISION CR 41
The Inspector General.)	
)	

DECISION OF ADMINISTRATIVE LAW JUDGE

On November 4, 1988, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and State health care programs.¹ The I.G. told Petitioner that his exclusions were due to revocation by the Alabama State Board of Medical Examiners (the Board of Examiners) of Petitioner's license to practice medicine in Alabama. Petitioner was advised that at the time he obtained a valid license to practice medicine in Alabama, he would have the right to apply for reinstatement to the Medicare and State health care programs.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I conducted a prehearing conference by telephone on February 9, 1989, at which Petitioner appeared pro se. I advised Petitioner that he had a right to obtain legal counsel. Petitioner acknowledged that he knew he had that right, but stated that he intended to appear pro se. As a result of this prehearing conference, I issued a

¹ "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. 1320a-7(h), to include any State Plan approved under Title XIX of the Act (such as Medicaid). State health care programs are referred to hereinafter as "Medicaid."

Prehearing Order on February 21, 1989, which, among other things, scheduled a hearing to be held in the case in Mobile, Alabama, on April 4, 1989.

Subsequently, I was advised by the parties that they had agreed to try this case on the basis of the written record, with oral argument to be conducted by telephone. I issued a Prehearing Order on March 31, 1989, which recited this agreement and established a schedule for the parties to submit proposed exhibits and briefs.

On July 31, 1989, I conducted oral argument of this case by telephone. Prior to hearing the parties' arguments, I admitted into evidence all of the exhibits that the parties proffered.

I have considered the evidence in this case, the parties' arguments, and applicable law. I conclude that the exclusions imposed and directed by the I.G. are permitted by section 1128(b)(4)(A) of the Social Security Act. Therefore, I am deciding this case in favor of the I.G.

ISSUES

The issues in this case are whether:

1. the Board of Examiners revoked Petitioner's license to practice medicine in Alabama for reasons bearing on Petitioner's professional competence or performance;
2. it would be relevant for Petitioner to prove that the Board of Examiners deprived him of due process;
3. I have authority to grant Petitioner relief based on his argument that section 1128(b)(4)(A) of the Social Security Act is unconstitutional;
4. the exclusions imposed and directed against Petitioner are reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a doctor of medicine. I.G. Ex. 1.²
2. Petitioner held a license to practice medicine in the State of Alabama. I.G. Ex. 1.
3. On September 17, 1987, the Board of Examiners issued an administrative complaint against Petitioner. I.G. Ex. 1.
4. The complaint alleged that Petitioner was unable to practice medicine, with reasonable skill and safety to patients, by virtue of physical and mental illness characterized by a physical impairment, mental and emotional depression, and misuse and abuse of controlled substances. I.G. Ex. 1.
5. The Board of Examiners issued an order, temporarily suspending Petitioner's license to practice medicine, and scheduled a hearing in Petitioner's case. I.G. Ex. 2.
6. On November 25, 1987, the Board of Examiners held a hearing concerning the allegations against Petitioner. I.G. Ex. 4.
7. On January 8, 1988, the Board of Examiners issued an Order revoking Petitioner's license to practice medicine in Alabama. I.G. Ex. 3.
8. The Board of Examiners found that in several instances Petitioner had prescribed, dispensed, furnished or supplied controlled substances for reasons other than a legitimate medical purpose and/or in quantities not reasonably related to a patient's medical condition. I.G. Ex. 3.
9. The Board of Examiners found that Petitioner was unable to practice medicine, with reasonable skill and safety to patients, by virtue of physical and mental

² The parties' exhibits and memoranda will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Exhibit	P. Ex. (letter designation)
Brief of the Inspector General	I.G.'s Brief at (page)
Petitioner's Memoranda	P.'s Memoranda

illness characterized by physical and mental impairment. I.G. Ex. 3.

10. The Board of Examiners revoked Petitioner's license to practice medicine in Alabama, for reasons bearing on Petitioner's professional competence or performance. Findings 7-9; Social Security Act, section 1128(b)(4)(A).

11. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662, May 13, 1983.

12. On November 4, 1988, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(b)(4)(A) of the Social Security Act. I.G. Ex. 9.

13. Petitioner's exclusions are effective until such time as his license to practice medicine in Alabama is restored and his participation status is reinstated. I.G. Ex. 9.

14. The I.G. had discretion to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Social Security Act, section 1128(b)(4)(A).

15. Petitioner's assertion that he was deprived of due process by the Board of Examiners is not relevant. See Social Security Act, section 1128(b)(4)(A).

16. I do not have authority to grant Petitioner relief based on his argument that section 1128(b)(4)(A) of the Social Security Act is unconstitutional. See Social Security Act, section 205(b).

17. The exclusions imposed and directed against Petitioner are reasonable. Social Security Act, section 1128(b)(4)(A).

ANALYSIS

The Board of Examiners revoked Petitioner's license to practice medicine in Alabama based on findings that Petitioner prescribed controlled substances to patients in circumstances where such prescriptions were not medically indicated and that Petitioner was unfit to

practice medicine, by virtue of physical and mental illness. Findings 7-9. Subsequently, the I.G. imposed and directed exclusions against Petitioner pursuant to section 1128(b)(4)(A) of the Social Security Act, which permits such exclusions in cases where an individual or entity's license to provide health care has been suspended or revoked by a state licensing authority for reasons bearing on the individual's or entity's professional competence or performance, or financial integrity. The exclusions imposed and directed by the I.G. are indefinite in duration. Petitioner may request reinstatement as a provider in Medicare and Medicaid when his license is reinstated.

Petitioner does not deny that the Board of Examiners revoked his license to practice medicine in Alabama. He does not dispute that the rationale expressed by the Board of Examiners pertained to Petitioner's professional competence or performance. He does not claim that, assuming it was reasonable for the I.G. to exclude him, the indefinite nature of the exclusions is unreasonable.

Petitioner argues that the exclusions in this case are unreasonable because the Board of Examiners allegedly did not give him a fair hearing. P.'s Ex. A-L; P.'s Memoranda. Alternatively, he argues that if section 1128(b)(4)(A) permits his exclusion from Medicare and State health care programs based on unfair Board of Examiners proceedings, then the exclusion law is unconstitutional.

The I.G. asserts that the authority contained in section 1128(b)(4)(A) for the Secretary (or his delegate, the I.G.) to impose and direct exclusions derives from the actions taken by state licensing boards, not the underlying facts on which state boards' decisions may be based. According to the I.G., the exclusion law does not authorize the Secretary to examine state boards' actions to ascertain their validity under state or federal statutes and constitutions, nor does it authorize the Secretary to examine the facts on which boards' actions are based, except to determine whether the reasons for such actions bear on the individuals' or entities' professional competence, performance, or financial integrity. I.G.'s Brief at 4.

1. The Board of Examiners revoked Petitioner's license to practice medicine in Alabama for reasons bearing on Petitioner's professional competence or performance.

As noted above, the Board of Examiners concluded that Petitioner had prescribed controlled substances, in a number of cases, to patients under circumstances where such prescriptions were not medically indicated. Finding 7. The Board of Examiners also found that Petitioner was unfit to practice medicine by virtue of physical and mental illness. Finding 8. These findings manifestly pertain to Petitioner's professional competence and performance. Therefore, the Board of Examiners revoked Petitioner's license to practice medicine in Alabama for reasons bearing on Petitioner's professional competence or performance, within the meaning of section 1128(b)(4)(A).

2. Petitioner's assertion that he was deprived of due process by the Board of Examiners is irrelevant. See Social Security Act, section 1128(b)(4)(A).

The heart of Petitioner's case is his assertion that he was not given a fair hearing by the Board of Examiners. According to Petitioner, the I.G.'s exclusion determination is invalid because it is based on a defective Board of Examiners' decision.

I conclude that Petitioner's claims concerning the fairness and completeness of the state licensing board proceedings are irrelevant. There are several possible issues which a petitioner may raise in a hearing brought to challenge exclusions imposed pursuant to section 1128(b)(4)(A). A petitioner may argue that his license was not, in fact, suspended or revoked; that no action was taken by a state licensing authority; or that the suspension or revocation imposed against the petitioner was not for reasons bearing on his or her professional competence, performance, or financial integrity. A petitioner may also argue that the terms of the exclusions imposed and directed by the I.G. are unreasonable.

A hearing on exclusions imposed and directed pursuant to section 1128(b)(4)(A) may not be used by a petitioner to mount a collateral attack on a state board's decision. The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(A) emanates from the actions taken by state licensing boards. The law instructs the Secretary to rely on these boards' decisions. The law does not intend that the Secretary

examine the fairness or propriety of the process which led to the decisions.³

The sections of the law which provide for administrative hearings in exclusion cases do not authorize collateral challenges of state board decisions on due process grounds. Congress directed the Secretary to provide excluded parties with the opportunity to have hearings on their exclusions. Social Security Act, section 1128(f). The law requires that an excluded party be afforded reasonable notice and opportunity for a hearing by the Secretary to the same extent as is provided in section 205(b) of the Social Security Act.

Section 205(b) states that:

Upon request by any . . . individual who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered . . . [the Secretary] shall give such . . . [individual] reasonable notice and opportunity for a hearing with respect to such decision, and if a hearing is held, shall on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. (Emphasis added.)

This section does not provide a petitioner with the right in an administrative hearing to prevail based on issues which are not relevant to the Secretary's (or pursuant to delegation, the I.G.'s) exclusion decision. In this case, the "decision" which is challenged is the I.G.'s decision to exclude Petitioner based on the Board of Examiners' license revocation determination. The fairness of the Board of Examiners' license revocation determination is not relevant to the I.G.'s exclusion decision, and thus evidence of the Board of Examiners' alleged lack of due process is similarly not relevant.

³ The exclusion law does not operate as a bar to a petitioner appealing a state board's suspension or revocation decision. As the I.G. notes in his brief, were Petitioner to successfully appeal the Board's license revocation decision and, thereby, have his license to practice medicine reinstated, the duration aspect of the exclusions would be satisfied, and Petitioner would be eligible for reinstatement as a participant in Medicare and State health care programs. I.G.'s Brief at 7.

3. I do not have authority to grant Petitioner relief based on his argument that section 1128(b)(4)(A) of the Social Security Act is unconstitutional. See Social Security Act, section 205(b).

At oral argument of this case, Petitioner asserted that if the exclusion law did not permit him to challenge the fairness of the Board of Examiners' license revocation decision in this case then the law is unconstitutional. I conclude that I do not have authority to decide this issue.

There is no language in section 1128(f) which provides that, in conducting hearings as to the propriety of exclusions, the Secretary must consider challenges to the constitutionality of the exclusion law. Section 205(b) does not suggest that challenges to the Secretary's decisions in administrative hearings may include arguments as to the constitutionality of statutes which give the Secretary authority to make decisions in individual cases.⁴

4. The exclusions imposed and directed against Petitioner are reasonable.

Although Petitioner has challenged the basis for the I.G.'s exclusion determination, he has not asserted that, assuming the I.G. had authority to impose and direct exclusions in this case, the duration of the exclusions imposed and directed against Petitioner is unreasonable.

The I.G. imposed and directed conditional exclusions against Petitioner's participation as a provider in Medicare and Medicaid. The I.G. asserts that his exclusion determination in this case is consistent with Congress' intent that individuals or entities who lose their licenses to provide health care in any State, for reasons pertaining to their professional competence or performance, or their financial integrity, be excluded in all States from participating in Medicare or in Medicaid until such time as they reacquire licenses and demonstrate trustworthiness as providers of services. I.G.'s Brief at 8-9.

One purpose of the exclusion law is to give the Secretary a remedy to protect Medicare beneficiaries and Medicaid recipients from individuals or entities who are found

⁴ I make no finding as to Petitioner's right to challenge the constitutionality of the exclusion law in another forum.

capable of causing harm to beneficiaries or recipients. Congress intended that the Secretary exclude individuals or entities who have lost their licenses for reasons pertaining to their professional competence or performance, or their financial integrity, from performing those services for which they had been licensed, until such time as their licenses are restored. S. REP. No. 109, 100th Cong., 1st Sess. 7, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 688.

The I.G. imposed and directed exclusions against Petitioner based on the Commission's revoking Petitioner's license to practice medicine for reasons pertaining to Petitioner's professional competence and performance. Given this, and in light of legislative purpose, the conditional exclusions imposed and directed by the I.G. are reasonable.

CONCLUSION

Based on the evidence and the law, I conclude that the I.G.'s determination to exclude Petitioner from participating in Medicare, and to direct that Petitioner be excluded from participating in Medicaid, was justified pursuant to section 1128(b)(4)(A) of the Social Security Act. I conclude further that it was reasonable to base the duration of the exclusions on Petitioner's obtaining a license to practice medicine in Alabama. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge