Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
C. William Alexander, Ph.D.,	)	Date: June 26, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-116
	)	Decision No. CR479
The Inspector General.	)	
	)	

DECISION

By letter dated September 20, 1996, Petitioner C. William Alexander, Ph.D., was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been decided to exclude him for a period of three years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services (Medicare and Medicaid) programs. The I.G. explained that the three-year exclusion was authorized under section 1128(b)(5)(B) of the Social Security Act (Act). The exclusion was based upon the May 19, 1994 termination by the Kansas Department of Social and Rehabilitative Services (SRS) of Petitioner's Medicaid provider agreement, for reasons bearing on his professional competence, professional performance, or financial integrity.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the case on the basis of written submissions in lieu of an in-person hearing.[1]

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[1] The I.G. submitted five proposed exhibits (I.G. Exs. 1-5). Petitioner submitted 10 proposed exhibits (P. Exs. 1-10). Neither party objected to my receiving any of these proposed exhibits into evidence. Therefore, I am receiving into evidence I.G. Exs. 1-5 and P. Exs. 1-10.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of three years.

APPLICABLE LAW

Section 1128(b)(5)(B) of the Act authorizes the I.G. to exclude "any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under . . . a State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity."

An appellate panel of the Departmental Appeals Board (DAB) has held that to justify exclusion under section 1128(b)(5)(B), the I.G. need prove that only two elements have been met: (1) a petitioner must have been excluded or suspended from a state health care program; and (2) the exclusion or suspension must have been for reasons bearing on the petitioner's professional competence, professional performance, or financial integrity. George Iturralde, M.D., DAB 1374 (1992).

Because exclusion under section 1128(b)(5)(B) is wholly derivative of suspension or exclusion under a state health care program, a petitioner may not collaterally attack the state proceeding which led to the state exclusion or suspension in a hearing before an administrative law judge (ALJ) of the DAB's Civil Remedies Division. Olufemi Okonuren, DAB 1319 (1992). Similarly, an ALJ is not required to determine the guilt or innocence of a petitioner with reference to the conduct on which the state action is based. Behrooz Bassim, M. D., DAB 1330 (1992). As stated by the DAB, "there would be no point in relying on these [state] actions if they would be reopened and relitigated during the [section 1128] exclusion proceedings." Iturralde, at 7.

Unless aggravating or mitigating factors provide a basis for lengthening or shortening a period of exclusion, an exclusion imposed under section 1128(b)(5)(B) will be for a period of three years. 42 C.F.R. § 1001.601(b)(1). Only the following factors may be considered in mitigation: (1) the period of exclusion, suspension or other sanction imposed under the federal or state health care program is less than three years; (2) the individual's or entity's cooperation with federal or state officials resulted in the sanctioning of other individuals or entities; or (3) alternative sources of the types of health care items or services furnished by the individual or entity are not available. 42 C.F.R. § 1001.601(b)(3).

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)(B) of the Act, and whether the three-year exclusion imposed by the I.G. is reasonable.

I make the following findings of fact and conclusions of law to support my decision that the I.G.'s determination to exclude Petitioner is authorized and that the three-year term of the exclusion is reasonable.

1. At all times relevant to this case, Petitioner was a psychologist providing mental health services to Medicaid patients in Kansas.

2. As a general rule, the Medicaid program in Kansas will not pay for psychotherapy services provided at an Intermediate Care Facility for the Mentally Retarded (ICF-MR). I.G. Ex. 2.

3. On September 18, 1990, SRS notified Petitioner that Petitioner had received a Medicaid overpayment in the amount of $105,480, which was related to his submission of claims for psychotherapy services. I.G. Exs. 1, 2.

4. Subsequent to the SRS notice of overpayment, the director of SRS reduced to $46,165 the amount of the overpayment which it was requesting that Petitioner repay. The $46,165 equaled the amount that Kansas Medicaid had paid Petitioner for non-covered psychotherapy services provided at ICF-MRs from December 1988 through May 1990. I.G. Exs. 1, 2.

5. On January 25, 1991, SRS notified Petitioner that it was proposing to terminate him from participation in the Kansas Medicaid program for five years.

6. On May 19, 1994, as a result of Petitioner's request for an administrative hearing, an SRS hearing officer entered an initial order affirming a five-year termination of Petitioner's Kansas Medicaid provider agreement, effective May 19, 1994, as well as requiring recoupment of the $46,165 overpayment. I.G. Ex. 1

7. On September 13, 1994, the SRS State Appeals Committee issued a final order affirming the hearing officer's initial order (I.G. Ex. 1), which stated that "the Committee finds there is evidence to support [that] the appellant had a history of submitting improper billings. He billed for noncovered services and may have billed for unnecessary services. Good cause to terminate him as a provider in the Medicaid program has been established." Id. at 3.

8. Petitioner filed suit in Kansas State court contesting the SRS State Appeals Committee's order. On March 29, 1995, the District Court of Shawnee County affirmed the SRS termination and recoupment order, herein to be referred to as the "State court order." I.G. Ex. 2.

9. The March 29, 1995 State court order states in part: "based solely on Alexander's conduct with respect to providing noncovered psychotherapy at the ICF-MRs, the Appeals Committee's decision to affirm the hearing officer's decision to terminate Alexander's participation in the Medicaid program is consistent with the provisions of the regulation allowing termination." I.G. Ex. 2 at 10.

10. The hearing officer, the SRS State Appeals Committee, and the Kansas State court, all rejected Petitioner's arguments concerning his authority to submit claims to Kansas Medicaid for psychotherapy services provided at ICF-MRs.

11. On June 27, 1995, Petitioner and SRS entered into a consent agreement, which states that "Dr. Alexander shall immediately stop participating in the Kansas Medicaid program and shall not rejoin that program before May 19, 1999." I.G. Ex. 3.

12. Under sections 3(a) and 3(b) of the consent agreement, Petitioner agreed to repay the balance of the $46,165 overpayment that had not already been withheld by SRS. I.G. Ex. 3.

13. As required by section 3(e) of the consent agreement, Petitioner's lawsuit seeking judicial review of the State court order was dismissed with prejudice at the request of both parties. I.G. Exs. 3, 4.

14. The Kansas Medicaid termination affirmed by the SRS final order and the State court order has not been revoked and remains in effect. I.G. Br. at 5.

15. Kansas Medicaid is a State health care program, within the meaning of sections 1128(h) and 1128(b)(5)(B) of the Act.

16. Pursuant to section 1128(b)(5)(B) of the Act, the Secretary of HHS has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid.

17. The Secretary has delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

18. On September 20, 1996, the I.G. excluded Petitioner from participation in the Medicare and Medicaid programs. I.G. Ex. 5.

19. Petitioner's termination from participation in the Kansas Medicaid program constitutes an exclusion or suspension or other sanction as those terms are used in section 1128(b)(5)(B) of the Act. 42 C.F.R. § 1001.601(a)(2).

20. Petitioner was excluded from participation in a State health care program for reasons bearing on his professional competence, professional performance, or financial integrity. I.G. Ex. 5; FFCL 7, 9.

21. In this administrative proceeding, Petitioner cannot collaterally attack the Kansas administrative and judicial actions which led to his exclusion from the Medicare and Medicaid programs. 42 C.F.R. § 1001.2007(d).

22. Petitioner has not established the existence of any mitigating factors within the scope of 42 C.F.R § 1001.601(b)(3).

23. Petitioner's three-year exclusion from participation in the Medicare and Medicaid programs is proper.

DISCUSSION

Petitioner argues that, in view of his settlement agreement, his "inactivity" in the Kansas Medicaid program is the result of mutual agreement, not an exclusion or suspension. P. Br. at 1. I find no merit in his argument. The orders of the State administrative agency and the State court constitute sufficient bases to exclude Petitioner from participation in the Medicare and Medicaid programs. The facts reflect that the settlement agreement is a result of SRS actions to terminate Petitioner's Medicaid provider status. As I found above, the record in this case reflects that SRS terminated Petitioner's Kansas Medicaid provider agreement for five years, beginning on May 19, 1994, as a result of Petitioner's improper billing practices. Following this, an SRS hearing officer issued an initial order affirming Petitioner's exclusion from Kansas Medicaid. On September 13, 1994, the SRS State Appeals Committee issued a final order unanimously affirming the hearing officer's initial order. On May 29, 1995, in response to Petitioner's appeal, the State court issued a memorandum decision and order affirming the SRS final order. On June 27, 1995, Petitioner and the SRS entered into a consent agreement, in which Petitioner agreed to stop participating in Kansas Medicaid and to a dismissal with prejudice of his appeal of the State court order.

Petitioner cites clauses in the consent agreement which stated that such agreement constitutes the "full and complete agreement between the parties," "that any other prior or written understandings or agreements are superseded hereby," and that "nothing in the agreement is to be construed to be a concession or admission by Dr. Alexander of any wrongdoing." I.G. Ex. 3 at

2. Petitioner contends these terms undermine any claim that he has been sanctioned within the scope of section 1128(b)(5)(B) of the Act. I reject these arguments. I find that the record shows that the existence of the SRS consent agreement does not negate the fact that, on three separate occasions, administrative and judicial reviewers upheld Petitioner's five-year exclusion from Kansas Medicaid. Under section 1128(b)(5)(B), it is the fact of an exclusion or suspension by a state for reasons bearing on an individual's professional competence, professional performance, or financial integrity, which gives the I.G. the authority to exclude that individual. The orders referenced here have not been revoked, remain in effect, and by themselves constitute sufficient bases for the I.G. to exclude Petitioner from participation in the Medicare and Medicaid programs. These clauses cited by Petitioner merely show that he has not conceded wrongdoing, and that the agreement constitutes the only agreement between the parties, but it does not in any way alter the legal effect of the judgements against him.

Based on this factual background, I find that Petitioner's case constitutes an exclusion, suspension, or other sanction within the scope of section 1128(b)(5)(B) of the Act. Moreover, I find further that the consent agreement provides an additional basis for Petitioner's exclusion. An appellate panel of the DAB has previously found that "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)(B)." Hassan Ibrahim, M.D., DAB 1613 (1997) at 1-2.

In Petitioner's case, a formal sanction was already in place at the time the SRS consent agreement was executed, but settlement was entered into to forestall continued appeal of the exclusion which had already been upheld by a State court judge. The petitioner in Ibrahim, like Petitioner here, contended that the I.G. should rely only on the settlement agreement in which the petitioner did not admit wrongdoing. The DAB rejected such argument, stating:

> Petitioner's arguments are without merit . . . Petitioner executed the agreement to remove a state exclusion resulting from an audit of his practice which found Petitioner's professional care to be below standard in numerous respects, as well as finding that Petitioner submitted a false Medicaid claim. Even though Petitioner did not admit any unacceptable practice in the agreement, the State action which the agreement resolved was clearly taken for reasons bearing on Petitioner's professional competence and performance, as well as financial integrity. Petitioner's voluntary withdrawal from full participation in the Medicaid program, even while retaining by agreement some limited

> ability to participate, in order to avoid a formal exclusion, meets the definition of 'otherwise sanctioned.' [within the meaning of section 1128(b)(5)(B) of the Act]. Id. at 2-3.

I find Petitioner's case presents an even more compelling example of a "sanction," in that the SRS consent agreement does not alter or remove the State exclusion which was affirmed in both administrative and judicial proceedings and does not even permit Petitioner the "limited ability to participate" in Medicaid, as the agreement in Ibrahim did for the petitioner in that case. In his response, Petitioner seeks to collaterally attack the State proceedings, but I reject this challenge. Petitioner contends that he maintained legitimate offices on the premises of the ICF-MRs and, therefore, his practice of billing Kansas Medicaid for services in the ICF-MRs was proper and should not have resulted in his exclusion from Kansas Medicaid. It is clear, however, that Petitioner is not entitled to use this proceeding to relitigate or collaterally attack the State Medicaid proceedings. The regulations specifically preclude such action and state that "when the exclusion is based on the existence of a conviction, a determination by another government agency or any other prior determination, the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in this appeal." 42 C.F.R. § 1001.2007(d).

Moreover, on this issue, an appellate panel of the DAB has precluded a collateral attack in a case involving a settlement agreement. Specifically, in Ibrahim, the panel held that "Petitioner was not entitled to collaterally attack the State proceedings before the ALJ. See George Iturralde, M.D., DAB No. 1374 (1992); Olufemi Okunoren, M.D., DAB No. 1319 (1992). The I.G. could reasonably rely on the State action in imposing a derivative federal exclusion." Ibrahim at 2-3.

In order to show that exclusion is justified, the I.G. must also establish that the exclusion, suspension, or other sanction occurred for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. I find that this requirement is established in Petitioner's case. The record shows that the exclusion was based on a finding that Petitioner had submitted claims to Kansas Medicaid for psychotherapy services provided at ICF-MRs that he knew or should have known were noncovered services. I.G. Ex. 1 at 3. I find that Petitioner's submission of claims to Kansas Medicaid for noncovered services bears on his professional performance and financial integrity.

In George Iturralde, M.D., an appellate panel of the DAB stated that exclusion under section 1128(b)(5)(B) is authorized where there is a "common sense connection between a state's findings and either professional competence, performance, or financial integrity," and that the "common sense connection is obvious" in a case of repeated overbilling. Iturralde, at 11. In Iturralde, the panel upheld the finding that the petitioner was properly excluded from Kansas Medicaid on the basis that "repeated overbilling of Medicaid evidenced a lack of financial integrity" within the meaning of section 1128(b)(5)(B). Id. at 9. In Petitioner's case, the SRS State Appeals Committee unanimously found "evidence to support [that] the appellant had a history of submitting improper billings. He billed for noncovered services and may have billed for unnecessary services." I.G. Ex. 1 at 4. The State court order pointed to "Alexander's conduct with respect to providing noncovered psychotherapy at the ICF-MRs," as an example of "a pattern of submitting billings for services not covered under the program." I.G. Ex. 2 at 10. I find that there is a common sense connection between these State findings and a lack of financial integrity.

I find also that the three-year term of exclusion is proper. In so finding, I reject Petitioner's arguments for mitigation. He contends that he has been fully cooperative in providing requested information. However, unless such cooperation results in the sanctioning of other individuals or entities, it does not qualify as a mitigating circumstance under 42 C.F.R. § 1001.601(b)(3)(ii).

Petitioner also asserts that he was in compliance with Medicaid guidelines. I cannot consider this assertion in mitigation of Petitioner's period of exclusion, because such compliance is not an enumerated mitigating circumstance under the regulations. He also maintains that he discontinued the use of satellite offices 10 years ago, but passage of time also is not an enumerated mitigating circumstance.[2]

Finally, Petitioner contends that his period of exclusion should be shortened because "he is the only psychologist who is board certified (by the American Association of Pain Management) to provide pain management services to this population in his area for hundreds of miles." P. Br. at 7. Petitioner has the burden of proof on this issue, since a mitigating factor is in the nature of an affirmative defense. Barry D. Garfinkel, M.D., DAB

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[2] Petitioner had satellite offices at ICF-MRs where he provided non-covered psychotherapy services. The Medicaid overpayment derived from Petitioner's billing for these non-covered services.

1572 (1996). Petitioner has provided no evidence to support his contention. Thus, Petitioner has not met his burden of proof on this issue.

CONCLUSION

Section 1128(b)(5)(B) authorizes the I.G. to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of three years, because he has been suspended or excluded from participation, or otherwise sanctioned, under a State health care program for reasons bearing on his professional competence, professional performance, or financial integrity. Therefore, I sustain Petitioner's three-year exclusion.

/s/

Joseph K. Riotto
Administrative Law Judge