Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
	Date: July 29, 1997
Donna Scotti, Orthotic and Prosthetic, Images, Ltd. And Louis Scotti	
Petitioners,	
	Docket Nos. C-97-282
- v. -	C-97-337
	C-97-365
The Inspector General.	Decision No. CR481

DECISION

I decide that the Inspector General (I.G.) is authorized to exclude Petitioners Louis Scotti, Donna Scotti, and Orthotic and Prosthetic Images, Ltd. (Petitioner Orthotic), from participating in Medicare and State health care programs, including State Medicaid programs. The exclusion of each of the Petitioners is authorized under section 1128(b)(5)(B) of the Social Security Act (Act), as it was revised and amended in 1996. I decide additionally that the length of the exclusions which the I.G. imposed against Petitioners is reasonable. The I.G. excluded each Petitioner for the same period of time that the Petitioner is excluded by the New York Medicaid program. An exclusion of at least that length is required for an exclusion imposed under the revised and amended section 1128(b)(5)(B) of the Act.

As I discuss in more detail below, at Finding 4, the I.G. made her determination to exclude Petitioners on the following facts. Petitioner Louis Scotti is the president and chief operating officer of Petitioner Orthotic. Petitioner Donna Scotti is a shareholder in Petitioner Orthotic. The New York State Department of Social Services (Department of Social Services) determined to exclude all three Petitioners from participating in the New York State Medicaid program. The basis for the Department of Social Services determination included findings that Petitioners had: submitted false Medicaid reimbursement claims; made false statements in connection with submitting Medicaid reimbursement claims; failed to disclose information concerning their right to reimbursement from the New York Medicaid program; and engaged in unacceptable record keeping. Petitioners negotiated a settlement with the Department of Social Services in which they agreed to be excluded from the New York Medicaid program for a two-year period, commencing on April 8, 1996 and ending on April 7, 1998.

Each Petitioner requested a hearing from the I.G.'s determination to exclude that Petitioner. Petitioners and the I.G. requested that the cases be consolidated. I ruled that the cases should be consolidated in light of the parties' request to consolidate the cases, and also in light of the issues, facts, and law that the cases share.

The parties agreed that the cases should be heard and decided based on their written submissions. The I.G. submitted a brief and a reply brief. Petitioners jointly submitted a brief and a reply brief. The deadline for submitting reply briefs was July 7, 1997. The I.G. submitted her reply brief timely. Petitioners did not submit their reply brief until July 11, 1997, and have not offered any explanation for submitting it untimely. I have decided not to exclude Petitioners' reply brief, however, inasmuch as it contains no arguments or assertions of fact that would affect my decision in these cases.

The I.G. submitted five exhibits (I.G. Ex. 1 - 5). Additionally, the I.G. provided me with a copy of the revised and amended version of section 1128 of the Act, as an attachment to her proposed exhibits ("Attachment A"). Petitioner submitted an exhibit, "Exhibit A", which I have redesignated as P. Ex. 1. I note that P. Ex. 1 is the same exhibit as is I.G. Ex. 5. Petitioners also submitted an affidavit of Petitioner Louis Scotti as an attachment to their reply brief, which they have not designated as an exhibit. I have designated the affidavit of Petitioner Louis Scotti as P. Ex. 2.

No objections have been made to my receiving into evidence I.G. Ex. 1 - 5 and P. Ex. 1. Petitioner seeks to have me admit into evidence P. Ex. 2, and the I.G. objects to my receiving into evidence P. Ex. 2. I base these conclusions on Petitioners' reliance on the exhibit, and the I.G.'s motion that I strike P. Ex. 2. Motion to Strike Affidavit in Response to the Draft Audit report. Prior to filing this motion, the I.G. had filed a motion that I strike portions of Petitioners' brief which comprise arguments based on the facts alleged in P. Ex. 2. Inspector General's Motion to Strike, or in the Alternative, Give no Weight to Louis Scotti's Statement; See Petitioners' brief at 11 - 12. On July 28, 1997, this office received an affidavit from Petitioners' counsel in opposition to the I.G.'s Motion to Strike. I have designated this affidavit as P. Ex. 3.

As I discuss below, at Finding 6, I find the contents of P. Ex. 2, and Petitioners' arguments that are based on the contents of P. Ex. 2, to be irrelevant to deciding the issues in these cases. However, I do not find the I.G. to be prejudiced by my receiving into evidence P. Ex. 2, and I deny both of the I.G.'s motions. Therefore, I receive into evidence I.G. Ex. 1 - 5 and P. Ex. 1 - 3. I do not receive into evidence the I.G.'s Attachment A, inasmuch as it is not evidence and was not submitted as evidence.

In her brief, the I.G. noted that the caption of these cases inaccurately designates Petitioner Orthotic as "Orthotic and Prosthetic Images, Inc." when, in fact, the correct designation of Petitioner Orthotic is "Orthotic and Prosthetic Images, Ltd." I.G. Ex. 5; P. Ex. 1. The I.G. moved to correct the incorrect nomenclature in the caption. Petitioner did not oppose the motion. Therefore, I order that the caption of these cases be amended to designate Petitioner Orthotic as "Orthotic and Prosthetic Images, Ltd."

These cases involve two issues. The first issue is whether the I.G. is authorized to exclude Petitioners pursuant to the revised and amended version of section 1128(b)(5)(B) of the Act. The second issue is whether it is reasonable for the I.G. to exclude each Petitioner for a period that is coterminous with the exclusion which was imposed on that Petitioner by the Department of Social Services. In deciding that each exclusion is authorized and is reasonable, I make findings of fact and conclusions of law (Findings). Below, I state each Finding as a heading, and I discuss each Finding in detail.

1. These cases are governed by the amendments and revisions to section 1128 of the Act which Congress adopted on July 31, 1996.

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. With exceptions that are not relevant here, the effective date of HIPAA is January 1, 1997. Pub.L. 104-191, section 218.

These cases are governed by the provisions of HIPAA which revise and amend section 1128(b)(5) of the Act. These revisions and amendments became effective on January 1, 1997. The exclusions that are at issue here became effective on April 16, 1997, more than four months after the effective date of HIPAA. Petitioners have not argued that their cases should be governed by the version of section 1128(b)(5) which predates the effective date of HIPAA.

In this case, the provisions of HIPAA may actually inure to Petitioners' benefit. Prior to the effective date of HIPAA, the Act did not mandate an exclusion of any given length in the case of an exclusion imposed under the pre-HIPAA version of section 1128(b)(5). The Secretary of the United States Department of Health and Human Services (Secretary) adopted a regulation implementing the pre-HIPAA version of section 1128(b)(5), which directed that an exclusion imposed under the pre-HIPAA version of section 1128(b)(5) be for a period of three years, in the absence of aggravating or mitigating factors which established a basis for an exclusion of more than or less than three years. 42 C.F.R. § 1001.601. That regulation has now been superseded by the provisions of HIPAA which direct that in the case of an exclusion imposed under section 1128(b)(5) the exclusion be for a period that is at least coterminous with the State action on which the exclusion is based.

The State actions at issue in these cases consist of two-year exclusions. The I.G. determined to impose exclusions that are coterminous with the two-year exclusions. Had these cases been governed by the pre-HIPAA version of section 1128(b)(5), then, absent proof of aggravating or mitigating factors, the exclusions imposed by the I.G. would have been for a period of three years, rather than a period which is coterminous with the two-year exclusions imposed by the Department of Social Services.

2. Section 1128(b)(5)(B) of the Act authorizes the I.G. to exclude any individual or entity who is suspended, 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.

HIPAA retained, at section 1128(b)(5)(B), the exclusion authority which predated the enactment of HIPAA and which was formerly codified at section 1128(b)(5) of the Act. Section 1128(b)(5)(B), like the pre-HIPAA version of section 1128(b)(5), authorizes the I.G. to exclude any individual or entity who is suspended, excluded from participation, or otherwise sanctioned, under a State health care program, for reasons bearing on that individual's or entity's professional competence, professional performance, or financial integrity. Act, section 1128(b)(5)(B).

The I.G.'s authority to impose an exclusion under section 1128(b)(5)(B) derives from the action taken by or pursuant to a State health care program. The I.G. is authorized to impose an exclusion under section 1128(b)(5)(B) where a State takes one of the actions described in that section for any of the reasons described in that section. Because the I.G.'s authority to exclude under section 1128(b)(5)(B) derives from the action taken by a State, and not from the conduct on which that action is based, an individual or entity who is excluded pursuant to the section may not attack the I.G.'s authority to exclude by asserting that the State acted improperly, or that the individual or entity did not engage in the conduct which the State found to be grounds for its action.

3. An exclusion that is imposed by the I.G. under section 1128(b)(5)(B) of the Act must be at least coterminous with the State exclusion, suspension, or other sanction on which the I.G.'s exclusion determination is based.

The I.G. has discretion to impose an exclusion under section 1128(b)(5)(B) where there exists State action authorizing an exclusion. However, under HIPAA, where the I.G. chooses to impose an exclusion, Congress has directed that the exclusion be for a period of time that is at least coterminous with the State exclusion, suspension, or other sanction on which the I.G.'s exclusion determination is based. Act, section 1128(c).

Arguably, sections 1128(b)(5)(B) and 1128(c) give the I.G. discretion to impose an exclusion under section 1128(b)(5)(B) that is for a period which is greater than coterminous with a State exclusion, suspension, or other sanction. If the I.G. did so, there would be an evidentiary issue of whether the greater-than-coterminous exclusion is reasonable. But, where the I.G. elects to impose a coterminous exclusion, there can be no evidentiary issue of reasonableness, because Congress established that a coterminous exclusion is reasonable in a case involving an exclusion imposed under section 1128(b)(5)(B) of the Act. Act, section 1128(c).

4. Petitioners were excluded from participating in a State health care program for reasons bearing on their financial integrity.

Petitioners were excluded from participating in a State health care program for reasons bearing on their financial integrity. I base this conclusion on the following undisputed facts. Petitioner Louis Scotti is an orthotist and prosthetist. He is president and chief operating officer of

Petitioner Orthotic. Petitioner Donna Scotti is a shareholder in Petitioner Orthotic. Petitioners' Brief at 2; See I.G. Ex. 5 at 1. Petitioner Orthotic was established to operate as a vendor of durable medical equipment including durable medical equipment that is requisitioned for use by recipients of the New York Medical Assistance Program. I.G. Ex. 5 at 1. I take notice that the New York Medical Assistance Program is New York's Medicaid program, and is a State health care program within the meaning of the Act. See I.G. Ex. 5 at 1.

On March 28, 1996, the Department of Social Services notified Petitioner Louis Scotti that it had determined to exclude him, Petitioner Donna Scotti, and Petitioner Orthotic from participating in the New York Medical Assistance Program for a period of at least five years. I.G. Ex. 1 at 2. Additionally, the Department of Social Services notified Petitioner Louis Scotti that it would seek restitution of $38,577.22, plus interest. Id. The Department of Social Services sent a substantially identical notice to Petitioner Donna Scotti on or about April 1, 1996. I.G. Ex. 2. The determinations to exclude Petitioners were premised on an audit report of Petitioner Orthotic which found that Petitioner Orthotic had engaged in unacceptable and improper billing practices resulting in overpayments to Petitioner Orthotic. I.G. Ex. 3 at 3.

The Department of Social Services based its determinations on a conclusion that Petitioners had engaged in unacceptable practices. I.G. Ex. 1 at 1; I.G. Ex. 2 at 1. The Department of Social Services defined an "unacceptable practice" to be a practice that includes fraud or abuse. Id. Specifically, the Department of Social Services found that Petitioners had engaged in the following unacceptable practices: submitting false claims; making false statements to support Medicaid reimbursement claims; failing to disclose facts concerning possible unauthorized payments or overpayments; and failing to maintain records or to make relevant records available to auditors. I.G. Ex. 1 at 1 - 2; I.G. Ex. 2 at 1 - 2.

On October 31, 1996, Petitioners entered into a settlement agreement with the Department of Social Services. I.G. Ex. 5. I note that, in its preamble, the settlement agreement refers only to the Department of Social Services and Petitioner Orthotic as parties. Id. at 1. However, it is evident from the text of the agreement and from the signatures of Petitioners Louis and Donna Scotti, that the agreement is between the Department of Social Services and all three Petitioners. I.G. Ex. 5.

Petitioners and the Department of Social Services agreed that the period of exclusion of Petitioners from participating in the New York Medical Assistance Program would be reduced from five years to two years. The exclusion was agreed to commence on April 8, 1996 and to end on April 7, 1998. Any of the Petitioners could apply to the Department of Social Services for reinstatement to the New York Medical Assistance Program on or after April 7, 1998. I.G. Ex. 5 at 2 - 3. The parties also agreed that the Department of Social Services could offset $38,577.22 in withheld payments against the overpayment in that amount which the Department of Social Services had determined that Petitioners caused. I.G. Ex. 5 at 3; see I.G. Ex. 1 at 2, I.G. Ex. 2 at 2.

The settlement agreement contains a disclaimer of liability by Petitioners. It recites that:

> [b]y entering into this Stipulation of Settlement . . . [Petitioners] do not admit to committing specific acts of wrong doing, nor does the Department [of Social Services] contend that specific acts of wrong doing, or specific practices deemed "unacceptable" under the Department's regulations were committed by . . . [Petitioners].

I.G. Ex. 5 at 3 - 4.

The evidence plainly establishes that Petitioners were excluded from participating in a State health care program. Petitioners agreed to be excluded from the New York Medical Assistance Program, a State health care program, as part of their settlement agreement with the Department of Social Services. I.G. Ex. 5.

Petitioners argue that an exclusion which is agreed to as part of a settlement is not an "exclusion" within the meaning of section 1128(b)(5)(B) of the Act. Petitioners assert that there must be an adjudication of culpability for an exclusion to be an "exclusion" within the meaning of section 1128(b)(5)(B). Petitioners contend that their agreement to settle their cases with the Department of Social Services may not be construed to include an exclusion of Petitioners from participating in the New York Medical Assistance program because no final adjudications of culpability were made in Petitioners' cases. Petitioners' brief at 4 - 7.

Section 1128(b)(5)(B) does not require that there be an adjudication of culpability in order for there to be a State action giving the I.G. the authority to impose an exclusion. The Act contains no language which supports Petitioners' argument. An exclusion is an "exclusion" within the meaning of the section, whether it is imposed by a State agency based on an adjudication, or whether it is agreed to as a settlement of a State action, as is the case here.

Petitioners were excluded for reasons bearing on their financial integrity. The exclusion determinations by the Department of Social Services were predicated on findings that Petitioners had engaged in financial misconduct resulting in overpayments to Petitioner Orthotic, which included submitting false reimbursement claims and making false statements in connection with those claims. I.G. Ex. 1 at 1 - 2; I.G. Ex. 2 at 1 - 2; I.G. Ex. 3 at 3.

Petitioners argue that the reasons for their exclusions may not be inferred from the Department of Social Services exclusion determinations in their cases, inasmuch as they settled their cases with the Department of Social Services with an agreement in which liability was disclaimed. See I.G. Ex. 5 at 3 - 4. The disclaimer notwithstanding, I find that Petitioners were excluded for reasons bearing on their financial integrity.

The settlement agreement between Petitioners and the Department of Social Services did not take place in a vacuum. Had the Department of Social Services not made determinations of financial misconduct, then there would not have been a settlement agreement. Petitioners entered into the settlement agreement because it offered them less restrictive sanctions than those which the Department of Social Services at first determined to impose.

Section 1128(b)(5)(B) does not require that the State determination which impels a settlement become a final determination by the State in order for it to be the reason underlying a settlement agreement which results in an individual or entity being excluded. Nor does the Act require that an excluded party accept or agree to a finding of liability. The Act only requires that an exclusion (whether it be imposed or agreed to by settlement) relate to the excluded individual's professional competence, professional performance, or financial integrity.

Under section 1128(b)(5)(B), I find that the requisite relationship between an exclusion and an individual's professional competence, professional performance, or financial integrity exists if a State determines to impose an exclusion based on any of the reasons described in section 1128(b)(5)(B), and the excluded party then settles with the State for a less stringent exclusion as a way of avoiding the exclusion that the State originally determined to impose. In such a case, a reason for the exclusion agreed to between the State and the excluded individual is the findings of misconduct by the State which underlie the State's initial determination. That is so, because no exclusion would be agreed to absent the underlying findings of misconduct.

Petitioners argue additionally that the Department of Social Services determinations may not be used as a basis for establishing their culpability. However, Petitioners' culpability is not at issue here. As I hold at Finding 2, the I.G.'s authority to exclude pursuant to section 1128(b)(5)(B) derives from the exclusion action taken by a State authority. What is necessary to give the I.G. authority to exclude under section 1128(b)(5)(B) is that a State make a determination about an individual's culpability which becomes a reason for that individual's ultimate exclusion by the State. The accuracy of that determination is not relevant.

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

The evidence establishes the necessary prerequisites to give the I.G. authority to exclude Petitioners pursuant to section 1128(b)(5)(B) of the Act. Petitioners were excluded from participation in a State health care program. They were excluded for reasons bearing on their financial integrity.

6. The exclusions are reasonable.

The I.G. imposed exclusions against Petitioners that are coterminous with the exclusions that were imposed against them as a result of their settlement agreement with the Department of Social Services. The remedies that were imposed by the I.G. in this case comport with the requirements of section 1128(c) of the Act. Therefore, they are reasonable.

Petitioners assert that it would not be in the interest of justice for the I.G. to exclude them. Petitioners' brief at 11 - 12; P. Ex. 2. Essentially, they argue that the exclusions are not fair to Petitioners. They assert also that, to the extent that Petitioners submitted inaccurate or unsupported reimbursement claims to the New York Medical Assistance Program, such claims were the consequence of innocent errors and not of misconduct. Id.

I do not find that these arguments are relevant to the issues I may hear and decide. Congress settled the issue of whether exclusions imposed by the I.G. pursuant to section 1128(b)(5)(B) that are coterminous with the State sanctions on which they are based are reasonable, by requiring that the I.G. impose exclusions in such cases that are at least coterminous with the State sanctions on which they are based.

/s/
Steven T. Kessel
Administrative Law Judge