

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
Walter J. Mikolinski, Jr.,)	DATE: NOV 2, 1989
Petitioner,)	
- v. -)	Docket No. C-83
The Inspector General.)	DECISION CR 52
)	
)	

DECISION NOT TO REVISE REOPENED DECISION

The Inspector General (the I.G.) petitioned to reopen and revise my decision in this case. I reopened my decision to consider the issues raised by the I.G. in his petition. Both parties have submitted briefs. Based on the arguments of the parties and on the applicable law, I conclude that the I.G. has offered neither argument nor new and relevant evidence which justifies revising my decision in this case. Therefore, I decline to revise my decision.

BACKGROUND

On December 9, 1988, the I.G. notified Petitioner that he was being excluded from participating in Medicare and State health care programs.¹ The exclusion was based on the suspension by the State of Massachusetts of Petitioner's license to practice pharmacy. Petitioner was advised by the I.G. that he would be excluded until

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

he regained his pharmacy license. Petitioner requested a hearing. The parties agreed that the case could be decided based on a stipulated record and on motions for summary disposition. The parties filed stipulations and briefs supporting their positions, and I conducted oral argument. On August 8, 1989, I issued a decision in this case.

I held that the I.G. had authority to impose and direct an exclusion against Petitioner, pursuant to section 1128(b)(4)(A) of the Social Security Act. This conclusion was based on my finding that Petitioner's pharmacy license had been suspended by the Massachusetts Board of Registration in Pharmacy (Pharmacy Board) for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity.

I found that the length of the exclusion imposed and directed against Petitioner by the I.G. was reasonable insofar as it applied to Petitioner's participation as a pharmacist in Medicare and Medicaid. However, I concluded that the length of the exclusion was not reasonable insofar as it applied to Petitioner's participation in Medicare and Medicaid as a nursing home operator, administrator, or employee.

This conclusion was premised on my finding that the exclusion imposed and directed by the I.G. conditioned Petitioner's eligibility for reinstatement as a participant in Medicare and Medicaid on his regaining his pharmacy license in Massachusetts. The terms of Petitioner's license suspension conditioned restoration of the license on Petitioner completing certain continuing education courses and on his taking and passing a pharmacy law examination with a grade of no less than 75 percent. I concluded that these conditions effectively made Petitioner's exclusion indefinite in duration. While the conditions were reasonably related to Petitioner's trustworthiness to render services as a pharmacist, they bore no rational relationship to Petitioner's trustworthiness to participate in Medicare and Medicaid as a nursing home operator, administrator or employee.

Therefore, I sustained the exclusion insofar as it applied to Petitioner's participation in Medicare and Medicaid as a pharmacist. I modified the exclusion insofar as it applied to Petitioner's participation in Medicare and Medicaid as a nursing home operator,

administrator, or employee to exclude Petitioner from participating in that capacity for a two year period.

ANALYSIS

The I.G. now asserts that my decision is incorrect in two respects and urges that I revise my decision accordingly. First, the I.G. argues that, by law, exclusions imposed and directed pursuant to section 1128 of the Social Security Act apply to any item or service rendered by an excluded party for which that party seeks reimbursement. Therefore, according to the I.G., any exclusion imposed and directed against Petitioner must apply equally to his participation as a nursing home operator, administrator, or employee as it does to his participation as a pharmacist. Second, the I.G. asserts that my finding that the length of the exclusion originally imposed against Petitioner is unreasonable, insofar as it applies to his participation as a nursing home operator, administrator or employee, is not supported by substantial evidence, and is, therefore, incorrect.

The I.G. premises his first argument on the language of section 1862(e)(1) of the Social Security Act. That section provides in relevant part that:

No payment may be made under this title with respect to any item or service (other than an emergency item or service) furnished --

(A) by an individual or entity during the period when such individual or entity is excluded pursuant to section 1128, 1128A, 1156, or 1842(j)(2) from participation in the program under this title;

The I.G. argues that when an individual or entity is excluded pursuant to section 1128 of the Social Security Act, section 1862(e)(1) operates to require that that individual or entity be barred from reimbursement for any item or service that he may provide to a Medicare recipient or Medicaid beneficiary. Thus, according to the I.G., exclusion of Petitioner based on suspension of his pharmacy license would, by law, require that he not be reimbursed for items or services rendered as a nursing home operator, administrator, or employee. The I.G. asserts that section 1862(e)(1) prohibits the Secretary from tailoring exclusions to apply to reimbursement for specific items or services.

I disagree with the I.G.'s "all or nothing" reading of section 1862(e)(1). The plain language of section 1862(e)(1) is that it bars reimbursement for items or services where reimbursement has been excluded pursuant to section 1128. Thus, the law does nothing more than direct the Secretary to adhere to the terms of exclusions imposed pursuant to section 1128.

A broader reading of section 1862(e)(1) would be inconsistent with the language and intent of section 1128. The exclusion law is remedial and is intended to protect the integrity of federally funded health care programs from parties who have demonstrated by their actions that they cannot be trusted to deal with program funds or to treat recipients and beneficiaries of those funds. Exclusions imposed and directed pursuant to section 1128 must be tailored to accomplish this remedial objective, in order to avoid having a punitive effect which would be inconsistent with legislative intent. If section 1862(e)(1) were read as categorically as is urged by the I.G., it would necessarily result in exclusions that are not rationally related to the remedial objectives of section 1128.

The I.G. premises his second argument on the contention that the record does not substantiate my conclusion that an indefinite exclusion is unreasonable insofar as it applies to Petitioner's participation in Medicare and Medicaid as a nursing home operator, administrator, or employee. The I.G. concedes that there exists at least a "theoretical or hypothetical possibility that [Petitioner] may, for an indefinitely prolonged period of time, (or may never) be able to satisfy" the conditions for reinstatement of his pharmacy license. Therefore, the I.G. admits that it is at least possible that Petitioner may never qualify for reinstatement as a nursing home operator, administrator, or employee under the terms of the the exclusion the I.G. originally imposed and directed. However, the I.G. contends that the record does not substantiate my conclusion that the exclusion imposed and directed against Petitioner was unreasonable as it applied to his participation as a nursing home operator, administrator, or employee, in the

absence of evidence showing a likelihood that this possibility may eventuate.²

My conclusion that the exclusion originally imposed and directed against Petitioner by the I.G. was unreasonable as it applied to Petitioner's participation as a nursing home operator, administrator, or employee, was based on my finding that the conditions for reinstatement of Petitioner's pharmacy license bore no rational relationship to his trustworthiness to provide nursing home items or services. The likelihood that Petitioner might satisfy these conditions did not enter into my analysis. Evidence as to that likelihood is not relevant.

Therefore, the I.G.'s argument misses the point of my decision. An exclusion which is premised on conditions which are not rationally related to the remedial purpose of the exclusion law is not a reasonable exclusion, irrespective of the likelihood that these conditions will be satisfied.

² At oral argument of the parties' motions for summary disposition, counsel for the I.G. stated that the I.G. had intended the exclusion imposed and directed against Petitioner to be limited in duration to two years. Tr. at 57. Counsel for the I.G. suggested to me that the appropriate course for me to take should I conclude that the exclusion be premised on satisfaction of conditions which potentially indefinitely prolonged the duration of the exclusion would be to modify the exclusion to be limited to two years or reinstatement of Petitioner's pharmacy license, whichever occurred first. Id. Counsel for the I.G. has offered me no explanation for his change of position to his present assertion that an indefinite exclusion was intended and is not necessarily unreasonable.

CONCLUSION

Having considered the arguments offered by the parties, I conclude that there exists no basis to revise the decision entered by me in this case on August 8, 1989.

/s/

Steven T. Kessel
Administrative Law Judge