DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of	
The Inspector General,	
- v.-	DATE: Nov 15, 1988
Neville Anthony, M.D.,	Docket No. C-44
Respondent	DECISION CR 15

ORDER ENTERING DEFAULT JUDGMENT AGAINST RESPONDENT

The Inspector General (the I.G.) has moved to enter a default judgment against Respondent.1/ This motion has not been opposed. After careful consideration of the I.G.'s motion, applicable law, and the record of this proceeding, I conclude that the motion is meritorious. I am therefore entering a default judgment against Respondent which includes imposition of: (1) a penalty of $60,000; (2) an assessment of $660; and (3) an exclusion for ten years from the Medicare and Medicaid programs.

BACKGROUND STATEMENT

This is a civil money penalties, assessment, and exclusion case arising from the I.G.'s determination that Respondent submitted false claims for Medi-Cal (California's Medicaid program) services. By notice dated June 1, 1988, the I.G. asserted that between June 1 and July 9, 1982, the Respondent presented or caused to be presented for Medicaid reimbursement 33 claims for items or services

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1/ The I.G.'s motion also requested additional alternative relief consisting of admission of certain items into evidence, partial summary judgment against Respondent, and establishment of certain assertions by the I.G. as admissions by Respondent. Although these requests may have merit, my decision to enter a default judgment renders them moot, and they are denied.

Medicaid reimbursement 33 claims for items or services that were not provided as claimed. The I.G. further alleged that Respondent knew, had reason to know, or should have known that the items or services were not provided as claimed. The I.G. asserted that Respondent's culpability in making these allegedly false claims was substantial, averring that on October 17, 1984, Respondent was convicted, after trial in California state court, of 15 counts of filing false Medi-Cal claims in violation of section 1410 of the Welfare and Institute Code of California and of petty theft in violation of section 488 of the Penal Code of California. These criminal acts were asserted to be part of a larger pattern of fraudulent or abusive practices by which Respondent intended to maximize Medicaid reimbursement with little regard to medical necessity or the need for integrity of patient charts, discernible over a period of at least two years. The I.G. further advised Respondent that it had considered other potentially aggravating and mitigating factors. Respondent was advised that in consideration of all of the foregoing, and pursuant to the provisions of section 1128A of the Social Security Act (42 U.S.C. 1320a-7a (1983 and 1988 Supp.)) as implemented by 42 C.F.R. 1003.100 et seq. (1987), the I.G. was proposing to impose a civil money penalty of $60,000, an assessment of $660, and a ten year exclusion from the Medicare and Medicaid programs.

The I.G.'s notice also advised Respondent that he was entitled to request a hearing, and it informed him of the specific regulatory criteria he had to satisfy in making a request for a hearing (Respondent was also provided with a copy of the regulations governing civil money penalty hearings). Respondent requested, and the I.G. granted, an extension of time for filing a hearing request. Respondent filed a handwritten hearing request on August 8, 1988, and the matter was assigned to me for hearing and decision.

On September 1, 1988, I issued an Order which, among other things, directed Respondent to file a more definite hearing request in compliance with the regulations. On September 19, 1988, I issued an Order which established a schedule for discovery and exchange of exhibits and names of proposed witnesses, and which set a hearing date of November 14, 1988. This Order was twice modified by me at the I.G.'s request. The I.G. filed its motion for entry of a default judgment on October 21, 1988, and on October

28,1988 I issued an Order staying the proceeding pending my decision on the I.G.'s motion.2/

ISSUES

The issues raised by the I.G.'s motion are whether:

1. Respondent has failed to comply with regulatory requirements and with directives contained in Orders that I have issued in this proceeding;

2. Respondent has meaningfully participated in this proceeding;

3. Respondent's failure to participate in this proceeding constitutes a failure to defend the action, pursuant to 42 U.S.C. 1320a-7a(c)(4); and

4. A default judgment against Respondent, including a penalty of $60,000, an assessment of $660, and a ten year exclusion from the Medicare and Medicaid programs, is a sanction which reasonably relates to the severity and nature of Respondent's failure to defend the action.

APPLICABLE STATUTES AND REGULATIONS

1. The Civil Monetary Penalties Law. Subsection (a) of the Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a(a), provides in relevant part that any person submitting a claim for Medicare or Medicaid reimbursement for an item or service that that person knew, had reason to know, or should have known, was not provided as claimed shall be subject to a civil money penalty of not more than $2,000 for each item or service, an assessment of not more than twice the amount claimed for each item or service, and exclusion from participating in the Medicare and Medicaid programs. Subsection (c)(2) provides that an adverse determination shall not be made against a person pursuant to the law until the person has been given written notice and an opportunity for the determination to be made on the record after an evidentiary hearing. Subsection (c)(4) provides that the official conducting the hearing (an Administrative Law Judge) may sanction a person for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly or fair conduct of the

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2/ A chronology of this proceeding is set forth in an Appendix to this Order.

hearing. "Such sanction shall reasonably relate to the severity and nature of the failure or misconduct" (Emphasis added) (Id.). Sanctions may include entering a default judgment (42 U.S.C. 1320a-7a(c)(4)(F)).

2. The Civil Monetary Penalties Regulations. Regulations governing civil money penalty, assessment, and exclusion proceedings are contained in 42 C.F.R. Part 1003. The regulations provide that a respondent who desires a hearing must specifically answer the I.G.'s notice of proposed penalty, assessment, and exclusion by admitting or denying whether the allegedly false claims itemized in the notice were presented for payment, and stating any affirmative defenses. 42 C.F.R. 1003.109(b). If a respondent does not timely request a hearing, the I.G. may, pursuant to 42 C.F.R. 1003.110, impose the proposed penalty, assessment, and exclusion. Section 1003.115 vests control of the hearing in the Administrative Law Judge. Section 1003.117(a) provides that the Administrative Law Judge shall allow a party seeking discovery of documents to inspect and copy all documents which are not privileged, which are relevant to the issues in the proceeding, and which are in the possession of the other party. Subsection (c)(1) of this regulation provides for exchange of witness lists, prior statements of witnesses, and proposed hearing exhibits within specified deadlines, and subsection (c)(2) establishes deadlines for completion of discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The notice of proposed penalty, assessment, and exclusion specifically enumerated the items or services alleged to not have been provided as claimed. Respondent was specifically advised of the reasons relied upon by the I.G. to support the proposed penalty, assessment, and exclusion.

2. The notice explicitly informed Respondent of the regulatory criteria he had to comply with in filing his hearing request.

3. Respondent requested a hearing so that he could "defend (himself) against unfounded allegations and prejudice--presented as though they are proven facts." He did not specifically admit or deny that the claims at issue had been presented or were caused to be presented for payment, nor did Respondent enumerate any defenses upon which he intended to rely.

4. Respondent's hearing request did not comply with the requirements of 42 C.F.R. 1003.109. He was notified in writing that his hearing request was deficient, and was subsequently ordered by me to file a more definite request. I advised Respondent in that Order that his failure to comply with my directives could result in the imposition of sanctions against him, including entry of a default judgment.

5. Respondent did not file a more definite hearing request within the time limits ordered by me or at any time thereafter.

6. On September 1, 1988, I notified the parties in writing that a prehearing conference would be held on September 15, 1988 to establish a discovery schedule and set a date and location for the evidentiary hearing.

7. On September 14, 1988, Respondent requested that the prehearing conference be rescheduled, allegedly because of a personal scheduling conflict that he had. He admitted receiving my September 1 notice, but asserted that he had not noticed the date of the prehearing conference. He declined offers to conduct the conference by telephone or to assist him to resolve his alleged schedule conflict so that he could attend the prehearing conference.

8. At my instruction, Respondent was notified that his request to postpone the prehearing conference was denied. He did not attend the September 15 prehearing conference, which was held in his absence.

9. On September 19, 1988, I issued a Prehearing Order and Notice of Hearing which, among other things, established a schedule for the parties to exchange discovery requests, proposed stipulations, documents, exhibit lists, and witnesses' names and statements.

10. Respondent has not filed any requests pursuant to this Order. He has not responded to any of the I.G.'s requests. He has not offered the names or statements of any proposed witnesses.

11. The I.G. filed its motion for default judgment and alternative relief on October 21, 1988. Respondent has filed no response to the motion.

12. Respondent has not communicated with me or the I.G. since the inception of this proceeding, aside from

his initial hearing request and his request to postpone the September 15, 1988 prehearing conference.

13. Respondent has been provided the opportunity to have an evidentiary hearing in this proceeding, as is required by 42 U.S.C. 1320a-7a(c)(2). Respondent's failure to: file a more specific hearing request; attend the September 15, 1988 prehearing conference or satisfactorily explain his failure to attend; comply with the discovery and other prehearing directives issued by me; respond to the I.G.'s motion for entry of a default judgment and for alternative relief; and to meaningfully participate in this proceeding, constitute a failure to defend this action, as defined by 42 U.S.C. 1320a-7a(c)(4).

14. A default judgment against Respondent, pursuant to 42 U.S.C. 1320a-7a(c)(4)(F), which includes imposition of a civil money penalty of $60,000, an assessment of $660, and an exclusion for ten years from the Medicare and Medicaid programs, is a sanction which reasonably relates to the severity and nature of Respondent's failure to defend this proceeding.

ANALYSIS

I am entering a default judgment against Respondent which includes the penalty, assessment, and exclusion proposed by the I.G. The sanction I am imposing is among the strongest permitted by law--resolution of all issues in the proceeding against Respondent without a hearing or creation of an evidentiary record. My decision is amply supported by Respondent's abandonment of even the pretense of a defense in this proceeding.

1. Respondent has not complied with regulatory requirements and with the terms of Orders entered in this proceeding. The hearing request filed by Respondent was deficient in two respects. It failed to specifically admit or deny that the items or services alleged by the I.G. to have been falsely claimed were presented for payment, and it failed to specify the defenses Respondent intended to rely on. Respondent was advised, prior to filing his request, of the regulatory criteria to which his request had to conform. He was told by letter that his hearing request was deficient, and he was requested to file a more definite request. I subsequently ordered Respondent to file a more definite request and advised him that he could be sanctioned for not complying with my

Orders. Despite all of this, Respondent has filed nothing.

Respondent has ignored all of the discovery directives and prehearing deadlines articulated in my September 19, 1988 Prehearing Order. He has neither requested discovery nor has he responded to any of the I.G.'s discovery requests. He has ignored deadlines for responding to requests for stipulations, producing documents, submitting the names of proposed witnesses and copies of any statements by them, and exchanging proposed hearing exhibits.

2. Respondent has not meaningfully participated in this proceeding. Respondent's failure to comply with regulatory requirements and the terms of my Orders is part of a pattern of noninvolvement which has persisted since the inception of this proceeding. Respondent neither attended the September 15, 1988 prehearing conference, nor provided a credible explanation for his failure to attend. He displayed no interest in offers to assist him to adjust his schedule so that he could either attend the conference or participate by telephone. During the course of the proceeding, numerous communications have been directed to Respondent by me and the I.G. in addition to those described in the preceding section. These have included various motions, including motions to amend or clarify my Prehearing Order, a motion for a stay of proceedings, and of course, the I.G.'s motion to enter a default judgment. Respondent has not provided a response to any of them. Respondent's obvious disinterest is most manifest in his failure to respond to the motion to enter a default judgment, because that motion clearly noticed Respondent that its resolution could determine the outcome of the proceeding. I stressed this possible outcome in my Order staying the proceeding, which was sent to Respondent at a time when he could have responded to the motion to enter a default judgment, but this warning obviously failed to induce Respondent to file a response. Indeed, with the exception of his hearing request and his request to postpone the September 15, 1988 prehearing conference, Respondent has engaged in no communications, either with me or the I.G., concerning the proceeding.

3. Respondent's failure to participate in the proceeding constitutes failure to defend the action. I will not second-guess Respondent's reasons for his failure to participate in the proceeding, but his noninvolvement clearly constitutes abandonment of any attempt to defend the action within the meaning of 42 U.S.C. 1320a-7a(c)(4).

My conclusion takes into account Respondent's pro se status. A respondent who is not represented by an attorney may be less sensitive to regulatory requirements and the terms of prehearing orders than would a respondent who is represented. A pro se respondent may not prosecute his defense as efficiently as a represented respondent.3/ But even a pro se respondent would be expected to make some minimal effort to defend his case, and this Respondent has not done so.

4. A default judgment against Respondent, including a penalty of $60,000, an assessment of $660, and a ten year exclusion from the Medicare and Medicaid programs is a sanction which reasonably relates to the severity and nature of Respondent's failure to defend the action. The Civil Monetary Penalties Law provides that I may enter sanctions against a party who fails to defend an action. 42 U.S.C. 1320a-7a(c)(4). The enumerated sanctions include, at subsection (c)(4)(F), entering a default judgment. However, any sanction I enter "shall reasonably relate to the severity and nature of the failure or misconduct" (Id.). In this case, a default judgment, including the penalty, assessment, and exclusion proposed by the I.G., is reasonable.

Had Respondent not filed a request for a hearing in this case, the I.G. could have imposed the proposed penalty, assessment, and exclusion pursuant to 42 C.F.R. 1003.110. Here, Respondent filed a plainly inadequate document and then simply walked away from the matter. Respondent's refusal to file a responsive hearing request, coupled with his subsequent failure to meaningfully participate in the proceeding, puts him on the same footing as a respondent who does not file a hearing request.

Were I to address Respondent's individual failures to comply with regulatory criteria and prehearing Orders on a piecemeal basis, applying less severe sanctions than default judgment in each event, the cumulative effect of such sanctions in this case would be indistinguishable from a default judgment. For example, I could have struck

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3/ I have given this Respondent more leeway to defend himself than I would have given to a represented respondent. I have taken steps to assure that regulatory requirements and the possible consequences of not complying with regulations or my Orders were explained to Respondent. I have also forborne--until now--from entering sanctions against Respondent.

Respondent's hearing request based on its inadequacies and Respondent's failure to rectify them, pursuant to 42 U.S.C. 1320a-7a(c)(4)(C). Had I done so, the I.G. would have been free to impose the full proposed penalty, assessment, and exclusion. I could also have deemed the allegations in the I.G.'s notice of proposed penalties, assessments, and exclusion to be established, based on Respondent's failure to respond to the I.G.'s discovery requests and requests for stipulations. Additionally, I could have prohibited Respondent from offering evidence, given his failure to file an acceptable hearing request. The consequence of these sanctions would have been to establish the I.G.'s case and to preclude Respondent from offering a defense. There would have been nothing left to litigate.

I am aware of the expense to the taxpayers that would result from an evidentiary hearing in this case. I had originally scheduled a hearing in New York, where Respondent resides, as an accommodation to him. Neither the I.G.'s counsel, the Departmental Appeals Board attorney staff, nor I, are stationed in New York, and all of the I.G.'s proposed witnesses reside elsewhere. The cost of travel and per diem which would have been necessitated by a hearing would have been substantial. Other costs would include purchasing a hearing transcript, and the salaries of federal employees involved in the hearing for the period of their involvement. Due process and the Civil Monetary Penalties Law require such expenditures by the government in any case where the respondent articulates and prosecutes a defense. Such is not required where a respondent fails to offer a defense or abandons it. The law requires that respondents be given the opportunity to present their defenses at a hearing. Where, as in this case, the government offers a respondent the opportunity to defend himself and that opportunity is spurned, the government's legal obligation is discharged.

My decision to enter a default judgment against Respondent does not embody any decision of the merits of this proceeding. No evidence is before me, and therefore, it would be inappropriate for me to characterize the I.G.'s case or to draw conclusions from the I.G.'s allegations. But inasmuch as Respondent has abandoned his defense, it would also be inappropriate for me to enter a judgment for a lesser penalty, assessment, or exclusion than that proposed by the I.G. As I have previously noted, Respondent's failure to defend the case puts him on the same footing as a respondent who does not request a

hearing. In that circumstance, the I.G. may impose the full proposed penalty, assessment, and exclusion, and that consequence is equally merited here.4/

ORDER

I Order that a default judgment be entered against Respondent. Respondent is Ordered to:

1. Pay a penalty of $60,000;

2. Pay an assessment of $660; and

3. Be suspended from the Medicare and Medicaid programs for a period of ten years.

/s/

Steven T. Kessel
Administrative Law Judge

4/Although I am not making a finding on the merits, I would note that the I.G. has alleged that Respondent was convicted in a criminal proceeding of having filed false claims on 15 of the 33 items or services at issue in this proceeding. Were the I.G. to establish the conviction at a hearing, then the doctrine of collateral estoppel would operate to direct an adverse finding against Respondent on those fifteen items or services. 42 U.S.C. 1320a-7a(c)(3); 42 C.F.R. 1003.114(c).

APPENDIX

Chronology of Proceeding

1. June 1,1988: The I.G. sends its notice of proposed penalty, assessment and exclusion to Respondent. The notice advises Respondent that any hearing request he files "(M)ust be accompanied by an answer to this letter which, with respect to the claims identified in this notice, admits or denies that you presented or caused to be presented such claims, and which states any defenses upon which you intend to rely...." Respondent is also provided with regulations governing civil money penalty proceedings. 42 C.F.R. 1003.100 et seq.

2. July 7, 1988: The I.G. grants Respondent's request for additional time to respond to the notice of proposed penalty, assessment, and exclusion.

3. August 8, 1988: Respondent files a hearing request. The request does not admit or deny that Respondent presented or caused to be presented the claims at issue, nor does it articulate any defenses upon which Respondent intends to rely.

4. August 19, 1988: Gerald Choppin, Chief, Civil Remedies Division, Departmental Appeals Board, writes to Respondent, advising him, in effect, that his hearing request does not comply with regulatory requirements. Respondent is requested to provide the required information as soon as possible. Respondent does not reply to this letter.

5. August 29, 1988: The proceeding is assigned to Administrative Law Judge Steven T. Kessel (ALJ) for hearing and decision.

6. September 1, 1988: The ALJ issues an Order scheduling a prehearing conference for September 15, 1988. The Order is sent to the parties with a transmittal letter from Mr. Choppin. The transmittal letter refers to Mr. Choppin's August 19 letter to Respondent and notes that no response has been received. The letter also refers the parties to Paragraph 6 of the ALJ's Order, which puts the parties on notice of possible sanctions for failure to comply with the ALJ's Orders or any procedural requirement, including the requirement that specific information be provided in the hearing request. The ALJ's Order specifically orders Respondent, at Paragraph 4, to file a more specific hearing request by September 9, 1988.

7. September 9, 1988: The deadline to file a more specific hearing request expires without Respondent having filed anything.

8. September 12, 1988: Mr. Choppin sends a telegram to Respondent, requesting Respondent to call him on September 13.

9. September 13, 1988: The I.G. serves initial proposed stipulations of fact on Respondent and files a prehearing memorandum. Respondent does not call Mr. Choppin.

10. September 14, 1988: Respondent telephones Mr. Choppin to request a postponement of the September 15, 1988 prehearing conference. Respondent asserts that on September 15 he has a conflict, consisting of a 12:00 noon appearance before the New York Board of Health. He declines Mr. Choppin's offer to contact the New York Board of Health on Respondent's behalf. The Respondent also rejects the offer to have the prehearing conference conducted by telephone, asserting that he would be enroute to the Board of Health at the time of the telephone call. Respondent admits having received the notice of the prehearing conference, but claims that he had overlooked the conference date set forth in the notice. Mr. Choppin advises Respondent that it is unlikely that the ALJ will postpone the prehearing conference on such short notice, given the explanation offered by Respondent for his postponement request.

11. September 14, 1988: Pursuant to the ALJ's direction, Mr. Choppin sends a telegram to Respondent advising him that the prehearing conference will not be postponed.

12. September 15, 1988: The prehearing conference is held, and Respondent does not attend.

13. September 19, 1988: Both parties are sent a Prehearing Order and Notice of Hearing, along with a transmittal letter from Mr. Choppin. The parties are also provided with Mr. Choppin's notes concerning his September 14 telephone conversation with Respondent. The transmittal letter advises Respondent that if he disagrees with Mr. Choppin's account of the conversation, he should state his disagreement by no later than five days from receipt of the letter. Respondent is also advised that Mr. Choppin will continue to make his services available to Respondent to answer Respondent's procedural questions.

Respondent communicates nothing in response to this letter.

The Prehearing Order: sets a hearing on the merits for November 14, 1988, in New York; recites that Respondent has not articulated issues, defenses, or mitigating facts in response to the I.G.'s allegations, and has not complied with the ALJ's Order directing him to file a more definite hearing request; directs the parties to identify the discovery they intend to request and to file and serve their requests by October 3, 1988; directs Respondent to respond to the I.G.'s initial proposed stipulations by November 1, 1988; directs Respondent to serve any proposed stipulations he may have by October 15, 1988, and directs the I.G. to respond to these by November 1, 1988; directs the parties to exchange initial exhibit lists and proposed witness lists by October 15, 1988; directs the parties to exchange written statements in lieu of testimony and written statements of witnesses, and the last known addresses of witnesses by October 15, 1988; establishes a deadline for final exchange of witness lists and exhibits of November 1, 1988; and establishes November 1, 1988, as the deadline for preliminary motions by either party. The Prehearing Order also urges any party having a question about the proceeding to request a telephone conference.

14. September 23, 1988: The I.G. moves to advance Respondent's deadline (to respond to the I.G.'s proposed stipulations) to October 15, 1988.

15. September 23, 1988: The ALJ gives Respondent until September 29, 1988 to answer the I.G.'s motion.

16. September 28, 1988: The I.G. files its discovery request.

17. September 30, 1988: Respondent has not answered the I.G.'s motion. The ALJ issues an Order granting the motion.

18. September 30, 1988: The deadline for filing discovery requests expires. Respondent has filed no request.

19. October 7, 1988: The I.G. submits supplemental proposed stipulations and moves for an Order directing Respondent to respond to them by October 15, 1988. Respondent files no answer to this motion.

20. October 13, 1988: By direction of the ALJ, Mr. Choppin corresponds with the parties, clarifying certain deadlines in the September 19 Prehearing Order.

21. October 14, 1988: The I.G. files its proposed witness and exhibit lists.

22. October 15, 1988: The deadline expires for filing proposed witness and exhibit lists. Respondent has filed neither a proposed witness nor a proposed exhibit list.

23. October 15, 1988: The deadline for Respondent to file proposed stipulations expires. Respondent has not filed any proposed stipulations.

24. October 19, 1988: The ALJ partially grants the I.G.'s unopposed October 7 motion by issuing an Order directing Respondent to respond to the I.G.'s supplemental proposed stipulations by October 21, 1988. Respondent is sent a telegram advising him of the ALJ's Order.

25. October 21, 1988: The deadline for Respondent to respond to the I.G.'s supplemental proposed stipulations expires. Respondent files no response to the proposed stipulations.

26. October 21, 1988: The I.G. files a motion for a default judgment against Respondent, and for alternative relief. Simultaneously, the I.G. moves to stay the proceedings.

27. October 25, 1988: The ALJ orders the deadline (to answer the motion for a stay) to be advanced to October 27, 1988. Respondent is sent a telegram advising him of the ALJ's Order.

28. October 27, 1988: The deadline to answer the motion for a stay expires. Respondent does not answer the motion.

29. October 28, 1988: The ALJ issues an Order granting a stay of the proceedings. The Order notes that a decision to grant any of the substantive relief sought by the I.G. in its motion for a default judgment and for alternative relief would "profoundly affect the outcome and trial of this matter," with consequences ranging from disposition of the proceeding to eliminating or reducing many of the evidentiary or proof burdens which would otherwise be assumed by the I.G. Copies of this Order

are sent to Respondent by both Certified and regular mail.

30. November 1, 1988: The deadline for Respondent to answer the I.G.'s motion for a default judgment and alternative relief expires. Respondent files no response to the motion.