DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
John W. Foderick, M.D.,	DATE: September 8, 1989
Petitioner,	
- v. -	Docket No. C-113
	DECISION CR 43
The Inspector General.	

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On March 29, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and any State health care program.[1] The I.G. told Petitioner that his exclusions were due to the fact that Petitioner surrendered his license to practice medicine in the State of Minnesota while a formal disciplinary proceeding was pending before the Minnesota Board of Medical Examiners (the Board of Medical Examiners). Petitioner was advised that in the event he obtained a valid license to practice medicine from the State of Minnesota, 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 May 23, 1989, at which Petitioner appeared pro se. He requested that I appoint counsel to represent him in this proceeding. I ruled that I had no authority to appoint counsel to

[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.

represent Petitioner, but I advised him that he had the right to obtain counsel. I suggested to Petitioner that he contact resources in his community which might provide legal services. Petitioner did not obtain counsel.

During the May 23 prehearing conference, the I.G. stated that he intended to move for summary disposition in this case. I issued a Prehearing Order on June 1, 1989, which established a schedule for filing the motion and responding to it, and which also provided for oral argument on the motion. The I.G. timely filed a motion for summary disposition, to which Petitioner responded. Neither party requested oral argument on the motion.

I have considered the arguments contained in the I.G.'s motion for summary disposition, the undisputed material facts, and applicable law and regulations. I conclude that the exclusions imposed and directed by the I.G. are authorized by section 1128(b)(4)(B) of the Social Security Act and are reasonable. Therefore, I am deciding this case in favor of the I.G.

ISSUES

The issues in this case are whether:

1. Petitioner surrendered his license to practice medicine and surgery while a formal disciplinary hearing was pending which concerned his professional competence, professional performance, or financial integrity within the meaning of Section 1128(b)(4)(B) of the Social Security Act;

2. It would be relevant for Petitioner to prove that the Board of Medical Examiners deprived him of due process;

3. The exclusions imposed and directed against Petitioner are reasonable;

4. Summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a doctor of medicine. I.G. Ex. 1/3.[2]

2. Petitioner held a license to practice medicine and surgery in the State of Minnesota. I.G. Ex. 1/3.

3. The Board of Medical Examiners is the state agency responsible for the licensure of, and, if necessary, the imposition of discipline, against physicians and surgeons in Minnesota. I.G. Ex. 5/2.

4. In the Fall of 1987, the Board of Medical Examiners received a complaint against Petitioner, alleging that he abused alcohol. I.G. Ex. 5/2.

5. In May 1988, pursuant to an order issued by the Board of Medical Examiners, Petitioner submitted to a mental and physical examination. I.G. Ex. 1/3.

6. The Board of Medical Examiners Discipline Committee concluded that the examination established that Petitioner suffered from serious physical impairments and deteriorating mental abilities that rendered him unable to practice medicine and surgery safely and that provided a basis for disciplinary action by the Board. I.G. Ex. 5/2.

7. Based on this evidence, the Discipline Committee held a conference with Petitioner at which it recommended that Petitioner permanently surrender his license to practice medicine in Minnesota, in order to avoid the necessity of further disciplinary proceedings. I.G. Ex. 5/2.

8. On June 15, 1988, as a condition for the Board of Medical Examiners terminating its investigation, Petitioner agreed to permanently surrender his license to practice medicine and surgery in Minnesota. I.G. Ex. 1/4-5.

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

Petitioner's Exhibit	P. Ex. (number)/(page)
Petitioner's Memorandum	P.'s Memorandum at (page)
I.G.'s Exhibit	I.G.'s Ex. (number)/(page)
I.G.'s Memorandum	I.G.'s Memorandum at (page)

9. On June 15, 1988, the Board of Medical Examiners issued a Stipulation and Order accepting Petitioner's surrender of his license to practice medicine and surgery in Minnesota. I.G. Ex. 1/6.

10. Subsequently, Petitioner requested the Board of Medical Examiners to modify or void its June 15, 1988 Stipulation and Order. I.G. Ex. 2/3.

11. Petitioner's request was denied by the Board of Medical Examiners on February 14, 1989. I.G. Ex. 2/3.

12. Subsequently, Petitioner requested the Board of Medical Examiners to reconsider its decision not to modify or void its June 15, 1988 Stipulation and Order. I.G. Ex. 3/3.

13. On May 17, 1989, the Board of Medical Examiners affirmed its February 14, 1989 decision not to void or modify the June 15, 1988 Stipulation and Order. I.G. Ex. 3/3.

14. On May 17, 1989, the Board of Medical Examiners held that its June 15, 1988 Stipulation and Order was its final decision in Petitioner's case. I.G. Ex. 3/5.

15. 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.

16. On March 29, 1989, the I.G. excluded Petitioner from participating in the Medicare program, and directed that he be excluded from participating in Medicaid. I.G. Ex. 4/2.

17. Petitioner's exclusions are effective until such time as his license to practice medicine and surgery in Minnesota is restored and he is reinstated as a provider. I.G. Ex. 4/3.

18. Petitioner's exclusions are based upon section 1128(b)(4)(B) of the Social Security Act. I.G. Ex. 4/2.

19. Petitioner's assertion that the Board of Medical Examiners deprived him of due process is not relevant. See Social Security Act, sections 205(b), 1128(b)(4)(B).

20. There do not exist disputed issues of material fact in this case; therefore, summary disposition is

appropriate. See Federal Rules of Civil Procedure, Rule 56.

21. Petitioner surrendered his license to practice medicine and surgery while a formal disciplinary hearing was pending which concerned his professional competence, professional performance, or financial integrity within the meaning of section 1128(b)(4)(B) of the Social Security Act. Findings 3-17.

22. 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)(B).

23. The exclusions imposed and directed by the I.G. are reasonable. Social Security Act, section 1128(b)(4)(B).

ANALYSIS

The I.G. bases his motion for summary disposition on Petitioner's voluntary surrender of his license to practice medicine and surgery in Minnesota. According to the I.G., there are no disputed issues of material fact in this case. The I.G. asserts that Petitioner surrendered his license as a condition for terminating a formal disciplinary proceeding against Petitioner which concerned his professional competence. Therefore, according to the I.G., Petitioner's case falls within the provisions of section 1128(b)(4)(B) of the Social Security Act, and the I.G. has discretion to exclude Petitioner from participation in Medicare and to direct that he be excluded from participation in Medicaid.[3] The I.G. argues that the indefinite length of the exclusions is justified by the purpose of the exclusion law, which is in part to protect program beneficiaries from individuals or entities who are capable of causing harm.

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[3] Section 1128(b)(4)(B) provides that the Secretary may impose and direct exclusions against any individual or entity who:

> surrendered . . . a license . . . [to provide health care] while a formal disciplinary hearing was pending before . . . [any State licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

Petitioner argues that the Board of Medical Examiners' actions in this case are not justified by the facts. He contends that elements in the record of the investigation concerning his license are "clearly false . . . ." P.'s Memorandum at 3. He also contends that the Board of Examiners' Medical decision in his case is not final, evidently because an appeal of the Board's decision is pending or contemplated.

1. Petitioner surrendered his license to practice medicine and surgery while a formal disciplinary hearing was pending which concerned his professional competence, professional performance, or financial integrity within the meaning of section 1128(b)(4)(B) of the Social Security Act.

I conclude that the Board of Medical Examiners' investigation of Petitioner constituted a "formal disciplinary proceeding" pertaining to Petitioner's professional competence or performance. I conclude further that Petitioner's surrender of his professional license to the Board of Medical Examiners Disciplinary Committee was a surrender of a license while a disciplinary hearing was pending concerning Petitioner's professional competence or performance. Therefore the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Social Security Act.

The undisputed facts of this case are that the Board of Medical Examiners received a complaint concerning Petitioner and initiated an investigation, which included ordering that Petitioner submit to a physical and mental examination. Based on the results of this examination, the Board of Medical Examiners Disciplinary Committee scheduled a conference with Petitioner at which it recommended that Petitioner permanently surrender his license to practice medicine and surgery as a condition for avoiding further proceedings against him. Petitioner agreed, and this agreement was memorialized in a written Board order. Findings 3-9.

Although section 1128(b)(4)(B) does not define the term "formal disciplinary proceeding," it is reasonable to conclude from the face of the statute, and from legislative history, that the law refers to a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in a license suspension or revocation. This interpretation is consistent with the purpose of the law. As is noted above, the law is intended to protect Medicare beneficiaries and Medicaid recipients from individuals

and entities who are demonstrated to be untrustworthy. The law presumes that an individual or entity who surrenders a health care license in the face of charges, and in the circumstance where he has the opportunity to defend himself, is as likely to be untrustworthy as the individual or entity who loses a license after litigating the issue of his or her professional competence, performance, or financial integrity.

The facts of this case establish both that charges had been made against Petitioner and that he had been afforded an opportunity to defend himself against those charges. It is apparent that the confrontational phase of the Board of Medical Examiners' case against Petitioner was in its early stages. See I.G. Ex. 5/2. But it is equally apparent that Petitioner agreed to surrender his license to practice medicine and surgery at a point in the process where it was apparent that the ultimate result would be a formal resolution of his entitlement to retain his license.[4]

The law does not define the terms "professional competence, professional performance, or financial integrity." I conclude that the plain meaning of the terms "professional competence" and "professional performance" encompasses those circumstances where license revocation proceedings concern the question of whether a party's ability to provide health care in a competent and professional manner has been compromised for reasons of health. That is precisely what was at issue in the Board of Medical Examiners' proceeding against Petitioner.

I conclude that Petitioner "surrendered" his license within the meaning of the law. Petitioner asserts that the decision of the Board of Medical Examiners to accept his surrender of his license is not "final," evidently contending that he plans to continue to petition the Board of Medical Examiners to reconsider its final order, to take such appeals from that order as may be available to him, or to collaterally attack the order. Petitioner appears to be arguing that there may be some uncertainty as to the finality of the order, and that he has not actually "surrendered" his license to practice medicine.

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[4] Arguably, a different situation might have existed had Petitioner surrendered his license at the point where the Board of Medical Examiners had received a complaint concerning Petitioner, but before the Disciplinary Committee had taken any action in Petitioner's case.

I disagree with Petitioner's contentions. First, the record of this case does not show that there are additional proceedings pending concerning the surrender of Petitioner's license. But even if additional proceedings were pending, I conclude that Petitioner's surrender of his license to the Board of Medical Examiners constitutes a "surrender" within the meaning of section 1128(b)(4)(B).

The law does not contain qualifying language which would suggest that a license surrender must be litigated through all potential appeals and collateral attacks in order to constitute a surrender upon which exclusions could be predicated. Indeed, the law provides that a license surrender which occurs during a disciplinary proceeding is sufficient to trigger the exclusion provisions--regardless whether the individual or entity who surrenders the license subsequently has a change of heart and appeals or petitions for reconsideration.

2. Petitioner's assertion that the Board deprived him of due process is not relevant.

Petitioner's central argument is that the proceedings before the Board of Medical Examiners which led to his surrendering his license to practice medicine were based on an incomplete and inaccurate record, and were thus deficient. Therefore, according to Petitioner, actions taken by the I.G. to exclude him from participation in Medicare and State health care programs are unjustified.

Petitioner's assertions concerning the Board of Medical Examiners' proceedings in his case amount to a claim that these proceedings are defective because he was denied due process of law. Petitioner's argument is the same argument as was offered by the petitioner in Frank Waltz, M.D. v. The Inspector General, Docket No. C-86, decided September 1, 1989. I held in the Waltz case that the petitioner's argument concerning the fairness of a state licensing board's license revocation proceeding was irrelevant to the issue of the I.G.'s authority to impose and direct exclusions based on the state board's final action. I reaffirm that holding here.

My authority to hear and decide exclusion cases is limited to deciding whether the decisions made by the Secretary comport with statutory and regulatory standards. If Petitioner's assertions are not relevant to the Secretary's exclusion decision, then they are beyond the bounds of the issues which I may consider in a hearing concerning that decision.

There are several issues which a petitioner may potentially argue in a hearing brought to challenge exclusions imposed pursuant to section 1128(b)(4)(B). A petitioner may argue that: a formal disciplinary proceeding was not pending against him; the proceeding was not before a State licensing authority; the proceeding did not concern his professional competence, professional performance, or financial integrity; he did not actually surrender his license to provide health care; or that the term of the exclusions imposed and directed against him is unreasonable.

However, as I held in Waltz, a hearing on exclusions imposed and directed pursuant to section 1128(b)(4) may not be used by a petitioner to mount a collateral attack on a state board's action. The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(B) emanates from the actions taken by state licensing boards. The law instructs the Secretary to rely on these boards' actions. The law does not intend that the Secretary examine the fairness or propriety of the process which led to the boards' actions. Consequently, the section of the exclusion law pursuant to which Petitioner was excluded does not provide him with a legitimate basis in this hearing to argue that the Board of Medical Examiners deprived him of due process.[5]

Furthermore, 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 as to their exclusions. Social Security Act, section 1128(f). The law provides that an excluded party be given reasonable notice and opportunity for a hearing by the Secretary to the same extent as is provided by section 205(b) of the Social Security Act.

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[5] As I noted in Waltz, the exclusion law does not operate as a bar to a petitioner appealing a state board's action. Moreover, were Petitioner to successfully appeal the Board of Medical Examiners' action, and thereby have his license to practice medicine and surgery in Minnesota reinstated, then the duration aspect of the exclusions would be satisfied, and Petitioner would be eligible for reinstatement as a participant in Medicare and Medicaid.

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).

As I held in Waltz, this section does not provide a petitioner with the right in an administrative hearing to argue 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 determination to exclude Petitioner based on the Board of Medical Examiners' acceptance of Petitioner's surrender of his license to practice medicine and surgery. The fairness of the Board of Medical Examiners' action is not relevant to the I.G.'s exclusion decision and is not a basis on which I may decide the reasonableness of the exclusions.

3. Summary disposition is appropriate in this case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Howard B. Reife, D.P.M. v. The Inspector General, Docket No. C-64, decided April 28, 1989; Michael I. Sabbagh, M.D. v. The Inspector General, Docket No. C-59, decided February 22, 1989; Jack W. Greene v. The Inspector General, Docket No. C-56, decided January 31, 1989, appeal docketed, DAB No. 89-59, Decision No. 1078 (1989); See F.R.C.P. 56.

As is noted supra, there are potential questions of fact which may arise in an exclusion hearing brought to challenge exclusions imposed and directed pursuant to section 1128(b)(4)(B) of the Social Security Act. I have carefully considered the arguments of the parties with respect to each of these possible issues, and I conclude that there exist no disputed issues of material fact with respect to any of them.

The first potential question of fact in this case is whether a formal disciplinary hearing was brought against

Petitioner. The I.G. has offered the Orders of the Board of Medical Examiners and the affidavit of the Chairman of its Disciplinary Committee which establish that, based on a complaint filed against Petitioner, and the results of physical and mental examinations, a disciplinary hearing had been implemented. Findings 4-9; I.G. Ex. 5. Petitioner has not challenged the veracity of any of this evidence. He asserts, however, that the proceedings of the Board of Medical Examiners were not "formal disciplinary proceedings" within the meaning of section 1128(b)(4)(B). P.'s Memorandum at 8. The issue asserted by Petitioner is not a question of fact, but is a legal question of how to characterize the Board proceedings which involved Petitioner. I concluded that the proceeding before the Board of Medical Examiners concerning Petitioner was a "formal disciplinary proceeding." See, Part I of this Analysis, supra.

The second potential question of fact is whether the proceeding was before a State licensing authority. The unrebutted evidence in this case is that the Board of Medical Examiners is a State licensing authority. Finding 3. Petitioner argues that he did not actually appear before the Board of Medical Examiners, but before its Disciplinary Committee. P.'s Memorandum at 7. However, it is not disputed that the Disciplinary Committee is a component of the Board of Medical Examiners with delegated authority to hear and decide questions of potential license suspension or revocation.

The third potential question of fact is whether the proceeding concerned Petitioner's professional competence, professional performance, or financial integrity. The evidence offered by the I.G. as to this issue establishes that the disciplinary proceeding against Petitioner was grounded on complaints that he abused alcohol, and findings from physical and mental examinations which showed that Petitioner experienced diminished physical and mental capacity. Findings 4-6. Although Petitioner asserts that the facts upon which the Board of Medical Examiners based its actions are "false," he does not dispute that the proceeding against him concerned his professional competence or performance.

The fourth potential question of fact in this case is whether Petitioner actually surrendered his license to provide health care. Petitioner seems to argue that, in fact, he did not surrender his license, asserting that "final disposition" of his case has not been made. P.'s Memorandum at 9. However, the evidence offered by the I.G. establishes that Petitioner surrendered his license to practice medicine and surgery to the Board of Medical

Examiners. Findings 8-9. The Board of Medical Examiners issued its final order in Petitioner's case. Finding 14. And, although Petitioner disputes the characterization of these acts pursuant to section 1128(b)(4)(B), he does not offer meaningful challenge to the evidence offered by the I.G. Petitioner's argument therefore relates to the legal issue of how to characterize his license surrender pursuant to the exclusion law, and not to the facts. As I have held supra at Part I of this analysis, Petitioner "surrendered" his license, as defined by law.

The final potential question of fact is the reasonableness of the exclusions the I.G. imposed and directed against Petitioner. The I.G. imposed and directed exclusions which will remain in effect until Petitioner's license to practice medicine and surgery in Minnesota is restored and he is reinstated by the I.G.

The I.G. asserts that its 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 their licenses and demonstrate their trustworthiness as providers of services. I.G.'s Memorandum at 16. The I.G. therefore asserts that, as a matter of law, the only reasonable exclusion determination that can be made in a case of this type is to impose and direct exclusions which will remain in effect until the restoration of a petitioner's license. If this analysis is accepted, then the only factual issues that may be litigated in a hearing to challenge exclusions imposed pursuant to section 1128(b)(4)(B) are those discussed supra, which relate to the issue of whether there exists a basis in law to impose exclusions.

I agree with the I.G.'s argument in this case as it pertains to exclusions of Petitioner from participating in Medicare or Medicaid programs which encompass the activities which had been licensed under state law. In this instance, it is apparent, from both the face of the statute and from legislative history, that Congress concluded that individuals and entities who lost their licenses to provide health care in a State were not to be trusted to provide previously licensed care to Medicare beneficiaries or Medicaid recipients:

> The provisions of . . . [the law] would permit the Secretary to exclude . . . persons [whose licenses

> had been revoked] in all States and to require the State to exclude them from participation in any State health care program.

This provision would also permit the exclusion of individuals or entities who surrender their licenses while disciplinary proceedings involving professional competence, professional conduct, or financial integrity are pending. This provision will prevent unfit practitioners from avoiding exclusion through the expedient of surrendering their license before the State can conclude proceedings against them.

S. REP. No. 109, 100th Cong., 1st Sess. 7, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 688.

Given this legislative directive, it is reasonable to conclude that Congress intended that individuals and entities excluded pursuant to section (b)(4) be excluded with respect to their licensed activities until such time as they regain their licenses and demonstrate their fitness for reinstatement. Thus, the exclusions imposed and directed in this case are reasonable, given the nature and terms of Petitioner's license revocation.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participating in Medicaid, was justified pursuant to section 1128(b)(4)(B) of the Social Security Act. I conclude further that the exclusions imposed and directed by the I.G. are reasonable insofar as the exclusions apply to Petitioner's rendering care as a physician. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge