

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

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In the Case of:)	
Andy E. Bailey, C.T.,)	DATE: October 6, 1989
)	
Petitioner,)	Docket No. C-110
)	
- v. -)	DECISION CR 47
)	
The Inspector General.)	
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DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On March 2, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.¹ The I.G. told Petitioner that his exclusion was due to the revocation by Georgia's Composite State Board of Medical Examiners (the Board of Examiners) of Petitioner's license to practice as a cardiac technician in the State of Georgia. Petitioner was advised that he would have the right to apply for reinstatement to the Medicare and Medicaid programs when he obtained a valid license to practice as a cardiac technician in Georgia.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. Petitioner moved that I appoint counsel to represent him in this case. I conducted a prehearing conference by telephone on May 10, 1989, at which I ruled that I was without authority to appoint counsel to represent Petitioner. I suggested to Petitioner that he seek representation from

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.

whatever agency could provide free legal assistance to indigent persons. Petitioner has not obtained counsel and has appeared pro se in this case.

During the May 10, 1989 prehearing conference, the I.G. stated that he intended to move for summary disposition. I issued a Prehearing Order on May 12, 1989, which, among other things, established a schedule for the I.G. to move for summary disposition and for the Petitioner to respond to the motion. The I.G. filed a motion for summary disposition pursuant to this Order, and Petitioner filed a timely response to the motion.

Petitioner requested oral argument of the motion, and I held oral argument in Grovetown, Georgia, on September 18, 1989.

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)(A) 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. The Board of Examiners revoked Petitioner's license to practice as a cardiac technician for reasons bearing on Petitioner's professional competence or performance;
2. It would be relevant for Petitioner to prove that he was deprived of due process in a state criminal proceeding or in his license revocation hearing;
3. The exclusions imposed and directed against Petitioner are reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed as a cardiac technician in the State of Georgia. I.G. Ex. 3/2.²

2. On October 6, 1986, the Board of Examiners held a hearing concerning whether Petitioner's license should be revoked. I.G. Ex. 3/1.

3. On September 4, 1987, a Hearing Officer for the Board of Examiners issued a recommended decision in Petitioner's case. I.G. Ex. 3.

4. The Hearing Officer found that Petitioner had been convicted of a felony, in violation of State rules and regulations governing licensure of medical technicians. I.G. Ex. 3/3.

5. The Hearing Officer found that Petitioner had failed to comply with recertification requirements for licensing as required by State regulations. I.G. Ex. 3/3.

6. The Hearing Officer concluded that Petitioner's felony conviction and failure to comply with recertification requirements constituted a factual and legal basis to revoke Petitioner's license to practice as a cardiac technician. I.G. Ex. 3/3.

7. On July 11, 1988, the Board of Examiners issued its final decision in Petitioner's case. I.G. Ex. 2.

8. The Board of Examiners adopted the findings of fact, the conclusions of law, and the recommended decision of the Hearing Officer, and revoked Petitioner's license to practice as a cardiac technician. I.G. Ex. 2/1.

² Exhibits and the parties' memoranda will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)/(page)
Memorandum in Support of Motion for Summary Judgment	I.G.'s Brief at (page)
Response to Motion for Summary Judgment	P.'s Memorandum at (page)

9. The Board of Examiners revoked Petitioner's license to practice as a cardiac technician for reasons bearing on Petitioner's professional competence or performance. Findings 4-8.

10. 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.

11. On March 2, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(b)(4)(A) of the Social Security Act. I.G. Ex. 1.

12. Petitioner's exclusion is effective until such time as his license to practice as a cardiac technician in Georgia is restored and his participation status is reinstated. I.G. Ex. 1/2.

13. The I.G. had discretion to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Finding 9; Social Security Act, section 1128(b)(4)(A).

14. Petitioner's assertions that he was deprived of due process at his State criminal trial and by the Board of Examiners are not relevant. See Social Security Act, section 1128(b)(4)(A).

15. The exclusion imposed and directed against Petitioner is reasonable. Social Security Act, section 1128(b)(4)(A).

ANALYSIS

The Board of Examiners revoked Petitioner's license to practice as a cardiac technician in Georgia based on a Hearing Officer's findings that Petitioner had been convicted of a felony and had failed to comply with State recertification requirements. Findings 4-8. Subsequently, the I.G. imposed and directed an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Social Security Act. This section permits such an exclusion of any individual or entity:

(W)hose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a

license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity; . . .

The exclusion imposed and directed by the I.G. is indefinite in duration. Petitioner may request reinstatement as a provider in Medicare and Medicaid when his license is restored.

Petitioner does not deny that his license to practice as a cardiac technician was revoked. He does not dispute that the rationale expressed by the Board of Examiners for revoking his license pertained to his professional competence or performance. He does not dispute that, assuming it was reasonable for the I.G. to exclude him, the indefinite nature of the exclusions is unreasonable.

Petitioner contends that he was denied due process at both his State criminal trial and at the license revocation proceeding. He asserts that he should be permitted to offer evidence in this case to prove that he was denied due process. P.'s Brief at 1. He argues that if the proceedings which resulted in his license revocation were unfair, then the I.G.'s determination to impose and direct an exclusion against him is unreasonable.

The I.G. argues that the authority contained in section 1128(b)(4)(A) for the Secretary (or his delegate, the I.G.) to impose and direct exclusions derives from the actions taken by state licensing boards, not the underlying facts on which state boards' decisions may be based. The I.G. contends that the validity of Petitioner's license revocation is not at issue in this case. I.G.'s Brief at 3. Therefore, according to the I.G., evidence as to the fairness of state proceedings is not relevant in this case.

1. The Board of Examiners revoked Petitioner's license to practice as a cardiac technician for reasons bearing on Petitioner's professional competence or performance.

The I.G. contends that either of the reasons given by the Board of Examiners for revoking Petitioner's license to practice as a cardiac technician establish that the license revocation was for reasons bearing on Petitioner's professional competence or performance. As is noted above, Petitioner has not disputed that the reasons given by the Board of Examiners for revoking

Petitioner's license pertain to his professional competence or performance.

I conclude that Petitioner's failure to comply with recertification requirements relates to his professional competence or performance. These requirements, as stated in Georgia law at O.G.C.A. 31-11-58, include both active practice and continuing education requirements. Failure by a licensed practitioner to comply with these requirements certainly could affect his competence to render licensed services or the quality of the services he renders. Therefore, the Board of Examiners' license revocation decision was at least in part based on reasons bearing on Petitioner's professional competence or performance.

The Hearing Officer who conducted a hearing in Petitioner's license revocation case for the Board of Examiners found that Petitioner had been convicted of the offense of felony murder. I.G. Ex. 3/2. I do not accept the I.G.'s contention that a conviction for felony murder relates to an individual's professional competence to provide health care or his performance as a health care provider, absent evidence establishing the circumstances and nature of the offense. In any event, the fact that Petitioner's license was revoked because, among other things, he had failed to comply with recertification requirements satisfies the requirement in section 1128(b)(4)(A) that license revocation be for reasons bearing on an individual or entity's professional competence or performance.³

³ At oral argument, counsel for the I.G. contended that section 1128(b)(4)(A) should be read to mean that the Secretary has authority to exclude an individual or entity where that party's license to provide health care had been revoked or suspended for any reason by a state licensing authority. It is possible to read the statute as the I.G. urges. It is also possible to read this section as requiring that the revocation or suspension be for reasons bearing on an individual's professional competence, performance, or financial integrity, as a prerequisite for the Secretary having authority to impose and direct exclusions. There is no need for me to resolve this interpretation issue in this case.

2. Petitioner's assertions that he was deprived of due process at his criminal trial and by the Board of Examiners are irrelevant.

Petitioner's principal argument is that he was denied due process at his criminal trial and by the Board of Examiners. Petitioner contends that the I.G.'s exclusion determination is invalid because it is based on defective proceedings.

Identical arguments to those raised by Petitioner in this case were raised by the petitioners in two recent cases, John W. Foderick, M.D. v. The Inspector General, Civil Remedies Docket No. C-113 (1989), and Frank Waltz, M.D. v. The Inspector General, Civil Remedies Docket No. C-86 (1989). In both of these cases, I held that claims of impropriety in state license revocation proceedings are not relevant to deciding whether the I.G. acted properly to impose and direct exclusions pursuant to section 1128(b)(4)(A). As I held in Waltz and Foderick, I conclude here also that Petitioner's claims concerning the fairness of state criminal proceedings and the Board of Examiners license revocation hearing are not relevant to the issues in this case. The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(A) emanates from the actions taken by state licensing boards. The law does not intend that the Secretary examine the fairness of the process which led to the state boards' decisions.

Furthermore, the section of the Social Security Act which entitles parties to administrative hearings in certain contested cases does not authorize collateral challenges of state decisions on due process grounds. Section 205(b) of the Social Security Act authorizes hearings with respect to specific decisions by the Secretary (or by officials with authority delegated by the Secretary). This section does not provide a petitioner with the right in an administrative hearing to prevail based on issues which are not relevant to the Secretary's decision. In this case, the "decision" which is challenged is the I.G.'s determination to exclude Petitioner based on the Board of Examiners' license revocation decision. The fairness of the state board or criminal proceeding is not relevant to the I.G.'s exclusion determination, and thus

evidence relating to the fairness of state proceedings is similarly not relevant.⁴

3. The exclusion imposed and directed against Petitioner is reasonable.

I held in Waltz and Foderick that Congress intended that the Secretary exclude individuals or entities who have lost their license for reasons pertaining to their professional competence or performance, or their financial integrity, from reimbursement for performing those services for which they had been licensed, until such time as their licenses are restored. This interpretation of the law is consistent with legislative history and with the statutory purpose of giving the Secretary a remedy to protect Medicare beneficiaries and Medicaid recipients from individuals or entities who are found capable of causing harm to beneficiaries and recipients.

Petitioner does not dispute that, assuming the I.G. had authority to impose and direct an exclusion in this case, the duration of the exclusion imposed and directed against him is reasonable. The length of the exclusion imposed and directed in this case coincides with the term of Petitioner's license revocation--that is, Petitioner is excluded until his license is restored and he applies for and receives reinstatement. I conclude that, given the purpose of the law, the term of the exclusion in this case is reasonable.

CONCLUSION

Based on the evidence and the law, I conclude that the I.G.'s determination to exclude Petitioner from participating in Medicare, and to direct that Petitioner be excluded from participating in Medicaid, was justified pursuant to section 1128(b)(4)(A) of the Social Security Act. I conclude further that it was reasonable to base the duration of the exclusion on Petitioner's obtaining

⁴ The exclusion law does not operate as a bar to a petitioner appealing a state board's revocation decision, or a state criminal conviction.

a license as a cardiac technician in Georgia. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge