

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Narayan Kulkarni, M.D.,	)	DATE: February 7, 1997
Petitioner,	)	
- v. -	)	Docket No. C-96-231
The Inspector General.	)	Decision No. CR458

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Narayan Kulkarni, M.D. (Petitioner), from participating in Medicare and State health care programs, including Medicaid, until Petitioner obtains a valid license to practice medicine or to provide health care in the State of Alabama. I base my decision on evidence which proves that Petitioner surrendered his license to practice medicine in Alabama during the pendency in that State of a formal disciplinary proceeding involving Petitioner's license to practice medicine that concerned Petitioner's professional competence, professional performance, and financial integrity. Petitioner has not offered any evidence which would support a finding that Petitioner's exclusion should be modified to a term that is less than coterminous with Petitioner's loss of his license to practice medicine in Alabama.

**I. Background**

On February 14, 1996, the I.G. notified Petitioner that he was being excluded from participating in Medicare and State health care programs. The I.G. asserted that she was authorized to exclude Petitioner because Petitioner allegedly surrendered his license to practice medicine in the State of Alabama while a formal disciplinary proceeding was pending before the Alabama Board of Medical Examiners (the Alabama licensing authority), concerning Petitioner's professional competence, professional performance, or financial integrity. The I.G. cited as authority for her action section 1128(b)(4) of the Social Security Act (Act). Additionally, the I.G.

advised Petitioner that his exclusion would remain in effect until Petitioner obtained a valid license to practice medicine or to provide health care in the State of Alabama.

Petitioner requested a hearing.<sup>1</sup> The case was assigned to me for a hearing and a decision. The parties agreed that the case could be decided based on their written submissions, and that an in-person hearing was not necessary. The parties each submitted written arguments and proposed exhibits. Petitioner's argument, dated September 29, 1996, is testimonial in nature. For that reason, I have designated it as P. Ex. 5.<sup>2</sup> The I.G. has not objected to my considering P. Ex. 5 as evidence.

The I.G. submitted five proposed exhibits (I.G. Exs. 1, 5-8), which relate to the merits of the case. Petitioner did not object to my receiving I.G. Exs. 1, 5, 7, and 8 into evidence.

Petitioner objected to my receiving into evidence I.G. Ex. 6. It is evident from Petitioner's objection that he disputes the truth of the contents of the exhibit, which consists of an investigative report made as a predicate to the Alabama proceedings concerning Petitioner's license to practice medicine. Petitioner's response includes P. Ex. 6, which consists of what may be voluminous excerpts from the proceeding before the Alabama licensing authority.

The I.G. responded to Petitioner's objection to my receiving I.G. Ex. 6 into evidence by averring that she offers the exhibit not for the truth of its contents, but to establish the nature of the proceeding before the Alabama licensing

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<sup>1</sup> Petitioner did not request a hearing until April 26, 1996. The I.G. moved to dismiss Petitioner's request on the ground that it was not made timely. I denied the I.G.'s motion. I ruled that Petitioner had not received notice of the I.G.'s exclusion determination until early March 1996, because Petitioner had been out of the United States until then.

<sup>2</sup> I.G. Exs. 2-4 and P. Exs. 1-4 were submitted by the parties in connection with the I.G.'s motion to dismiss Petitioner's request for a hearing on the ground that it was not made timely. I am rejecting I.G. Exs. 2-4 and P. Exs. 1-4 in the case in chief because they are not relevant to the merits. Moreover, the issue of timeliness of Petitioner's hearing request is now moot inasmuch as I ruled in favor of Petitioner on that issue.

authority. I conclude that I.G. Ex. 6 is relevant to establishing the purpose of the Alabama proceedings concerning Petitioner's license to practice medicine. Therefore, I admit into evidence P. Exs. 5 and 6 and I.G. Exs. 1, and 5-8. I base my decision in this case on the exhibits, on the applicable law, and on the arguments of the parties.

## **II. Issues, findings of fact and conclusions of law**

The issues in this case are whether the I.G. was authorized to exclude Petitioner, and whether the exclusion that the I.G. imposed is reasonable. I make the following findings of fact and conclusions of law (Findings) to support my decision that the I.G. was authorized to exclude Petitioner and that it is reasonable to exclude Petitioner until he obtains a valid license to practice medicine or to provide health care in the State of Alabama. I discuss each of my Findings in detail at Part III. of this decision.

1. Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who voluntarily surrenders his license to provide health care in a State during the pendency of formal disciplinary proceedings by the State's licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

2. Where an exclusion is imposed pursuant to section 1128(b)(4)(B) of the Act, and there exist no aggravating factors or exceptional circumstances, the exclusion will remain in effect until the excluded individual regains a license to provide health care in the State in which that individual surrendered his or her license to provide health care.

3. An exclusion may be of a greater duration than the period where a State license is lost when an exclusion is imposed pursuant to section 1128(b)(4) of the Act if there exist aggravating factors, not offset by mitigating factors, justifying an exclusion of a greater duration.

4. An exclusion may be of a shorter duration than the period where a State license is lost if there exist circumstances that are an exception to the requirement of a coterminous exclusion and which justify an exclusion of a shorter duration.

5. Petitioner surrendered his license to practice medicine in the State of Alabama during the pendency of an investigation brought by the Alabama licensing authority into the manner in which Petitioner practiced medicine.

6. The investigation of Petitioner by the Alabama licensing authority involved allegations that Petitioner had conducted his practice of medicine in violation of statutes which permitted the Alabama licensing authority to suspend or revoke the license of a physician who: engages in immoral, unprofessional or dishonorable conduct; practices medicine in such a manner as to endanger the health of patients; or, who performs unnecessary diagnostic tests or medical or surgical services.

7. Among the allegations which the Alabama licensing authority had before it at the time that Petitioner surrendered his license were allegations that Petitioner: improperly performed or supervised the performance of laboratory tests; performed unnecessary medical procedures; and made claims for reimbursement from the Alabama Medicaid program for items or services which were unnecessary or which had not been provided by Petitioner.

8. Petitioner surrendered his license to practice medicine in Alabama during the pendency of a formal disciplinary proceeding by the Alabama licensing authority which concerned Petitioner's professional competence, professional performance, and financial integrity.

9. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act.

10. The I.G. neither alleged nor proved the presence of aggravating factors.

11. Petitioner did not prove the presence of any exceptions which would justify reducing the exclusion which the I.G. imposed to one which was less than coterminous with Petitioner's loss of his license to practice medicine in Alabama.

12. The exclusion imposed against Petitioner by the I.G., which precludes Petitioner from applying to the I.G. for reinstatement until Petitioner obtains a valid license from the State of Alabama to practice medicine or to provide health care, is reasonable.

### III. Discussion

#### A. Governing law (Findings 1-4)

The I.G. excluded Petitioner pursuant to section 1128(b)(4)(B) of the Act.<sup>3</sup> This section authorizes the Secretary of the United States Department of Health and Human Services (the Secretary), or her delegate, the I.G., to exclude an individual who surrenders a State license to provide health care while a formal disciplinary proceeding was pending before a State licensing authority and that proceeding concerned the individual's professional competence, professional performance, or financial integrity.

The Secretary has published regulations which establish criteria for determining the length of any exclusion that is imposed pursuant to section 1128(b)(4) of the Act. An exclusion imposed pursuant to section 1128(b)(4) ordinarily shall be for the same duration as the period during which an individual's license is lost as a result of a State disciplinary proceeding. 42 C.F.R. § 1001.501(b)(1). An exclusion may be for a longer duration than a period that is coterminous with a loss of a State license to provide health care, if there exist aggravating factors that are not offset by any mitigating factors. 42 C.F.R. § 1001.501(b)(2), (3). An exclusion may be for a shorter duration than a period that is coterminous with the loss of a State license to provide health care, if prior to the date of the notice of exclusion:

. . . the licensing authority of a State (other than the one in which the individual's . . . license had been revoked, suspended, surrendered, or otherwise lost), being fully apprised of all of the circumstances surrounding the prior action by the licensing board of the first State, grants the

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<sup>3</sup> The February 14, 1996 notice letter to Petitioner from the I.G. does not state explicitly which subsection of section 1128(b)(4), subsection 1128(b)(4)(A) or subsection 1128(b)(4)(B), the I.G. was relying on as authority for excluding Petitioner. However, the text of the notice letter recites that Petitioner was being excluded as a result of Petitioner having surrendered his license to practice medicine or provide health care in Alabama while a formal disciplinary proceeding was pending before that State's licensing authority. I find that the text of the notice letter gave Petitioner adequate notice that the I.G. was excluding Petitioner pursuant to section 1128(b)(4)(B) of the Act.

individual . . . a license or takes no significant adverse action as to a currently held license . . .

42 C.F.R. § 1001.501(c)(1). Additionally, the I.G. will consider a request for early reinstatement if, after the date of the exclusion, the excluded individual fully and accurately discloses to the licensing authority of a different State the circumstances of the exclusion, and the licensing authority of that State grants the individual a new license to provide health care or takes no significant adverse action concerning a license which the excluded individual holds in that State. 42 C.F.R. § 1001.501(c)(2).

B. The relevant facts concerning Petitioner's loss of his license to practice medicine in Alabama (Findings 5-7)

On December 2, 1994, Petitioner executed an agreement in which he agreed to surrender voluntarily his license to practice medicine in the State of Alabama. I.G. Ex. 1. In that agreement, Petitioner acknowledged that he was taking this action while under investigation by the Alabama licensing authority for violations of Alabama law. Id. The agreement specifically referred to violations of three sections of Alabama law: Ala. Code §§ 34-24-360(2), (3), and (11)(1975). Id.; I.G. Ex. 5. The sections in question empower the Alabama licensing authority to suspend or revoke the license of a physician who: engages in immoral, unprofessional or dishonorable conduct; practices medicine in such a manner as to endanger the health of patients; or, who performs unnecessary diagnostic tests or medical or surgical services. I.G. Ex. 5 at 1-2.

Petitioner executed the agreement in the face of an investigative report which had been prepared for the Alabama licensing authority. I.G. Ex. 6. This report recited findings made by other investigators, to the effect that Petitioner had provided laboratory services for Medicaid recipients that were deficient in numerous respects. Id. at 2. Additionally, it recited findings that Petitioner had billed the Alabama Medicaid program for numerous tests that he did not perform. Id. at 3. These included tests that were not documented in the records of patients seen by Petitioner, but for which Petitioner submitted invoices to the Alabama Medicaid program. Id. at 4.

The report additionally reported on interviews that were conducted with former employees of Petitioner. One former employee was reported to have stated that she performed tests on behalf of Petitioner which she was not trained to perform. I.G. Ex. 6 at 8. This former employee averred that she had told Petitioner that she was not trained to perform the tests

but that Petitioner had ordered her to perform them anyway. Id. The report also addressed patient records that the investigator reviewed independently. The investigator found instances in which Petitioner had utilized personnel to perform laboratory tests which they were not trained to perform. Id. at 11. The investigator additionally found instances in which Petitioner had used outdated chemicals to perform tests, had ordered tests for no apparent medical reasons, had charged for undocumented visits, and had appeared to perform excessive numbers of medical tests. Id. at 11-12.

Petitioner admits agreeing to surrender his license. P. Ex. 1 at 1. According to Petitioner, he did so in order to avoid civil, and possibly, criminal proceedings. Id. Petitioner asserts that, in agreeing to surrender his license, he did not consider the possibility that the agreement might lead to his being excluded. Id. Petitioner asserts that the State disciplinary proceeding which led to his agreement to surrender his license was not based on substantial evidence. Id. at 1-2. I infer from this last assertion by Petitioner that he does not agree with the findings contained in the investigative report. Id.; see I.G. Ex. 6.

C. The absence of aggravating factors and of exceptional circumstances (Findings 10-11)

The I.G. neither alleged, nor did she offer evidence to establish, the presence of any aggravating factors in this case. Nor did Petitioner prove the presence of any exceptional circumstances that might justify reducing the length of his exclusion to a period of time that is less than coterminous with his loss of his Alabama license to practice medicine.

At the first prehearing conference, Petitioner asserted that he was licensed to practice medicine in States other than Alabama. I advised Petitioner then that I would afford him the opportunity to show that facts existed which established either of the exceptions contained in 42 C.F.R. § 1001.501(c)(1) or (2). However, Petitioner has offered no evidence concerning his alleged licensure by other States, nor has he offered evidence concerning whether those States other than Alabama in which he is allegedly licensed are aware of, or have considered the circumstances of and acted on Petitioner's case as is required under 42 C.F.R. § 1001.501(c)(1) or (2).

D. Application of the law to the facts (Findings 8-9, 12)

Petitioner surrendered his license to practice medicine in Alabama during the pendency of a formal disciplinary proceeding concerning Petitioner's professional competence, professional performance, and his financial integrity. Thus, the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act.

The investigation that was conducted by the Alabama licensing authority into Petitioner's conduct is part of a formal disciplinary proceeding. The I.G. did not introduce exhibits which established the precise nature of the proceedings that were begun against Petitioner by the Alabama licensing authority. However, it is apparent, both from the investigative report that was prepared for the Alabama licensing authority concerning Petitioner, and by Petitioner's communications with the Alabama licensing authority, that he was the subject of a formal disciplinary proceeding. I.G. Ex. 6; P. Ex. 1. Petitioner acknowledges that he was visited by investigators on behalf of the Alabama licensing authority, who told Petitioner that he was under investigation. P. Ex. 1 at 1. Petitioner acknowledges also that he instructed his attorney to settle the matter. Id.

The license surrender agreement which Petitioner executed and the sections of Alabama law which that agreement refers to make it evident that the proceeding against Petitioner concerned his professional competence, professional performance, or financial integrity. I.G. Ex. 1; I.G. Ex. 5. The nature of the disciplinary proceeding is evident also from the investigative report which predates the agreement. I.G. Ex. 6.

An exclusion which is coterminous with Petitioner's loss of his license to practice medicine in Alabama is reasonable. There exist neither aggravating factors nor exceptional circumstances which would justify varying the exclusion from one that is coterminous with Petitioner's loss of his license to practice medicine in Alabama.

I have considered Petitioner's assertion that the proceeding against him in Alabama was not grounded on substantial evidence of wrongdoing by Petitioner. I find this assertion not to be relevant, concerning the issue of the I.G.'s authority to exclude Petitioner, and concerning also the issue of whether the exclusion is reasonable. It is not relevant to the issue of the I.G.'s authority to exclude Petitioner, because, the I.G.'s authority to exclude an individual pursuant to section 1128(b)(4) derives from the State proceeding against that individual, and the



proceeding's outcome, and not from the evidence on which the proceeding is based. Petitioner's assertion is not relevant to the issue of whether the exclusion is reasonable because it does not address any of the exceptional circumstances which I might consider as a basis for modifying the exclusion.

#### **IV. Conclusion**

I conclude that the I.G. was authorized to exclude Petitioner, pursuant to section 1128(b)(4)(B) of the Act. I conclude also that the exclusion imposed by the I.G., which permits Petitioner to apply for reinstatement only after he obtains a valid license to practice medicine or to provide health care in the State of Alabama, is reasonable.

/s/

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Steven T. Kessel  
Administrative Law Judge