

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Joel A. Baringer, R.Ph.,)	DATE: October 5, 1995
Petitioner,)	
- v. -)	Docket No. C-95-125
The Inspector General.)	Decision No. CR397

DECISION

By letter dated March 22, 1995, Joel A. Baringer, R.Ph., the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner requested a review of the I.G.'s action by an administrative law judge of HHS's Departmental Appeals Board (DAB). The I.G. moved for summary disposition.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

I find no reason to disturb the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. During the period relevant to this case, Petitioner was a licensed pharmacist in the State of Ohio. P. Ex. 1.
2. On May 13, 1994, in the Franklin County Municipal Court (State court), Columbus, Ohio, Petitioner pled guilty to attempted Medicaid fraud, a misdemeanor. I.G. Ex. 1.
3. The State court accepted Petitioner's guilty plea to the charge of attempted Medicaid fraud and sentenced Petitioner to 1) pay a \$150 fine; 2) serve 90 days in jail (suspended); and 3) probation for two years. I.G. Ex. 2.
4. Petitioner was convicted within the meaning of section 1128(i) of the Act. Act, section 1128(i)(1), 1128(i)(3); I.G. Exs. 1, 2; Findings 1 - 3.
5. Petitioner's conviction for attempted Medicaid fraud is program-related within the meaning of section 1128(a)(1). I.G. Exs. 1, 2; Finding 4.
6. Petitioner was properly excluded from participation in Medicare and Medicaid for the mandatory minimum five-year period. I.G. Exs. 1, 2; Act, sections 1128(a)(1), 1128(c)(3)(B); Findings 1 - 5.

¹ I cite to the parties' exhibits and my Findings of Fact and Conclusions of Law as follows:

Petitioner's Exhibit	P. Ex. (number)
I.G.'s Exhibit	I.G. Ex. (number)
My Findings of Fact and Conclusions of Law	Findings (number)

PETITIONER'S ARGUMENT

Petitioner acknowledges that he pled guilty to the misdemeanor charge of attempted Medicaid fraud. However, he argues that a misdemeanor is too trivial an offense to justify exclusion from the Medicare and Medicaid programs.

Petitioner contends that the State's prosecuting attorney in his criminal case represented to him that he knew of no further action that the federal government would take against him. Petitioner further contends that for the I.G. to direct and impose a five-year exclusion against him violates the spirit and the terms of Petitioner's plea agreement, because the intent of all parties in entering into a plea agreement was to allow Petitioner to keep his license and continue being a pharmacist providing services to patients in federally funded programs.

Petitioner asserts that excluding him would violate the Eighth Amendment in that it would be cruel and unusual punishment because it would preclude Petitioner from being able to earn a living as a pharmacist. Finally, Petitioner further argues that his exclusion from Medicare and Medicaid constitutes double jeopardy.

DISCUSSION

The statute under which the I.G. seeks to exclude Petitioner, section 1128(a)(1) of the Act, requires, initially, that Petitioner have been convicted of a criminal offense.

Section 1128(i) of the Act provides that an individual will be deemed "convicted" under any of the following circumstances:

- (1) when a judgment of conviction has been entered against the individual or entity by a federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

- (2) when there has been a finding of guilt against the individual or entity by a federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court or

(4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

In the case at hand, sections 1128(i)(1) and (3) are applicable. Petitioner pled guilty to the offense of attempted Medicaid fraud and the State court accepted Petitioner's plea. Moreover, the evidence shows that the State court entered judgment against Petitioner because Petitioner's guilty plea explicitly states that "[t]he Court accepts the defendant's plea of 'guilty' and enters a finding and judgment of 'guilty' accordingly." I.G. Ex. 1.²

The second requirement of section 1128(a)(1) of the Act is that the criminal activity be program-related. In this regard, Petitioner's conviction is, on its face, program-related because Petitioner was convicted of attempted Medicaid fraud. I.G. Exs. 1, 2. No further connection need be shown. Scott Gladstone, M.D., DAB CR331 (1994); Ian C. Klein, D.P.M., DAB CR177 (1992); Olufemi Okunoren, M.D., DAB CR150 (1991). Petitioner admits that his conviction is program-related in page two of his brief.

Petitioner pled guilty to the offense of attempted Medicaid fraud. I.G. Exs. 1, 2. Webster's Dictionary defines fraud as "intentional perversion of truth in order to induce another to part with something of value or surrender a legal right." Webster's Ninth New Collegiate Dictionary 490 (9th ed. 1990).

² Petitioner submitted four exhibits in conjunction with his motion for summary disposition. (P. Exs. 1 - 4). I admit all four of Petitioner's exhibits into evidence. The I.G. submitted three exhibits in conjunction with her motion for summary disposition (I.G. Exs. 1 - 3). I admit I.G. Exs. 1 and 2. I reject I.G. Ex. 3, as, per my June 5, 1995 Order (Order), I instructed the parties not to submit a copy of the Notice letter as an exhibit in this case. The I.G. submitted two attachments which are copies of DAB decisions in the cases of Larry D. Warden, DAB CR299 (1993) and Glen E. Bandel, DAB CR261 (1993). I have labelled these as Attachments 1 and 2 respectively, but, as per my Order, I do not admit them into evidence in this case.

In the context of this case, the evidence establishes that the intended victim of Petitioner's fraud was the Medicaid program. I.G. Exs. 1, 2. The plain meaning of the offense to which Petitioner pled guilty is that Petitioner intentionally submitted a claim to Medicaid in order to receive monetary reimbursement to which he was not entitled. It is well established that such financial crimes directed at Medicare or Medicaid are related to the delivery of items or services under Medicare or Medicaid. Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Therefore, there is no question that Petitioner's offense is program-related within the meaning of section 1128(a)(1) of the Act.

As to Petitioner's contention that his exclusion would subject him to cruel and unusual punishment, in violation of his rights under the Eighth Amendment of the Constitution, it is well settled that the primary purpose of the exclusion sanction is remedial rather than punitive. Moreover, the purpose of a mandatory exclusion is to protect the integrity of the Medicare and Medicaid programs, program beneficiaries, and the public from persons who have been shown to be guilty of program-related or patient-related crimes. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991). I have no authority to rule on the constitutionality of Petitioner's exclusion. Shanti Jain, M.D., DAB 1398 (1993); See 42 C.F.R. § 1005.4.

Petitioner further claims that subjecting him to an exclusion is violative of the double jeopardy provisions of the Constitution. However, double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a State conviction. Abbate v. United States, 359 U.S. 187 (1959). As an appellate panel of the DAB expressed, the mandatory exclusion provision is not comparable to the civil penalty imposed in Halper [U.S. v. Halper, 490 U.S. 435 (1989)], but is remedial in nature and, therefore, constitutionally inoffensive. Janet Wallace, L.P.N., DAB 1126 (1992).

Finally, Petitioner argues that a five-year exclusion is too harsh, given that he was convicted of only a misdemeanor. The distinction that Petitioner is attempting to make is not one that exists in the application of the mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B). The Act makes no distinction between a felony conviction and a misdemeanor conviction, it simply mandates that all persons or entities convicted of program-related offenses are to be excluded for the mandatory minimum five years. Larry D.

Warden, DAB CR299 (1993); Glenn E. Bandel, DAB CR261 (1993); Act, sections 1128(a)(1) and 1128(c)(3)(B); 42 C.F.R. §§ 1001.101, 1001.102.

CONCLUSION

Petitioner's exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because the I.G. has demonstrated that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

/s/

Joseph K. Riotto
Administrative Law Judge