

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Paul Karsch,)	DATE: January 27, 1997
)	
Petitioner,)	
)	
- v. -)	Docket No. C-96-374
)	Decision No. CR454
The Inspector General.)	
)	

DECISION

By letter dated July 19, 1996, Paul Karsch (Petitioner) was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that it had decided to exclude him 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). I use the term "Medicaid" in this Decision when referring to the State programs. The I.G. explained that the five-year exclusion was mandatory under 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 the Medicare program.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. filed a motion for summary disposition, accompanied by a supporting brief with five exhibits. I have marked and identified these exhibits as I.G. Ex. 1 through 5. Petitioner submitted a brief in response, with three exhibits. I have marked these exhibits as Petitioner's Ex. 1 through 3. As neither party has contested the authenticity of the exhibits introduced by the other party, I am admitting all the exhibits into evidence.

Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the

case on the basis of written submissions in lieu of an in-person hearing.

I affirm 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.

PETITIONER'S ARGUMENT

Petitioner concedes that he pled guilty to a misdemeanor pursuant to a Plea Agreement executed on November 22, 1994. Petitioner contends, however, that the document specifically identified the terms and conditions of the plea and that such document failed to inform him of the exclusion provisions of 42 U.S.C. § 1320a-7, the codification of section 1128 of the Act. Petitioner maintains that, in order for him to have knowingly and voluntarily entered into a plea agreement, he was entitled to full disclosure of all consequences, including exclusion from the Medicare and Medicaid programs, as a result of entering a guilty plea. Petitioner contends that his right to make an informed decision concerning his guilty pleas was thus violated. Petitioner further argues that his right to be free from double jeopardy was violated when, after being punished in a criminal prosecution, he is penalized by the subsequent civil sanction of exclusion from the Medicare and Medicaid programs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was the manager of ATS Medical Services Inc. (ATS), a Pennsylvania corporation providing medical services for Medicare patients. I.G. Ex. 3.
2. ATS was affiliated with AMOX Medical (AMOX), a Massachusetts corporation providing similar services to Medicare patients. I.G. Ex. 3.

3. Medicare contracts with various private insurance who will administer the processing and payment of claims by Medicare providers.

4. All claims for Medicare services provided by ATS to patients in Pennsylvania were required to be filed with Pennsylvania Blue Shield. I.G. Ex. 3.

5. All claims for Medicare services provided by AMOX for patients in Maine, New Hampshire, and Massachusetts were required to be filed with Massachusetts Blue Shield. I.G. Ex. 3.

6. Reimbursement rates for medical services vary from location to location throughout the United States.

7. Petitioner caused to be filed with Pennsylvania Blue Shield a claim which falsely represented that certain health care services were provided in Pennsylvania, whereas in fact the services had been provided by AMOX in Massachusetts. I.G. Ex. 3.

8. On December 29, 1994, a criminal information was filed in the United States District Court, Middle District of Pennsylvania, charging Petitioner with wilfully making false statements on an application for Medicare reimbursement. I.G. Ex. 3.

9. Petitioner pleaded guilty to the offense charged in the information pursuant to a plea bargain negotiated with the United States Attorney. I.G. Ex. 4.

10. The Court accepted Petitioner's plea and entered judgment against him on June 1, 1995. I.G. Ex. 5.

11. Petitioner was ordered to pay a \$3000 fine and \$25 assessment. I.G. Ex. 5.

12. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a "conviction" within the meaning of section 1128(i)(3) of the Act.

13. For the mandatory exclusion of section 1128(a)(1) to apply, the criminal offense giving rise to the conviction must be related to the delivery of items or services under the Medicare or Medicaid programs.

14. Filing false claims under the Medicare or Medicaid programs is a program-related offense.

15. Petitioner herein was convicted of a criminal offense "related to the delivery of an item or service" under the Medicare program, within the meaning of section 1128(a)(1) of the Act.

16. Exclusion of Petitioner does not subject him to double jeopardy.

17. A defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his guilty plea.

18. Sections 1128(a)(1) and 1128(i) of the Act, read together, provide adequate notice of the consequences which could result from conviction of an offense related to the delivery of an item or service under the Medicare program.

19. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in the Medicare and Medicaid programs.

20. The minimum mandatory period for exclusions pursuant to section 1128(a)(1) of the Act is five years.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

22. Neither the I.G. nor the administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual subject to such action must have been convicted of a criminal offense under federal or State law. Section 1128(i)(3) provides, inter alia, that when a person enters a guilty plea to a criminal charge and the court accepts such plea, the individual will be regarded as having been convicted within the meaning of section 1128 of the Act. In the case at hand, Petitioner concedes that he entered a plea of guilty to filing false claims under the Medicare program in violation of 42 U.S.C. § 1320a-7b(a) and that the United States District

Court for the Middle District of Pennsylvania accepted his plea. Petitioner's admissions are supported by the evidence adduced by the I.G., and I therefore find that Petitioner was convicted of a criminal offense within the meaning of the Act.

Next, section 1128(a)(1) of the Act requires that the criminal offense in question be related to the delivery of an item or service under Medicare or Medicaid. Petitioner does not dispute that he pled guilty to the offense of filing a false claim under the Medicare program. Departmental Appeals Board (DAB) case law has long held that filing false Medicare or Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion. See, e.g., Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F.Supp. 835, 838 (E.D. Tenn. 1990). I accordingly find that the offense which Petitioner was charged and convicted of in the present case constitutes criminal fraud related to the delivery of Medicare services.

With respect to the double jeopardy issue, the impact of the double jeopardy clause on civil and criminal multiple "punishments" was extensively reviewed in U.S. v. Halper, 490 U.S. 435 (1985). There, the Supreme Court recognized that in the rare case a civil penalty may be so extreme and so disproportionate to the Government's actual damages and expenses as to constitute prohibited punishment. Id. at 447-51. The Halper Court specifically recognized that the question of double jeopardy was not dependent solely on whether the penalty was characterized as "civil" or "criminal." Rather, the focus was on the purpose and effect of the penalties on the particular case.

The remedial nature of the mandatory exclusion was examined in Manocchio v. Sullivan, 768 F.Supp. 814 (S.D. Fl. 1991), where the Court applied the Supreme Court's two-prong test. The first prong is a determination of Congress' intent. The Court found that because specific sections of the 1987 Amendments were labelled "criminal," other sections not so entitled, such as the mandatory exclusion, were remedial. Second, the Court examined the purpose and effect of the exclusion period and found its intent, as expressed by Congress, was clearly remedial and intended: (i) to protect the Medicare and Medicaid programs from fraud and abuse, and (ii) to protect citizens who rely on the integrity of participants in the

program.¹ The Court held that there was sufficient public interest in excluding convicted providers that the exclusion did not violate either the double jeopardy or the ex post facto clauses. Therefore, the Court found that, as the provider failed to establish that there was no rational relationship between the nonpunitive interests and the exclusion period, his appeal must fail.

The remedial nature of the 1987 Amendments was also considered in Greene v. Sullivan, 731 F.Supp. 838, 840 (E.D. Tenn. 1990).² There a District Court held the double jeopardy arguments of Halper inapplicable to the case of a pharmacist who had been convicted for having filed a false report and as a result had received a mandatory five-year exclusion. That Court particularly noted the agency's argument that in Greene, as opposed to Halper, the government was not seeking any monetary recovery. Rather, as in the instant case, the government sought to protect the Medicare and Medicaid programs by excluding persons convicted of defrauding those programs. These goals, the Court declared, "are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc." 731 F. Supp. at 840. Thus, the exclusion remedy is more analogous to the revocation of a professional license for misconduct than it is punitive, and accordingly there is no double jeopardy. 731 F. Supp. at 840; Dwayne Franzen, DAB 1165, at 11-12 (1990).

Clearly Petitioner has not here established that his exclusion presents one of those rare Halper cases in which the civil penalty is extreme and bears no rational relation to the remedial goals. The primary purpose of this exclusion is not to punish Petitioner, but to protect the programs, beneficiaries, and recipients from future misconduct by a provider who has proved himself untrustworthy. See Manocchio v. Sullivan, supra.

Finally, Petitioner argues that he should not be subject to an exclusion under section 1128(a)(1) because he was not informed in the criminal proceeding that he would be excluded from the Medicare and Medicaid programs as a result of his conviction. Petitioner asserts that he was

¹ See S.Rep. No. 100-109, 100th Cong., 1st Sess. 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

² For additional discussion of the remedial nature of the 1987 Amendments, see 57 Fed. Reg. 3744 (January 29, 1992).

deprived of his due process, as he claims that he has been deprived of his livelihood.

This argument is essentially the same as an argument made by a petitioner in the case Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992). In that case, the petitioner argued that his due process rights were violated because he was deprived of the notice necessary to understand the possible consequences of his guilty plea. The petitioner asserted that, had he known of the consequences of his plea, he would have pled differently. This argument was rejected. In rejecting this argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985), for the proposition that a defendant in a criminal proceeding does not have to be advised of all the possible consequences which may flow from his plea of guilty. DAB CR215, at 6. The appellate panel of the DAB affirmed this decision, finding that it "correctly held that, as defendant, Petitioner did not have to be advised of all the possible consequences of his plea." DAB 1372, at 11. The DAB has held in other cases that arguments about the process leading to a petitioner's criminal conviction are completely irrelevant to an exclusion proceeding. See, e.g., Charles W. Wheeler, DAB 1123 (1990). In view of the foregoing, Petitioner's argument that the I.G. is precluded from imposing an exclusion in this case because Petitioner did not know that his conviction would result in an exclusion is without merit.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of his conviction of a program-related criminal offense. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, at 12-14 (1989).

The I.G.'s five-year exclusion of Petitioner is therefore upheld.

/s/

Joseph K. Riotto
Administrative Law Judge