

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Joshua Yaw Boateng, D.P.M.,)	DATE: March 27, 1995
Petitioner,)	
- v. -)	Docket No. C-94-399
The Inspector General.)	Decision No. CR365

DECISION

By letter dated June 27, 1994, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Joshua Yaw Boateng, D.P.M. (Petitioner), that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.¹ The I.G. advised Petitioner that he was being excluded as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid. The I.G. advised Petitioner that the exclusion of individuals convicted of such program-related offenses is mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that for exclusions imposed pursuant to section 1128(a)(1) of the Act, section 1128(c)(3)(B) requires a five-year minimum period of exclusion.

Petitioner filed a timely request for review of the I.G.'s action. During a prehearing conference conducted by me on August 19, 1994, the parties agreed to proceed by written submissions. Accordingly, I established a schedule for the parties to file briefs and documentary evidence.

¹ In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

On October 4, 1994, the I.G. filed a motion for summary disposition accompanied by a brief and eight exhibits. I identify these exhibits as I.G. Ex. 1 through 8.

By letter dated October 21, 1994, Petitioner requested an in-person hearing. Petitioner stated that he wished "to be heard personally (rather than by affidavit)." Petitioner argued that characteristics of his speech, his articulation, and his response to complex sentences in English may "have substantial bearing upon the manner in which the Administrative Law Judge may desire to exercise whatever discretion he possesses in disposing of this case." The I.G. opposed Petitioner's request for an in-person hearing on the grounds that there existed no genuine issues of material fact which justified my holding such a hearing.

In order to allow Petitioner an opportunity to fully present his case, I granted his request to make a personal statement before me. However, I determined that, under the circumstances of this case, a hearing by telephone would be appropriate. I also determined that the parties would continue to adhere to the briefing schedule established by me. November 1, 1994 Order and Notice of Telephone Hearing.

Petitioner subsequently filed a responsive brief accompanied by three exhibits. I identify these as P. Ex. 1 through 3. The I.G. filed a reply and Petitioner filed a sur-reply.

On December 14, 1994, I conducted a hearing by telephone. The parties agreed not to file posthearing briefs.

In his responsive brief, Petitioner made some objections to I.G. Ex. 3 and I.G. Ex. 4 which go to the weight that I should give these exhibits. Since Petitioner did not contest the authenticity or relevancy of these or any other exhibits offered by the I.G., I admit I.G. Ex. 1 through 8 into evidence. The I.G. did not object to any of the exhibits offered by Petitioner, and I admit P. Ex. 1 through 3 into evidence.

I have carefully considered the applicable law, the evidence, and the parties' arguments. I conclude that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. At all times relevant to this case, Petitioner was a licensed podiatrist in the Commonwealth of Pennsylvania. I.G. Ex. 3.
2. On August 17, 1992, the Pennsylvania Attorney General's Office filed a criminal complaint alleging that Petitioner had: (1) knowingly submitted false information for the purpose of obtaining greater compensation than that to which he was legally entitled for furnishing services under Medicaid; (2) submitted claims which misrepresented the description of services provided; and (3) submitted claims for services which were not rendered to a recipient. In an attached affidavit, the Attorney General's Office alleged that there was probable cause to arrest Petitioner for Medicaid Fraud. I.G. Ex. 1.
3. The Attorney General's Office subsequently filed a Bill of Information charging Petitioner with 126 counts of Medicaid Fraud. The Bill of Information alleged that Petitioner knowingly submitted Medicaid claims for a specific surgical procedure which was not rendered as claimed. I.G. Ex. 2, 3.
4. Petitioner pled no contest to 78 counts of Medicaid Fraud in the Court of Common Pleas of Dauphin County, Pennsylvania (the court). I.G. Ex. 4, 5, 7.
5. Based on its acceptance of Petitioner's nolo contendere plea, the court sentenced Petitioner to pay costs totaling \$16,224 and restitution with interest in the amount of \$16,224. The court also sentenced him to probation for up to 23 months and required him to perform 100 hours of community service. I.G. Ex. 6.
6. The Secretary of DHHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).
7. Petitioner's nolo contendere plea, and the court's acceptance of that plea, constitute a conviction within the meaning of sections 1128(a)(1) and 1128(i) of the Act. FFCLs 1 - 5.
8. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCLs 1 - 5, 7.

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

10. The minimum mandatory period for an exclusion imposed pursuant to section 1128(a)(1) of the Act is five years. Act, section 1128(c)(3)(B).

11. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCLs 1 - 10.

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

13. There is no equitable relief from the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

1. Petitioner was convicted of a criminal offense related to the delivery or an item or service under Medicaid.

The material facts of this case are not in dispute. The evidence adduced by the I.G., and not disputed by Petitioner, amply demonstrates that Petitioner was convicted of a criminal offense related to the delivery or an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

The first requirement that must be satisfied in order to establish that the I.G. has the authority to exclude Petitioner under section 1128(a)(1) of the Act is that Petitioner must have been convicted of a criminal offense. Petitioner does not dispute that he was convicted of a criminal offense within the meaning of the Act.² The undisputed facts establish that Petitioner

² In his letter requesting a hearing, Petitioner stated that he did not concede that he was, in fact, convicted of a criminal offense. He stated that he was never informed by the judge hearing the criminal case upon which his exclusion is based that he was found guilty, and he did not understand that he was convicted.

(continued...)

entered a nolo contendere plea to the offense of Medicaid Fraud, and that the Court of Common Pleas of Dauphin County, Pennsylvania, accepted Petitioner's plea. FFCLs 2 - 5. The Act defines the term "convicted of a criminal offense" to include those circumstances in which a plea of nolo contendere by an individual has been accepted by a federal, State, or local court. Act, section 1128(i)(3). Therefore, I conclude that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

I further find that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction must be related to the delivery of an item or service under Medicare or Medicaid -- has also been met. Petitioner does not dispute that he was convicted of Medicaid Fraud and that this criminal offense relates to the delivery of an item or service under Medicaid. The I.G. offered evidence showing that Petitioner was convicted of 78 counts of Medicaid Fraud based on charges that he knowingly filed false Medicaid claims. FFCLs 2 - 5. A conviction for filing false Medicaid claims is a conviction of an offense related to the delivery of an item or service under Medicaid. Jack W. Greene, DAB 1078 (1989), aff'd sub nom Greene v. Sullivan, 731 F.Supp. 839 (E.D. Tenn. 1990). I find that the undisputed facts establish that Petitioner was convicted of an offense which is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

2. A minimum mandatory five-year exclusion is required by law.

Section 1128(a)(1) of the Act requires exclusions for individuals convicted of offenses related to the delivery of items or services under Medicaid. The law not only mandates exclusions for individuals convicted of program-related offenses, it requires that the term of such exclusions be for at least five years. Congressional

²(...continued)

While he was aware that the court sentenced him, he did not understand that this implied conviction. However, in his responsive brief, Petitioner admitted that he "submitted a plea of nolo contendere that was accepted by the court, which the statute addresses as the equivalent of a conviction." Petitioner's responsive brief at p. 6.

intent is clear from the express language of section 1128(c)(3)(B) of the Act:

In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . .

Since Petitioner was convicted of a criminal offense and it was related to the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1) of the Act, the I.G. is required by law to exclude Petitioner for a minimum of five years.

3. I do not have the authority to grant Petitioner the equitable relief he seeks.

Petitioner does not dispute that the Act mandates exclusion for at least five years following conviction of an offense related to the delivery of an item or service under Medicaid. However, Petitioner argues that "administrative adjudication resembles court decision-making . . . and, therefore, logically, entails a certain amount of inherent discretion and equitable power." Petitioner's sur-reply at p. 2. According to Petitioner, basic precepts of administrative law dictate that "even where rules preclude discretion (as here, where exclusion is mandatory upon a finding of conviction), there must be 'needed individualizing.'" Petitioner's sur-reply at p. 2. Petitioner urges that the task of the administrative law judge is to "harmonize" the demands of the statute and regulations and the competing demands of "discretion, equity, and individualizing of disposition." Petitioner's responsive brief at p. 6.

Petitioner states that in deciding this case I should consider certain "individualized concerns." Petitioner's responsive brief at pp. 6 - 7. According to Petitioner, these "individualized concerns" include the fact that he did not understand the full meaning of the regulations pertaining to the procedure code Medicaid required him to use in billing for his services. Petitioner asserts that since English is his second language, he did not understand the punctuation used in the Medicaid regulations and, as a result, he mistakenly believed that he was billing under the proper procedure code. Petitioner argues also that, during the criminal proceedings which led to the conviction upon which his exclusion is based, he was represented by a lawyer who provided poor legal advice. As a result of this poor legal advice, Petitioner contends that his nolo contendere plea was not an informed plea. In addition, Petitioner states that he was denied access to the

services of a public defender because he was misled into believing that he was not eligible for these legal services. Petitioner states that this forum is the "practicable forum of last resort" because he does not have sufficient funds to pursue relief under the Post-Conviction Remedies Act. Petitioner's responsive brief at pp. 7 - 8; Petitioner's hearing request.

Petitioner emphasizes that he is not challenging the I.G.'s authority to exclude him. In addition, Petitioner states that his arguments are not a collateral attack on the underlying conviction. Petitioner does not object to the five-year exclusion "being imposed and being made of record." Petitioner's sur-reply at p. 3. Instead, Petitioner states that what he is seeking is the exercise of the administrative law judge's equitable discretion after the exclusion is imposed. In particular, Petitioner urges that the administrative law judge may exercise equitable discretion to take either or both of the following actions:

- (1) grant Petitioner a stay of the exclusion for such period of time as the administrative law judge finds appropriate;
- (2) grant Petitioner probation upon such conditions as the administrative law judge finds appropriate.

Petitioner states that these "suggestions" are not made to circumvent the mandatory exclusion requirement, but that they are made "in search of equity, as an amelioration of the harsh results of law." Petitioner's responsive brief at pp. 8 - 9.

I do not have the authority to grant the equitable relief sought by Petitioner. An administrative law judge's jurisdiction in hearings regarding exclusions imposed pursuant to section 1128(a) of the Act is limited to those issues specified in the regulations. Specifically, 42 C.F.R. § 1001.2007(a)(1) restricts the issues that an administrative law judge may hear to the issues of "whether: (i) [t]he basis for the imposition of the sanction exists, and (ii) [t]he length of the exclusion is unreasonable." The regulations provide also that:

When the [I.G.] imposes an exclusion under subpart B of this part for a period of 5 years, paragraph (a)(1)(ii) of this section will not apply.

42 C.F.R. § 1001.2007(a)(2).

In the instant case, the I.G. has imposed a five-year minimum mandatory exclusion under Subpart B of the regulations.³ Thus, the only issue I may consider is whether the basis for the imposition of the exclusion exists.⁴ There is nothing in the law or regulations which either states or suggests that the Secretary has delegated to administrative law judges the authority to grant the equitable relief sought by Petitioner.

There is no equitable relief from the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Mark Gventer, D.P.M., DAB CR173 (1992). The equities that may be present in this case are not relevant with respect to the issue of whether there is a basis for the imposition of a five-year exclusion under sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Accordingly, I do not have the authority to "stay" an exclusion, to grant "probation," or to grant any other equitable relief.

³ Subpart B of the regulations provides for a mandatory exclusion for a minimum period of five years for individuals convicted of criminal offenses related to the delivery of an item or service under Medicare or Medicaid.

⁴ If the I.G. had imposed an exclusion against Petitioner under Subpart B for a period longer than five years, then there would exist an issue as to the reasonableness of that part of the exclusion which exceeded five years. In that event, an administrative law judge would be permitted to consider the presence of aggravating or mitigating factors specified at 42 C.F.R. § 1001.102.

CONCLUSION

Based on the law and the undisputed material facts in this case, I conclude that the I.G. properly excluded Petitioner from Medicare and Medicaid pursuant to section 1128(a)(1) of the Act. I further conclude that the five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act. In addition, I conclude that I do not have the authority to grant the equitable relief sought by Petitioner.

/s/

Joseph K. Riotto
Administrative Law Judge