Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Subha Reddy,	)	DATE: July 13, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-007
	)	Decision No. CR384
The Inspector General.	)	
	)	

DECISION

By letter dated September 16, 1994, Subha Reddy, the Petitioner herein, was notified by the Inspector General (I.G.) of the United States Department of Health and Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs.[1] The I.G. asserted that an exclusion of at least five years was mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act), because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action. On January 4, 1995, I held a prehearing conference in this case. During that conference, the I.G. moved for disposition of the case without an in-person hearing. Petitioner objected and requested an in-person hearing. Having reviewed the parties' submissions, 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. Thus, I have decided the case on the basis of the parties' written submissions. Based on the undisputed facts and the law, I have determined that

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

the I.G. was required to exclude Petitioner for at least 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 LAW

1. During the period relevant to this case, Petitioner was employed as a physician's assistant at the Kelly Plaza Medical Clinic in Detroit, Michigan. P. Br. at 2.[2]

2. Also during the period relevant to this case, Petitioner was not licensed to practice medicine as either a physician or a physician's assistant in the United States. P. Br. at 2.

3. Under Michigan law, an individual who is not licensed as a physician or physician's assistant cannot legally prescribe substances containing codeine. P. Br. at 6.

4. If an unlicensed individual prescribes substances containing codeine to a Medicaid patient, and submits a claim for his or her services to Medicaid, under Michigan law the individual is presumed to have knowingly submitted a false claim. P. Br. at 6.

5. Petitioner's responsibilities as a physician's assistant included the prescribing of medications to Medicaid-eligible patients at the Kelly Plaza Medical Clinic. I.G. Br. at 5; I.G. Ex. 6 at 2.

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[2] I cite to Petitioner's brief as P. Br. at (page). I cite to the I.G.'s brief as I.G. Br. at (page). Petitioner submitted one exhibit with her brief, which I cite to as P. Ex. 1. The I.G. submitted nine exhibits with her brief, which I cite to as I.G. Exs. 1-9. Since neither party has objected to the exhibits offered by the other party, I admit P. Ex. 1 and I.G. Exs. 1-9 into evidence.

6. On October 6, 1993, Petitioner was charged with two counts of submitting false claims to the State of Michigan for reimbursement. I.G. Ex. 7.

7. Specifically, Petitioner was alleged to have illegally prescribed Tylenol/Acetaminophen with Codeine to Medicaid patients and to have knowingly submitted false claims for her services to the State of Michigan for Medicaid reimbursement. I.G. Ex. 7.

8. Petitioner entered a guilty plea to two counts of knowingly filing false claims for Medicaid reimbursement. I.G. Ex. 8.

9. The court accepted Petitioner's guilty plea, and sentenced her to two years' probation, performance of 150 hours of community service, and fined her $720. I.G. Exs. 8, 9.

10. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(3) of the Act. Findings 1-9.

11. Petitioner's conviction of a criminal offense was based upon her submission of false Medicaid claims regarding items which she had illegally prescribed. I.G. Exs. 7-9; Findings 1-10.

12. Petitioner's conviction of a criminal offense is related to the delivery of services under Medicaid, within the meaning of section 1128(a)(1) of the Act. I.G. Exs. 7-9; Findings 1-11.

13. An administrative law judge (ALJ) is without authority to review the I.G.'s exercise of discretion to exclude an individual or determine the scope or effect of an exclusion. 42 C.F.R. § 1005.4(c)(5) (1993).

14. The preamble to the regulations which govern this case states explicitly that "the ALJ is not authorized under these regulations to modify the date of commencement of the exclusion." 57 Fed. Reg. 3298, 3325 (1992).

15. I do not have the authority to change the effective date of Petitioner's exclusion. Findings 13-14.

16. Any exclusion imposed pursuant to section 1128(a) must be for a period of at least five years. Section 1128(c)(3)(B) of the Act.

17. Only if an exclusion is for a period of more than five years, may an individual's cooperation with federal or State officials (which cooperation results in others being convicted, excluded, or assessed a civil monetary penalty), act as a mitigating factor to reduce the individual's period of exclusion. 42 C.F.R § 1001.102(c).

18. Since Petitioner received the minimum, mandatory five-year period of exclusion, the mitigating factor of cooperation with federal or State officials does not apply to her case. Findings 16-17.

19. A defendant in a criminal proceeding does not have to be advised of all possible consequences which may flow from his plea. U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985).

20. Petitioner's argument that she did not know that her guilty plea would lead to a five-year exclusion does not mitigate against the length of her exclusion. Finding 19.

21. Petitioner may not collaterally attack her conviction by contending that she did not know that her practice of prescribing codeine-based substances to Medicaid patients, without a license, was against the law. 42 C.F.R. § 1001.2007(d).

22. Petitioner's argument that she has been found by a State administrative law judge to be a person of good moral character is not relevant to any of the issues in this case. See Finding 16.

23. The I.G. was required to exclude 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. Findings 2-12, 16.

PETITIONER'S ARGUMENT

Petitioner argues that her exclusion should be held in abeyance until she is able to complete her residency program at Wayne State University's School of Medicine. Petitioner alleges, in support of her argument, that the I.G. held an exclusion in abeyance in a case similar to hers.

Alternatively, Petitioner states that she understands that her exclusion is mandatory and alleges that the primary issue is "whether the Government should exclude

her from program participation for an additional period." P. Br. at 1. Petitioner argues that "no additional action [should] be taken" since she was a key witness for the State of Michigan in its prosecution of one of her former employers; she was naive regarding medical practices in the United States and did not realize that her actions were against the law; she was unaware that her guilty plea could lead to her exclusion from Medicare and Medicaid; and, finally, that findings made by an ALJ for the Michigan Department of Commerce demonstrate that she is a person of good moral character.

DISCUSSION

The facts alleged by the I.G., and not disputed by Petitioner, demonstrate that Petitioner was convicted of a criminal offense related to the delivery of a service under Medicaid within the meaning of section 1128(a)(1) of the Act. For this reason, Petitioner's five-year exclusion is required as a matter of law.

For purposes of the Act, an individual is considered to have been "convicted" of a criminal offense, when, among other bases, the individual's plea of guilty has been accepted by a State court. Section 1128(i)(3) of the Act. In the present case, Petitioner pled guilty to two counts of filing false Medicaid claims.[3] Findings 6-8. The Michigan State court accepted Petitioner's plea and sentenced her to two years' probation, 150 hours of community service, and fined her $720. Finding 9. Accordingly, I find that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a) and 1128(i) of the Act.

Further, I find that Petitioner's conviction is related to the delivery of a service under Medicaid. Petitioner's crime involved the fact that she knowingly submitted of a false Medicaid claim for

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[3] Petitioner asserts that she pled no contest to the two counts of filing false Medicaid claims, but she has not offered any evidence to support her contention. However, even if I accept Petitioner's statement as true, it is immaterial here whether Petitioner pled guilty or no contest to the charges against her. This is because the definition of "conviction" under section 1128(i)(3) of the Act, includes "when a plea of [either] guilty or nolo contendre by the individual or entity has been accepted by a Federal, State or local court." Emphasis added.

Tylenol/Acetaminophene with Codeine to the State of Michigan, when, as an unlicensed individual, Petitioner could not legally prescribe such a substance. Findings 2-9. There exists an obvious nexus between the Medicaid items which Petitioner illegally prescribed and Petitioner's submission of false Medicaid claims. That nexus lies in the relationship between the Medicaid items prescribed by Petitioner and the receipt of reimbursement checks from Medicaid for her services in prescribing these items. Thus, Petitioner's conviction is "related to the delivery of an item or service under Medicaid," pursuant to section 1128(a)(1) of the Act.

Because Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, the I.G. was required to exclude Petitioner for at least five years. Petitioner argues, however, that her exclusion should be held in abeyance until she is able to complete her residency program. P. Br. at 1. In support of her position, Petitioner asserts that, in at least one other instance, the I.G. agreed to delay the imposition of a five-year exclusion. Petitioner contends that in the case of Dr. Falih Kazangy, pursuant to a settlement agreement, the I.G. held Dr. Kazangy's exclusion in abeyance pending completion of his residency training. P. Br. at 10. Petitioner argues that she should be offered the same settlement agreement which was given to Dr. Kazangy.[4] Id.

In essence, Petitioner's request is that I change the commencement date of her exclusion. However, I do not believe that I am authorized to change the commencement date of Petitioner's exclusion. I interpret the regulations governing this case to preclude me from reviewing the I.G.'s exercise of discretion in excluding Petitioner or in determining the scope or effect of her exclusion. 42 C.F.R. § 1005.4(c)(5). I agree with the analysis of the ALJ in the case of Laurence Wynn, M.D., DAB CR344 (1994), when he concluded that a challenge to the timing of an exclusion amounted to a challenge to the I.G.'s exercise of discretion in deciding when to impose an exclusion. Id. at 11. Indeed, the preamble to the regulations governing this case states explicitly that "the ALJ is not authorized under these regulations to modify the date of commencement of the exclusion." 57

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[4] Dr. Kazangy's case has never been before the Departmental Appeals Board (DAB) and Petitioner did not provide any evidence of an agreement between Dr. Kazangy and the I.G. Therefore, Petitioner's assertions regarding Dr. Kazangy are mere allegations.

Fed. Reg. 3298, 3325 (1992). Furthermore, an appellate panel of the DAB concluded that appellate panels and ALJs of the DAB have no power to change the beginning date of a mandatory exclusion. Samuel W. Chang, M.D., DAB 1198, at 10 (1990); see also Thomas J. DePietro, R.Ph., DAB CR117 (1991).

With regard to Petitioner's argument that she be offered the same settlement agreement as that allegedly entered into by Dr. Kazangy, it is within the the I.G.'s discretion to decide whether or not to enter into settlement agreements with individuals who have been excluded. In this case, the I.G. apparently considered Petitioner's request to have her exclusion held in abeyance pending completion of her residency program and decided not to grant her request. I.G. Exs. 2, 3. I do not have the authority to review this decision and I cannot order the I.G. to delay imposition of an exclusion or to enter into settlement agreements with petitioners.

Petitioner argues also that the I.G. should not "exclude her from program participation for an additional period" since she cooperated with the State of Michigan in its prosecution of Dr. Kelly, the Medical Director of the clinic where Petitioner was employed. P. Br. at 1, 7-8. In addition, Petitioner asserted that she made arrangements with the Michigan State Attorney General's Office to cooperate in their investigation of a kickback scheme involving clinical laboratories and durable medical equipment suppliers in the Detroit area. P. Br. at 8. While under certain circumstances an individual's cooperation with federal or State officials may be considered as a mitigating factor in reducing the length of an exclusion, it can only mitigate to reduce an exclusion which is longer than the minimum five-year period. 42 C.F.R § 1001.102(c) (1993). In this case, the I.G. did not impose an exclusion of more than five years. Thus, I cannot consider Petitioner's cooperation with State authorities as a factor mitigating against the length of her exclusion, since I do not have the authority to reduce a five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

Further, Petitioner argues that "no additional action [should] be taken," because she was unaware that her plea could serve as the basis for the I.G.'s exclusion. P. Br. at 1, 7. This argument is without merit. I rejected a similar argument in the case of Douglas Schram, R. Ph., DAB CR215 (1992), aff'd, DAB 1372 (1992). In rejecting Petitioner's argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985), and I noted that the court had held that a defendant in a criminal

proceeding does not have to be advised of all possible consequences which may flow from his plea, which consequences may include, as is the case here, temporarily being barred from the receipt of government reimbursement for professional services.

Petitioner contends that she did not realize that her actions were against the law. Specifically, Petitioner asserts that she did not knowingly make a false Medicaid claim, as required by the Michigan law she was convicted under, since she was naive regarding medical practices in the United States. P. Br. at 8. Petitioner asserts further that she told her employers she was not licensed as a physician or physician's assistant in the United States and that they assured her that this was not a problem. Id. Petitioner's arguments, however, go to the merits of her criminal case and amount to a collateral attack on her conviction. Such collateral attacks on a criminal conviction are beyond my scope of review and I may not consider them here.

The regulations which apply in this case provide that "[w]hen the exclusion is based on the existence of a conviction, . . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds." 42 C.F.R. § 1001.2007(d). Thus, Petitioner may not argue the merits of her criminal case in this forum. An appellate panel of the DAB discussed the reasoning behind this rule, with regard to a mandatory exclusion taken under section 1128(a)(2) of the Act in the case of Peter J. Edmonson, DAB 1330 (1992). In Edmonson, the appellate panel held as follows:

> It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

Petitioner asserts, in essence, that she has appealed her criminal conviction in the Detroit Recorder's Court and that her exclusion should be stayed pending the outcome of her appeal. P. Br. at 10 n.3. If Petitioner is successful with her appeal there would be no basis for her exclusion. Upon application to the I.G., she would

be reinstated. 42 C.F.R. § 1001.3005. At the present time, however, there is no basis for staying the effect of the exclusion.

Lastly, Petitioner alleges that in disciplinary proceedings before an ALJ of the State of Michigan, Department of Commerce, Bureau of Occupational and Professional Regulation, Office of Legal Services, the ALJ found that Petitioner was subject to professional disciplinary action due to her conviction, but not subject to disciplinary action due to a lack of good moral character. P. Br. at 9. However, a finding of good moral character is not relevant to any of the issues before me. As I stated earlier, sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate a five-year exclusion when an individual has been convicted of a program-related offense. Therefore, while statements attesting to Petitioner's good character may be factors that reflect positively upon her, I have no authority to consider them as bases for reducing the five-year exclusion imposed and directed against her by the I.G.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from Medicare and Medicaid for a period of at least five years because of her conviction of a criminal offense related to the delivery of services under Medicaid. Neither the I.G. nor an ALJ is authorized to reduce a five-year minimum mandatory exclusion.

Petitioner's five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge