

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Michael Fesler,)	DATE: August 22, 1995
)	
Petitioner,)	
)	
- v. -)	Docket No. C-95-066
)	Decision No. CR388
The Inspector General.)	
)	

DECISION

By letter dated January 27, 1995, Michael Fesler, the Petitioner herein, was notified by the Inspector General (I.G.), of the United States Department of Health & Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare program and from participation in the 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 Medicare.

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

Because I 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 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 affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

PETITIONER'S ARGUMENT

Petitioner contends that the I.G. does not have the authority to exclude Petitioner from Medicare and Medicaid, because an agent of the United States (U.S.) released Petitioner from any civil action or penalty arising from the claims which he filed for Medicare reimbursement. P. Br. at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)¹

1. During the period relevant to this case, Petitioner was a provider of ambulance services in the State of Arkansas. I.G. Exs. 2 - 6; P. Ex. 1.
2. In 1994, the U.S. Department of Justice (DOJ) brought a civil action against Petitioner, pursuant to the False Claims Act (31 U.S.C. 3729 et. seq.). I.G. Exs. 2, 3; P. Ex. 1.
3. The DOJ alleged that, during the period January 7, 1991 to January 6, 1993, Petitioner had submitted claims for reimbursement from Medicaid and Medicare covering services that Petitioner had not provided as he had claimed. I.G. Exs. 2, 3; P. Ex. 1.
4. Petitioner and the DOJ entered into an agreement on March 4, 1994 to settle the civil action. I.G. Exs. 2, 3; P. Ex. 1.
5. The settlement agreement provided that Petitioner would make restitution to the government in the amount of \$14,168. I.G. Exs. 2, 3; P. Ex. 1.
6. The settlement agreement further provided that the DOJ released Petitioner from any claims or actions it might have against him under the False Claims Act, or the Civil Monetary Penalties Law (42 U.S.C. 1320a-7a), or from any other claims, actions, demands, or causes of action whatsoever arising from the requests by Petitioner for reimbursement under the provisions of Titles XVIII

¹ The I.G. submitted five exhibits and an attachment to I.G. Ex. 2 which I have marked as an exhibit. Accordingly, I have redesignated the attachment as I.G. Ex. 3, and renumbered the exhibits which were originally designated as I.G. Exs. 3 - 5 to be I.G. Exs. 4 - 6. I cite the I.G.'s exhibits as "I.G. Ex.(s). (number) at (page)." I admit into evidence I.G. Exs. 1 - 6. Petitioner offered one exhibit which I cite as "P. Ex. 1." I admit P. Ex. 1 into evidence. I cite the I.G.'s brief as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)."

and XIX of the Act, for services purportedly rendered from January 7, 1991 through January 6, 1993. I.G. Exs. 2, 3; P. Ex. 1.

7. On April 22, 1994, a criminal information was filed against Petitioner in the U.S. District Court for the Eastern District of Arkansas charging him with seven counts of converting government property to his own use by submitting false claims for reimbursement to the Medicaid/Medicare programs. The events underlying these charges took place on or about January 16, 1993 (Count I), December 3, 1992 (Count II), January 14, 1993 (Count III), December 28, 1992 (Count IV), December 10, 1992 (Count V), December 15, 1992 (Count VI), and December 10, 1992 (Count VII). I.G. Ex. 4.

8. Petitioner pled guilty to counts I, II, III, IV, and V. I.G. Ex. 5.

9. The district court accepted the plea, dismissed the remaining charges, and issued a formal judgment declaring Petitioner to be guilty of conversion of government property. I.G. Ex. 6.

10. Petitioner was sentenced to two years of probation, fined \$1000, and ordered to perform 100 hours of community service. I.G. Ex. 6.

11. A judgment of conviction was entered against Petitioner on May 23, 1994. I.G. Ex. 6.

12. The entry of Petitioner's judgment of conviction constitutes a conviction within the meaning of section 1128(i)(1) of the Act. Section 1128(i)(1) of the Act; FFCL 11.

13. The judgment of conviction entered against Petitioner states that Petitioner is "adjudged guilty" of the counts to which he pled guilty. I.G. Ex. 6.

14. The adjudication contained in the judgment of conviction constitutes a finding of guilt against Petitioner within the meaning of section 1128(i)(2) of the Act. Section 1128(i)(2) of the Act; FFCL 13.

15. The district court which convicted Petitioner "accepted" his plea, within the meaning of section 1128(i)(3) of the Act. Section 1128(i)(3) of the Act; FFCLs 9, 10, 11.

16. I find that Petitioner was "convicted" under the three separate criteria of sections 1128(i)(1), (2), and (3). FFCLs 11-15.

17. Petitioner's conviction of five counts of conversion of U.S. property were all based on false claims by Petitioner to Medicare for payment for ambulance services. I.G. Ex. 4.

18. Filing a false or fraudulent claim for payment is "related to the delivery of a health care item or service" under the mandatory exclusion provision of section 1128(a)(1). Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

19. Petitioner's conviction is related to the delivery of an item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act. FFCLS 11-18.

20. Section 1128(c)(3)(B) of the Act and the applicable regulation at 42 C.F.R. § 1001.102(a) require that an exclusion imposed under section 1128(a)(1) be for a mandatory minimum period of at least five years. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a) (1993).

21. Neither the ALJ nor the I.G. is authorized to reduce the five-year mandatory minimum exclusion. Maximo Levin, DAB CR343 (1994).

22. Petitioner's five-year exclusion is deemed reasonable as a matter of law. FFCLS 20-21.

23. The release clause of the settlement agreement which Petitioner entered into with the DOJ, specifically states that Petitioner would be released from any claims or causes of action that the U.S. may have against Petitioner, "under the False Claims Act . . . and the Civil Monetary Penalties Law." I.G. Exs. 2, 3; P. Ex. 1.

24. The mandatory exclusion provision of section 1128(a) of the Act is not included within the scope of the False Claims Act or the Civil Monetary Penalties Law. See Section 1128(a) of the Act.

25. The settlement agreement releases Petitioner from any claims or causes of action arising from payments requested by or amounts received by Petitioner from Medicare and Medicaid. I.G. Exs. 2, 3; P. Ex. 1.

26. Petitioner's exclusion under section 1128(a)(1) arose from the fact of his conviction and the fact that his conviction is program-related. I.G. Ex. 1.

27. I find that Petitioner's exclusion was not the type of action which the parties intended to include within the scope of the release language of the settlement agreement. FFCLS 23 - 26.

28. The settlement agreement released Petitioner from any causes of action arising from his claims for, and receipts of Medicaid or Medicare payments, "for services provided by [Petitioner] from January 7, 1991, through January 6, 1993." I.G. Ex. 3; P. Ex. 1.

29. One of the counts to which Petitioner pled guilty, (Count I), charges Petitioner with criminal conversion of U.S. property "on or about the 16th day of January, 1993." I.G. Ex. 4 at 1.

30. The conduct which led to the charge in Count I was committed after the January 6, 1993 date set out in the settlement agreement, and therefore, is outside the scope of the agreement. FFCLs 28 - 29.

31. I find that Petitioner's exclusion does not fall within the purview of the release clause of the settlement agreement. FFCLs 23 - 30.

32. The I.G. was authorized to exclude Petitioner from the Medicare and Medicaid programs for a period of at least five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCLs 1 - 31.

DISCUSSION

I. The I.G. was authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

The I.G. is authorized to exclude an individual or entity from participation in Medicare and Medicaid pursuant to section 1128(a)(1) of the Act where two elements are present: (1) the individual or entity has been "convicted" of a criminal offense, within the meaning of section 1128(i); and (2) the conviction is related to the delivery of an item or service under Medicare or Medicaid. In the present case, the I.G. has proven that Petitioner was "convicted" under the three separate criteria of sections 1128(i)(1), (2), and (3), and that Petitioner was convicted of a program-related crime.

Petitioner was charged, by federal information, with seven misdemeanor counts of conversion of U.S. property in violation of 18 U.S.C. § 641. I.G. Ex. 4. The information alleged that Petitioner had converted U.S. money and property through claims to Medicare for reimbursement of ambulatory services provided by Petitioner. *Id.* Petitioner pled guilty to five counts of the misdemeanor information (Counts I through V), and was adjudged guilty of the counts to which he pled guilty, by the U.S. Magistrate Judge of the U.S. District Court for the Eastern District of Arkansas. I.G. Ex. 5, 6. Petitioner was sentenced to two years of probation,

fined \$1000, and ordered to perform 100 hours of community service. I.G. Ex. 6.

Under section 1128(i)(1) of the Act, an individual or entity is determined to have been convicted "when a judgement of conviction has been entered against the individual or entity by a Federal, State, or local court." I find that a "judgment of conviction" was entered against Petitioner within the meaning of section 1128(i), since the corrected judgment entered against Petitioner states that he was "adjudged guilty" of the counts to which he pled guilty. I.G. Ex. 6. Moreover, the adjudication of Petitioner guilt stated in the corrected judgment constitutes a finding of guilt against Petitioner within the meaning of section 1128(i)(2) of the Act.

Finally, Petitioner's plea of guilty and the court's acceptance of the plea also constitute a "conviction" within the meaning of section 1128(i)(3) of the Act. A plea is "accepted" within the meaning of section 1128(i)(3) whenever a party offers the plea and the court consents to receive the plea in disposing of the pending criminal matter. Maximo Levin, M.D., DAB CR343 (1994); Lila M. Nevrekar, M.D., DAB CR319 (1994). The federal court in Petitioner's criminal case disposed of Petitioner's criminal matter when the presiding magistrate sentenced Petitioner to a term of probation, a fine, and the performance of 100 hours of community service. Thus, the federal court "accepted" Petitioner's plea within the meaning of section 1128(i)(3) of the Act.

I find also that Petitioner was convicted of a criminal offense related to the delivery of a Medicare service. In each of the five counts at issue, Petitioner pled guilty to "knowingly convert[ing] to his own use money and property belonging to the United States and the Department of Health and Human Services . . . by and through a claim to Medicare for reimbursement for ambulance services." I.G. Ex. 4. Petitioner's conviction of five counts of conversion of U.S. property were all based on false claims by Petitioner to Medicare for payment for ambulance services. It is well-established that filing a false or fraudulent claim for payment is "related to the delivery of a health care item or service" under the mandatory exclusion provisions of section 1128(a). Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). Thus, Petitioner's conviction is related to the delivery of an item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act.

II. Petitioner must be excluded for the mandatory minimum period of five years.

Section 1128(c)(3)(B) of the Act requires that an exclusion imposed under section 1128(a)(1) be for a mandatory minimum period of at least five years. Chris Mark Spierer, DAB CR360 (1995); Pamela Gail Hill, DAB CR347 (1994). This five-year mandatory minimum requirement is also codified at 42 C.F.R. § 1001.102(a). Neither the ALJ nor the I.G. is authorized to reduce the five-year mandatory minimum exclusion. Maximo Levin, DAB CR343 (1994). Since the I.G. excluded Petitioner pursuant to section 1128(a)(1), the five-year exclusion is deemed reasonable as a matter of law.

III. The I.G. is not precluded from excluding Petitioner under section 1128(a) of the Act.

Petitioner's argument that the I.G. does not have the authority to exclude him, by reason of the settlement agreement which he entered into with the DOJ, is without merit. Petitioner entered into a settlement agreement with the DOJ on March 4, 1994, to resolve the issue of Petitioner's claims for reimbursement for ambulance services. I.G. Ex. 3; P. Ex. 1. The U.S. alleged that Petitioner submitted claims for reimbursement for services which were not provided as claimed, and which constituted false claims under the False Claims Act, 31 U.S.C. § 3729 *et seq.* I.G. Ex. 3 at 1, 2. In order to avoid litigation, Petitioner agreed to settle. As part of the settlement agreement, Petitioner agreed to pay the U.S. the sum of \$14,168. *Id.* In consideration of the settlement amount, the U.S., through an agent of the DOJ, agreed to release Petitioner and his spouse from --

any claims, actions, demands, or causes of action they may have against defendant under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Civil Money Penalties Law, 42 U.S.C., Sec. 1320a-7a, or any other claims, actions, or causes of action whatsoever, other than any potential IRS claims, arising from the claims filed by defendant for reimbursement, or request for payment made by defendant or amounts received by defendant as reimbursement under the provision of Title XVIII and XIX of the Social Security Act for services provided by defendant from January 7, 1991, through January 6, 1993.

I.G. Ex. 3 at 2-3. In April of 1994, Petitioner was charged by a federal misdemeanor information with seven counts of conversion of money and property of the U.S. I.G. Ex. 4.

I find that the express terms of the release language cited above do not apply to Petitioner's exclusion. The release specifically states that Petitioner would be released from any claims or causes of action that the U.S. may have against Petitioner "under the False Claims Act . . . and the Civil Money Penalties Law." I.G. Ex. 3 at 2, 3; P. Ex. 1 at 2, 3. The mandatory exclusion provision of section 1128(a) of the Act is not included within the scope of the False Claims Act or the Civil Monetary Penalties Law.²

Furthermore, the settlement agreement releases Petitioner from any claims or causes of action arising from payments requested by, or amounts received by Petitioner, from Medicare and Medicaid. However, Petitioner's exclusion under section 1128(a)(1) arose solely from his conviction and the fact that his conviction was program-related. I.G. Ex. 1. The I.G.'s authority to exclude an individual under section 1128(a)(1) derives from the fact of the individual's criminal conviction, and not from the conduct which culminated in the conviction. Rosalyn Saba Khalil, M.D., DAB CR353 (1995) (citing Peter J. Edmonson, DAB 1330 (1992)). Thus, it is simply the fact of the conviction which provides the I.G. with the authority to exclude the individual or entity as a means of protecting program beneficiaries and recipients. Id. It is for these reasons that an ALJ does not have the authority to look behind the actions which led to the conviction. Id. I find, therefore, that Petitioner's exclusion derived solely from his conviction of a program-related crime, and was not the type of action which the parties intended to include within the scope of the release language of the settlement agreement.

Moreover, Petitioner was convicted of a criminal offense which was expressly not covered by the terms of the settlement agreement. The settlement agreement released Petitioner from actions and causes of action arising from his claims for and receipt of Medicaid or Medicare payments "for services provided by [Petitioner] from January 7, 1991, through January 6, 1993." I.G. Ex. 3 at 3; P. Ex. 1 at 3. As I stated earlier, Petitioner pled guilty to and was convicted of Counts I through V of a seven-count information. I.G. Exs. 5, 6. Count I charges Petitioner with criminal conversion of U.S.

² The permissive exclusion provision of section 1128(b)(7), however, specifically refers to the Civil Monetary Penalties Law. Thus, it appears that the parties intended to release Petitioner from any causes of action arising under this exclusionary authority. Since Petitioner was excluded under section 1128(a), Petitioner's exclusion falls outside the purview of the release clause.

property "on or about the 16th day of January, 1993." I.G. Ex. 4 at 1. Thus, the conduct which led to the charge in Count I was committed after the January 6, 1993 date set out in the settlement agreement, and therefore, is outside the scope of the agreement.

I find, therefore, that the settlement agreement which Petitioner entered into with an agent of the DOJ is immaterial to the issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a). I find that Petitioner's exclusion does not fall within the purview of the release clause of the settlement agreement. Furthermore, I find that Petitioner was "convicted," within the meaning of section 1128(i), of a program-related crime, and that his exclusion was mandatory pursuant to section 1128(a).

CONCLUSION

The I.G. was authorized to exclude Petitioner from the Medicare and Medicaid programs for a period of at least five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge