

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Robert L. Howard,	)	DATE: February 7, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-046
	)	Decision No. CR459
The Inspector General.	)	
	)	

DECISION

By letter dated July 25, 1995, Robert L. Howard (Petitioner) was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that she 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" hereafter 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 Medicaid program.

Petitioner filed a request for review of the I.G.'s action.\* The I.G. moved for summary disposition, accompanied by a supporting brief with three exhibits. I have marked and identified these exhibits as I.G. Ex. 1 through 3. As Petitioner did not object to the authenticity of these exhibits, I am admitting them into evidence.

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The I.G. disputed the timeliness of Petitioner's filing. Because the resolution of the timeliness issue might have required the taking of testimony at an in-person hearing, I decided to allow Petitioner the opportunity to go forward and address the validity of his exclusion.

In response, Petitioner submitted a brief with ten exhibits consisting of abstracts apparently printed off the Internet, all of the abstracts addressing issues of substance abuse or addiction or affective disorders. I have marked and identified these exhibits as P. Ex. 1 through 10. The I.G. objected to the introduction of these exhibits, contending that the exhibits were irrelevant to this proceeding. The I.G. contended that Petitioner apparently submitted the exhibits in support of a claim that substance abuse or depression should be considered a mitigating factor that would reduce the period of his exclusion from participation in the Medicare and Medicaid programs. The I.G. explained that mitigating factors are not relevant here since the I.G. proposed to exclude Petitioner for only the minimum period of five years, not for a longer period where the I.G. relies on aggravating factors and where mitigating factors may be introduced by a petitioner to counter the aggravating factors.

I find that there is merit to the I.G.'s objection to Petitioner's exhibits. I have therefore decided not to accept 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 maintains that his criminal conduct arose out of certain factors which were beyond his ability to control. Petitioner maintains that he suffered from a diminished mental capacity due to illness, drug addiction, and depression. Petitioner contends that his resulting mental state was the cause of his misconduct

and that he lacked criminal intent. Petitioner maintains that these are mitigating factors which should lessen his period of exclusion. Petitioner asserts also that the regulations pursuant to which he is being excluded treat more harshly non-physician health care workers than physicians. In his case, Petitioner asserts that the effect of the exclusion is to deny him the ability to practice his profession. Petitioner requested further that, in the event that I sustain the five-year exclusion, the period of the exclusion be applied from either his arrest in September 1992 or his indictment in October 1993.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a pharmacist in the State of Tennessee.
2. On October 20, 1993, a grand jury in Hamilton County, Tennessee, issued an indictment charging Petitioner with theft in excess of \$1000 against the Medicaid program. I.G. Ex. 2.
3. Specifically, Petitioner was accused of forging numerous prescriptions and billing the prescriptions to the Medicaid program. I.G. Ex. 1.
4. On December 2, 1993, in the State of Tennessee, Eleventh Judicial Circuit, Hamilton County, Petitioner pled guilty to this charge and other drug related offenses. I.G. Ex. 3.
5. 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.
6. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to section 1128 of the Act.
7. 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.
8. 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.
9. 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.

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

11. I am without authority to consider Petitioner's arguments that he lacked criminal intent and that he will suffer hardship by his exclusion.

12. 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.

13. 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.

14. I do not have the authority to determine the date from which an exclusion commences.

#### 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 theft against the Medicaid program and that the court accepted his plea. Petitioner's admissions are supported by evidence adduced by the I.G. and I find that Petitioner was convicted of a criminal offense within the meaning of the Act.

Next it is required by section 1128(a)(1) 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 theft against the Medicaid program. Departmental Appeals Board (DAB) caselaw has long held that filing false Medicaid or Medicare claims constitutes clear program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19 (1989), aff'd sub nom. Greene v. Sullivan, 731 F.Supp. 835, 838 (E.D. Tenn. 1990). I find that the offense which Petitioner was charged and convicted of in the present case constitutes criminal fraud related to the delivery of Medicaid services.

Once it is determined that a program-related criminal conviction has occurred, exclusion is mandatory under section 1128(a) of the Act as a purely derivative action. The I.G. is not permitted to look beyond the fact of conviction. Peter J. Edmondson, DAB CR162, aff'd, DAB 1330 (1992). The intent of the individual committing the offense is not relevant under section 1128(a). DeWayne Franzen, DAB CR58 (1989), aff'd, DAB 1165 (1990). Further assertions by a petitioner that he or she is actually innocent, that his or her trial was unfair, or that the statutory five-year minimum mandatory exclusion specified in section 1128(a) should be modified because of mitigating circumstances cannot be addressed in this forum. Edmondson, DAB 1330, at 4-5; Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992); Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). Mitigating factors are not relevant unless the I.G. relies upon aggravating factors to exclude a petitioner for more than five years. 42 U.S.C. § 1001.102(c). Petitioner was excluded for only the minimum period, with no aggravating factors cited. Thus, in the case at hand, I am without authority to consider Petitioner's assertions that he lacked the requisite criminal intent, that the exclusion is unduly harsh as it would deprive him of his livelihood, and that such penalty be mitigated. The exhibits that Petitioner submitted regarding his substance abuse and depression are therefore not relevant to this appeal. Similarly, I do not have the authority to determine when a period of exclusion should begin. Samuel W. Chang, DAB 1198, at 9-10 (1990). That determination lies within the discretion of the I.G.

#### CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of five years because of his criminal conviction for a program-related offense.

The five-year exclusion is, therefore, sustained.

/s/

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**Joseph K. Riotto**  
**Administrative Law Judge**