

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Thomas Malik,)	DATE: February 10, 1995
)	
Petitioner,)	
)	
- v. -)	Docket No. C-94-415
)	Decision No. CR357
The Inspector General.)	

DECISION

By letter dated July 21, 1994, Thomas Malik, 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, 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 is mandatory under 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 September 7, 1994, I held a prehearing conference in this case. During that conference, the parties agreed to proceed by filing briefs supported by documentary evidence.

Thereafter, the I.G. filed a brief and two exhibits. I identify these exhibits as I.G. Ex. 1 and I.G. Ex. 2.

By telephone on November 21, 1994, counsel for Petitioner indicated that Petitioner did not wish to file a responsive brief in this case. However, he stated that Petitioner would like to offer the three documents attached to his hearing request as evidence in this case.

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

By letter dated November 28, 1994, I identified these three documents as P. Ex. 1 through 3. In addition, I allowed the I.G. additional time to file a submission indicating whether the I.G. objected to admitting these documents into the record, and to comment on the contents of the proposed exhibits.

The I.G. submitted a letter stating that she did not object to admitting P. Ex. 1 through 3 into evidence.

Since neither party has objected to the exhibits offered by the other party, I admit I.G. Ex. 1 and 2 and P. Ex. 1 through 3.

I have considered the parties' arguments, supporting exhibits, and the applicable law. I conclude that there are no material factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). I conclude also 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.

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 herein, Petitioner was a licensed nursing home administrator. Petitioner was employed as the Administrator of the Arcadia Nursing Center, a nursing facility located in Gargatha, Virginia. I.G. Ex. 1.

2. Medicaid recipients residing at the Arcadia Nursing Center entrusted Petitioner with safeguarding their personal funds in accordance with Medicaid regulations. I.G. Ex. 1.

3. Medicaid regulations required the Arcadia Nursing Center to establish and maintain a system which assures a full and complete and separate accounting of each resident's personal funds entrusted to the facility on the resident's behalf. 42 C.F.R. § 483.10(c)(4).

4. From January 26 through 28, 1993, Medicaid auditors conducted a surprise on-site audit of Arcadia Nursing Center's financial data. The audit revealed that Petitioner received and deposited \$14,919.49 of residents' personal funds into the facility's operating account and used the residents' personal funds to pay the facility's operating expenses. I.G. Ex. 1.

5. Petitioner admitted to Medicaid auditors that his actions violated Medicaid regulations. Petitioner admitted that he was aware that residents of Arcadia Nursing Center were being denied access to their personal funds and were not earning interest on their personal funds. I.G. Ex. 1.

6. Based on information obtained as a result of the Medicaid audit, the Virginia Accomack County General District Court issued two warrants. One warrant (Case No. C93-1275) charged Petitioner with the offense of knowing failure to deposit, transfer, or maintain residents' trust funds in a separate account as required by 42 C.F.R. § 483.10(c)(3 - 8). The other warrant (Case No. C93-1274) charged Petitioner with the offense of embezzlement deemed larceny. I.G. Ex. 1, I.G. Ex. 2.

7. Petitioner entered into a plea agreement in which he agreed to plead guilty to the offense of knowing failure to deposit, transfer, or maintain residents' trust funds in a separate account. The Commonwealth of Virginia agreed to recommend that a fine and suspended jail sentence be imposed on Petitioner for this offense. I.G. Ex. 1.

8. Petitioner agreed to plead no contest to the offense of embezzlement deemed larceny. The Commonwealth of Virginia agreed to recommend that this warrant be continued for six months, with the understanding that this charge would be dismissed if Petitioner engaged in good behavior during that period of time. I.G. Ex. 1.

9. Pursuant to the plea agreement, on August 30, 1993 Petitioner pled guilty to the offense of knowing failure to deposit, transfer, or maintain residents' trust funds in a separate account and the court found Petitioner to be guilty as charged. Based on its acceptance of Petitioner's guilty plea, the court imposed a fine of \$1000 and a 30-day suspended jail sentence. I.G. Ex. 2.

10. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

11. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a conviction within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

12. A nursing facility's protection of funds held in trust for Medicaid recipients who are residents of the facility is an integral element of the delivery of health care services under Medicaid.

13. 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.

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

15. The I.G.'s determination to impose and direct a five-year exclusion in this case does not violate the United States Constitution's prohibition against double jeopardy.

16. 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. Findings 1 - 15.

17. 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.

PETITIONER'S ARGUMENT

Petitioner claims that he entered into a plea agreement with State officials in order to save the Arcadia Nursing Center from total financial disaster. He contends that since he "made the sacrifice of accepting the error alone to save the [nursing] home", it is "not equitable" to prevent him from earning a living.

Petitioner contends further that he has received "dual punishment" for a single offense. Lastly, Petitioner objects to the fact that he was not informed about the collateral consequences of pleading guilty.

DISCUSSION

The evidence adduced by the I.G., and not disputed by Petitioner, demonstrates that 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. For this reason, Petitioner's five-year exclusion is required as a matter of law.²

The first requirement that must be satisfied in order to establish that the I.G. had 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. The undisputed facts establish that Petitioner entered a guilty plea to the offense of knowing failure to deposit, transfer, or maintain residents' trust funds in a separate account, and that the Virginia Accomack County General District Court accepted Petitioner's guilty plea. The Act defines the term "convicted of a criminal offense" to include those circumstances in which a plea of guilty 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.

² In a letter to the Commonwealth Attorney dated May 12, 1994, Petitioner urges the Commonwealth of Virginia to dismiss his case based on his good behavior pursuant to the terms of the plea agreement. Petitioner appears to take the position in that letter that a dismissal of his case would undermine the I.G.'s authority to exclude him under the Act. P. Ex. 3. I disagree. The record shows that two warrants were issued charging Petitioner with two separate offenses. Pursuant to the terms of the plea agreement, Petitioner pled guilty to the warrant charging him with knowing failure to deposit, transfer, or maintain residents' trust funds in a separate account and the court accepted Petitioner's guilty plea. The I.G. stated in her brief that she excluded Petitioner based on the court's disposition of this warrant. The plea agreement provided also that the disposition of the other warrant charging Petitioner with embezzlement deemed larceny would be continued, with a recommendation that the charge would be dismissed in six months in return for good behavior. Since the I.G. does not argue that the court's disposition of the warrant charging Petitioner with the offense of embezzlement deemed larceny is a basis for the exclusion in this case, the disposition of that warrant is irrelevant to this proceeding.

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. Section 1128(a)(1) encompasses far more than just the theft of Medicare and Medicaid funds or frauds directed against the programs. For example, in Jerry L. Edmonson, DAB CR59 (1989), the petitioner, who was a nursing home administrator, was convicted of the offense of misapplying funds that he had held in a fiduciary capacity for a Medicaid recipient. The administrative law judge in Edmonson found that the protection of Medicaid recipients' funds is an integral element of the Medicaid services delivered by nursing facilities. Since the petitioner in Edmonson had been convicted of a criminal offense affecting an integral element of Medicaid services, the administrative law judge reasoned that the petitioner's offense was related to the delivery of Medicaid services within the meaning of section 1128(a)(1) of the Act. I find that in this case, as in Edmonson, Petitioner's breach of his fiduciary duty had a direct impact on the Medicaid's integrity and that it justifies an exclusion under section 1128(a)(1) of the Act. See also Gary Gregory, DAB CR274 (1993).

Petitioner claims that he entered into a plea agreement in order to save the Arcadia Nursing Center from total financial disaster. He argues that under the circumstances of this case, it is "not equitable" to prevent him from earning a living. I conclude that, based on the undisputed material facts in the record of this case, the I.G. properly excluded Petitioner from Medicare and Medicaid pursuant to section 1128(a)(1) of the Act and that the length of the exclusion is controlled by section 1128(c)(3)(B), which mandates a minimum period of exclusion of five years. Since I do not have the authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act, the mitigating circumstances which Petitioner alleges exist in this case could not affect the outcome of this case.

Petitioner contends that he is receiving "dual punishment." I take this to mean that Petitioner contends that his exclusion violates the prohibition against double jeopardy under the United States Constitution. Petitioner's argument is without merit. When an exclusion is imposed pursuant to section 1128 of the Act, its primary purpose is to protect Medicare and Medicaid from future misconduct by a provider who has shown himself to be untrustworthy. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991). Federal district courts have specifically found that exclusions under section 1128 are remedial in nature, rather than punitive, and do not violate the double jeopardy provisions of the United States Constitution. Manocchio

v. Sullivan, 768 F. Supp. 814 (S.D. Fla. 1991). Additionally, Petitioner was initially convicted in a State court, and it has been held that double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a State conviction. Abbate v. United States, 359 U.S. 187 (1959).

In addition, 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. This argument is essentially the same as an argument made by a petitioner in the case of Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992). 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, including temporarily being barred from government reimbursement for his professional services.

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 his conviction of a criminal offense related to the delivery of items or services under these programs. Neither the I.G. nor an administrative law judge is authorized to reduce a five-year mandatory minimum exclusion.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge