Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Nazirul Quayum, D.D.S.,	)	DATE: December 15, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-127
	)	Decision No. CR408
The Inspector General.	)	
	)	

DECISION

For the reasons discussed below, I conclude that the three-year exclusion from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs[1], imposed and directed against Nazirul Quayum, D.D.S. (Petitioner), is reasonable.

Procedural History

By letter dated March 21, 1995, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner that he was being excluded for three years from participating as a provider in Medicare and Medicaid.

The I.G. notified Petitioner that he was being excluded as a result of his conviction in New York of a criminal offense in connection with the interference with or obstruction of an investigation into a criminal offense involving fraud, theft, embezzlement, breach of fiduciary responsibility, financial misconduct, patient abuse or neglect, or program-related crime. The I.G. further advised Petitioner that exclusions after such a

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

conviction are authorized by section 1128(b)(2) of the Social Security Act (Act).[2]

Petitioner filed a request for hearing. During a prehearing conference held on June 2, 1995, the parties agreed that there were no disputed issues of material fact which would need to be resolved by an in-person hearing. The parties consequently agreed to a schedule for filing briefs supported by documentary evidence.[3]

During the prehearing conference, Petitioner admitted that he pled guilty to one count of attempted perjury as part of a plea agreement. Petitioner denied, however, that the attempted perjury to which he pled guilty was in connection with the interference with or obstruction of an investigation into a criminal offense involving fraud, theft, embezzlement, breach of fiduciary responsibility, financial misconduct, patient abuse or neglect, or program-related crime, within the meaning of section 1128(b)(2) of the Act.

Upon careful consideration of the record before me, I find that no facts material to my decision are genuinely in dispute and that the only matters to be decided are the legal implications of the undisputed facts. I conclude that Petitioner is subject to the exclusion

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[2] Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

[3] The I.G. filed a brief (I.G. Br.), including a statement enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s brief was accompanied by I.G. Exhibits (I.G. Exs.) 1 and 2. At my direction, the I.G. later submitted a corrected copy of I.G. Ex. 2. Petitioner filed a response brief (P. Br.), accompanied by Petitioner's Exhibits (P. Exs.) 1 through 4, and incorporating Petitioner's letter brief filed with his request for hearing. Petitioner requested that the documents submitted with his letter brief be admitted in evidence. Petitioner had marked the documents submitted with his letter brief as P. Exs. A-G. Although this marking is inconsistent with my prehearing order, I have retained Petitioner's marking because the exhibits are referenced in Petitioner's letter brief. The I.G. then filed a reply brief (I.G. R. Br.).

There were no objections to the proposed exhibits. In the absence of objection, I admit into evidence I.G. Exs. 1 and 2, and P. Exs. 1 through 4 and A-G.

provisions of section 1128(b)(2) of the Act, and I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of three years.

Applicable Law

Section 1128(b)(2) of the Act authorizes the I.G. to exclude --

> [a]ny individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in [section 1128(b)(1) or section 1128(a) of the Act].

Criminal offenses described in section 1128(a) include those related to the delivery of an item or service under the Medicare or State health care programs[4] and those related to neglect or abuse of patients in connection with the delivery of a health care item or service.

Criminal offenses described in section 1128(b)(1) include those relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, State, or local government agency.

Issues

The first issue is whether Petitioner's conviction was in connection with the interference with or obstruction of an investigation into a criminal offense described in section 1128(a) or 1128(b)(1) of the Act, within the meaning of section 1128(b)(2) of the Act.

A further issue is whether the length of the exclusion imposed and directed against Petitioner -- three years -- is reasonable.

Findings of Fact and Conclusions of Law

1. Petitioner is a dentist, practicing in New York.

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[4] "State health care programs" are defined at section 1128(h) of the Act and include Medicaid.

2. On April 15, 1994, Petitioner pled guilty to attempted perjury in the first degree, in satisfaction of Count 1 of Indictment No. 11775/93, in Kings County, New York. I.G. Exs. 1 and 2.

3. Count 1 charges that Petitioner testified falsely before a special grand jury on January 26, 1993, and that Petitioner's false testimony was material to the special grand jury's investigation of a Medicaid fraud scheme involving employees of pharmacies located near Petitioner's dental offices. I.G. Ex. 2.

4. At his plea allocution, Petitioner admitted to the court that he knowingly made false statements under oath before the grand jury, related to conversations he had "with employees in the pharmacy as well as in the medical center." I.G. Ex. 1 at 12, 13.

5. At his plea allocution, Petitioner specifically admitted that his false statements were in response to questions from the grand jury that related to Medicaid fraud. I.G. Ex. 1 at 15.

6. On May 27, 1994, the court sentenced Petitioner to pay a fine of $5000, to be on probation for five years, to provide 250 hours of community service, and to pay a five-dollar crime victim's assistance fee. I.G. Ex. 1 at 13-14; P. Request for Hearing at 3-4.

7. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. Findings 2, 6.

8. Petitioner's conviction of Count 1 of the indictment was in connection with the interference with or obstruction of an investigation into a criminal offense relating to the delivery of an item or service under Medicaid (a program-related crime), as described in section 1128(a), within the meaning of section 1128(b)(2) of the Act. Findings 2-7.

9. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

10. There are no aggravating or mitigating factors as specified in the regulations.

11. In the absence of aggravating or mitigating factors, the I.G. is required to exclude Petitioner from

participating in Medicare and to direct his exclusion from participating in Medicaid for a three-year period. Act, section 1128(c)(3)(A); 42 C.F.R. § 1001.301(b) (1994).

12. A three-year period of exclusion is reasonable.

DISCUSSION

A. Petitioner was convicted of a criminal offense.

Petitioner admits that he pled guilty to one count of attempted perjury. June 14, 1995 Order and Schedule for Filing Briefs and Documentary Evidence at 1; P. Br. at 1-2. Petitioner also admits that the court sentenced him, based on his guilty plea. P. Letter Brief at 3-4. Petitioner has not expressly admitted that he was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Nevertheless, that conclusion follows as a matter of law from Petitioner's admissions that he pled guilty, and from the fact that the court, in passing sentence, accepted that plea. Therefore, I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act.

B. Petitioner's conviction was in connection with the interference with or obstruction of an investigation into a criminal offense described in section 1128(a) or 1128(b)(1) of the Act, within the meaning of section 1128(b)(2).

Petitioner was convicted of the crime of attempted perjury. Examination of the indictment to which Petitioner pled guilty and of his plea allocution establishes conclusively that Petitioner's conviction was in connection with the interference with or obstruction of an investigation into a program related criminal offense. Therefore, Petitioner's exclusion was authorized by section 1128(b)(2) of the Act.

1. Petitioner was convicted of an offense in connection with the interference with or obstruction of an investigation.

Count One of Petitioner's indictment charges that, on January 26, 1993, Petitioner gave false answers in testimony before the Special Grand Jury of Kings County, New York. The indictment alleges that the grand jury was investigating whether the New York State Medicaid program had been defrauded through a scheme under which employees

of a pharmacy purchased prescriptions from Medicaid recipients so that the pharmacy could bill the Medicaid program for dispensing drugs without actually doing so. The indictment charges that it was material to this investigation to know whether Petitioner had ever discussed the prescription buying scheme with employees of the pharmacy. The indictment charges that Petitioner falsely testified that he never had any such conversations. I.G. Ex. 2.

At his plea allocution, Petitioner admitted that he had lied when he testified that he had no conversations with employees or others connected with the pharmacy regarding the prescription buying scheme. I.G. Ex. 1 at 15. Petitioner argues, however, that his conviction was not in connection with the interference with or obstruction of an investigation, within the meaning of section 1128(b)(2), for two reasons. First, Petitioner contends that his conviction was not for obstructing or interfering with an investigation. Second, Petitioner argues that, regardless of his conviction, he did not in fact obstruct or interfere with an investigation. I am not persuaded by Petitioner's arguments.

Petitioner argues, first, that his conviction was for attempted perjury, and not for obstructing or interfering with an investigation. Petitioner's argument is that he was not charged with, and could not have been convicted of, hindering prosecution, which is a specific criminal offense under New York law (P. Ex. 1). P. Br. at 4. Petitioner pursues his argument by contending that if he could not have been convicted of hindering prosecution, he cannot be found to have interfered with or obstructed an investigation. Petitioner cites People v. Lorenzo, 110 Misc. 2nd 410, 422 N.Y.S.2d 726 (1981), for the proposition that Petitioner would have to have been involved with the wrongdoing to have hindered prosecution. P. Br. at 4.

Petitioner overlooks the broad scope of the prohibition against interfering with or obstructing an investigation under section 1128(b)(2). That section does not require that an individual be convicted of the specific offenses of interference with or obstruction of an investigation. Nor does section 1128(b)(2) require an individual to have been involved with the wrongdoing being investigated for that individual to be found to have interfered with or obstructed an investigation. Instead, section 1128(b)(2) permits the exclusion of individuals convicted of crimes in connection with the interference with or obstruction of an investigation. Administrative law judges and appellate panels of the DAB have held that the phrase "in

connection with" is equivalent to the phrase "related to" as used in section 1128(a) of the Act. Chander Kachoria, DAB CR220, at 11 n.6 (1992), aff'd, DAB 1380, at 4-5 (1993). The cases interpreting the latter phrase have held that an offense is "related to the delivery of an item or service" when there is a common sense connection or nexus between the criminal offense and the delivery of items or services under the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467, at 5 (1994). Thus, an individual convicted of perjury may be excluded pursuant to section 1128(b)(2) if there is a nexus or common sense connection between the perjury and interference with or obstruction of an investigation.

This broad interpretation of the phrase "in connection with" is reinforced by the preamble to the notice of proposed rulemaking for 42 C.F.R. § 1001.301, the regulation implementing section 1128(b)(2) of the Act. The preamble enumerates perjury among the types of crimes intended to be within the scope of the statute and regulation:

> Among the types of convictions covered by this section are perjury, witness tampering, and obstruction of justice. This list is not intended to be exhaustive.

55 Fed. Reg. 12207 (1990)(emphasis added).

Petitioner's conviction for attempted perjury in testimony before the grand jury satisfies the requirement of the statute. His testimony was material to the grand jury's investigation. Therefore, it follows that, in testifying falsely, he obstructed or interfered with the grand jury's investigation. It appears beyond debate that Petitioner's conviction has a common sense connection to the offenses of interference with or obstruction of an investigation.

Petitioner's second argument is that, as a factual matter, he could not have interfered with or obstructed an investigation, because the investigation **was over**:

> Since Dr. Williams was already "wired," and this Grand Jury was an extension of the old Grand Jury, it seemed obvious that this particular investigation **was over**, when they subpoenaed Quayum (Petitioner).

P. Br. at 5. Petitioner reasons that Dr. Williams had already been shown to be guilty of Medicaid fraud (P. Br. at 4); and that the grand jury inquiry of Petitioner was

not really targeting Dr. Williams or other pharmacy employees, but was instead targeting Petitioner. Petitioner labels his grand jury appearances a "perjury trap."

Petitioner's argument is unpersuasive. The prosecutor could not have known that Petitioner would lie before the grand jury. Furthermore, Petitioner has not shown what basis, if any, he has to know what individuals, besides Dr. Williams, were being investigated. Further, Petitioner cannot know what offenses were being investigated, even if Petitioner was aware of certain offenses previously committed by Dr. Williams.

Perhaps more importantly, however, Petitioner's argument that the facts underlying his conviction are not consistent with the facts charged in the indictment, to which he pled guilty, amounts to a collateral attack on his conviction. Petitioner may not reargue the merits of his criminal case in this administrative proceeding. In this regard, an appellate panel of the Departmental Appeals Board has held:

> [i]t 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.

Peter J. Edmonson, DAB 1330, at 4 (1992); see also 42 C.F.R. § 1001.2007(d) ("the basis for the underlying [conviction] is not reviewable and the individual or entity may not collaterally attack the underlying [conviction], either on substantive or procedural grounds"). Because Petitioner was convicted of Count 1 of the indictment, the facts charged therein are accepted as true for purposes of this decision. As I have already discussed, the language of the indictment establishes that Petitioner's criminal offense was in connection with the interference with or obstruction of the grand jury's investigation.

2. Petitioner interfered with or obstructed an investigation into a criminal offense related to the delivery of items or services under Medicaid.

I have concluded that Petitioner was convicted of a criminal offense in connection with the interference with or obstruction of an investigation. For Petitioner to be excluded under section 1128(b)(2), the investigation he interfered with or obstructed must have been into a criminal offense described in section 1128(b)(1) or section 1128(a) of the Act. I conclude that the investigation which Petitioner interfered with or obstructed was related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1).

Petitioner argues that his crime of attempted perjury is not related to Medicare/Medicaid. P. Br. at 6. The indictment language proves to the contrary:

> As part of its inquiry, the Grand Jury was attempting to ascertain whether the New York State Medical Assistance Program (Medicaid) had been defrauded through a scheme under which employees of a pharmacy had purchased prescriptions from Medicaid recipients so that the pharmacy could bill Medicaid for dispensing drugs without actually doing so. It was material to this investigation to know whether defendant (Petitioner), a dentist in a medical center adjacent to one of the pharmacies under investigation, had ever discussed the foregoing practices with employees and other persons connected with the facilities.

I.G. Ex. 2 at 2.

At the time that he entered his guilty plea, Petitioner admitted that his false testimony before the grand jury related to Medicaid fraud. The court inquired of Petitioner: "The questions asked of you before the grand jury related to Medicaid fraud, is that right?" Petitioner responded: "Yes." I.G. Ex. 1 at 15. Petitioner specifically admitted that the questions he answered falsely were about whether he had had any conversations with employees or people from the medical

center or pharmacy about the "script" buying scheme, i.e., purchasing prescriptions from Medicaid recipients:

> Prosecutor: Could I ask the defendant just to -- could I ask the defendant, Doctor Quayum Nazirul[5], you were asked in the grand jury whether you had any conversations with employees or people from the medical center or pharmacy whether you had conversations with them about the script buying scheme. Do you remember that?
>
> Petitioner: Yes, sir.
>
> Prosecutor: The purchasing script from Medicaid recipients?
>
> Petitioner: Yes, sir.
>
> Prosecutor: In the grand jury you said you had no conversations?
>
> Petitioner: Yes.
>
> Prosecutor: And that was a lie, that was not correct?
>
> Petitioner: Yes, sir.
>
> Prosecutor: Thank you.

I.G. Ex. 1 at 15.

Thus, the indictment charged, and Petitioner admitted, that the grand jury was investigating Medicaid fraud, and that Petitioner's testimony was material to that investigation. Medicaid fraud is a crime described in section 1128(a)(1) of the Act. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Thus, taken together, the facts charged in the indictment and Petitioner's admissions in pleading guilty establish on their face that Petitioner was convicted of a crime described in section 1128(b)(2) of the Act. Accordingly, the I.G. was authorized to exclude Petitioner.

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[5] The clerk later clarified for the record that the Defendant's (Petitioner's) true name is Nazirul Quayum [not Quayum Nazirul]. I.G. Ex. 1 at 16.

C. Petitioner's argument that his exclusion is unfair is not persuasive; further, I am not authorized to set aside a valid exclusion based on equitable considerations.

In the letter brief attached to his request for a hearing, as well as in his response to the I.G.'s motion for summary disposition, Petitioner argues that excluding him from Medicare and Medicaid would be unfair, for several reasons. Petitioner argues that he intended, by his guilty plea, to avoid collateral consequences. P. Br. at 1-2. He suggests that he was misled into entering a guilty plea. P. Letter Brief at 6-7. Petitioner argues that he relied on the prosecutor's representation that, if no one asked him, he would not write a recommendation against Petitioner receiving a Medicaid provider's license (I.G. Ex. 1 at 4-5). Petitioner argues also that he was issued a Certificate for Relief from Disabilities (P. Ex. 4), which I should also consider in determining whether Petitioner ought to be excluded. P. Br. at 6.

Contrary to Petitioner's suggestion that he relied on representations by the prosecutor that he would not be subject to collateral consequences if he pled guilty, the transcript of Petitioner's guilty plea shows that Petitioner was on notice that his conviction would be reported to appropriate agencies, including Medicaid:

> Petitioner's attorney: ***my client was a Medicaid provider, and he's going to again apply for that Medicaid provider's license. The Department of Social Services investigates him and does what they have to do. [The prosecutor] has committed himself that if no one asks him, he is not going to write a recommendation against my client receiving the provider's license. If the Department of Social Security does inquire of [the prosecutor], [the prosecutor] will explain fully the entire proceeding that took place today and what occurred during the investigation.
>
> Prosecutor: Yes, that is correct. To the extent, your Honor, as a matter of course, when any Medicaid provider is convicted of any crime, my office automatically refers the fact of that conviction to the appropriate agency.

I.G. Ex. 1 at 4-5. Thus, it appears that Petitioner's argument that he was misled about the consequences of his

plea is without factual support. Nevertheless, even if Petitioner had, in fact, been unaware that his guilty plea might subject him to exclusion, this would not invalidate his exclusion. See Douglas Schram, R.Ph., DAB 1372, at 11 (1992).

Similarly, the fact that Petitioner received a Certificate of Relief from Civil Disabilities is not a bar to the imposition of an exclusion. Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992). As Petitioner acknowledges, such certificate relates only to civil actions by the State and does not bind the federal government. See P. Br. at 6.

Finally, Petitioner argues that he did not profit from his crime of attempted perjury. P. Br. at 3. Profit by Petitioner is not requisite to his being excluded. Bernard Lerner, M.D., DAB CR60, at 13 (1989); cf. Basem S. Kandah, R.Ph., DAB CR80, at 9; Barry D. Garfinkel, M.D., DAB CR400, at 27 (1995) (both holding that lack of profit by petitioners may be evidence relevant to trustworthiness, but nevertheless upholding exclusions). Further, financial crimes are not the only crimes which are related to delivery of items or services under the programs. Paul R. Scollo, D.P.M., DAB 1498, at 9-11 (1994).

Although Petitioner has failed to persuade me that his exclusion is inequitable, even if I were persuaded of the merits of Petitioner's claims, I am without authority to overturn the exclusion. I have already concluded that Petitioner's exclusion was authorized under section 1128(b)(2) of the Act. The regulations governing these proceedings make clear that the administrative law judge lacks authority to set aside an exclusion in these circumstances. The regulations provide:

> The ALJ does not have the authority to--
>
> * * *
>
> Review the exercise of discretion by the OIG to exclude an individual or entity under section 1128(b) of the Act. . .[or]
>
> * * *
>
> Set a period of exclusion at zero, or reduce a period of exclusion to zero, in any case where the ALJ finds that an individual or entity committed an act described in section 1128(b) of the Act. . . .

42 C.F.R. § 1005.4(c)(5),(6). Thus, to the extent Petitioner is arguing that the I.G. should not have exercised her discretion to exclude him, I am without authority to review that act of discretion. Similarly,

to the extent Petitioner is arguing that it would not serve the remedial purposes of the Act to exclude him for any period, I am without authority to reduce his period of exclusion to zero.

D. A three-year period of exclusion is reasonable.

In the absence of aggravating or mitigating factors, the Petitioner is required to be excluded from participating in the Medicare and Medicaid programs for a three-year period. Act, section 1128(c)(3)(A); 42 C.F.R. § 1001.301(b). Petitioner has the burden of proving mitigating factors, which he has made no attempt to do. Potential mitigating factors which could reduce the length of the exclusion are found at 42 CFR § 1001.301(b)(3) (1994). I.G. Br. at 12-13. Nothing in the record indicates that any of the potential mitigating factors would apply here.

Furthermore, upon careful review of the record as a whole, I find that a three-year exclusion of Petitioner is reasonable. Congress intended that the Act, including section 1128(b)(2), be applied to protect the integrity of federally funded health care programs, and the welfare of program beneficiaries and recipients, from individuals and entities who have been shown to be untrustworthy. Petitioner's lying before the grand jury demonstrates untrustworthiness, which is addressed by excluding him, in accordance with the remedial purposes of section 1128. See Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327 (1992).

Conclusion

The three-year exclusion from participating in Medicare and Medicaid which the I.G. imposed and directed against Petitioner is reasonable.

/s/

Jill S. Clifton
Administrative Law Judge