

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Michael Blake Runyon, D.P.M.,	)	DATE: June 13, 1996
Petitioner,	)	
- v. -	)	Docket No. C-96-093
The Inspector General.	)	Decision No. CR422

DECISION ON REMAND

Background

The procedural history of this case is contained in my prior decision, DAB CR392 (1995), and in the decision of the appellate panel of the Departmental Appeals Board (DAB) 1555 (1996), which remanded the case to me for further proceedings.

In my decision, I determined that Petitioner's conviction for receiving unlawful remuneration (kickbacks) from Sunmac, a medical supply business, for referring his podiatric patients to Sunmac for TENS (transcutaneous electronic nerve stimulators) units was sufficiently related to the delivery of an item or service under Medicare to justify exclusion under section 1128(a)(1) of the Social Security Act (Act).

In his appeal of my decision, Petitioner contended that his criminal conviction was not related to the delivery of items or services under Medicare. The appellate panel remanded the case so that I could clarify whether the remuneration which the Petitioner was convicted of receiving related to Medicare patients.

By letter dated January 30, 1996, I gave the parties until March 6, 1996 to file whatever statements they wished to make on the remand of this case. The I.G. submitted a "Supplemental Memorandum in Support of the I.G.'s Motion for Summary Disposition upon Remand to the Administrative Law Judge" (supplemental memorandum). Petitioner did not make a

submission or object to the brief and exhibit submitted by the I.G.<sup>1</sup>

Findings of fact and conclusions of law

1. Adrian Tigmo is a Deputy Attorney General assigned to the Bureau of Medi-Cal Fraud of the California Attorney General's Office in Los Angeles, California. I.G. Ex. 20 at 1.
2. The Bureau of Medi-Cal Fraud was created to investigate and prosecute provider-related offenses involving the Medicaid (known as Medi-Cal in California) program. I.G. Ex. 20 at 1.
3. Medi-Cal does not prosecute private insurance cases, unless they are part of a program-related offense on which Medi-Cal has filed charges. I.G. Ex. 20 at 1.
4. Adrian Tigmo prosecuted the criminal case against Petitioner and has personal knowledge of the joint investigation of Petitioner by the Bureau of Medi-Cal Fraud and the Office of Inspector General. Mr. Tigmo is familiar with the charges filed against Petitioner and the factors leading to Petitioner's conviction on February 24, 1994 in the Municipal Court of Los Angeles County, Van Nuys, California. I.G. Ex. 20 at 1 - 2.
5. The nature and scope of the investigation against Petitioner centered on government paid medical services billed to the Medicare program, along with some Medi-Cal nexus, i.e., Medicare/Medi-Cal crossover patients. I.G. Ex. 20 at 2.
6. According to Mr. Tigmo, during plea bargain negotiations, Petitioner was provided with over 45 investigative reports involving the joint Bureau of Medi-Cal and Office of Inspector General's investigation of Petitioner and Sunmac, which set forth Petitioner's involvement with Sunmac in a scheme to defraud the Medicare program. I.G. Ex. 20 at 2.

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<sup>1</sup> In the I.G.'s supplemental memorandum, the I.G. includes the declaration of Adrian Tigmo and designates it as I.G. Ex. 19. However, there is an I.G. Ex. 19 already in the record. Thus, I designate Adrian Tigmo's declaration as I.G. Ex. 20. Petitioner has not objected to this exhibit. I admit I.G. Ex. 20 into evidence.

7. The investigative reports focused on interviews of Petitioner's patients, all of whom were Medicare beneficiaries. There were no interviews with privately insured patients as part of the prosecution against Petitioner. I.G. Ex. 20 at 2; Finding 6.
8. Petitioner pleaded no contest to receiving unlawful remuneration for sending business to Sunmac in violation of California Business and Professions Code Section 650. The transcript of that no contest plea shows that the only victim in this case to receive restitution was the government. I.G. Ex. 20 at 3; I.G. Ex. 17 at 11.
9. The dismissed counts of prescription forgeries (Counts two through five of the Complaint) involved Petitioner's Medicare patients and the forgery set forth in Count five of the Complaint occurred on or about December 20, 1989 and related to prescriptions for TENS units for a Medicare beneficiary, J.D. I.G. Ex. 20 at 4; I.G. Exs. 14, 17.
10. Mr. Tigmo stated that Petitioner pled guilty to Count six which used the date and circumstances of Count five, which explains the dates of both being identical. Petitioner, having been advised of the allegations against him and having been advised and represented by privately retained counsel, stipulated to a factual basis for the plea of no contest to count six. I.G. Ex. 20 at 4; I.G. Ex. 17.
11. Mr. Tigmo's declaration explained that the selection of the date set forth in Count six (December 20, 1989) was an acquiescence to defense counsel's desire to change the allegations in Count five (but use the same identified Medicare beneficiary, J.D., and date of December 20, 1989) to a mutually agreed upon offense for a no contest plea involving a violation of the California Business and Professions Code Section 650. I.G. Ex. 20 at 5; I.G. Ex. 13 at 24 - 26.
12. Mr. Tigmo indicated that "[c]ount 6 was merely a substitution of Count 5, agreed upon by both parties prior to coming to court on February 24, 1994." I.G. Ex. 20 at 6.
13. On December 20, 1989, Petitioner completed and signed a form entitled "Certification of Medical Necessity Transcutaneous Electrical Nerve Stimulator (Tens)" for his patient J.D. Petitioner had to also enter his Medicare number on this form. I.G. Ex. 13 at 24 - 25; see also I.G. Ex. 13 at 3; I.G. Ex. 2 at 61.
14. On December 20, 1989, Petitioner wrote a prescription for J.D. for a "Tens unit rental 2 mos Osteoarthritis." I.G. Ex. 13 at 26.

15. I find that J.D. was a Medicare beneficiary. I.G. Ex. 20; see also I.G. Ex. 13; Findings 6 - 14.

16. Petitioner informed J.D. that there would be no cost to her for the TENS unit that she was provided, thus waiving co-payments as a matter of course. I.G. Ex. 20 at 5; I.G. Ex. 2 at 47, 75 - 77.

17. The date of the offense that Petitioner was convicted of in Count six related to the date of the prescription for a Sunmac TENS unit for Medicare beneficiary J.D. I.G. Ex. 20 at 5; Findings 13 - 14.

18. The offense of which Petitioner was convicted -- receiving remuneration in exchange for patient referrals -- constitutes a conviction of a criminal offense related to the delivery of items of services under Medicare within the meaning of section 1128(a)(1) of the Act and justifies application of the exclusion provision. Findings 5 - 17.

### Discussion

On remand, the I.G. introduced a statement from Adrian Tigmo, an attorney who had prosecuted Petitioner for fraud. He noted that Petitioner had initially been charged with five counts of fraud. He further noted that at least 45 cases involving Petitioner were investigated and that all involved false claims against either the Medicare or Medi-Cal programs -- none involved false claims against private insurers.

I find J.D. to be a Medicare beneficiary based on the declaration of Mr. Tigmo as well as the evidence of record. The record reveals that Petitioner completed a form entitled "Certification of Medical Necessary [CMN] Transcutaneous Electrical Nerve Stimulator (TENS)" which the treating physician has to complete in order for a Medicare or Medi-Cal patient to rent a TENS unit. I.G. Ex. 13 at 2 - 3, 24 - 25; Runyon, DAB CR392 at 3 - 4. The authorizing prescription and CMN must be submitted to the fiscal intermediary, along with a claim form for a TENS rental and subsequent TENS order for supplies. I.G. Ex. 3. In this case, the evidence of record shows that Petitioner completed a CMN for J.D. on December 20, 1989. I.G. Ex. 13 at 24 - 25. Right under the place for the name of the physician are the words "Medicare I.D.#" and that information was filled in by Petitioner or his office. Id. Furthermore, on December 20, 1989, Petitioner issued a prescription to a J.D. that prescribes "Tens unit rental 2 mos osteoarthritis." Id. at 26. I conclude from this that J.D. was a Medicare beneficiary, and in order to treat her osteoarthritis, Petitioner prescribed a TENS unit and

completed the necessary paperwork, which included his Medicare number for reimbursement purposes.

The declaration of Adrian Tigmo explains that the sixth count against Petitioner filed at the request of his attorney as part of the plea bargain process in fact exactly matched the circumstances of J.D., a Medicare beneficiary, who, on or about the date alleged in the indictment, received a Sunmac TENS unit through Petitioner, and that Petitioner was compensated by Sunmac with Medicare money very shortly thereafter. I.G. Ex. 20; I.G. Ex. 13 at 24 - 26. Petitioner adduced no evidence whatever contradicting this account offered by the I.G. and I regard it as sufficient to show the connection between Medicare funds and the criminal charges brought against this Petitioner.

#### Conclusion

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction for accepting unlawful remuneration. Jack W. Greene, DAB CR19 (1989), aff'd DAB 1075, aff'd sub nom., Green v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). The five-year exclusion is, therefore, sustained.

/s/

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Joseph K. Riotto  
Administrative Law Judge