

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Samuel Arnold, D.D.S.,	)	Date: November 19, 1997
Petitioner,	)	
- v. -	)	Docket No. C-97-231
The Inspector General.	)	Decision No. CR506
	)	

DECISION

By letter dated February 21, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Samuel Arnold, D.D.S. (Petitioner), that he would be excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.<sup>1</sup> The I.G. explained 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 the Medicaid program.

Petitioner filed a request for review of the I.G.'s action. I convened a prehearing conference on April 10, 1997. During the conference, counsel for the I.G. indicated that she did not think that an in-person hearing was necessary in this case, and that she wished to move for disposition based on a written record. I established a briefing schedule which I set forth in my April 21, 1997 Order and Schedule for Filing Briefs and Documentary Evidence (April 21, 1997 Order).

The I.G. moved for summary disposition, accompanied by an initial brief and three proposed exhibits (I.G. Ex. 1 - 3). Petitioner filed a response brief. The I.G. filed a reply

---

<sup>1</sup> Unless the context indicates otherwise, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

brief. Petitioner did not object to the three exhibits submitted by the I.G. and I admit I.G. Ex. 1 - 3 into evidence.<sup>2</sup>

Because there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' 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 ARGUMENTS**

Petitioner contends that he was not guilty of the criminal conduct for which he has been convicted but instead pled guilty on the advice of his attorney. Petitioner contends also that the I.G. acted improperly in having his exclusion begin four years after the date of his criminal conviction. Petitioner alleges that adverse actions were taken against him because he is Jewish and because he has sought to assist the poor and disadvantaged. Finally, Petitioner contends

---

<sup>2</sup> In his August 4, 1997 response brief, Petitioner indicated that due to a bad connection, he had had difficulty hearing what was said during the April 10, 1997 telephone conference. Based on this, Petitioner stated that he does "not understand why any decision could have been made regarding that conversation." My April 21, 1997 Order memorializes the April 10, 1997 telephone conference, and it shows that no outcome determinative rulings or decisions were made by me during the conference. I merely established a briefing schedule to allow the parties the opportunity to present their arguments in writing. In addition, I reserved judgment at that time on the issue of whether an in-person hearing would be necessary in this case. Accordingly, given that the April 10, 1997 conference was concerned merely with the procedural business of establishing a briefing schedule; that the record contains an Order memorializing what occurred at the April 10, 1997 conference; and that Petitioner at no time objected to the briefing schedule; I do not find that Petitioner has shown that he has been prejudiced by any difficulty he may have had in hearing what was said during the prehearing conference.

that such exclusion is excessive because he is the only dentist available in the area to provide dental services to poor and disadvantaged patients.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a dentist licensed to practice in the State of Ohio. I.G. Initial Brief at p. 2; Petitioner Response Brief at p. 1.
2. On May 21, 1992, a four-count indictment was filed against Petitioner in the Court of Common Pleas of Franklin County, Ohio, Criminal Division. I.G. Ex. 1.
3. Count One of that indictment charged that during the period from September 1986 to February 1991, Petitioner, in his capacity as President of Midwest Mobile Dental Care, Inc., knowingly made false or misleading statements on direct entry submission tapes in order to obtain improper reimbursement from the Ohio Medicaid program. Count One charged also that the value of the funds reimbursed due to Petitioner's false or misleading statements was in the amount of \$5,000 or more. I.G. Ex. 1.
4. Count One of the indictment alleged that Petitioner's offense constitutes Medicaid Fraud in violation of Ohio Revised Code Section 2913.40(B). I.G. Ex. 1.
5. On February 11, 1993, Petitioner pled guilty to Count One of the indictment. Based on its acceptance of Petitioner's plea, the court found Petitioner guilty of that offense. The court sentenced Petitioner to a 24-month suspended period of incarceration and to a 36-month period of probation. In addition, the court directed Petitioner to pay restitution and court costs. I.G. Ex. 2.
6. 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.
7. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.
8. Petitioner may not utilize this administrative proceeding to collaterally attack his criminal conviction by seeking to show that he did not do the act charged.
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. 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.

12. An administrative law judge is without authority to change the effective date of an exclusion imposed and directed by the I.G.

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.

#### DISCUSSION

Petitioner does not dispute that he was convicted of a criminal offense. Nor does he dispute that the offense underlying his conviction is program-related. Moreover, the undisputed evidence adduced by the I.G. establishes 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 is required to be excluded for at least five years as a matter of law.

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual to be excluded must have been convicted of a criminal offense. Section 1128(i)(3) of the Act expressly provides that when an individual enters a plea of guilty to a criminal charge and the court accepts such plea, the individual will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act.

In the case at hand, undisputed evidence establishes that the State of Ohio charged Petitioner with the offense of Medicaid Fraud. Petitioner pled guilty to this offense. Based on this plea, the court found Petitioner guilty of the offense. The evidence establishes that Petitioner pled guilty in order to dispose of the criminal charge against him, and the court disposed of the case based on its receipt of Petitioner's guilty plea. That transaction amounts to "acceptance" of a guilty plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore convicted of a criminal offense within the meaning of that provision.

The statute further requires that the criminal offense in question must have been "program-related," i.e., related to the delivery of items or services under Medicaid or Medicare. It is well-established that filing false Medicare or Medicaid claims relates to the delivery of items or services under such programs and clearly constitutes program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom.

Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). In the case at hand, Petitioner was convicted of defrauding Medicaid by intentionally making false statements in order to obtain reimbursement to which Petitioner was not entitled. This offense is tantamount to filing false Medicaid claims, and therefore it is program-related.

Furthermore, it has been held that a criminal offense meets the statutory test for program-related misconduct where either the Medicare or Medicaid program is the victim of the crime. Domingos R. Freitas, DAB CR272, at 30 (1993), citing Napoleon S. Maminta, M.D., DAB 1135 (1990). The record shows that Petitioner was convicted of making false statements which led to his receipt of fraudulent Medicaid reimbursement. Petitioner's offense victimized the Medicaid program because it caused Medicaid to make payments to Petitioner to which he was not entitled. This had an adverse financial impact on the Medicaid program. Under the test enunciated in Maminta and Freitas, I find that Petitioner's offense is program-related.

Petitioner seeks to challenge his exclusion by asserting that he was not in fact guilty of the offense for which he has been convicted. Petitioner claims that he was singled out because he is Jewish and because he serves a disadvantaged population. However, under section 1128(a)(1) of the Act, proof that an appropriate criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is called for. These administrative proceedings cannot be used to attack the substantive decision arrived at by the court. The law does not permit me to look behind the fact of conviction. When an individual has been convicted of a crime encompassed by section 1128(a)(1), exclusion is mandatory; such individual's subsequent claim of innocence will not be considered in this forum. Russell E. Baisley and Patricia Mary Baisley, DAB CR128 (1991); 42 C.F.R. § 1001.2007(d).

Petitioner asserts also that it is unfair that his exclusion did not commence at the date of his criminal conviction and that such delay "added to (his) sentence." I find no merit in this claim. The I.G. has the discretion to determine when to impose an exclusion. Lawrence Wynn, DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. As a matter of law, an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. An administrative law judge is without authority to change the effective date of any exclusion imposed and directed by the I.G. Also, an administrative law judge lacks the authority to compel the I.G. to send out notices of exclusions by any date certain. The regulations are clear that the effective date of an exclusion is not a reviewable issue in this administrative proceeding. 42 C.F.R. § 1001.2007.

Petitioner maintains that his exclusion should be shortened because his disadvantaged patients do not have access to another dentist who can treat them. I am without the authority to consider this argument because I do not have authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

#### 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 at least five years because he has been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. The five-year exclusion is therefore sustained.

/s/

---

Joseph K. Riotto  
Administrative Law Judge