

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Alan J. Chernick, D.D.S.,)	DATE: August 30, 1996
Petitioner,)	
- v. -)	Docket No. C-96-099
The Inspector General.)	Decision No. CR434

DECISION

By letter dated November 28, 1995, Alan J. Chernick, D.D.S., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been decided to exclude Petitioner 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.'s rationale was that exclusion, for at least 5 years, is mandated by 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 timely request for review of the I.G.'s action by an administrative law judge (ALJ) of the Departmental Appeals Board (DAB). The I.G. moved for summary disposition.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have granted the I.G.'s motion

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

and decided the case on the basis of the parties' written submissions.²

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.

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 New York. P. Ex. 3 at 2; I.G. Ex. 1 at 8-9.
2. A State Superior Court Information charged Petitioner with the crime of offering a false instrument for filing in the first degree. According to the Superior Court Information, which is the basis of the Petitioner's criminal conviction, on or about December 11, 1992, Petitioner, knowing that a magnetic diskette contained false billing information, caused that diskette to be submitted to a fiscal agent of the New York Medicaid program. I.G. Ex. 2.
3. The Superior Court Information alleged that the claim submitted by Petitioner was false in that it represented that Petitioner had furnished certain dental services to a Medicaid recipient when Petitioner knew these services had not been furnished. I.G. Ex. 2.
4. On June 7, 1994, Petitioner pled guilty in County Court, Rockland County, State of New York, to the reduced charge of offering a false instrument for filing in the second degree in violation of N.Y. Penal Law section 175.30, a misdemeanor. Petitioner admitted that, on or

² The I.G. submitted a brief (I.G. Brief), accompanied by five exhibits (I.G. Exs. 1-5). I admit I.G. Exs. 1-5 into evidence. Petitioner submitted a brief (P. Brief), accompanied by four exhibits (P. Exs. 1-4). I admit P. Exs. 1-4 into evidence.

about December 11, 1992, he filed or caused to be filed a claim form with regard to a Medicaid recipient that contained false billing information. I.G. Ex. 1.

5. On July 19, 1994, as a result of his guilty plea, Petitioner was sentenced to three-years' probation, 300 hours of community service, and a penalty assessment of \$90. I.G. Exs. 3, 4.

6. Petitioner paid restitution to the State of New York in the amount of \$18,000. I.G. Exs. 1, 3.

7. As a result of Petitioner's conviction, the New York State Department of Social Services, by letter dated June 14, 1994, excluded Petitioner from the Medicaid program for two years. I.G. Ex. 5.

8. By letter dated November 28, 1995 (Notice), the I.G. informed Petitioner that, effective 20 days from the date of the Notice, he would be excluded from participation in Medicare and Medicaid for the minimum mandatory period of five years.

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

10. Petitioner's guilty plea, and the court's acceptance of that plea, constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i) of the Act. Findings 4-5.

11. 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. Findings 2-4, 10.

12. The minimum mandatory period of exclusion pursuant to section 1128(a)(1) is five years. Act, section 1128(c)(3)(B).

13. Assertions by a petitioner that he or she actually is 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.

14. 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 1-13.

15. Neither the I.G. nor an ALJ 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 acknowledges that he was convicted of a misdemeanor offense. Petitioner acknowledges further that the basis of the criminal charge upon which he was convicted was the result of his performing dental services for a Medicaid patient. He asserts in his defense that the offense at issue involved only a small amount of money and he maintains that he properly submitted the work to Medicaid. Petitioner admits that he pled guilty to the offense, but claims he did so only because he did not wish to undergo a trial with the expense and stress such a proceeding would involve. Petitioner contends also that he was not informed that, as a result of his guilty plea, he would be excluded from participation in Medicare and Medicaid. Pet.'s request for hearing; P. Brief. Petitioner alleges that "the exclusion is disproportionate to the actual circumstances of the case." P. Brief, at 1. He requests that I "consider a concomitant two year exclusion [with the State exclusion] and that any mandated exclusion start on the day of conviction," rather than 20 days from the date of the I.G.'s Notice. Id. at 2.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question has been convicted of a criminal offense under federal or State law. Section 1128(i) of 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). In the present case, it is undisputed that, on June 7, 1994, Petitioner pled guilty to the crime of offering a false instrument for filing in the second degree and that the State court accepted the plea. I.G. Ex. 1 at 27-28, 30. On July 19, 1994, as a result of his guilty plea, Petitioner was sentenced to three-years' probation, 300 hours of community service, and a penalty assessment of \$90. I.G. Exs. 3, 4. Petitioner paid also restitution in the amount of \$18,000. I.G. Exs. 1, 3. Based on the foregoing, I conclude that Petitioner was convicted of a

criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

I find also that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied. Here, Petitioner, in pleading guilty, admitted that, on or about December 11, 1992, he filed or caused to be filed a claim with regard to a Medicaid recipient that contained false billing information. I.G. Exs. 1, 2. It is well-established that financial misconduct directed at Medicare or Medicaid, in connection with the delivery of items or services under the program, constitutes a program-related offense invoking mandatory exclusion. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute clear program-related misconduct. 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); Scott Gladstone, M.D., DAB CR331 (1994); Ian C. Klein, D.P.M., DAB CR177 (1992).

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 Secretary is not permitted to look beyond the fact of conviction. Peter J. Edmonson, DAB CR163 (1991), 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 actually is 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. Edmonson, 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). Thus, in the case at hand, Petitioner's assertions that he was not informed of the consequences of his guilty plea or that he pled guilty only to avoid the expense and stress of a trial are irrelevant. Additionally, although Petitioner requests "that some mitigation be applied to the length of exclusion" (P. Brief, at 2), I have no authority to consider his request.

The fact that New York State excluded Petitioner for two years from the date of his conviction has no bearing on the length of the exclusion imposed and directed by the I.G. Section 1128(c)(3)(B) of the Act requires that an exclusion imposed under section 1128(a)(1) be for a

minimum mandatory period of at least five years. This five-year minimum mandatory requirement is codified also in the regulations at 42 C.F.R. § 1001.102(a). The Act does not permit the Secretary to offset a minimum mandatory exclusion against a previously imposed State exclusion. Neither the I.G. nor an ALJ has the authority to reduce a five-year minimum mandatory exclusion. Maximo Levin, M.D., DAB CR343 (1994). Since the I.G. excluded Petitioner pursuant to section 1128(a)(1), Petitioner's five-year exclusion is reasonable as a matter of law.

Furthermore, the appellate panel in Shanti Jain, M.D., DAB CR237 (1992), aff'd, DAB 1398 (1993), held that "[a]n administrative law judge has no authority to alter the effective date of exclusion designated by the I.G. where the I.G. acted within the discretion afforded by statute and regulation in setting the effective date." Jain, DAB 1398, at 7. Thus, I am without authority to alter the commencement date of Petitioner's exclusion.

Finally, I note that Petitioner has submitted numerous "character reference" letters. P. Ex. 2. Whether or not Petitioner has a good character is immaterial and irrelevant to my consideration of the issues in this case. While statements attesting to Petitioner's good character may reflect positively upon him, I have no authority to consider them as bases for reducing the five-year exclusion imposed and directed against him by the I.G.

CONCLUSION

For the foregoing reasons, I find that the I.G. properly excluded Petitioner from participating in Medicare and Medicaid, pursuant to section 1128(a)(1) of the Act. Furthermore, the five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act.

Petitioner's five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge