Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Michael Blake Runyon, D.P.M.,	)	DATE: September 8, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-067
	)	Decision No. CR392
The Inspector General.	)	
	)	

DECISION

By letter dated December 15, 1994, Michael Blake Runyon, D.P.M., the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. 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 program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five 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 Medi-Cal program.[1]

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[1] The I.G.'s December 15, 1994 letter notifying Petitioner of his exclusion states that Petitioner's criminal offense is related to the delivery of an item or service "under the Medi-Cal program," (California's Medicaid program, a State health care program). However, in her brief, the I.G. informed me that she had inadvertently sent an incorrect notice to Petitioner. I.G. Memorandum at 1 - 2, n.2. The notice should have stated that Petitioner was convicted of a criminal offense related to the Medicare program. The I.G. asserts that the reference to Medi-Cal -- instead of Medicare -- is of no legal consequence because section 1128(a)(1) of the Act requires the Secretary to exclude "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII [Medicare] or under any State health care program

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board (DAB). The I.G. moved for summary disposition.

Because I 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 decided the case on the basis of the parties' written submissions.

I find no reason to disturb 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

Findings of Fact and Conclusions of Law by Agreement of the Parties[2]

1. As a result of an investigation conducted by the California Department of Justice Bureau of Medi-Cal Fraud and the Office of the I.G., Petitioner was charged with one felony count of conspiracy to defraud the Medi-Cal and Medicare programs, in violation of: section 182(a)(1) and

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[including Medicaid]." Id. Petitioner has not contested the adequacy of the notice or argued that the I.G.'s inadvertent mistake supports a contention that there is no basis for his exclusion. Thus, the I.G.'s notice is not an issue in this case. P. Response at 4.

[2] In this section, I have adopted I.G. Proposed Findings 1, 2, and 7. Petitioner did not contest these specific findings of fact and conclusions of law. P. Response at 2. I have independently reviewed the record and determined that the findings have a basis in the record. Thus, I have adopted these findings of fact and conclusions of law, with only minor editorial changes. Additionally, I have supplied the citations to the record that support the findings.

(4) of the California Penal Code (Conspiracy); section 14107.2(a) and (b) of the California Welfare and Institutions Code (False Claims); section 650 of the California Business and Professions Code (CBPC) (Unlawful Remuneration); section 4390 of the CBPC (Prescription Forgery); and four felony counts of forgery of a prescription for a TENS (Transcutaneous Electrical Nerve Stimulators) device, a dangerous drug, as defined in section 4211(b) of the CBPC, in violation of section 4390(a) of the CBPC. I.G. Exs. 2 - 5, 14.[3]

2. Pursuant to a plea bargain, Petitioner pleaded no contest to, and was convicted of, one count of receiving unlawful remuneration on or about December 30, 1989, for sending medical business to Sunmac, a medical supply company, in violation of section 650 of the CBPC. Petitioner was sentenced to three years' probation on condition that he disgorge his kickbacks in the amount of $3863; pay a fine of $8500 for the cost of the investigation; and pay restitution of $1000 through the California Department of Justice. I.G. Exs. 17, 18.

3. The Secretary of HHS has delegated to the I.G. the duty (pursuant to 42 U.S.C. § 1320a-7(a)) of excluding persons and entities convicted of program-related crimes from participating in Medicare and of directing their exclusion from State health care programs. 48 Fed. Reg. 21,662 (1983); 42 C.F.R. § 1001.101 et seq.

Other Findings of Fact and Conclusions of Law

4. During the period relevant to this case, Petitioner was a podiatrist, practicing in California.

5. Under Medicare and Medicaid regulations, a physician must sign a prescription for a patient to rent a TENS unit.

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[3] The I.G. submitted 18 exhibits with the I.G.'s motion and memorandum for summary disposition. I cite these exhibits as "I.G. Ex(s). (number) at (page)." The I.G. submitted also one exhibit, I.G. Ex. 19, with her reply brief. Petitioner submitted exhibits A - E with his response. Since Petitioner's exhibits were not labelled correctly, I have relabelled them and they are now Petitioner's exhibits 1 - 5. I cite these exhibits as "P. Ex(s). (number) at (page)." The pages in Petitioner's response brief are not numbered. I have numbered these pages. Page 1 begins with the "Introduction" and the last page is 12. Neither party has objected to the other party's exhibits. In the absence of objection, I admit both parties' exhibits into evidence.

The physician must also complete and sign a Certificate of Medical Necessity (CMN) for rental of the TENS device. If a patient wishes to purchase a TENS unit, the physician must then sign a separate written prescription after conducting a follow-up examination to determine whether the TENS unit benefitted the patient. I.G. Ex. 3; P. Response at 2 - 3; I.G. Memorandum at 7 - 9; I.G. Reply at 4 - 6.

6. The authorizing prescription and CMN must be submitted to the Medicare or Medicaid fiscal intermediary, along with a claim form, for a TENS rental, TENS purchase, and subsequent TENS order for supplies. I.G. Ex. 3.

7. The complaint filed against Petitioner alleged a fraudulent scheme between Petitioner and Sunmac whereby Petitioner agreed to prescribe Sunmac's TENS units, for certain of his podiatric patients, knowing that these TENS units were not medically necessary. Petitioner then allegedly received unlawful remuneration from Sunmac for referring his podiatric patients to Sunmac for the TENS units. I.G. Ex. 2 at 1; I.G. Exs. 3, 14, 18.

8. Allegedly, Sunmac submitted claims to Medicare and Medicaid for the TENS units, which Petitioner had prescribed. Sunmac's forms to Medicare contained falsely completed authorizing documents and Sunmac was then paid by Medicare for the claims it submitted based upon the false prescriptions and CMN forms. I.G. Exs. 14, 17, 18.

9. Petitioner's plea of no contest was accepted by the Los Angeles County Municipal Court, Van Nuys Branch. The court found him guilty as a matter of law. I.G. Ex. 17.

10. Petitioner's plea of no contest, and the court's acceptance of that plea, constitute a conviction within the meaning of sections 1128(a)(1) and 1128(i)(3) of the Act.

11. The offense of which Petitioner was convicted -- receiving remuneration in exchange for patient referrals -- is related to the delivery of items or services under Medicare, within the meaning of section 1128(a)(1) of the Act.

12. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years, as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.

13. I do not have the authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act. 42 C.F.R. § 1001.102.

14. Petitioner is not entitled to an in-person hearing, because no disputed issue of material fact exists in this case.

PETITIONER'S ARGUMENT

Petitioner argues the following: (1) that his criminal conviction was not related to the delivery of items or services under Medicare or Medicaid; (2) that he did nothing improper in prescribing medical equipment -- rather, he acted in good faith to help his patients; and (3) that a criminal conviction for receiving kickbacks does not justify mandatory exclusion under section 1128(a)(1) -- instead, section 1128(b) (permissive exclusion) must be regarded as controlling.

DISCUSSION

I. The I.G. was required to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

The law relied upon by the I.G. to exclude Petitioner, section 1128(a)(1) of the Act, requires initially that Petitioner have been convicted of a criminal offense. As previously noted, Petitioner, a podiatrist, was charged with a number of criminal offenses, all related to his receiving unlawful remuneration from a supplier of medical equipment. Petitioner entered a no contest plea to the unlawful remuneration charge. The judge accepted Petitioner's plea and sentenced him. The Act defines the term "convicted of a criminal offense" to include those circumstances in which a plea of nolo contendere (no contest) 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.

Next, the Act requires that the criminal activity must have been related to the delivery of an item or service under Medicare or Medicaid. A person may be guilty of a program-related offense even if he or she did not physically deliver any items or services. Napoleon S. Maminta, M.D., DAB 1135 (1990); Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990); Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). An offense is program-related if there is a common-sense connection between the offense and the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467 (1994). I find that connection here. Petitioner admits that "he pled no contest to . . . receiving unlawful remuneration for

sending business to Sunmac . . . ." P. Response at 3. See I.G. Ex. 17. The receipt of unlawful remuneration for sending business to the entity paying such remuneration constitutes a kickback. The kickback paid by Sunmac to Petitioner involved medical equipment (TENS units) for which Sunmac billed Medicare. Thus, Petitioner's receipt of the kickback was directly related to the program that paid for the equipment which was the subject of the kickback. Niranjana B. Parikh, M.D., DAB 1334 (1992).

Applying a mandatory exclusion under these circumstances also comports with the intent of Congress to strengthen the mandatory exclusion provision by amendment of the exclusion laws in 1987. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 4(a)-(c), 101 Stat. 688, 689 (1987) (codified at 42 U.S.C. § 1396); Maminta, DAB 1135 at 10. In Maminta, an appellate panel of the DAB examined the legislative history of the mandatory exclusion provision and found that Congress intended mandatory exclusions to be instituted whenever the programs were victimized by a criminal offense whether or not the offense involved actual delivery of medical care by a convicted individual or entity. Id. at 12.

With regard to this case, Petitioner's criminal conviction for accepting kickbacks for referring patients for the rental or purchase of medical equipment that was not medically necessary is sufficiently related to the delivery of an item or service under Medicare or Medicaid to justify application of the mandatory exclusion provisions of section 1128(a)(1). It is no defense that the kickbacks may have been paid for medically justifiable transactions or that Petitioner acted in good faith in prescribing the equipment. Zenaida Macapagal, R.N., DAB CR179 (1992). It is not necessary that I examine Petitioner's motivations, since proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). Summit Health Limited dba Marina Convalescent Hospital, DAB 1173 (1990). Further, with regard to the five-year minimum mandatory exclusion, an administrative law judge cannot look beyond the fact of conviction, or consider evidence intended to mitigate the length of the minimum mandatory exclusion. Asadollah Amrollahifar, Ph.D., DAB CR238 (1992).

I reject also Petitioner's argument that he should be sanctioned under section 1128(b)(7) of the Act, which provides for the exclusion of individuals who have committed an act described in sections 1128A or 1128B. P. Response at 8 - 9. It is undeniable that there is some subject matter overlap between the mandatory exclusion for criminal convictions authorized by section 1128(a)(1) and the permissive exclusion for fraud or kickbacks authorized by

section 1128(b)(7). Parikh, DAB 1334 at 4. However, once a person has been convicted of a program-related criminal offense, exclusion is mandatory under section 1128(a)(1). Id. at 4 (citing Leon Brown, M.D., DAB CR83 (1990), aff'd DAB 1208 (1990)). Therefore, it has consistently been held that the Secretary is under no obligation to proceed under section 1128(b) of the Act. Thus, once the I.G. determined that Petitioner's conviction was within the meaning of section 1128(a)(1), the I.G. was under no obligation to consider whether section 1128(b)(7) was applicable.

II. Petitioner is not entitled to an in-person hearing.

Since there are no disputed issues of material fact in this case, I find that an in-person hearing is not justified. As the I.G. has correctly noted, the only issues in this case are: (1) whether Petitioner was convicted of a criminal offense under federal or State law; and (2) whether Petitioner's criminal offense was related to the delivery of an item or service under Medicare or Medicaid. I.G. Memorandum at 16. As for the first issue, Petitioner admitted that he was convicted of a criminal offense in that he admitted pleading to a charge of "receiving unlawful remuneration." P. Response at 1, 6. The second issue, whether Petitioner's conviction was program-related, is a question of law. I have found Petitioner's conviction to be program related. Thus, I find that Petitioner's case can be decided without an in-person hearing.

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 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge