Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ishfaq Pendi, M.D.,	)	
	)	Date: April 7, 1995
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-417
	)	Decision No. CR368
The Inspector General	)	
	)	

DECISION

By letter dated July 21, 1994, Ishfaq Pendi, M.D., the Petitioner herein, was notified by the Inspector General (I.G.) of the United States Department of Health and Human Services (HHS), that it had been decided to exclude him 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. asserted 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 Medicaid.

Petitioner filed a timely request for review of the I.G.'s action. On September 8, 1994, I held a prehearing conference in this case. During that conference, the parties agreed to proceed by filing briefs supported by documentary evidence.[2] Having reviewed the parties'

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[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

[2] The I.G. submitted a brief (Br.) and eight exhibits (I.G. Exs. 1-8). Petitioner submitted a brief (P. Br.) and five exhibits, which Petitioner labeled "A" through "E." I have renumbered Petitioner's exhibits as P. Exs. 1-5. The I.G. objected to exhibits "C" through

(continued...)

submissions, I have determined that there are no material and relevant factual issues in dispute (i.e., the only dispute is as to the legal significance of the undisputed facts). Based on the undisputed facts and the law, I have determined that the I.G. is entitled to prevail because she properly determined that she was required to exclude Petitioner for at least 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. In 1985 and 1986, Petitioner was the office manager in at least two of his stepfather's medical clinics in New York City.[3] I.G. Ex. 2 at 1; I.G. Proposed Finding (PF) #1; P. PF #1.

2. On or about September 4, 1986, Petitioner was indicted in the United States District Court for the Southern District of New York on one count of conspiracy and seven counts of knowingly soliciting and receiving kickbacks and bribes for referring Medicaid patients to an ambulette service for transportation that was reimbursed by Medicaid. I.G. Ex. 2; I.G. PF #3; P. PF #4.

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[2](...continued)
"E" (P. Exs. 3-5) as duplicative. I sustain the I.G.'s objection and reject P. Exs. 3-5. I have admitted I.G. Exs. 1-8 and P. Exs. 1 and 2 in evidence.

[3] Both the I.G. and Petitioner submitted proposed findings of fact and conclusions of law. Neither party contested the other's proposed findings of fact. The only issue contested by the parties is whether the I.G. properly decided to exclude Petitioner for five years, effective 20 days after July 21, 1994. My findings of fact incorporate elements from the proposed findings of each party.

3. On or about April 28, 1987, Petitioner and prosecutors executed an agreement in which Petitioner agreed to cooperate with authorities in their investigation of Medicaid fraud in return for an agreement by prosecutors to accept his guilty plea to one count of conspiracy in full satisfaction of the criminal charges pending against him. P. Ex. 1; I.G. PF ##5, 6; P. PF #5.

4. On or about November 19, 1990, Petitioner pled guilty to count one of the indictment, conspiracy to solicit and receive Medicaid kickbacks. P. Ex. 2; I.G. PF #6; P. PF #8.

5. The court accepted Petitioner's plea, but deferred sentencing and placed the plea allocution under seal at the request of prosecutors because Petitioner's cooperation was not at an end. P. Ex. 2; I.G. PF #7; P. PF #8.

6. Petitioner cooperated fully with authorities. I.G. Ex. 3; I.G. PF #8; P. PF #10.

7. On or about July 26, 1993, Petitioner was sentenced to a suspended prison sentence of one year, was placed on probation for five years, and was fined $10,000. I.G. Ex. 4; I.G. PF #9; P. PF #9.

8. Petitioner was convicted of a criminal offense. Findings 4, 5.

9. The criminal offense of which Petitioner was convicted was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 4, 8.

10. The Secretary of HHS has delegated to the I.G. her authority to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

11. The I.G. was required to exclude Petitioner for at least five years. Finding 9.

12. By letter dated July 21, 1994, the I.G. imposed and directed Petitioner's exclusion from participation in the Medicare and Medicaid programs for a period of five years, to commence 20 days after the date of the letter.

13. An administrative law judge has no authority to modify the date on which an exclusion becomes effective.

14. An administrative law judge has no authority to remand a case to the I.G. with directions to change the effective date of an exclusion.

PETITIONER'S ARGUMENT

Petitioner states that he does not contest the I.G.'s proposed findings of fact. P. Br. at 6. I take this to be an admission that Petitioner was "convicted" and that his conviction related to the delivery of an item or service under Medicaid. Thus, Petitioner concedes that the I.G. had a basis for the exclusion.

Petitioner's only argument is that his exclusion should be modified to commence on or about November 19, 1990, the date Petitioner pled guilty pursuant to the cooperation agreement. Petitioner argues that it is arbitrary and capricious to delay the effect of his exclusion when the delays in his sentencing were due to the desire of prosecutors to maintain secrecy so that Petitioner could continue to serve as an undercover witness. If I cannot modify the exclusion, Petitioner asks, in the alternative, that I remand this case to the I.G. with directions to modify the commencement of the exclusion.

DISCUSSION

The facts alleged by the I.G. and not disputed by Petitioner demonstrate 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's five-year exclusion is required as a matter of law.

An individual is "convicted" of a criminal offense, as defined by section 1128(i) of the Act, when, among other things, the individual's plea of guilty is accepted by a court. Act, section 1128(i)(3). In the present case, it is undisputed that Petitioner pled guilty to one count of conspiracy to solicit and receive Medicaid kickbacks. The district court accepted Petitioner's plea. P. Ex. 2. Therefore, Petitioner was convicted of a criminal offense, within the meaning of sections 1128(a) and 1128(i) of the Act.

Further, Petitioner's conviction is related to the delivery of an item or service under Medicaid. Petitioner pled guilty to conspiring to solicit and receive bribes and kickbacks for referring patients to an

ambulette service for transportation reimbursable by Medicaid. An appellate panel of the Departmental Appeals Board (DAB) has previously held that the crime of accepting kickbacks for Medicaid referrals is related to the delivery of items or services, within the meaning of section 1128(a)(1). Niranjana Parikh, M.D., DAB 1334 (1992). Therefore, a conspiracy to pay or receive kickbacks for Medicaid referrals must likewise be related to the delivery of Medicaid items or services.

Because Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, the I.G. was required to exclude Petitioner for at least five years. Petitioner argues, however, that his five-year exclusion should be treated as having commenced on or about November 19, 1990, when he pled guilty in federal district court. Petitioner's argument is unavailing, however, because both the regulations and case precedent make clear that I am without authority to change the commencement date of his exclusion.

Section 1005.4(c)(5) of Title 42 of the Code of Federal Regulations provides that the administrative law judge is without authority to review any exercise of discretion by the I.G. In Laurence Wynn, M.D., DAB CR344 (1994), the administrative law judge concluded that a challenge to the timing of an exclusion amounted to a challenge to the I.G.'s exercise of discretion in deciding when to impose an exclusion. Id. at 11. I agree with this analysis. Thus, the regulations do not authorize the administrative law judge to review the timing of an exclusion.

Indeed, the preamble to the regulations explicitly states that "the ALJ is not authorized under these regulations to modify the date of commencement of the exclusion." 57 Fed. Reg. 3298, 3325 (1992). Similarly, appellate panels and administrative law judges of the DAB have consistently held that an administrative law judge "has no power to change . . . the beginning date" of a mandatory exclusion. Samuel W. Chang, M.D., DAB 1198, at 10 (1990); see also Thomas J. DePietro, R.Ph., DAB CR117 (1991). Moreover, in the Chang case, the appellate panel rejected the argument that an exclusion should be made retroactive to run concurrently with another sanction. Chang, DAB 1198, at 10-11; see also David D. DeFries, D.C., DAB CR156, at 7 (1991), aff'd, DAB 1317 (1992).

As these authorities demonstrate, it is well-settled that I am without authority to modify Petitioner's exclusion, whether to make it retroactive to the date of his guilty plea or for any other reason. Nevertheless, Petitioner argues, in the alternative, that I should remand the case

to the I.G. for reconsideration of the commencement date of the exclusion. I reject Petitioner's request for a remand. I can find no remand authority in the regulations governing my conduct of hearings in these cases. 42 C.F.R. Part 1005. However, even were I to conclude that my inherent authority to conduct a fair hearing included the power to remand appropriate cases to the I.G., I would not exercise that power here. It is my conclusion that my lack of authority to modify the date on which the I.G. imposes an exclusion amounts to a lack of jurisdiction over the question. Thus, as I lack jurisdiction to consider Petitioner's request that I change the commencement date of his exclusion, I similarly lack jurisdiction to remand this issue to the I.G.

CONCLUSION

For the reasons stated, I conclude that the I.G. was required to exclude Petitioner for not less than five years because he was convicted of a criminal offense related to the delivery of an item or service under Medicaid. I am without authority either to modify the beginning date of Petitioner's exclusion or to remand the case to the I.G. for reconsideration of that issue.

/s/

Joseph K. Riotto
Administrative Law Judge