

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Gregory J. Salko, M.D.,  
(O.I. File Number 3-05-40539-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-542

Decision No. CR2443

Date: October 5, 2011

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Gregory J. Salko, M.D., from participating in Medicare and other federally funded health care programs for a period of five years.

**I. Background**

Petitioner is a physician. The I.G. determined to exclude Petitioner from participating in Medicare because he concluded that Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act). This section mandates the exclusion of anyone who is convicted of a criminal offense relating to the delivery of an item or service under Medicare or a State health care (Medicaid) program.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G. filed a brief, a reply brief, and five proposed exhibits that he identified as I.G. Exhibit (Ex.) 1 – I.G. Ex. 5. Petitioner filed a brief and, with it, a collection of documents that Petitioner did not mark or identify as proposed exhibits. For purposes of the record, I am identifying these documents, collectively, as P. Ex. 1.

Neither the I.G. nor Petitioner requested that I convene an in-person hearing. Therefore, I decide this case based on the parties' submissions. I receive into the record I.G. Ex. 1 – I.G. Ex. 5 and P. Ex. 1.

## **II. Issue, Findings of Fact, and Conclusions of Law**

### **A. Issue**

The issue in this case is whether the I.G. must exclude Petitioner from participating in Medicare and other federally funded health care programs for a minimum period of five years.

### **B. Findings of Fact and Conclusions of Law**

I make the following findings of fact and conclusions of law.

- 1. Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Act, and, therefore, the I.G. must exclude him.***

The undisputed facts of this case are that, on June 23, 2009, Petitioner pled guilty to the federal crime of filing a false statement in a federal health care program (Medicare). I.G. Ex. 2 at 1-2. Petitioner entered his guilty plea in response to a criminal information that charged him with knowingly and willfully causing to be made a false representation of a material fact for use in determining rights to a payment or benefit from Medicare. I.G. Ex. 3 at 1. Specifically, Petitioner was charged with, and pled guilty to, falsely representing that he had examined a patient and making false statements about that patient's medical condition. *Id.* at 1-2.

The undisputed facts describe a criminal offense related to the delivery of an item or service under the Medicare program. There is no dispute that the patient whose care was involved in Petitioner's crime was a Medicare beneficiary. Nor is there any dispute that Petitioner made a material misrepresentation of fact concerning the care that he had provided to this patient in connection with the delivery of a Medicare item or service to the patient.

The two necessary elements of Petitioner's crime were: (1) making a false statement or misrepresentation of a material fact; and (2) making that statement for use in determining rights to a benefit or payment under Medicare, a federal health care program. I.G. Ex. 4 at 11-12. Petitioner's crime is intimately related to the delivery of health care under the Medicare program. Indeed, the care that Petitioner alleged that he provided to a Medicare beneficiary was the essence of Petitioner's crime. Petitioner would not have committed the crime for which he was charged and pled guilty to had he not provided

care to a Medicare beneficiary and then made a material misrepresentation of fact about that care for use in determining rights to a Medicare benefit or payment.

Petitioner asserts that there is no basis for the I.G. to exclude him. He contends that he committed no crime that is related to the delivery of a Medicare item or service because he never filed a reimbursement claim premised on the false representation that is the basis for his conviction. However, actually filing a claim is not a prerequisite for committing a program-related crime under section 1128(a)(1) of the Act. Petitioner admitted that he made his misrepresentation for the purpose of determining rights to a benefit or a payment under the Medicare program. That is all that is needed to establish that his crime relates to a Medicare item or service. The fact that he never filed a claim for benefits does not mean that his crime is unrelated to Medicare.

Additionally, Petitioner argues that his exclusion should not fall under the mandatory exclusion requirements of section 1128(a)(1) of the Act because his conviction is of an offense that is described under the permissive exclusion language of section 1128(b)(1) of the Act. Section 1128(b)(1) of the Act permits the I.G. to exclude any individual who is convicted of a misdemeanor offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service.

This argument has been addressed and rejected on innumerable occasions. The more stringent mandatory exclusion language of section 1128(a)(1) of the Act plainly controls the facts of this case. The facts of this case squarely fall within the reach of the mandatory exclusion authority of section 1128(a)(1). The fact that Petitioner's crime may also fit within the less stringent discretionary authority of section 1128(b)(1) does not exclude application of section 1128(a)(1) of the Act to the case.

Petitioner also appears to argue that he should not be excluded because the Centers for Medicare and Medicaid Services (CMS) reviewed his case and determined not to revoke his enrollment as a Medicare provider for a five-year period. Rather, CMS revoked his enrollment only for a period of one year based on Petitioner's failure to report his criminal conviction to CMS. P. Ex. 1. Petitioner seems to contend that this determination by CMS effectively immunizes him from exclusion by the I.G. for any length of time that is greater than one year.

I disagree. Petitioner's argument addresses authority vested in CMS that is independent from that of the I.G. to revoke a provider's enrollment status. For example, CMS may revoke the enrollment of a provider who has been convicted of a felony that CMS determines to be detrimental to the best interest of Medicare and its beneficiaries. 42 C.F.R. § 424.535(a)(3). CMS may also revoke a provider's enrollment, pursuant to 42 C.F.R. §§ 424.535(a)(1) and 424.516(d)(1)(ii), where a provider fails to report to CMS the occurrence of an adverse legal action. That independent authority – and the manner

in which CMS determines to exercise it – does not serve as a check or limitation on the I.G.’s obligations under section 1128 of the Act. Even as CMS may function independently to exercise its authority so also may, and in some circumstances must, the I.G. exercise his own statutory authority.

As I discuss above, the exclusion authority under section 1128(a)(1) of the Act is *mandatory*. The I.G. must exclude an individual who is convicted of a crime that falls within the reach of that section. There is nothing in section 1128 of the Act, or in any other section of the Act, that suggests that the I.G.’s authority is limited by additional, discretionary authority conferred on CMS to revoke provider enrollment by other sections of the Act or by implementing regulations. Therefore, the fact that CMS may have exercised discretion not to revoke Petitioner’s enrollment for a period of time greater than one year is of no significance here.

Finally, Petitioner argues that the I.G.’s exercise of his statutory authority violates the United States Constitution. I have no authority to address that issue.

***2. Petitioner’s exclusion is reasonable as a matter of law.***

An exclusion that is imposed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Petitioner’s exclusion is reasonable as a matter of law, inasmuch as the I.G. excluded him for the minimum period.

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/s/  
Steven T. Kessel  
Administrative Law Judge