

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Joel Fass,)	DATE: December 30, 1994
Petitioner,)	
- v. -)	Docket No. C-94-388
The Inspector General.)	Decision No. CR349

DECISION

By letter dated May 13, 1994, Joel Fass, 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 three 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 reason given for this action was that Petitioner had been convicted in a State court of grand larceny in the fourth degree. The I.G. concluded that Petitioner's crime amounted to an offense involving fraud and/or other financial misconduct in connection with the delivery of health care and merited exclusion pursuant to section 1128(b)(1) of the Act.

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).

I determined that there were no facts of decisional significance genuinely in dispute, and that the only matters to be decided in this case were the legal implications of the undisputed facts. In the absence of objection, I, therefore, have decided the case on the basis of the parties' briefs and exhibits.
42 C.F.R. § 1005.4(b)(12) (1992).

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 three years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. During the period relevant to this case, Petitioner was employed at Brookhaven Memorial Hospital (the "Hospital"), located on Long Island, in the State of New York. I.G. Ex. 2.
2. At the same time he was employed by the Hospital, Petitioner was also a part owner and corporate officer of Brookhaven Clinical Laboratories ("BCL"), located on Long Island, in the State of New York. I.G. Br. 2.²
3. New York charged Petitioner, by criminal information, with grand larceny and receiving unlawful kickbacks from a clinical laboratory. I.G. Ex. 1.
4. The criminal information alleged that Petitioner, "acting as secretary and high managerial agent of Brookhaven Clinical Laboratories, Inc.," collected \$104,366 in fees which should have been paid to the

¹ The I.G. submitted six exhibits. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) at (page)." I admit into evidence I.G. Exs. 1-6. The I.G. submitted a motion and brief for summary disposition to which Petitioner responded. I cite the I.G.'s brief for summary disposition as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)." In addition to his response brief, Petitioner submitted a copy of the motion to vacate his conviction which he filed in State court. He submitted also a memorandum of law in support of the motion, with accompanying affidavits. I have marked Petitioner's exhibits in conformance with my Order and Schedule for Filing Briefs and Documentary Evidence, dated August 18, 1994. Thus, Petitioner's memorandum of law in support of his motion to vacate his conviction is now P. Ex. 1. Petitioner's notice of motion and accompanying affirmation are now P. Ex. 2. Ex. A is now P. Ex. 3; Ex. B is now P. Ex. 4; Ex. C is now P. Ex. 5; and Ex. D is now P. Ex. 6. The I.G. also submitted a reply to Petitioner's response, which I cite as "I.G. R. Br. at (page)."

² Petitioner did not object to the I.G.'s characterization of Petitioner's position at BCL.

Hospital for laboratory work performed for International Clinical Labs (ICL). I.G. Ex. 1.

5. The criminal information alleged that Petitioner obtained the \$104,366 by defrauding the Hospital. I.G. Ex. 1.

6. Pursuant to a plea bargain, Petitioner pled guilty to a reduced charge of grand larceny in the fourth degree, a class E felony. I.G. Ex. 4.

7. In his plea colloquy, Petitioner acknowledged that, from June 1985 through August 1988, he had knowingly and wrongfully received sums of money from ICL which were payable to the Hospital and deposited these monies into BCL accounts. He further acknowledged to the court that he knew the monies in question were for tests that were performed at the Hospital, by Hospital personnel, and not by any employees of BCL. I.G. Ex. 4.

8. Petitioner was sentenced to 5 years probation and was required to make restitution in the amount of \$104,366. A forfeiture of \$203,181 was also ordered. I.G. Ex. 5.

9. Petitioner was convicted of a criminal offense. Section 1128(i)(3) of the Act. FFCL 6- 8.

10. A criminal offense involving "the performance of management or administrative services" is considered to be "in connection with the delivery of any health care item or service," within the meaning of section 1128(b)(1) of the Act. 42 C.F.R. § 1001.201(a)(1).

11. Petitioner was convicted of a criminal offense relating to fraud or financial misconduct in connection with the delivery of a health care item or service within the meaning of section 1128(b)(1) of the Act. FFCL 9; 10.

12. Individuals convicted of offenses described in section 1128(b)(1) of the Act are required to be excluded for a period of three years, unless certain specified aggravating or mitigating factors are present. 42 C.F.R. § 1001.201(b).

13. Petitioner's criminal acts took place over a period of three years and are an aggravating factor. I.G. Ex. 4; 42 C.F.R. § 1001.201(b)(2)(ii).

14. The I.G. was authorized to exclude Petitioner for a period of at least three years. FFCL 11-13.

15. Petitioner may not collaterally attack the circumstances of his conviction in this administrative proceeding. 42 C.F.R. § 1001.2007(d).

16. Petitioner's allegations of inadequate counsel at his State trial, or evidence submitted to prove that he was not guilty of the criminal offense for which he was convicted, are not relevant in this proceeding.

17. The permissible payment practices described at 42 C.F.R. § 1001.952 are inapplicable where, as here, Petitioner's conviction relating to fraud authorizes his exclusion under section 1128(b)(1) of the Act.

PETITIONER'S ARGUMENT

Petitioner does not deny that he pled guilty to grand larceny in the fourth degree and agreed to make restitution in the amount of \$104,366. Petitioner's principal argument, based on his analysis of the law, is that his conviction fails to support a permissive exclusion under section 1128(b)(1) of the Act. Petitioner argues that his grand larceny conviction was not connected with the delivery of a health care item or service, since an alleged failure to remit the money owed to a hospital for laboratory tests did not directly impact on the provision of health care services. P. Br. at 5. Petitioner contends that his actions were too attenuated and remote from actual health care delivery to be encompassed by section 1128(b)(1). *Id.* Petitioner contends also that the criminal offense of which he was convicted does not relate to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the Act. P. Br. at 6. Moreover, Petitioner contended in his request for a hearing that certain mitigating factors existed which justified reducing his period of exclusion. Petitioner argued also that his conduct could not serve as the basis for an exclusion because his criminal offense fell within the exceptions listed at 42 C.F.R. § 1001.952. Request for a Hearing, July 7, 1994.

Petitioner contends further that he received inadequate assistance of counsel since the attorney who represented him also represented his co-defendants with whom he had conflicting interests. P. Br. at 8. Petitioner alleges that his attorney did not explain to him the benefits of cooperating with the authorities against the other co-defendants or of consulting his own attorney. P. Br. at 9-10. Petitioner asserts that his attorney did not advise him of the collateral consequences of his guilty

plea. P. Br at 10. Petitioner argues that due to the ineffective assistance of his counsel, he has filed a motion to have his conviction vacated. Finally, Petitioner requests that these proceedings be stayed until a ruling is issued on this motion. Id.

DISCUSSION

I. Petitioner was properly excluded under section 1128(b)(1) of the Act.

Pursuant to section 1128(b)(1), the I.G. may exclude any individual or entity convicted under federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of health care items or services, including the performance of management or administrative services relating to the delivery of health care. 42 C.F.R. § 1001.201(a)(1).

I find that Petitioner was convicted of a criminal offense as defined by section 1128(i)(3) of the Act. Petitioner entered a guilty plea, the court questioned him to ensure its validity, and then imposed a sentence. This is sufficient to constitute a conviction for purposes of imposing an exclusion under the Act. I find also that Petitioner's conviction satisfies the criteria of section 1128(b)(1) of the Act. Specifically, Petitioner's conviction was for an offense: (1) in connection with the delivery of a health care item or service; and (2) related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The determination of whether Petitioner's conviction fits within the language of section 1128(b)(1) requires an examination of: (1) the criminal offense for which Petitioner was convicted; and (2) the actions which formed the basis for the conviction. See Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990); Francis Craven, DAB CR143 (1991). Petitioner was convicted of grand larceny in the fourth degree due to his involvement in a scheme to defraud the Hospital of \$104,366. While the criminal offense of grand larceny in the fourth degree does not necessarily relate to the delivery of a health care item or service, the conduct which led to Petitioner's conviction plainly related to health care items and services.

Petitioner, an employee of the Hospital, participated in a scheme with two other owners of BCL by which he billed one of BCL's clients (ICL) for work that was done by the Hospital, and not by BCL. As a result of Petitioner's and the other co-defendants' actions, the Hospital was defrauded of \$104,366. This conduct related to the delivery of health care items and services in two respects. First, the scheme involved billing for clinical laboratory services, which are health care services. Second, the Hospital was in the business of providing health care, and Petitioner's criminal enterprise may have affected the Hospital's ability to deliver health care services by depriving the Hospital of funds.³ Criminal acts directed at a health care provider's administration or financial management will necessarily be indirect, but nevertheless, can have a very marked effect on the provision of care, thus meeting the requirements of the Act.

Petitioner argues that his conviction does not fall within section 1128(b)(1) of the Act because it is too attenuated and remote from actual health care delivery. However, the regulations, as well as administrative law judge decisions, demonstrate that section 1128(b)(1) does not require that Petitioner's crime involve the direct or immediate manipulation of items or services. The regulations clearly contemplate that administrative services may satisfy the statutory criteria. 42 C.F.R. § 1001.201(a)(1). In addition, DAB precedent has established that even false entries in a hospital's accounting records are deemed to be "in connection with the delivery of a health care item or service," within the meaning of the Act. Frank Haney, DAB CR81 (1990). Because Petitioner's fraudulent scheme deprived the Hospital of compensation for laboratory services, the criminal activity for which Petitioner was convicted, was

³ Petitioner asserts that the Hospital was not deprived of money or services because a co-owner of BCL, one of Petitioner's co-defendants, was also a contracted manager of the Hospital's laboratory and must have authorized Petitioner to use his time or the lab's services in connection with outside work. This argument lacks any merit since it fails to address the fact that the Hospital was not paid anything for the work which was done using its equipment and perhaps other hospital services. In any event, such an argument is a challenge to the circumstances surrounding Petitioner's conviction, and is therefore irrelevant, as explained in section III of this decision.

committed in connection with the delivery of health care items and services.

Furthermore, Petitioner's misappropriation by fraud or trick of \$104,366 clearly satisfies the other criterion of section 1128(b)(1) -- that the crime upon which the exclusion is predicated, involve fraud or other financial misconduct. Petitioner argues that the I.G. has failed to establish that his criminal offense was a crime involving fraud. I disagree. Petitioner pled guilty to larceny, as charged in the criminal information. I.G. Ex. 2; I.G. Ex. 4. By pleading guilty, Petitioner admitted that he committed the acts charged. Specifically, he admitted that he obtained the \$104,366 by defrauding the Hospital. Therefore, Petitioner's conviction was related to fraud. Petitioner sought to prove that ICL, the party from whom he wrongfully received the compensation due the Hospital, was not misled by his actions. Any such proof is irrelevant, since Petitioner was convicted of defrauding the Hospital.

II. The regulations require that Petitioner be excluded for a period of at least three years.

The regulations set forth the sole factors which an ALJ may consider in determining the appropriate length of an exclusion. In the case of an exclusion under section 1128(b)(1) of the Act, the governing regulation, 42 C.F.R. § 1001.201(b), provides that an exclusion imposed under 1128(b)(1) of the Act must be for a period of three years unless specified aggravating or mitigating factors are present.

In this case, Petitioner was excluded for three years, despite the presence of an aggravating factor justifying the imposition of a lengthier exclusion. The regulation, at 42 C.F.R. § 1001.201(b)(2)(ii), provides that it is an aggravating factor if the conduct which led to the conviction were committed over a period of one year or more. The I.G. alleges, and Petitioner does not deny, that the acts that resulted in Petitioner's conviction occurred over a three year period from June 1985 through August 1988. Since Petitioner's scheme occurred over a period of one year or more, the I.G. had the discretion to exclude Petitioner for more than three years.

Petitioner argued in his request for a hearing that his three-year exclusion should be reduced due to the presence of mitigating factors. Petitioner did not, however, cite any of the mitigating factors listed at 42 C.F.R. § 1001.201(b)(3). It is Petitioner's burden to

prove the existence of mitigating factors. James H. Holmes, DAB CR270 (1993). Since Petitioner has not met this burden, I find that there are no mitigating factors present here.

Since the I.G. was justified in excluding Petitioner for more than three years due to the existence of an aggravating factor, and because there are no mitigating factors present, I find that the I.G.'s imposition of a three year exclusion is reasonable.

III. Petitioner may not collaterally attack the circumstances of his conviction in this proceeding.

Petitioner argues, in essence, that he was improperly excluded because his conviction is invalid due to ineffective assistance of counsel. Petitioner asserts that, due to his attorney's poor advice, his guilty plea and his conviction are both invalid. Petitioner contends that his attorney represented his co-defendants, as well as himself, and did not advise him of his right to cooperate with the authorities against these co-defendants. Petitioner argues that his attorney failed to alert him to the danger of this conflict of interest and of the need for Petitioner to hire his own attorney. In addition, Petitioner argues that his attorney did not advise him of the collateral consequences of his plea.

The applicable regulations provide that "[w]hen the exclusion is based on the existence of a conviction, . . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds." 42 C.F.R. § 1001.2007(d). Thus, Petitioner may not argue either the merits of his criminal case or the ineffectiveness of his attorney's advice in this forum. An appellate panel of the DAB discussed the reasoning for this rule, in regards to a mandatory exclusion taken under section 1128(a)(2) of the Act, in Peter J. Edmonson, DAB 1330 (1992). The appellate held:

It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

This reasoning applies in the case of exclusions taken under section 1128(b) as well.

In addition, I must reject Petitioner's request to stay these proceedings until a decision is rendered on his motion to vacate the underlying conviction. If Petitioner wished to stay these proceedings, he should have made this request at the prehearing conference. In any event, a stay in this proceeding would have no effect upon the I.G.'s exclusion, since the exclusion is already in effect and an ALJ does not have the authority to review the I.G.'s discretion in this regard. 42 C.F.R. § 1005.4(c)(5). Moreover, the regulations provide that if an individual's conviction is vacated or overturned, the individual will be reinstated into the Medicare program retroactive to the effective date of the exclusion. 42 C.F.R. § 1001.3005(a)(1).

IV. The payment practices described at 42 C.F.R. § 1001.952 are inapplicable to Petitioner's exclusion under section 1128(b)(1) of the Act.

In Petitioner's request for a hearing, Petitioner alleged that he was exempt from exclusion since the actions leading up to his conviction were the type of payment practices described at 42 C.F.R. § 1001.952. Section 1001.952 lists various exemptions from exclusions imposed under section 1128B of the Act. Since the basis for Petitioner's exclusion was his conviction for fraud in connection with the delivery of an item or service under section 1128(b)(1) of the Act, these exemptions do not apply in this case.

CONCLUSION

Section 1128(b)(1) of the Act permits the Secretary of HHS, in the exercise of her discretion, to exclude any individual from participation in the Medicare and Medicaid programs who has been convicted of a criminal offense relating to fraud, theft, embezzlement, or other financial misconduct, in connection with the delivery of a health care item or service. There is no indication that the Secretary's discretion was misused in this case.

/s/

Joseph K. Riotto
Administrative Law Judge