

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:

Muhammad A. Malick,

Petitioner,

- v. -

The Inspector General.

DATE: February 24, 1997

Docket No. C-97-014
Decision No. CR463

DECISION

By letter dated August 16, 1996, Muhammad A. Malick, 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 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. explained that the five-year exclusion was 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 and the I.G. moved for summary disposition.

Because I conclude that there are no material and relevant factual issues in dispute, and the only matter to be decided is the legal significance of the undisputed facts, I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. I grant the I.G.'s motion for summary disposition.

Thus, I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

¹ In this decision, I use the term "Medicaid" to refer to these State health care programs.

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.

PETITIONER'S ARGUMENT

Petitioner contends, first, that his exclusion is not warranted because he was not a provider of items or services under Medicaid. He argues also that the I.G. unreasonably prolonged his exclusion by waiting so long to act against him. Petitioner argues that the effective date of his exclusion should start from the date of his conviction, which was more than two years ago.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant herein, Petitioner operated a business which administered sonogram and blood tests.
2. On July 19, 1993, Petitioner was indicted in New Jersey Superior Court on one count of conspiracy (3rd degree), one count of misconduct by corporate officials and complicity (3rd degree), one count of Medicaid fraud and complicity (high misdemeanor), and one count of commercial bribery and complicity (3rd degree). I.G. Ex. 2.²
3. The indictment alleged that Petitioner and an acquaintance formed a corporation called Muasif Services, Inc., and its purpose was to administer sonogram and blood tests. I.G. Ex. 2.³
4. In setting forth the conspiracy allegations, the indictment charged that, between April 1, 1988 and February 28, 1989, a physician who was also a Medicaid provider directed his patients at various times to submit to tests administered by Petitioner, without regard to the medical necessity of the tests.

² The I.G. submitted a brief and five exhibits (I.G. Exs. 1-5). I refer to the I.G.'s brief as "I.G. Brief." Petitioner has not objected to the I.G.'s exhibits. In the absence of objection, I admit the I.G.'s exhibits into evidence. I refer to Petitioner's brief in this case as "P. Brief." Petitioner did not submit any exhibits.

³ I note for the record that Petitioner, in his brief, spells the name of his corporation as both "Masif Services, Inc." (P. Brief at 1) and "Muasif Services, Inc." (P. Brief at 2, 3, 4). I will use "Muasif Services, Inc.", which is also the spelling used in the Indictment.

5. The indictment alleged further that, as part of the conspiracy, Petitioner paid the aforementioned physician's office and overhead expenses in exchange for the referral of patients for blood and sonogram testing.

6. The indictment alleged that Petitioner offered a kickback to this physician in connection with the furnishing of services under Medicaid, in that Petitioner paid for that physician's office and overhead expenses, in exchange for the referral of patients, including Medicaid recipients, to him for the administration of sonogram and blood tests.

7. On June 24, 1994, a judgment of conviction was entered in New Jersey Superior Court finding Petitioner guilty of conspiracy, misconduct by corporate officials and complicity, and Medicaid fraud and complicity. I.G. Ex. 1.

8. On June 24, 1994, Petitioner was sentenced to the custody of the Commissioner of the Department of Corrections for three years, and was assessed a \$50 penalty. I.G. Ex. 1; I.G. Ex. 3 at 22-23.

9. The judgment of conviction entered against Petitioner constitutes a conviction within the meaning of sections 1128(a)(1) and 1128(i)(1) of the Act.

10. Petitioner's offering of kickbacks in exchange for patient referrals, including Medicaid recipients, is related to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act.

11. Once a person has been convicted of a program-related criminal offense, exclusion is mandatory under 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.

DISCUSSION

The first statutory requirement for the imposition of a mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a criminal offense under federal or state law. In the case at hand, Petitioner does not contest that he was convicted of a criminal offense. A judgement of conviction was entered in Petitioner's case and he was sentenced by the State court. Petitioner was thus convicted within the meaning of section 1128(i)(1) of the Act. This satisfies the first criterion of section 1128(a)(1) of the Act.

Next, section 1128(a)(1) requires that the crime at issue be related to the delivery of an item or service under Medicaid or Medicare. I find that in this case there is a common-sense connection between the criminal offense and the Medicaid program. Clarence H. Olson, DAB CR46 (1989). I conclude that the delivery of items or services under Medicaid played an essential and integral role in Petitioner's criminal conduct and conviction. The evidence relating to the State court proceeding shows that Petitioner was found guilty of the crimes of conspiracy, misconduct by corporate officials, and Medicaid fraud. These crimes arose as part of a scheme by Petitioner to have Petitioner's corporation perform medically unnecessary tests on patients, including Medicaid recipients. In return, the physician involved received kickbacks, in the form of payment of his rent and overhead expenses, from Petitioner's corporation. Thus, the criminal offenses for which Petitioner was convicted arose directly out of the delivery of services under Medicaid.

Petitioner's argument that the exclusion mandated by section 1128(a)(1) is inapplicable to him because he is not a health care practitioner or provider is without merit. Petitioner's assertion is contrary to congressional intent. Specifically, in 1980, when Congress was drafting section 1128, it declared that it intended to exclude not only "physicians and other practitioners convicted of program-related crimes," but also other persons, "such as administrators of health care institutions," who were similarly convicted. 1980 U.S.C.C.A.N. 5526, 5572. This policy is reflected also in the regulations which implement mandatory exclusion under section 1128(a)(1). The regulations provide, inter alia, that the requirement of a relationship between a criminal conviction and the delivery of items or service under the Medicare and Medicaid programs can be satisfied by criminality in ". . . the performance of management or administrative services . . ." 42 C.F.R. § 1001.101(a). Thus, I find that Petitioner, as co-owner of a business which administered sonogram and blood tests, falls within the class of persons the law was intended to deter and is not immune to exclusion.

In Ifeoma Afeonyi, DAB CR262 (1993), the petitioner was an owner of a clinic who received kickbacks for directing Medicaid-funded laboratory work. It was held that the criminal conviction was based upon acts which arose directly out of the delivery of services under Medicaid and that it was proper to exclude the petitioner from the programs based upon her criminal conviction even though she was not a health-care practitioner but, rather, occupied the role of an owner or manager.

As to Petitioner's contention that the I.G. did not act within a reasonable time to effect his exclusion, I, as an administrative law judge, have no authority to alter the effective date of exclusion designated by the I.G. as a remedy for the latter's alleged tardiness. 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.

Although one may understand Petitioner's irritation at being excluded from federal health care programs over two years after he was convicted by the State court and imprisoned, the regulations specify no time limit for the I.G. in cases involving exclusions under section 1128(a)(1) of the Act. Fred R. Spierer, DAB CR359 (1995).

Finally, Petitioner contends also that his "exclusion is permissive, not mandatory," and that "[t]he minimum period of exclusive [sic] is 3 years". Petitioner's generalized position that the I.G. should have proceeded under the permissive exclusion provisions of section 1128(b) of the Act is without merit. Where a criminal conviction satisfies the statutory criteria of section 1128(a)(1), then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion which the statute provides.

The basis for Petitioner's exclusion rests upon his conviction of a program-related offense. It is well established that, under section 1128(a)(1), the Secretary is required to exclude from participation any individual who is convicted of an offense related to the delivery of an item or service under the Medicare or Medicaid programs. See e.g., Francis Shaenboen, DAB 1249 (1991); DeWayne Franzen, DB 1165 (1990); Jack W. Greene, DAB 1078 (1989), aff'd sub nom, Greene v. Sullivan, 731 F.Supp. 835 (E.D. Tenn 1990).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because he has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge