

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
William J. Schuhmacher,)	DATE: Jan 18, 1989
Petitioner,)	
- v. -)	Docket No. C-60
The Inspector General)	DECISION CR 18

DECISION GRANTING INSPECTOR GENERAL'S MOTION
FOR SUMMARY DISPOSITION

Petitioner has requested a hearing, protesting the Inspector General's (the I.G.'s) determination to exclude him from participating in the Medicare program and any state health care program, as defined in section 1128(h) of the Social Security Act (Act), for five years.^{1/} The I.G. moved for summary disposition of this case. I have considered the I.G.'s motion and Petitioner's response to the motion. I conclude that there are no disputed material facts in this case and there remain no questions to be addressed at a hearing whose answers could affect the outcome of this case. Based on the undisputed facts, the law, and applicable regulations, I conclude that the five-year exclusion imposed on Petitioner by the I.G. is mandatory. Therefore, I am deciding this case in favor of the I.G.

^{1/} Medicaid is a state health care program, as defined in section 1128(h) of the Act, from which Petitioner was excluded. This record does not indicate from which, if any, other state health care programs Petitioner was excluded. For purposes of brevity, I will use the term "Medicaid" in this decision to represent all affected state health care programs.

BACKGROUND STATEMENT

On October 11, 1988, the I.G. sent notice to Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for a period of five years. Petitioner was advised that his exclusion was the result of his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. He was further advised that the law required a minimum mandatory five-year exclusion from participation in the Medicare and Medicaid programs, of any individual convicted of a program-related offense.

Petitioner timely requested a hearing as to his exclusion and the case was assigned to me for a hearing and decision. I conducted a prehearing conference on November 29, 1988, at which time the I.G. stated his intent to file a motion for summary disposition of the case. I issued a prehearing Order on December 1, 1988, establishing a schedule for moving for summary disposition and responding to the motion. My Order also gave either party the option to request oral argument on the motion. The motion has been filed and responded to according to the schedule I established. Neither party has requested oral argument and I can discern no reason to schedule oral argument on my own initiative.

ISSUES

The issue in this case is whether, given the undisputed material facts, the I.G.'s determination to exclude Petitioner from participating in Medicare and Medicaid for five years is mandated by law.

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: Section 1128(a)(1) of the Social Security Act, 42 U.S.C. 1320a-7(a)(1), requires the Secretary of Health and Human Services (Secretary) to exclude from participation in Medicare and to direct the states to exclude from Medicaid any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under Medicare or Medicaid. "Conviction" is defined at 42 U.S.C. 1320a-7(i) to include those circumstances when: (1) a judgment of conviction has been entered against a physician or individual, regardless whether there is an appeal pending, or the judgment of conviction or other

record of criminal conduct has been expunged; (2) there has been a finding of guilt against the physician or individual; (3) a plea of guilty or nolo contendere by the physician or individual has been accepted; and (4) the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld. The law provides, at 42 U.S.C. 1320a-7(c)(3)(B), that for exclusions based on a conviction for a program-related offense, "the minimum period of exclusion shall not be less than five years."

2. Regulations Governing Suspension, Exclusion, or Termination of Practitioners, Providers, Suppliers of Services and Other Individuals: The Secretary has delegated to the I.G. the duty to exclude individuals or entities convicted of program-related offenses. 42 C.F.R. Part 1001. Section 1001.123(a) provides that when the I.G. has conclusive information that a person has been convicted of a program-related crime, he shall give that person written notice that he is being suspended (excluded) from participation. Section 1001.125(b) establishes criteria for the I.G. to use in determining the appropriate length of exclusions, in those circumstances where the I.G. may exercise discretion. Section 1001.128 provides that a person excluded based on conviction of a program-related offense may request a hearing before an administrative law judge on the issues of whether: (1) he or she was, in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services programs; and (3) whether the length of the suspension is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Beginning in late 1984, Petitioner was employed at a pharmacy owned by Thomas G. Starr. His duties as an employee related in part to the preparation of Medicaid forms. P.'s Memorandum at 1.2/

2/ The parties' memoranda and supporting documents will be cited as follows:

Petitioner's Memorandum	P.'s Memorandum at (page)
Attachment to P.'s Memorandum	P.'s Memorandum, (name)/(page)
I.G.'s Memorandum	I.G.'s Memorandum at (continued...)

2. In 1987, Petitioner, along with others, was indicted for offenses concerning Medicaid claims for prescriptions sold by his employer. See P.'s Memorandum at 1-2; P.'s Memorandum, letter to I.G. dated May 9, 1988; P.'s Memorandum, letter by Guy Till.

3. On January 22, 1988, Petitioner pleaded guilty to crimes consisting of conspiracy and filing false Medicaid claims. I.G.'s Memorandum, Stipulation for Deferred Judgment and Sentence/2.

4. The offenses to which Petitioner pleaded guilty are "criminal offense(s) related to the delivery of an item or service" under the Medicaid program. 42 U.S.C. 1320a-7(a) (1).

5. Petitioner's guilty plea is a "conviction" as defined by 42 U.S.C. 1320a-7(i).

6. The Secretary is required to exclude Petitioner from participating in Medicare and to direct the states to exclude Petitioner from participating in Medicaid because Petitioner has been convicted of an offense related to the delivery of an item or service under the Medicaid program. 42 U.S.C. 1320a-7(a) (1).

7. The minimum mandatory exclusion period for a person excluded based on conviction of a program-related crime is five years. 42 U.S.C. 1320a-7(c) (3) (B).

8. The I.G. is authorized to exclude persons convicted of program-related crimes from participating in Medicare and to require their exclusion from Medicaid. 42 C.F.R. Part 1001.

9. The I.G. has excluded Petitioner from participating in Medicare and has directed the states to exclude him from Medicaid for five years. The exclusion is mandatory and for the minimum period of time required by law.

10. Neither Petitioner's cooperation with prosecuting authorities, nor his emotional state during

2/ (...continued)

Attachment to I.G.'s Memorandum (page)
I.G.'s Memorandum,
(name)/(page)

the time when he committed the offenses for which he pled guilty, nor other evidence concerning the equities of his case, provides a legal basis for reducing his exclusion from that imposed by the I.G.

ANALYSIS

Petitioner pleaded guilty to, and was convicted of, a crime involving claims for Medicaid reimbursement. As a consequence of Petitioner's conviction, the I.G. imposed on Petitioner a five-year exclusion from participating in Medicare and required his exclusion from Medicaid. Petitioner challenged this exclusion, asserting that equitable considerations in his case justify a shorter exclusion than that imposed by the I.G. These include his emotional state at the time he committed the crimes, his truthful testimony to the grand jury which investigated the case, his cooperation with the prosecutor, and the deferred sentence he received in recognition of his cooperation. He did not dispute that he was convicted of crimes related to the delivery of an item or service under the Medicaid program.

The law explicitly requires the Secretary to exclude individuals who are convicted of program-related crimes from participating in the Medicare and to direct their exclusion from Medicaid for a minimum of five years. 42 U.S.C. 1320a-7(a)(1) and (c)(3)(B). It does not permit exceptions based on the personal circumstances of excluded individuals. Id. Congressional intent is plain, both in the letter of the law and in legislative history:

(A) minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. The minimum exclusion provides the Secretary with adequate opportunity to determine whether there is a reasonable assurance that the types of offenses for which the individual or entity was excluded have not recurred and are not likely to do so. Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 100-109, 100th Cong. 1st Sess. 2, reprinted in 1987 U.S. Cong. & Ad. News 682, 686.

A five-year exclusion in this case may appear to be harsh, given the equitable considerations argued by Petitioner.

But these considerations are irrelevant in light of the statutory mandate.^{3/}

CONCLUSION

Based on the undisputed material facts, the law, and regulations, I conclude that the five-year exclusion imposed on Petitioner by the I.G. is mandatory. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge

^{3/} There are circumstances where the Secretary has discretion to impose an exclusion of less, or greater, than five years. For example, pursuant to 42 U.S.C. 1320a-7(b)(3), the Secretary has discretion to exclude an individual or entity convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Other circumstances where the Secretary has discretion to impose an exclusion are set forth at 42 U.S.C. 1320a-7(b)(1), (2), and (4)-(6). The Secretary also has discretion to impose an exclusion of more than five years in cases involving conviction of a program-related offense. See 42 U.S.C. 1320a-7(c)(3)(B). In cases where a discretionary exclusion is imposed, equitable considerations such as those argued by Petitioner may be relevant to determine the appropriate length of the exclusion. 42 C.F.R. 1001.125(b)(1)-(7).