

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Louis Mathews,)	DATE: January 3, 1997
Petitioner,)	
- v. -)	Docket No. C-96-246
The Inspector General.)	Decision No. CR452

DECISION ON REMAND

This case is before me on remand from the Departmental Appeals Board.

BACKGROUND

In the case that was initially before me, Petitioner filed a timely appeal seeking review of the determination of the Inspector General of the Department of Health and Human Services (I.G.) to exclude him for a period of three years pursuant to section 1128(b)(3) of the Social Security Act (Act).

In that case, inasmuch as there were no facts of decisional significance genuinely in dispute, I granted the I.G.'s motion to decide the case on the basis of the parties' written submissions. The I.G. established that, during the period relevant to this case, Petitioner was a Physician Assistant licensed in California. On March 31, 1993, the State of California filed a criminal complaint against Petitioner, charging him with unlawfully issuing a prescription for a controlled substance, uttering a false prescription, and practicing medicine without a license. On July 5, 1994, Petitioner entered into a plea agreement, whereby he pled nolo contendere to one misdemeanor count of "prescribing without a medical purpose."

I determined that Petitioner's plea constituted a "conviction" for purposes of the Act, and that the facts underlying Petitioner's conviction fully comported with the requirements necessary for an exclusion to be

directed and imposed against Petitioner in accordance with section 1128(b)(3) of the Act - "Conviction Relating To Controlled Substance."

Thus, I found no reason to disturb the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs. In my Decision of November 24, 1995 (DAB CR403), I found that the I.G. properly excluded Petitioner from participation in Medicare and State health care programs (hereinafter referred to as "Medicaid") for a period of three years pursuant to section 1128(b)(3) of the Act. I upheld Petitioner's exclusion based on the evidence presented which indicated that there were no aggravating and no mitigating factors.

Petitioner appealed my Decision to the Departmental Appeals Board (DAB). In a Decision issued on May 8, 1996 (DAB 1574), the DAB upheld the basis for Petitioner's exclusion, but remanded the case to me for the limited purpose of determining whether Petitioner could present additional material evidence to establish the existence of a mitigating factor under 42 C.F.R. § 1001.401(c)(3)(i)(A). Louis Mathews, DAB 1574, at 1 (1996). Pursuant to the Board's remand, I conducted a conference call with the parties to obtain any additional information relevant to Petitioner's cooperation with authorities, the mitigating factor that the Board directed me to further consider. During the call, Petitioner indicated that he wished to proceed with the case by filing statements or affidavits in support of his position. Accordingly, in my Order of June 13, 1996, I established a schedule for Petitioner to submit additional evidence relevant to the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A).

Petitioner has filed his additional evidence in accordance with my June 13 Order. I find that Petitioner has failed to establish the existence of the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A). Accordingly, I uphold the three-year exclusion directed against and imposed upon Petitioner by the I.G.

APPLICABLE LAW AND REGULATIONS

This case is controlled by section 1128(b)(3) of the Act, codified as 42 U.S.C. 1320a-7(b)(3), which provides that:

The Secretary may exclude the following individuals and entities from participation in any program under title XVIII and may direct that the following individuals and

entities be excluded from participation in any State health care program:

(3) CONVICTION RELATING TO CONTROLLED SUBSTANCE. - Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

As to the term of exclusion, the controlling regulation, 42 C.F.R. 1001.401(c) provides that "an exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period."¹ Aggravating factors include circumstances where the acts that resulted in the conviction were committed over a period of a year or more; had a significant adverse impact on program beneficiaries or other individuals or the Medicare/Medicaid programs; the sentence imposed by the court included incarceration; or the convicted individual has a prior criminal, civil or administrative sanction record. 42 C.F.R. § 1001.401(b)(2); 42 C.F.R. § 1001.401(c)(2)

The mitigating factors at 42 C.F.R. § 1001.201(b)(3) and 42 C.F.R. § 1001.401(c)(3) include the individual's cooperation with law enforcement officials which resulted in others being convicted, excluded or subject to a civil money penalty; or the unavailability of alternative

¹ There exist two different and potentially relevant regulations regarding aggravating and mitigating factors. The regulation at 42 C.F.R. § 1001.201(b)(2) and (b)(3) is applicable to permissive exclusions generally and the regulation at 42 C.F.R. 1001.401(c)(2) and (3) is specifically applicable to permissive exclusions for convictions relating to controlled substances. These two regulatory provisions are not identical, but their dissimilarities are not relevant given that they both contain the identical mitigating factor of cooperation with federal, State or local officials resulting in the conviction, exclusion or imposition of a civil money penalty against another individual. Furthermore, the DAB has remanded the case to me specifically to allow Petitioner to present additional evidence relevant to the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A).

sources of the type of health care furnished by such individual.

DISCUSSION

As noted above, Petitioner appealed my Decision. On review, the DAB affirmed the exclusion but remanded the case for the limited purpose of determining "whether Petitioner could present additional material and relevant evidence which could establish the existence of a mitigating factor under 42 C.F.R. § 1001.401(c)(3)(i)(A)." Louis Mathews, DAB 1574 (May 8, 1996).

On June 11, 1996, I conducted a prehearing conference during which time I established a schedule for Petitioner to file any additional evidence and argument and further established a deadline for the I.G. to file a response to Petitioner's submission. On August 24, 1996, in accordance with my Order requesting Petitioner submit additional evidence relevant to the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i), Petitioner submitted a transcript of proceedings in the California Superior Court, San Bernardino County.² The transcript indicates that a motion was made pursuant to section 1203.4 of the California Penal Code to have expunged the conviction upon which Petitioner's exclusion was predicated.³ The State did not oppose the motion and the motion was granted.

However, Petitioner has presented no additional evidence relevant to the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A). Nothing in P. Ex. 1 indicates that Petitioner's cooperation with federal or State authorities resulted in the another individual being convicted or excluded from Medicare. Instead, the I.G. correctly asserts that section 1203.4 provides that a criminal defendant that has successfully completed his

² Petitioner has marked this exhibit as "P. Ex. 1", and I receive it into evidence.

³ Section 1128(i) of the Act states that "For purposes of subsections (a) and (b), an individual or entity is considered to have been convicted of a criminal offense - (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal misconduct has been expunged."

probation may be permitted to withdraw his plea and have the court dismiss the charge or charges against him. This is plainly what happened in this case. However, the expungement does not eradicate Petitioner's conviction. People v. Wiederberg, 44 Cal. App. 3d 550, 553; 118 Cal. Rptr. 755, 757 (1975); See Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 206 P. 2d 1085 (1949). Nor does such expungement remove the basis for the permissive three-year exclusion imposed against Petitioner in this case pursuant to section 1128(b)(3). James F. Allen, M.D., DAB CR71 (1990); Betsy Chua, M.D., DAB CR76, aff'd DAB 1104 (1990); Carlos Zamora, M.D., DAB CR22, aff'd DAB 1204 (1989); Benjamin P. Council, M.D., DAB CR391 (1995).

Moreover, the tenor of Petitioner's argument apparently has changed. Initially, the case was remanded because, according to the DAB "relevant and material evidence concerning this factor (42 C.F.R. § 1001.401(c)(3)(i)(A)) was not presented before the ALJ and that there were reasonable grounds for Petitioner's failure to adduce this evidence." Louis Mathews, DAB 1574, at 2 (parenthetical added). I have given Petitioner the opportunity to present evidence relevant to the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A) and have specifically requested that he do so, but Petitioner has offered nothing relevant.

In his brief, Petitioner has simply argued that his conviction was expunged "based on a complaint against the Attorney General and not because Petitioner completed all of the requirements of probation." P. Response at 1. I take this to mean that Petitioner's cooperation resulted in the attorney general in the State of California filing charges against an unnamed individual. However, this assertion is itself contradicted by the exhibit Petitioner himself submitted, which unequivocally states that it is a motion made pursuant to section 1203.4 of the California Penal Code, the section which permits the California court to expunge Petitioner's record based on his successful completion of probation. P. Ex. 1.

Accordingly, to the extent Petitioner contends that he cooperated with authorities, the record contains nothing to support this contention. More importantly, to the extent Petitioner contends that his alleged cooperation with authorities resulted in the conviction, exclusion or the imposition of a civil money penalty in accordance with 42 C.F.R. § 1001.401(c)(3)(i)(A), such contention is likewise unsupported.

CONCLUSION

Petitioner has not shown that any of the mitigating factors enumerated in the statute or regulations are present in his case. More importantly, Petitioner has offered no evidence that the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A) is present. Accordingly, I find that Petitioner was therefore properly excluded for a period of three years pursuant to section 1128(b)(3) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge