Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Andre W. Gilmore,	)	DATE: June 29, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-441
	)	Decision No. CR383
The Inspector General.	)	
	)	

DECISION

By letter dated August 30, 1994, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Andre W. Gilmore (Petitioner), that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.[1] The I.G. advised Petitioner that he was being excluded as a result of his conviction in the Washington State Superior Court of a criminal offense related to the delivery of an item or service under Medicare. The I.G. advised Petitioner that the exclusion of individuals convicted of such program-related offenses is mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that for exclusions imposed pursuant to section 1128(a)(1) of the Act, section 1128(c)(3)(B) requires a five-year minimum period of exclusion.

By letter dated September 19, 1994, Petitioner requested a hearing before an administrative law judge. By letter dated October 25, 1994, Petitioner submitted a 29 page document to support his request for a hearing.

---

[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

I convened a prehearing conference on November 9, 1994. During the conference, I identified the document submitted by Petitioner on October 25, 1994 as P. Ex. 1. The I.G. did not contest the admissibility of this exhibit, and I admitted P. Ex. 1 into evidence. November 16, 1994 Order and Schedule for Filing Briefs and Documentary Evidence (November 16, 1994 Order) at p. 3.

During the prehearing conference, Petitioner admitted that: (1) he was convicted of a criminal offense, and (2) the criminal offense of which he was convicted was related to the delivery of an item or service under Medicare or Medicaid. The parties agreed that, to the extent that there are no genuine issues of material fact, there was no need for an in-person hearing. They agreed to proceed by written submissions. Accordingly, I established a schedule for the parties to file written submissions in my November 16, 1994 Order. In addition, I memorialized Petitioner's admissions in my November 16, 1994 Order. Petitioner has not disagreed or retreated from these admissions at any time during this proceeding.

The I.G. filed a brief in support of a motion for summary disposition. The I.G. did not offer any evidentiary materials into evidence. Petitioner filed a cross-motion for summary disposition, accompanied by a brief and one exhibit. By letter dated March 30, 1995, I identified this exhibit as P. Ex. 2.

The I.G. filed a reply brief. The I.G. did not contest the admissibility of P. Ex. 2, and I admit it into evidence.

I have considered the parties' arguments, supporting exhibits, and the applicable law. I conclude that there are no material factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). I conclude also that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. Petitioner was convicted of a criminal offense in Washington State Superior Court. November 16, 1994 Order at p. 2; P. Ex. 2.

2. The criminal offense of which Petitioner was convicted is related to the delivery of an item or service under Medicare or Medicaid. November 16, 1994 Order at p. 2.

3. The Secretary of DHHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

4. On August 30, 1994, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid for a period of five years, pursuant to section 1128(a)(1) of the Act.

5. Section 1128(a)(1) of the Act requires the I.G. to exclude Petitioner from participating in Medicare and Medicaid.

6. The minimum mandatory period of exclusion pursuant to section 1128(a)(1) is five years. Act, section 1128(c)(3)(B).

7. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCLs 1 - 6.

8. I do not have the authority to reduce a five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

9. The determination of the I.G. to impose and direct a five-year exclusion in this case does not violate the prohibition against double jeopardy under either the United States Constitution or the Washington State Constitution.

10. I do not have the authority to consider a request for a waiver of Petitioner's exclusion.

DISCUSSION

Section 1128(a)(1) of the Act requires exclusions for individuals convicted of offenses related to the delivery of items or services under Medicare or Medicaid. The law not only mandates exclusions for individuals convicted of program-related offenses, it requires that the term of such exclusions be for at least five years. Act, section 1128(c)(3)(B).

The material facts of this case are not in dispute. Petitioner admitted during the November 9, 1994 prehearing conference that he was convicted of a criminal offense. FFCL 1. Petitioner admitted also during the same conference that the criminal offense of which he was convicted is related to the delivery of an item or service under Medicare or Medicaid. FFCL 2. Since Petitioner was convicted of a criminal offense and it was related to the delivery of an item or service under Medicare or Medicaid, the I.G. is required by law to exclude Petitioner for a minimum of five years.

Petitioner's principal argument is that application of the mandatory exclusion provisions to this case violates the prohibition against double jeopardy contained in the United States Constitution and in the Washington State Constitution. Petitioner argues that the double jeopardy clause found in both the United States Constitution and the Washington State Constitution prohibits multiple punishments for the same offense. Petitioner states that he was prosecuted and punished in State court for a criminal offense. Later, the I.G. excluded him for the same criminal offense. Petitioner contends that:

> This is not a single coordinated prosecution, but instead involves two separate efforts to punish the defendant. The Double Jeopardy Clause prohibits this type of action.

Petitioner's brief in support of cross-motion for summary disposition at p. 10.

The purpose of a minimum mandatory exclusion imposed pursuant to sections 1128(a)(1) and 1128(c)(3)(B) is remedial, not punitive. The minimum mandatory exclusion provisions serve to protect beneficiaries and recipients from an individual or entity whose trustworthiness Congress has deemed questionable, based on that individual's or entity's conviction of a program-related crime. Federal courts have specifically found that exclusions under section 1128 are remedial in nature, rather than punitive, and do not violate the prohibition against double jeopardy. Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990); Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992). The Greene court noted the "apt comparison between the exclusion remedy and professional license revocations for lawyers, physicians, and real estate brokers which have the function of protecting the public and have routinely been held not to violate the double jeopardy clause." 731 F. Supp. 838, 840. In view of the remedial nature of the exclusion, I

reject Petitioner's argument that his exclusion violates the prohibition against double jeopardy.

Petitioner requests also that consideration be given to reducing the length of his exclusion in light of the circumstances of this case. He states that he cooperated with the authorities in the underlying criminal proceeding and that he entered into a plea agreement in which he agreed to divest himself of the portion of his business involving Medicare and Medicaid. He states that since he entered into the plea agreement on April 12, 1993, he has not been a provider of Medicare or Medicaid services. Thus, he argues that the length of his exclusion should be reduced because he has been constructively excluded since April 12, 1993. Petitioner states that he has learned his lesson and that safeguards are now in place to prevent any recurrence of his criminal misconduct. Petitioner states also that he is a veteran of the Vietnam conflict and that he lost his left leg in combat. He states that his injury provides him with a unique ability to deal with other amputees in need of prosthetic devices.

As I held above, sections 1128(a)(1) and 1128(c)(3)(B) require the Secretary to impose and direct an exclusion of at least five years against an individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. I do not have the authority to reduce the minimum mandatory exclusion imposed and directed against Petitioner. Thus, I am without the authority to consider the equitable arguments raised by Petitioner regarding the effect the unique circumstances of his case should have on the length of his five-year exclusion.

In the alternative, Petitioner requests that his exclusion be waived on the grounds that he provides specialized services to the community. As I stated in my November 16, 1994 Order, I do not have the authority to grant Petitioner's request that his exclusion be waived. There is nothing in the law or regulations which either states or suggests that the Secretary has delegated to administrative law judges the authority to waive the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Yvon Nazon, M.D., DAB CR169 (1991).

CONCLUSION

Based on the law and the undisputed material facts in this case, I conclude that the I.G. properly excluded Petitioner from Medicare and Medicaid pursuant to section 1128(a)(1) of the Act. I further conclude that the five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act. Therefore, I sustain the exclusion.

/s/

Joseph K. Riotto
Administrative Law Judge