Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: May 22, 1992
	)	
Arnulfo Rodriguez, M.D.,	)	
	)	
Petitioner,	)	Docket No. C-92-029
	)	Decision No. CR201
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

By letter dated November 4, 1991, the Inspector General (I.G.) notified Arnulfo Rodriguez, M.D. (Petitioner) that he would be excluded from participation in the Medicare program and any federally-assisted State health care program (such as Medicaid) as defined in section 1128(h) of the Social Security Act (Act), for a period of five years.[1] The I.G. further advised Petitioner that his exclusion was due to his federal conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ) to contest his exclusion. The case was assigned to me for hearing and decision. The I.G. filed a motion for summary judgment, and Petitioner filed a response.

On January 29, 1992, the Secretary of the Department of Health and Human Services (DHHS) published new regulations containing procedural and substantive provisions affecting exclusion cases. I gave the parties

---

[1] "State health care program" is defined by section 1128(h) of the Act to cover three types of federally-assisted programs, including State plans approved under Title XIX of the Act (Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

the opportunity to submit comments on the issue of what, if any, effect these regulations might have on the outcome of this case. The parties did not comment. I find that the new regulations do not affect my decision in this case.

I have considered the parties' arguments, the documentary evidence submitted, and the applicable federal law and regulations. I conclude that there are no disputed questions of material fact that would require an evidentiary hearing. I further conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The remaining issues in this case are:

1. Whether Petitioner was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act.

2. Whether Petitioner was convicted of a criminal offense "related to the delivery of an item or service," within the meaning of section 1128(a)(1) of the Act.

3. Whether Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

Having considered the entire record, the arguments and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner is a physician who is licensed to practice medicine in the State of New York and who

---

[2] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

specializes in internal medicine and pulmonary diseases. I.G. Ex. 10.[3]

2. In an undated superseding indictment filed in the United States District Court for the Eastern District of New York (District Court), Petitioner was charged with four criminal counts. I.G. Ex. 1.

3. Count One alleged that Petitioner and a co-conspirator did knowingly and intentionally combine, conspire, and agree to violate "Section 1001 of Title 18, United States Code," by knowingly, willfully, and unlawfully making false, fictitious, and fraudulent statements on forms to insurance carriers under government contract to DHHS, so that payments under the Medicare program would be made to one of the conspirators. I.G. Ex. 1.

4. Counts Two through Four of the superseding indictment alleged that Petitioner did knowingly and willfully solicit and receive from another remuneration, in return for ordering and arranging for the ordering of one or more items for which payment may be made in whole or in part under the Medicaid and Medicare programs. I.G. Ex. 1.

5. On June 1, 1990, after a jury trial in the District Court, Petitioner was convicted of one felony count of receiving a kickback in exchange for ordering medical equipment for which reimbursement could be made under the Medicare and Medicaid programs, in violation of 42 U.S.C. § 1320a-7(b)(1)(B). Petitioner was not found guilty as to the other three counts and they were discharged. I.G. Ex. 2.

6. Imposition of sentence of incarceration was suspended. Petitioner was not placed on probation. I.G. Ex. 2/2.

7. Petitioner was ordered to pay a fine of $3,000 and a special assessment of $50. I.G. Ex. 2/4.

---

[3] Citations to the record in this decision are as follows:

Petitioner's Petition	P. Pet. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)

8. On April 25, 1991, the judgment of the District Court was affirmed by the United States Court of Appeals for the Second Circuit. I.G. Ex. 3.

9. Petitioner was "convicted" of a criminal offense "related to the delivery of an item or service" under Medicaid. FFCL 5-8.

10. The Secretary of Health and Human Services delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128(a)(1) of the Act.

11. On November 17, 1991, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from Medicaid, pursuant to section 1128(a)(1) of the Act.

12. There are no disputed issues of material fact in this case and summary disposition is appropriate.

13. The exclusion imposed and directed against Petitioner is for five years, the minimum period required under the Act. Act, sections 1128(a)(1) and 1128(c)(3)(B).

14. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. FFCL 1-10; Act, sections 1128(a)(1) and 1128(c)(3)(B).

15. Neither the I.G. nor the ALJ has the discretion or authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

DISCUSSION

I. Petitioner was "convicted" of a criminal offense as a matter of federal law.

Section 1128(a)(1) of the Act mandates an exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Section 1128(c)(3)(B) provides that the minimum term for any exclusion imposed under section 1128(a)(1) is five years.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is that Petitioner was convicted of a criminal offense. Petitioner does not dispute that he was convicted of a criminal offense, within the meaning of the Act. Section 1128(i) defines the term "convicted" of a criminal offense to include those circumstances when a judgment of conviction has been entered against an individual by a federal, State, or local court, regardless of whether there is an appeal pending. The undisputed facts establish that, after a jury trial, Petitioner was adjudged guilty of a felony count related to Medicaid fraud. I.G. Ex. 2. Further, the United States Court of Appeals for the Second Circuit affirmed the District Court. I conclude that Petitioner was "convicted," within the meaning of sections 1128(i) and 1128(a)(1) of the Act.

II. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the criminal offense which formed the basis for the conviction was "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

I find and conclude that Petitioner's criminal offense was "related to the delivery of an item or service" under the Medicaid program. The name of the criminal offense which formed the basis of Petitioner's conviction was "Medicaid Fraud." I.G. Ex. 2. The subsection of the statute under which Petitioner was convicted provides:

> Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under subchapter XVIII of this chapter or a State health program, shall be guilty of a felony upon conviction thereof.

42 U.S.C. § 1320a-7b(b)(1)(B).

Petitioner states that he is innocent of all charges and that he has not committed fraud against any health care

program, even though he was convicted. P. Pet. 1.[4] Petitioner contends that he was the victim of a dishonest man (i.e., the co-conspirator who was not indicted). P. Pet. 1. Petitioner also argues that the I.G.'s exclusion did not take into consideration the degree of the offense, since he allegedly accepted a $500 bribe. P. Pet. 1. Petitioner further avers that the I.G.'s exclusion is draconian, unjustified, and excessive. P. Pet. 1. Petitioner contends that there was no impropriety in his billing practices and that he was one of the lowest Medicare and Medicaid billers in Brooklyn. P. Pet. 1. In support of his contentions, Petitioner provided a letter written by his wife to the judge presiding over his trial in the District Court. P. Pet. 5.

Petitioner was adjudged guilty after a jury trial of one count of receiving a kickback in exchange for ordering medical equipment for which reimbursement could be made under the Medicaid and Medicare programs, in violation of 42 U.S.C. § 1320a-7(b)(1)(B). I.G. Ex. 2. Specifically, Petitioner was found guilty of knowingly and wilfully soliciting and receiving $500 from a medical supplier in return for certifying that there was a medical need for breathing equipment. I.G. Ex. 1/2, /5. Petitioner allegedly filled out or caused to be filled out the necessary forms indicating that a certain medical test had been performed and that the result of that test demonstrated the medical need for the breathing equipment. I.G. Ex. 1.

That section of the statute under which Petitioner was convicted is titled "Criminal Penalties for Acts Involving Medicare or State Health Care Programs." Both the section under which he was convicted, section 1320-7B(b)(1)(B), and the section under which he was excluded section 1128(a)(1), involve crimes against the Medicare and Medicaid programs. On June 1, 1990, the District Court entered judgment against Petitioner, imposing a $3,000 fine together with a $50 special assessment fee. I.G. Ex. 2.

---

[4] In a letter dated February 21, 1991, Petitioner requested a waiver of his exclusion so that he could continue working at an AIDS clinic at Cumberland Hospital, Brooklyn, New York. I informed Petitioner that I could not grant him that type of relief and advised Petitioner of the proper procedure for seeking a waiver, which is provided for at 42 C.F.R. § 1001.1801.

The Act does not define what it means to be "related to" the delivery of an item or service under Medicare or Medicaid. However, case law has consistently held that a criminal offense falls within the reach of section 1128(a)(1) of the Act where the delivery of an item or service is an element in the chain of events giving rise to the offense. For example, in Jack W. Greene, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990), an appellate panel of the Departmental Appeals Board held that a conviction for submission of a false Medicaid claim met the statutory test established by section 1128(a)(1) of the Act. In reaching this conclusion, the appellate panel reasoned:

> the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB 1078 at 7. Under this analysis, the appellate panel reasoned that but for the delivery of the Medicaid item or service, a false bill for the item or service would not have been submitted. Since the delivery of the item or service is an element in the chain of events giving rise to the offense of false billing, the billing offense is "related to" the delivery of the Medicaid item or service. See Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

III. A five-year exclusion is required in this case.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs.[5]

---

[5] The I.G. also addressed the issue of whether a permissive exclusion is appropriate in this case. I.G. Br. 11. The I.G. contends that this issue was raised by Petitioner's representative after Petitioner received his Notice determination. See I.G. Ex. 8. Petitioner appeared in this proceeding pro se. I conclude that I need not address the issue regarding the permissive exclusion, since I find and conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service, within the meaning of section 1128(a)(1) of the Act.

On March 15, 1992, Petitioner forwarded a letter from the Cumberland Neighborhood Family Care Center, endorsing Petitioner for Medicaid privileges and stating that it would be devastating to the administration of their HIV program to lose Petitioner. Although I am sympathetic to the Center's stated need, Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program, within the meaning of sections 1128(a)(1) and (i) of the Act. Thus, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum period of five years. Neither the I.G. nor the ALJ has discretion to reduce the mandatory minimum five-year period of exclusion. See Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990); Charles W. Wheeler, DAB CR28 (1989), aff'd, Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

IV. Summary disposition is appropriate in this case.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an in-person evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

CONCLUSION

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

/s/

Charles E. Stratton
Administrative Law Judge