

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Kenneth G. Schwarz,)	DATE: January 26, 1994
)	
Petitioner,)	Docket No. C-93-108
)	Decision No. CR301
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letter dated July 13, 1993, Kenneth G. Schwarz, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare.

Petitioner filed a timely request for review of the I.G.'s action. The I.G. moved for summary disposition.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications 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 affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner owned and operated a business in California selling durable medical equipment -- specializing in prosthetic and orthotic devices. I.G. Ex. 3 at 3; P. Ex. 1 at 3.¹
2. Petitioner was a Medicare and Medicaid provider. Petitioner's Brief (P. Br.) at 4.
3. On July 23, 1992, Petitioner was charged, by means of a criminal information, with theft of government property (18 U.S.C. § 641) on or about November 30, 1989. I.G. Ex. 1 at 1 - 2.
4. The government property at issue consisted of Medicare funds, unlawfully acquired by Petitioner through filing false claims. I.G. Ex. 1, 3.
5. Petitioner submitted a claim form to Medicare dated December 1, 1989, seeking reimbursement for services allegedly provided to one of his customers on November 30, 1989. I.G. Ex. 3 at 17.
6. Petitioner was involved in a major automobile accident on December 3, 1989; he closed his business in March of 1990. P. Ex. 1 at 4; P. Ex. 2.
7. According to a Medicare claim notice dated December 29, 1989, sent to the customer, Medicare stated that it was reimbursing Petitioner in the amount of \$2505.05 for the services allegedly provided to the customer on November 30, 1989. I.G. Ex. 3 at 26.

¹ The I.G. submitted three exhibits. I cite the I.G.'s exhibits as "I.G. Ex. (number) at (page)." Petitioner submitted five exhibits. I cite Petitioner's exhibits as "P. Ex. (number) at (page)." I admit into evidence I.G. Ex. 1 - 3 and P. Ex. 1 - 5.

8. Petitioner wrote a letter to the customer dated December 27, [1989], in which he explained that he had illegally billed Medicare for some prosthetic work under the customer's name. I.G. Ex. 3 at 20 - 24.

9. In July 1990, Medicare received a complaint to the effect that one of Petitioner's customers had received a Medicare claim notice dated December 29, 1989 indicating that Medicare was paying Petitioner for prosthetic work for the customer, although the customer had not ordered or received the items or services described in the notice. I.G. Ex. 3 at 14 - 16.

10. When the customer was interviewed by the I.G.'s agents on May 31, 1991, he signed a sworn affidavit stating that he had not received any items or services from Petitioner since May of 1988. I.G. Ex. 3 at 4, 32.

11. On November 5, 1992, Petitioner pled guilty in the U.S. District Court for the Eastern District of California to theft of government property in violation of 18 U.S.C. § 641. I.G. Ex. 1.

12. The court entered judgment against Petitioner, sentencing him to three years' probation, payment of a special assessment, and payment of restitution. I.G. Ex. 1.

13. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act to the I.G. 48 Fed. Reg. 21,662 (1983).

14. The combination of Petitioner's guilty plea and the court's entry of judgment and imposition of a sentence are the equivalent of a "conviction" for purposes of mandatory exclusion under section 1128(a)(1). Findings 11 - 12; Social Security Act, section 1128(i).

15. Petitioner's conviction for submitting a fraudulent claim for Medicare reimbursement constitutes clear program-related misconduct, sufficient to mandate exclusion. Findings 3 - 5, 7 - 12; Social Security Act, section 1128(a)(1).

16. Because Petitioner's criminal conviction related to the delivery of health care items or services under Medicare, within the meaning of section 1128(a)(1) of the Act, the I.G. must exclude him for a period of at least five years. Findings 3 - 5, 7 - 12; Social Security Act, sections 1128(a)(1), 1128(c)(3)(B).

17. The administrative law judge is not authorized to reduce the length of a mandatory five-year period of exclusion.

18. There is no evidence that the I.G. acted outside the discretion afforded the I.G. by statute and regulation.

19. The administrative law judge has no authority to alter the effective date of exclusion imposed by the I.G.

20. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for five years, as required by section 1128(c)(3)(B) of the Act.

ARGUMENT

Petitioner admits his offense and acknowledges that it was wrong and that a penalty is justified. He also notes, though, that it was a once-in-a-lifetime transgression, and that the I.G.'s inaction, until more than three years after the offense, unfairly increases his punishment.

He is disturbed also by the harshness of the proposed sanction, contending that it is unjust for a person who only committed one unlawful act in more than 20 years of professional practice (and subsequently cooperated fully with the authorities) to be deprived of the means to support himself and his child. (See generally P. Ex. 1.)

Additionally, Petitioner says that he did not intend to commit fraud. He explains that, because of extreme financial difficulties, he billed early for services he fully intended to deliver. He explains further that an automobile accident forced him to close his business and thus he was unable to carry out his intention.

DISCUSSION

The first statutory requirement for 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 present case, it is undisputed that Petitioner pled guilty to a criminal charge and that a United States court entered judgment and imposed a penalty upon him. Findings 11 - 12. These events are a "conviction" for purposes of the mandatory exclusion law. Section 1128(i) of the Act.

I find also that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied. It is well-established that financial misconduct directed at the Medicare and Medicaid programs, connected with the delivery of items or services, constitutes a program-related offense invoking mandatory exclusion. Samuel W. Chang, M.D., DAB 1198 (1990) (false billing); Carlos E. Zamora, M.D., DAB 1104 (1989) (false billing); and Napoleon S. Maminta, M.D., DAB 1135 (1990) (conversion of a Medicare reimbursement check). In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute clear program-related misconduct. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). I find that the act which provided the basis for Petitioner's criminal conviction in the present case -- making false representations in claims for Medicare reimbursement -- constitutes a criminal offense related to the delivery of an item or service under Medicare.

As to Petitioner's argument that he was injured by the I.G.'s delay in seeking his exclusion, it has been held that an administrative law judge has no authority to alter the effective date of exclusion where the I.G. acted, as appears to have been the case here, within the discretion afforded the I.G. by statute and regulation. Shanti Jain, M.D., DAB 1398 (1993).

Even if the impact of the exclusion is harsh, this is the minimum penalty provided by Congress when section 1128(a)(1) is invoked. Section 1128(c)(3)(B) of the Act and 42 C.F.R. §§ 1001.101 - .102. Neither the I.G. nor the administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion. Greene, DAB CR19, at 12 - 14 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Thus, as the I.G. has excluded Petitioner for the minimum mandatory period only, I am unable to consider any of the mitigating factors raised by Petitioner regarding the reasonableness of the length of his exclusion.

Lastly, Petitioner's contention that he did not intend to commit fraud is irrelevant. P. Br. at 1, 6. It is the fact of conviction of a program-related criminal offense that triggers exclusion; proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). DeWayne Franzen, DAB 1165 (1990).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction on a program-related charge.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge