Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Nick S. Pomonis, D.O.,	)	DATE: September 28, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-090
	)	Decision No. CR396
The Inspector General.	)	
	)	

DECISION

By letter dated January 19, 1995, Nick S. Pomonis, D.O., Petitioner herein, was notified by the Inspector General (I.G.) of the U.S. Department of Health & Human Services (DHHS), that it had been decided to exclude him, for a period of five years, from participation in the Medicare program and from participation in the Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs, which are referred to hereinafter collectively 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 Medicaid.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board (DAB). 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 granted the I.G.'s motion and decided the case on the basis of the parties' written submissions.

As the I.G. has proven that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of

section 1128(a)(1) of the Social Security Act (Act), I find no reason to disturb 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 to be excluded from participation in Medicare and Medicaid for a period of at least five years.[1]

PETITIONER'S ARGUMENT AND OBJECTIONS TO THE I.G.'s EXHIBITS

Petitioner contends that he was not convicted of any offense under State law. Accordingly, Petitioner contends that the I.G. had no basis to exclude him for the five year mandatory period under section 1128(a)(1) of the Act.

The I.G. submitted 15 exhibits (marked as I.G. Ex. 1 through 15) in conjunction with her motion for summary disposition. Petitioner submitted six exhibits (marked as P. Exs. 1 through 6) in conjunction with his opposition to the I.G.'s motion for summary disposition. Petitioner has objected to I.G. Exs. 2, 3, 5, 9, and 13. The I.G. has not objected to any of Petitioner's exhibits. The I.G. submitted four additional exhibits, marked as I.G. Exs. 16 - 19, with her reply brief. Petitioner has filed no objection to I.G. Exs. 16 - 19. Although the I.G. submitted I.G. Exs. 16 - 19 untimely, I find that she had good cause for doing so, as these exhibits specifically address issues that were first raised by Petitioner in his response brief. See 42 C.F.R. § 1005.4; 42 C.F.R. § 1005.8; 42 C.F.R. § 1005.15.

I overrule all of Petitioner's objections to the I.G.'s exhibits. Petitioner has not argued that I should exclude the I.G.'s exhibits because they are either

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[1] Section 1128(a)(1) of the Act mandates that the Secretary of the Department of Health and Human Services (Secretary) exclude individuals and entities convicted of program related criminal offenses from participation in Medicare and shall direct that such individuals and entities be excluded from participation in Medicaid.

irrelevant or immaterial. 42 C.F.R. § 1005.17(b). Nor has Petitioner suggested that any of these exhibits unfairly prejudice or confuse the issues before me. 42 C.F.R. § 1005.17(d). While Petitioner suggests that I apply the Federal Rules of Evidence and reject the above I.G. exhibits, I am not bound by the Federal Rules in the context of this administrative proceeding. 42 C.F.R. § 1005.17.

As to I.G. Exs. 2 and 15, Petitioner contends that these exhibits contains unsworn and incorrect allegations and conclusions that are directly contradicted by his affidavit. That objection is not proper in this administrative forum. The fact that I.G. Exs. 2 and 15 are at odds with Petitioner's sworn statement is not relevant to the exhibits' admissibility, but to the weight I assign to these exhibit. Moreover, neither Petitioner's affidavits nor any of his exhibits contradict the vital points contained in I.G. Exs. 2 and 15.

The record as a whole establishes that Petitioner's plea of nolo contendere was the direct result of Petitioner's submission of a claim for reimbursement in the amount of $177.72 for Medicaid services that were not in fact provided as claimed by Petitioner. I.G. Exs. 1 - 8, 10 - 19; P. Exs. 1 - 4. Petitioner's contention that the patients he saw on December 18, 1991 had other insurance is not relevant to my determination here, nor does Petitioner's exhibit support these contentions. The documentation submitted by Petitioner contains nothing which contradicts that Medicaid recipient PCN-511369544 was a Medicaid recipient on December 18, 1991, the date she allegedly received treatment at his office. Nor does anything in the record contradict that Petitioner's submission of a claim for reimbursement to provide Medicaid services to recipient PCN-511368544 in the amount of $177.72 formed the basis for Petitioner's conviction. I.G. Exs. 2, 3; P. Exs. 4, 5.

Additionally, Petitioner objects to the characterization contained in I.G. Ex. 5. This objection is specious. The I.G. is entitled to argue as to the meaning of I.G. Ex. 5. It is my function as the finder of fact to determine what interpretation that exhibit ultimately has in the context of this case. I have done that in the context of this Decision. The record as a whole supports that the events described in I.G. Ex. 5 did occur in the context of Petitioner's criminal case. Petitioner has offered nothing substantive to contradict this evidence.

Petitioner objects to I.G. Ex. 9, which is a copy of the letter notifying Petitioner of the I.G.'s determination to exclude him. The basis for Petitioner's objection is that the exclusion directed and imposed against Petitioner by the I.G. is unreasonable. I take this argument to mean that since the five-year exclusion of Petitioner is unreasonable, the notice letter which the I.G. sent to Petitioner, and which informed Petitioner of his exclusion, is merely a self-serving, unsupported statement by the I.G. I do not find I.G. Ex. 9 particularly helpful to me in my determination in this case, but I do not reject it for the reasons argued by Petitioner. In my prehearing order dated March 15, 1995, I told the parties not to submit the notice letter as an exhibit. Accordingly, I reject I.G. Ex. 9.

Petitioner objects to I.G. Ex. 13 because he received it after he received notice of his exclusion. This exhibit is a letter informing Petitioner that the I.G. has considered additional information provided by Petitioner and remains convinced that Petitioner should be excluded under the mandatory exclusion provisions. Again, while I do not find this exhibit particularly helpful to me in making my Decision, there is nothing prejudicial to Petitioner contained in this letter. The letter merely states the I.G.'s position.

Accordingly, I admit I.G. Exs. 1 - 8 and 10 - 19 and P. Exs. 1 through 6 into evidence for purposes of my Decision in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. During the period relevant herein, Petitioner was an osteopathic physician licensed in the state of Texas. I.G. Ex. 1.

2. On December 13, 1993, Petitioner was charged by the State of Texas with committing deceptive business

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[2] I cite to the parties' briefs and my Findings of Fact and Conclusions of Law as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Exhibit	P. Ex. (number)
I.G.'s Exhibit	I.G. Ex. (number)
My Findings of Fact and Conclusions of Law	Finding (number)

practices, a misdemeanor under Texas law. I.G. Exs. 1, 5, 10 at 2.

3. Specifically, the State alleged that Petitioner claimed reimbursement from Medicaid for services he did not actually provide to patients. I.G. Exs. 1, 2, 3, 19.

4. On December 14, 1993, Petitioner pled nolo contendere to the misdemeanor charge of deceptive business practices, as contained in the charging document, and the plea was accepted by the court. I.G. Exs. 1, 3, 5, 10 at 2; P. Ex. 4.

5. The judge receiving Petitioner's plea issued a "Deferred Adjudication Order," requiring Petitioner to be placed on probation for 6 months, pay a fine, and pay restitution in an unspecified amount. I.G. Exs. 3, 4, 5; P. Exs. 2, 4.

6. Petitioner's plea of nolo contendere is a conviction for purposes of section 1128(a)(1) of the Act. Act, section 1128(i)(3). Finding 4.

7. Petitioner's participation in a deferred adjudication program is a conviction for purposes of section 1128(a)(1) of the Act. Act, section 1128(i)(4). Finding 5.

8. Petitioner's conviction for deceptive business practices was based on his claiming to have provided $177.72 of Medicaid services which he did not in fact provide. I.G. Exs. 1, 2, 3; Findings 6, 7.

9. Inasmuch as (1) Petitioner's plea of nolo contendere was accepted by the court; (2) the offense to which Petitioner pled was related to his delivery of an item or service under Medicaid; and (3) Petitioner participated in a formal deferred adjudication program, Petitioner's conviction satisfies the criteria set forth in section 1128(a)(1) of the Act. Findings 4 - 8; Act, section 1128(a)(1).

10. On or about June 3, 1994, Petitioner satisfied the deferred adjudication requirements imposed by the court, whereupon the court terminated his probation, permitted him to withdraw his plea, and dismissed the charges against him. P. Ex. 2; I.G. Exs. 8, 19.

11. Prior to the June 3, 1994 action by the State court, on April 25, 1994, the court entered an order dismissing the criminal complaint against Petitioner because he

fulfilled the terms of his probation. P. Ex. 2; I.G. Exs. 6, 19.

12. On May 6, 1994, the State court granted Petitioner's motion for a new trial in Petitioner's misdemeanor case. P. Ex. 1; I.G. Ex. 6, 19.[3]

13. In an order dated June 1, 1994, the State court vacated its May 6 order granting Petitioner a new trial, and set aside its April 25, 1994 order. I.G. Ex. 19; Findings 11 - 12.

14. On April 20, 1995, the State court dismissed separate felony indictments against Petitioner. I.G. Ex. 19.

15. The State court's dismissal of Petitioner's felony indictments did not affect the misdemeanor charge of deceptive business practices to which Petitioner pled nolo contendere. I.G. Ex. 19.

16. Federal law is controlling in determining whether an individual has been "convicted" for purposes of section 1128(a)(1). Act, section 1128(i).

17. Petitioner was properly excluded pursuant to the mandatory five year exclusion provision contained in the Act. Act, sections 1128(a)(1), 1128(c)(3)(B). Findings 1 - 16.

18. I have no authority to reduce the five-year exclusion that the I.G. has directed and imposed upon Petitioner. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. §§ 1001.102, 1005.4. Findings 1 - 17.

DISCUSSION

The law relied upon by the I.G. to exclude Petitioner requires, initially, that the person to be excluded have been convicted of a crime.

Section 1128(i) provides that an individual will be deemed to have been "convicted" of a crime under any of the following circumstances:

> (1) when a judgment of conviction has been entered against the individual or entity by a federal,

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[3] P. Ex. 1 and I.G. Ex. 6 are identical copies of Petitioner's May 2, 1994 motion for new trial.

> State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation first offender, deferred adjudication, or other arrangement or program where formal judgement of conviction is withheld in order to give a defendant an opportunity to correct his conduct or make restitution, in the hope that this will convince the judge that no formal finding of guilt is necessary.

In the case at hand, Petitioner, an osteopath, was charged with intentionally billing the Medicaid program for services he did not, in fact, render as claimed. He entered a plea of nolo contendere to the charges and a State judge sentenced him to a fine and probation, imposed in the context of deferred adjudication. Finding 5. The I.G. argues that Petitioner has been convicted of a criminal offense for purposes of the exclusion statute because his nolo plea was accepted by the court and because he was placed on deferred adjudication as part of sentencing. Findings 6, 7.

It is well established in numerous DAB and federal court decisions that a criminal conviction based on filing false claims for reimbursement from Medicare or Medicaid mandates exclusion under 1128(a)(1). Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). Therefore, Petitioner's submission of documents to Medicaid in which he claimed reimbursement from Medicaid for services that were not provided as claimed constitutes financial misconduct related to the delivery of Medicaid services.

Petitioner, however, has a very different analysis of the question of whether he was convicted. He argues that, in Texas, when a prior court decision is vacated, and/or a new trial ordered, the case "is restored to its position before any former trial and/or plea or holding by the court." Consequently, since he sought and was granted a new trial in his criminal case, his plea and the court's

holdings become nullities. Since his conviction no longer existed, Petitioner contends, there was no legal basis for excluding him.

However, contrary to Petitioner's argument, the DAB has concluded that a determination of whether an individual has been convicted within the meaning of section 1128(i) of the Act is a matter of federal law, and that a State court's determination is not controlling. Michael P. Hiotis, DAB CR316 (1994). The federal courts, too, have held that what constitutes a conviction under the Medicaid Act is determined by federal law not State law. Dickerson v. New Banner Institute Inc., 460 U.S. 103, 110 (1983).

The federal law which controls this case is section 1128(i) of the Act, quoted above. It has been held by this office, and affirmed by an appellate panel of the DAB, that Congress intended mandatory exclusion to apply to all situations in which a person is convicted of a program-related offense, and that a conviction remains a conviction, with regard to section 1128(a), even if it is subsequently expunged from the defendant's record. Carlos E. Zamora, DAB CR22, aff'd DAB 1104 (1989). The legislative intent of the Act could not be clearer than that expressed by the congressional committee that drafted the 1986 amendments to the exclusion law:

> The principal criminal disposition to which the exclusion remedy [currently] does not apply are the "first offender" and "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.
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> These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program

> are not subject to exclusion from either Medicare or Medicaid. These individuals admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986), reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

Consequently, Texas law does not control the outcome here. The case law and statutory intent both support that Petitioner was convicted by pleading nolo contendere and by his participation in a deferred adjudication program, irrespective of the fact that the charges were dismissed before a conviction was entered. Findings 6, 7.

The second requirement of section 1128(a)(1) is that the conviction must be related to the delivery of an item or service under Medicare or Medicaid.

Petitioner has submitted an affidavit in which he states that he did not commit the offense to which he pled nolo contendere. P. Ex. 5. Petitioner further states in his affidavit that it was not his understanding that he was being charged with deceptive business practices related to the Medicare or Medicaid program. P. Ex. 5. Petitioner has also submitted an affidavit from an employee that, in part, attacks the Medicaid fraud investigator's report (I.G. Ex. 15). P. Ex. 6. However, as I stated in overruling Petitioner's objection to I.G. Ex. 5, nothing in either P. Ex. 5 or P. Ex. 6 contradicts the evidence of record that Petitioner's plea of nolo contendere was the direct result of Petitioner's submission of a claim for reimbursement for Medicaid services in the amount of $177.72 that were not in fact provided as claimed by Petitioner. I.G. Exs. 1 - 8, 10 - 19; P. Exs. 1 - 4.[4] The I.G.'s contention that Medicaid

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[4] Although the evidence of record establishes that Petitioner paid $19,886 in restitution to the Texas Attorney General's Medicaid Fraud Control Unit, the I.G. has not alleged the aggravating factor at 42 C.F.R. § 1001.102(b)(2) [acts resulting in conviction, or similar acts, resulted in financial loss to Medicare and Medicaid of $1,500 or more]. I.G. Exs. 5, 15. Moreover, the evidence indicates that most, if not all, of the

recipient PCN-511369544 was a Medicaid recipient on December 18, 1991 is undisputed, even by a generous reading of Petitioner's exhibits. Petitioner's statement that it was never his understanding that the charge of committing deceptive business practices was related to Medicare or Medicaid is irrelevant. P. Ex. 5 at 2.

The fact remains that the I.G. has submitted a statement from the prosecuting attorney, who has personal knowledge of the nature of the charges against Petitioner, that the charge to which Petitioner pled nolo contendere was based on Petitioner's failure to provide services to Medicaid recipient PCN-5511368544. I.G. Exs. 5, 19. Petitioner has offered nothing to contradict that the investigation conducted by the Texas Medicaid Fraud Bureau found that Petitioner had submitted a claim for reimbursement for Medicaid services that were not provided as claimed and formed the basis for the charge of deceptive business practices to which Petitioner ultimately pled. I.G. Exs. 1 - 5, 19. Nor does anything in the record contradict that Petitioner's submission of a claim for reimbursement to provide Medicaid services to recipient PCN-511368544 in the amount of $177.72 formed the basis for Petitioner's conviction. I.G. Ex. 2, 3; P. Ex. 4, 5.

The affidavits that Petitioner contends cast doubt upon the I.G.'s assertion that Petitioner's nolo contendere plea is program related simply fail to do so. P. Ex. 5.

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restitution of $19,886 was paid for offenses which are not related to the offense to which Petitioner pled nolo contendere, because the affidavit from the prosecuting attorney states that the $19,886 in restitution was for many offenses that were allegedly outside the statute of limitations. I.G. Exs. 2, 3, 4, 5. Obviously, any offense that Petitioner allegedly committed outside of the criminal statute of limitations was not the basis for Petitioner's plea of nolo contendere. I.G. Exs. 2, 3, 4, 5.

The court documents do not state with specificity the amount of restitution that Petitioner was required to pay. However, the record as a whole does reflect that Petitioner pled guilty to one count of deceptive business practices, where Medicaid services totalling $177.72 were not provided as claimed by Petitioner. I.G. Exs. 2, 3. However, I am unable to make any conclusions regarding the amount of restitution Petitioner was made to pay as a result of his pleading nolo contendere to the charge of deceptive business practices, nor is it necessary for me to do so in this case. I.G. Exs. 2, 3.

Petitioner states in his affidavit that the charges against him do not state that they involved Medicare or Medicaid and further states that it was not his understanding that he was being charged with an offense related to Medicare or Medicaid. These statements do nothing to contradict the evidence against Petitioner. Whether Petitioner understood that the charges to which he pled nolo contendere involved Medicare or Medicaid is irrelevant to my Decision in this case. Furthermore, it is well established that having the words Medicare or Medicaid within the conviction documents is not a prerequisite to a finding that the conviction is program related. Napoleon S. Maminta, M.D., DAB 1135 (1990); Robert C. Greenwood, N.A., DAB 1423 (1993).

The affidavit submitted by Petitioner's nurse likewise fails to cast doubt upon the program related nature of Petitioner's offense. P. Ex. 6. The affidavit's primary focus is the accuracy of the I.G. investigator's report contained at I.G. Ex. 15. However, the affidavit does not address the accuracy of the report contained at I.G. Ex. 2, which states that the basis for the charge to which Petitioner pled nolo contendere was Petitioner's failure to provide services to a Medicaid recipient. I.G. Ex. 2; P. Ex. 6. Nor does the affidavit contained at P. Ex. 6 contradict any of the evidence on the critical issues of whether Petitioner was convicted and whether that conviction is program related.

Finally, Petitioner has requested oral argument for the purpose of presenting his arguments and evidence. I deny Petitioner's request. Petitioner has no inherent right to an oral argument. 42 C.F.R. § 1005.3, 1005.4. The regulations grant me the discretion to grant or deny any motion by either party, including a motion for oral argument. 42 C.F.R. § 1005.3, 1005.4. I exercise that discretion here and deny Petitioner's request for oral argument.

Petitioner has already submitted his argument and evidence through his briefs and exhibits, as well as a sworn statement on his own behalf and an affidavit from his nurse. P. Exs. 5, 6. Both of these exhibits contain denials stating that Petitioner did nothing wrong. However, as I stated above, these affidavits are not probative of the critical aspects of this case, that is, whether Petitioner was convicted of a criminal offense and whether that conviction is related to the delivery of an item or service under Medicaid. To the extent that Petitioner's affidavit contains a denial of his conviction, it amounts to a collateral attack upon his conviction, which I cannot consider in the context of

this case. Petitioner cannot use this forum to collaterally attack his conviction. Ian C. Klein, D.P.M., DAB CR177 (1992); Olufemi Okunoren, M.D., DAB CR150 (1991). Whether Petitioner knew that his conviction in State court would result in an exclusion from Medicare and Medicaid is also irrelevant. Thomas Malik, DAB CR357 (1995); Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992).

As I find above, it is Petitioner's plea of nolo contendere, and the fact that the conduct to which Petitioner pled nolo contendere is program related that triggers the mandatory exclusion. The statute requires only a common sense connection between the criminal offense and the delivery of items or services under Medicare or Medicaid. Berton Siegel, D.O., DAB 1467, at 5 (1994); Thelma Walley, DAB CR207 (1992); Boris Lipovsky, M.D., DAB 1363 (1992). The I.G. has more than met her burden to establish a common sense connection between Petitioner's plea of nolo contendere and the Medicaid program. The record as a whole establishes that Petitioner's plea of nolo contendere to the charge of deceptive business practices was the result of his not providing services to a Medicaid recipient as he claimed to have done.

Under the law and regulations governing this case, Petitioner must be excluded for a mandatory five-year period once it is established that the offense to which he pled nolo contendere is program related. Act, section 1128(a)(1); 42 C.F.R. § 1001.101, 1001.102. Petitioner has not made any showing that an oral argument is necessary in this case, nor has Petitioner made any proffer that oral argument would be helpful to me in deciding this case. I am not permitted to consider any factors Petitioner may have to offer in mitigation unless the exclusion imposed and directed by the I.G. is for more than the five-year mandatory period and the I.G. has alleged an aggravating factor. 42 C.F.R. § 1001.101, 1001.102. I have no authority to reduce Petitioner's exclusion based on any mitigating factors that Petitioner may allege at oral argument.

I have considered the statement made to me by Petitioner in his affidavit, but nothing in that statement can serve as a basis from which I can reduce his exclusion below the five-year mandatory period. The evidence in this case establishes that Petitioner was convicted within the meaning of section 1128(i) and that his conviction is program related under section 1128(a)(1). These are the only issues before me in this case. The regulations do

not permit me to assess mitigating factors in this case of mandatory exclusion.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for the Petitioner 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. Accordingly, because the I.G. has established that Petitioner has been convicted and has further shown that Petitioner's conviction is related to the delivery of Medicaid items or services, I have no discretion but to uphold the mandatory five-year exclusion imposed and directed against Petitioner by the I.G.

/s/

Joseph K. Riotto
Administrative Law Judge