

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Maria M. Melendez, M.D.,)	DATE: October 20, 1995
Petitioner,)	
- v. -)	Docket No. C-95-097
The Inspector General.)	Decision No. CR398
)	

DECISION

By letter dated January 24, 1995, Maria M. Melendez, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), of the 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 Medicaid.

Petitioner requested a review of the I.G.'s action by an administrative law judge of HHS's Departmental Appeals Board (DAB). During the telephone prehearing conference call on April 21, 1995, the I.G. moved for submission of this case on a written record. Petitioner did not object to the I.G.'s request. I granted the I.G.'s request.

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 evidentiary hearing. 42 C.F.R. § 1005.4(b)(12) (1992).

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 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. Petitioner is a medical doctor, practicing in the Bronx, New York.
2. On August 22, 1994, Petitioner pled guilty in the District Court of the State of Vermont, Unit 3, Orleans Circuit, to one count of Medicaid Fraud and one count of Prescription Fraud. I.G. Exs. 1, 2.¹
3. Specifically, the Information charged that, on or about August 30, 1993, Petitioner intentionally prepared a false or fraudulent prescription, which she gave to a Medicaid recipient who was not her patient nor was he ever examined by her. I.G. Exs. 1 - 3.
4. Allegedly, Petitioner issued the false prescription knowing that a pharmacy would fill the prescription, as she directed, and wrongly bill the Medicaid program. I.G. Ex. 2 at 2 - 3.
5. On September 9, 1993, the pharmacy which received Petitioner's false prescription, billed the Medicaid program based on her fraudulent representation. I.G. Exs. 1, 2.
6. In pleading guilty, Petitioner indicated that there were sufficient facts to support the charges in count 2 (Medicaid Fraud) and count 3 (Prescription Fraud) of the Information filed against her. I.G. Ex. 1 at 4; Finding 3.

¹ The I.G. submitted three exhibits with her brief and I have admitted them into evidence. I refer to the I.G.'s exhibits as "I.G. Ex(s). 1 - 3."

7. Petitioner was sentenced by the court to probation, a \$3500 fine, and 100 days of community service. I.G. Ex. 3 at 1 - 2.

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

9. On January 24, 1995, the I.G. issued a notice stating that Petitioner was being excluded from participation in the Medicare and Medicaid programs for five years, pursuant to section 1128(a)(1) of the Act.

10. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a "conviction," within the meaning of section 1128(a)(1) and 1128(i) of the Act.

11. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 6, 7, 10.

12. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in the Medicare and Medicaid programs.

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

14. 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. Findings 1 - 13.

15. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

16. Although Petitioner may indeed provide medical services to indigent persons, that, also, does not provide me with authority to waive or lessen her exclusion.

PETITIONER'S ARGUMENT

Petitioner contends that, under the totality of circumstances in her case, a five-year sanction is inherently excessive. Petitioner argues also that the public has nothing to fear from her continuing to

practice in light of the fact that her writing of this single false prescription was her only transgression of law.

Petitioner notes that she has had to overcome a history of childhood deprivation and abuse which have caused her psychological difficulties in life, which necessitated extensive treatment and that she now applies her skills as a psychiatrist to serve a uniquely disadvantaged clientele in the South Bronx.

Lastly, Petitioner notes that the medicine which she prescribed contrary to regulation was an antidepressant, which she needed for own treatment but was unable to afford. Petitioner has also submitted numerous letters of support attesting to her professional skills and service to the community.²

DISCUSSION

I. Petitioner was properly excluded under section 1128(a)(1) of the Act.

The statute under which the I.G. seeks to exclude Petitioner -- section 1128(a)(1) -- requires, initially, that Petitioner have been convicted of a criminal offense.

Section 1128(i) of the Act provides that an individual will be deemed "convicted" under any of the following circumstances:

(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 conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a federal, State, or local court;

² In her responsive brief, Petitioner included numerous letters and refers to them in the brief as "Exhibit A." I have relabelled this exhibit as Petitioner's exhibit 1 "P. Ex. 1," in accordance with my Order and Schedule for Filing Briefs and Documentary Evidence, dated April 25, 1995. I admit P. Ex. 1 into evidence.

(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 in a first offender, deferred adjudication, or other arrangement or program where judgement of conviction has been withheld.

In the case at hand, sections 1128(i)(1) and (3) are obviously applicable. Petitioner pled guilty and the court clearly accepted such plea when it imposed a sentence. Findings 2, 6, 7; I.G. Ex. 3.

Next, the statute requires that the criminal activity have been program related. It is well established that financial misconduct directed at Medicare and Medicaid, in connection with the delivery of items or services under the programs, constitutes a program-related offense invoking mandatory exclusion. 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). In this regard, Petitioner's misrepresentations resulted in the payment by Medicaid of a fraudulent claim. Moreover, Petitioner's offense was program related because Medicaid was the victim of the offense. Ian Klein, DAB CR177 (1992). For these reasons, Petitioner's conviction was related to the delivery of an item or service under Medicaid.

In this case, the I.G. made the determination that Petitioner's conviction was governed by section 1128(a)(1). Once that determination was made, the I.G. had no discretion to impose anything but a mandatory five-year exclusion. Niranjana B. Parikh, M.D., et al., DAB 1334, at 7 (1992). I conclude that in this case, the I.G. properly classified Petitioner's conviction as falling under the minimum mandatory exclusion authority of sections 1128(a)(1) and 1128(c)(3)(B). The law requires that Petitioner be excluded for at least five years.

II. The I.G. is entitled to prevail as a matter of law.

As noted above, Petitioner offers several explanations for her criminal behavior -- i.e., psychological difficulties and financial hardship. She claims also that any violation of law on her part is more than balanced by her community service. However, under section 1128(a)(1), proof that a relevant criminal conviction has occurred ends the inquiry as to whether

mandatory exclusion is justified. DeWayne Franzen, DAB 1165 (1990). The administrative law judge does not look beyond the fact of conviction, or entertain claims of innocence, or evaluate explanations for the misconduct, or consider evidence intended to mitigate the minimum exclusionary period. It is also well established that the intent of the individual committing the criminal offense is not relevant. Summit Health Limited, dba Marina Convalescent Hospital, DAB 1173 (1990). Consequently, Petitioner's explanations are not relevant or material to the outcome of this case.

Section 112(c)(3)(B) of the Act requires that an exclusion imposed under section 1128(a)(1) be for a mandatory minimum period of at least five years. Chris Mark Spierer, DAB CR360 (1995); Pamela Gail Hill, DAB CR347 (1994). This five-year mandatory minimum requirement is also codified at 42 C.F.R. § 1001.102(a). Neither the administrative law judge nor the I.G. is authorized to reduce the five-year mandatory minimum exclusion. Maximo Levin, DAB CR343 (1994). Since the I.G. excluded Petitioner pursuant to section 1128(a)(1), the five-year exclusion is deemed reasonable as a matter of law.

For the reasons stated above, the I.G. is entitled to prevail as a matter of law. Thus, for the purposes of this decision and to resolve this summary disposition issue, I find that there is no material fact in dispute, and the I.G. is entitled to summary disposition.

CONCLUSION

Petitioner's exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because of her conviction of a criminal offense related to the delivery of an item or service under Medicaid.

/s/

Joseph K. Riotto
Administrative Law Judge