

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Shanti Jain, M.D.)	DATE: October 20, 1992
Petitioner,)	
- v. -)	Docket No. C-92-092
The Inspector General.)	Decision No. CR237

DECISION

By letter dated February 13, 1992, Shanti Jain, M.D., 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 her for a period of five years from participation in the Medicare program and those State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I will use "Medicaid" hereafter in this Decision to represent those State programs.) The I.G. explained that the five-year exclusion was mandatory under 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, and the I.G. moved for summary disposition.

Because I conclude that there are no material and relevant factual issues in dispute, summary disposition is appropriate. Therefore, I have decided the case on the basis of written submissions in lieu of an in-person hearing. For the reasons stated below, I conclude that the I.G. was required to exclude Petitioner for at least five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B). Therefore, I uphold the exclusion.

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.

ARGUMENT

Petitioner makes a number of arguments against judgment in favor of the I.G. She contends that there was no loss to the program, since she had, overall, rendered at least as much service to patients as she had billed for. She also notes that, under New York law, intent to defraud is not an element of the crime to which she pled.

Petitioner argues also that the I.G.'s delay in initiating an exclusion harmed her by effectively causing her -- as a result of the consecutive action of State and federal penalties -- to be excluded for almost ten years. Lastly, she asserts that the I.G. improperly sent her a notice of intent to exclude dated July 29, 1991, which invited her to state any mitigating factors she believed applicable to her case. This was erroneous, Petitioner asserts, since no mitigating evidence could have saved her from a five-year exclusion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. It is undisputed that, during the period relevant herein, Petitioner was a duly licensed physician in New York. P. Br. at 2.
2. On February 7, 1991, in the New York Supreme Court, Bronx County, Petitioner pled guilty to and was convicted of, offering a false instrument for filing (second degree). I.G. Exhibit (Ex.) 3.
3. The State alleged in its indictment that Petitioner had submitted claims to Medicaid for medical care and treatment of Medicaid patients whereas such care and treatment had not been provided. I.G. Ex. 1.

¹ Petitioner and the I.G. submitted written argument and documentary exhibits. I admitted all of the exhibits into evidence. I refer to the parties' briefs as I.G. Br. (page) and P. Br. (page).

4. Petitioner was sentenced to three years' probation plus a \$250 fine. I.G. Ex. 3.
5. Petitioner was suspended from the State Medicaid program pending further review. I.G. Ex. 2; P. Br. at 2.
6. The Secretary of the Department 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. 48 Fed. Reg. 21662 (May 13, 1983).
7. A criminal conviction based upon submitting false claims to Medicaid is related to the delivery of an item or service under Medicaid and justifies application of the mandatory exclusion provisions of section 1128(a)(1), even if there was no proof of fraudulent intent on the part of Petitioner. N.Y. Penal Law § 175.30 (McKinney 1988); I.G. Br. at 3, note 2.
8. An administrative law judge has no authority to alter the effective date of exclusion designated by the I.G. as a remedy for the latter's tardiness or misfeasance.
9. Petitioner is not entitled to relief on the basis that in error the I.G. sent her a notice of intent to exclude which invited her to state any mitigating factors she believed applicable to her case.

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 case at hand, Petitioner pled guilty and a judgment of conviction was entered against her by a State court, which manifestly satisfies this requirement. See section 1128(i).

Next, it is required by section 1128(a)(1) that the crime at issue be related to the delivery of an item or service under Medicare or Medicaid. It is well established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims constitutes clear program-related misconduct. Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). In the present case, although her conviction does not prove intentional fraud by Petitioner, it is an element of her offense that her false representations to Medicaid were made knowingly and intentionally. Such knowing misrepresentations have

no less effect on the program than misrepresentation in intentional fraud cases.

Furthermore, it is the fact of conviction of a relevant 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).

As to Petitioner's contention that the I.G. did not act within a reasonable time to effect her exclusion, the administrative law judge has no authority to alter the effective date of exclusion as a remedy for the I.G.'s tardiness or misfeasance. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, DAB CR119 at 7 - 9 (1991). It should also be noted that the exclusion of providers from the Medicare and Medicaid programs is expressly required by statute where there has been a relevant criminal conviction. Neither the I.G. nor this judge is authorized to reduce the five-year minimum mandatory period of exclusion. Greene, DAB CR19 at 12 - 14.

Lastly, Petitioner is not entitled to relief on the ground that in error the I.G. sent her a notice of intent to exclude which invited her to state any mitigating factors she believed applicable to her case. It might not have been done in error, as the I.G. might have contemplated imposing a greater than five year exclusion, in which case mitigating factors would certainly have been relevant. And, even if such factors were not relevant, Petitioner was not significantly harmed by the I.G.'s inquiry.

CONCLUSION

Petitioner's conviction requires her exclusion for a period of at least five years, pursuant to section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge