

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Barclay M. Wilson, D.O.,)	DATE: November 10, 1992
Petitioner,)	
- v. -)	Docket No. C-92-122
The Inspector General.)	Decision No. CR241

DECISION

By letter dated June 17, 1992, Barclay M. Wilson, D.O., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that he been excluded for a period of five years from participation in the Medicare program and from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the 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, I have granted the I.G.'s motion and have decided the case on the basis of written submissions in lieu of an in-person hearing.

I uphold 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.

Section 1128(b) permits, but does not mandate, the exclusion of any person whom the Secretary of HHS concludes is guilty, or has been convicted, of health care related fraud, kickbacks, false claims, or similar activities. It incorporates, as bases for exclusion, offenses described in sections 1128A and 1128B of the Act.

ARGUMENT

Petitioner argues that any charges against him should have been brought under the permissive exclusion provisions of section 1128(b) inasmuch as his offenses bore only a remote relationship to the delivery of items or services under Medicaid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. During the period relevant to this case, Petitioner was a licensed osteopathic physician and Medicaid provider in the State of Pennsylvania.
2. On March 11, 1991, Petitioner pled guilty in the Court of Common Pleas for Northumberland County, Pennsylvania, to four felony counts of Medicaid fraud. I.G. Ex. 2/9 - 12, /16 - 22.
3. Petitioner was sentenced on each of the four felony counts of Medicaid fraud to one year probation, a fine of \$1,000 and a \$25/month probation supervision fee and 50 hours of community service, for a total of four years probation, a \$4,000 fine, a \$100/month probation supervision fee and 200 hours of community service. I.G. Ex. 14 - 17.

¹ Petitioner and the I.G. submitted written argument and the I.G. submitted documentary exhibits. I admitted all of the exhibits into evidence and refer to them herein as I.G. Ex. (number/page).

4. 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).

5. Petitioner's criminal conviction for four felony counts of Medicaid fraud is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a), and thus mandates an exclusion for at least five years.

DISCUSSION

The first statutory requirement for the imposition of mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question must have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty to four felony counts of Medicaid fraud and he was sentenced by a State court. This, manifestly, satisfies the first criterion of section 1128(a)(1). See subsection 1128(i) of the Act.

The second statutory requirement under section 1128(a)(1) is that the crime at issue be related to the delivery of an item or service under Medicaid or Medicare. This criterion is met where there is a common sense connection between a criminal offense and the Medicaid or Medicare programs. Clarence H. Olson, DAB CR46 (1989). A person may be guilty of a program related offense even if he or she did not physically deliver items or services. Jack W. Greene, DAB 1078 (1989). Other relevant precedent holds that a criminal offense is deemed to be related to the delivery of an item or service under Medicaid or Medicare where the delivery of such Medicaid or Medicare item or service is an element in the chain of events constituting the offense. See Larry W. Dabbs & Gary L. Schwendimann, DAB CR151 (1991), and cases cited therein.

I conclude that there is a clear connection between the criminal conduct upon which Petitioner's conviction was based and the delivery of items or services under Medicaid. The documentary evidence submitted by the I.G. shows, on its face, that Petitioner was charged with, pled guilty to, and was sentenced for, four separate counts of Medicaid fraud. I.G. Ex. 2; I.G. Ex. 3/1, 5 - 6; I.G. Ex. 14 - 17. A plea of guilty that is accepted by a State court, as Petitioner's was, is a conviction for purposes of section 1128(a). Social Security Act, section 1128(i)(3). Moreover, Petitioner's conviction is, on its, face, related to the Medicaid program. This

evidence alone is sufficient to enable me to find that Petitioner was convicted of a program related offense within the meaning of section 1128(a)(1).

However, the record of this case provides even further evidence to support that Petitioner's conviction is related to the delivery of a Medicare item or service within the meaning of section 1128(a)(1). The factual basis underlying Petitioner's guilty plea to four counts of Medicaid fraud was Petitioner knowingly issuing prescription drugs to a medical assistance recipient, when, in fact, he knew the prescription drugs would be given to a third person not eligible for medical assistance benefits. I.G. Ex. 2/16 - 22. Petitioner, in pleading guilty to Medicaid fraud, admitted that he knew that the purpose of issuing the prescriptions was to ensure that the medical assistance program would reimburse him for the prescriptions, where it otherwise would not have. I.G. Ex. 2/16 - 19. The admissions made by Petitioner during his guilty plea, in conjunction with Petitioner's subsequent sentencing by the court, indicate that, in obtaining illicit reimbursement from the State medical assistance program, Petitioner was defrauding the Medicaid program. I.G. Ex. 2/16 - 22; I.G. Ex. 14 - 17.

Petitioner's admissions provide additional evidence that his conviction is program related within the meaning of section 1128(a)(1). However, I reiterate that these admissions are not necessary to my determination in this case. Petitioner's conviction alone is, on its face, sufficient evidence for me to find Petitioner subject to the mandatory exclusion provision of section 1128(a)(1).

Petitioner's pattern of unlawful conduct began with his abusing the prescription process and continued with his de facto cooperation with the submission of false claims. The Medicaid program was the intended target of the fraud and Petitioner's acts directly impacted essential elements of the Medicaid treatment-payment cycle. Under these circumstances, exclusion pursuant to section 1128(a)(1) is appropriate and a period of exclusion of at least five years is mandatory.

Petitioner argues also that the I.G. should have treated his criminal conviction as grounds for a permissive exclusion action. In this regard, the appellate decision rendered by the DAB in Samuel W. Chang, M.D., DAB 1198 (1990), held that "the permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid ... programs."

Also relevant is a recent decision in which an appellate panel considered the relationship between section 1128(a)(1) and section 1128(b)(1). It concluded that where a criminal conviction satisfies the requirement of section 1128(a)(1), then that section is controlling and the I.G. must impose the mandatory exclusion which the statute provides. The fact that the criminal conviction may appear to fall also within the broader criteria for permissive exclusion found in section 1128(b)(1) is irrelevant. Boris Lipovsky, M.D., DAB 1363 (1992).

In light of this precedent, it is evident that the I.G. committed no error, under the facts of this case, in proceeding under 1128(a)(1) and, indeed, that the I.G. had no discretion to do otherwise.

CONCLUSION

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

/s/

Joseph K. Riotto
Administrative Law Judge