Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
David D. DeFries, D.C.,	)	DATE: October 11, 1991
	)	
Petitioner,	)	
	)	
- v.-	)	Docket No. C-393
	)	
The Inspector General.	)	Decision No. CR156
	)	

DECISION

This case is before me on both Petitioner's and the I.G.'s motions for summary disposition on the matter of Petitioner's exclusion from participation in the Medicare program and certain federally-assisted State health care programs.

By letter dated April 12, 1991, the I.G. notified Petitioner that he was being excluded from participation in the Medicare program, and any State health care program (such as Medicaid), as defined in section 1128(h) of the Social Security Act (Act)[1]. The I.G.'s notice informed Petitioner that his exclusion resulted from his State conviction of a criminal offense related to the delivery of an item or service under Medicare. The I.G. further informed Petitioner that section 1128(a)(1) of the Act requires that individuals convicted of such program-related offenses be excluded for a minimum period of five years. The I.G. told Petitioner that he was being excluded for the mandatory minimum five year period under section 1128(c)(3)(B) of the Act.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. By my prehearing order of July 19, 1991, the I.G. was given until August 26, 1991 to file his motion for summary disposition and supporting brief. Petitioner was given until September 30, 1991 to file a response and supporting brief. In his response, Petitioner also moved for summary disposition. Oral argument was not requested.

I have considered the parties' briefs, the undisputed material facts, and the law. I conclude that there are no disputed questions of material fact that would require an evidentiary hearing. I further conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. I accordingly enter summary disposition in favor of the I.G. and deny Petitioner's motion for summary disposition.

ISSUES

The issues in this case are whether:

1. Petitioner's conviction is more properly classified under section 1128(a)(1) of the Act or section 1128(b)(1) of the Act.

2. Petitioner's conviction pursuant to a plea of nolo contendere to two counts of Medicaid fraud, under 62 Pa. Cons. Stat. Ann. sections 1407(a)(7) and (12), was a conviction of a criminal offense within the meaning of section 1128(a)(1) of the Act and is therefore subject to the mandatory minimum five year exclusion.

3. The effective date of Petitioner's exclusion should be the date when the State of Pennsylvania first suspended payments of Medicaid reimbursement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a licensed chiropractor in the Commonwealth of Pennsylvania. I.G. Ex. 4; I.G. Ex. 6 at 2.[2]

2. On August 23, 1990, Petitioner was convicted, in the Court of Common Pleas, Dauphin County, Pennsylvania, pursuant to a plea of nolo contendere, for Medicaid fraud under 62 Pa. Cons. Stat. Ann. sections 1407(a)(7) and (12). I.G. Ex. 2; I.G. Ex. 5 at 1.

3. Petitioner admits that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. July 19, 1991 prehearing order at 2.

4. On August 23, 1990, Petitioner was sentenced to two years probation, fined $7,669.50, ordered to make restitution in the amount of $4,035, and ordered to pay $500 to the Office of the Attorney General of Pennsylvania to cover the cost of his investigation. I.G. Ex. 2.

5. Petitioner's Medicaid fraud involved submitting claims for reimbursement for x-rays. It is not disputed that Medicaid does not reimburse chiropractors for x-rays. I.G. brief at 5; Pet. brief at 3.

6. Petitioner submitted his patients' x-ray reports to a Dr. Hirsh, who then submitted the bills to Medicare to obtain reimbursement. Dr. Hirsh would then give Petitioner a referral fee. Pet. brief at 3; I.G. brief at 5 - 6.

7. There are no disputed issues of material fact in this case, and summary disposition is appropriate.

8. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21622 (May 13, 1983).

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[2] The I.G. submitted ten numbered and paginated exhibits in support of his motion for summary disposition. Petitioner did not object and I have admitted them into evidence. They will be referred to as I.G. Ex. (number) at (page). Petitioner submitted a brief but no exhibits.

9. Petitioner's exclusion properly falls under section 1128(a)(1), not under section 1128(b)(1) of the Act.

10. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required by the Act. Sections 1128(a)(1) and (c)(3)(b) of the Act.

11. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Sections 1128(a)(1) and (c)(3)(b) of the Act.

ANALYSIS

1. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(a)(1) of the Act.

There are no disputed issues of material fact in this case. Petitioner was convicted, via a plea of nolo contendere, of Medicaid fraud under Pennsylvania law, specifically, 62 Pa. Cons. Stat. Ann. sections 1407(a)(7) and (12). The I.G. imposed and directed an exclusion against Petitioner, pursuant to section 1128(a)(1) of the Act, which mandates an exclusion of any individual or entity who is convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. Petitioner disputes that his conviction is a conviction within the meaning of 1128(a)(1) of the Act. He argues that his "misconduct" is more properly classified under section 1128(b)(1) and, therefore, is subject to a permissive, not mandatory, exclusion. Petitioner argues that the fact that his offense could colorably be characterized under 1128(b)(1) as a conviction for fraud means that 1128(a)(1) is inapplicable. Petitioner argues, in effect, that section 1128(B)(1) narrows the reach of section 1128(a)(1) to program-related crimes other than fraud.

The I.G. counters that Petitioner's conviction is the result of his conspiring with a Dr. Hirsh to obtain reimbursement from Medicaid for x-rays which would have been non-compensable if rendered by the Petitioner. The I.G. argues that this offense is properly classified under 1128(a)(1) because it is a program-related criminal conviction for fraud.

In earlier decisions, I have addressed similar arguments to Petitioner's that section 1128(b)(1) applies. See, e.g., Mark D. Bornstein, DAB Civ. Rem. C-218 at 8 (1990), citing Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D.

Tenn. 1990), affirming Jack W. Greene, DAB App. 1078 (1989). In Bornstein I held:

> [W]here financial crimes, such as fraud, theft, or embezzlement are committed in connection with the rendering of services under the Medicare or State health care programs, section 1128(a)(1) mandates exclusion. By contrast, section 1128(b)(1) applies to convictions for financial misconduct committed against programs other than Medicare and State health care programs. The fraud committed by Petitioner was directed against the Medicare program. Accordingly, his exclusion is governed by section 1128(a)(1).

Petitioner's crime was a financial crime directed against the Medicare and Medicaid programs, within the meaning of section 1128(a)(1), Greene, and Bornstein. Petitioner was convicted of fraud. It is undisputed that Petitioner falsely billed Medicaid for non-reimbursable x-ray services. Therefore, Petitioner's fraud was directed against the Medicaid program and is covered by section 1128(a)(1) of the Act.

I am not persuaded by Petitioner's contention that section 1128(b)(1) of the Act governs this case. Petitioner's arguments imply that, because the terms "fraud" and "financial offense" are not explicitly used in section 1128(a)(1), section 1128(b)(1) is the proper arena for all fraud and financial misconduct cases.

Similar arguments were made by petitioners in Howard B. Reife, DAB Civ. Rem. C-64 (1989). I acknowledged then, as I do now, that section 1128(b)(1) is broad enough, when read out of context, to encompass Petitioner's offense. Reife at 12. I held:

> However, when it is read in context, it becomes evident that Congress intended this section to provide for discretionary exclusion of individuals and entities who are convicted of offenses directed against programs other than Medicare or State health care programs.

Reife at 12. See, Jack W. Greene, DAB Civ. Rem. C-56 (1989) and Michael A. Sabbagh, DAB Civ. Rem. C-59 (1989).

I have spoken to the issue of congressional intent as it relates to the categorization of Petitioner's exclusion. Specifically:

> Congress' intent was to require exclusion of those individuals or entities who committed offenses directed against the Medicare and State health care programs and to permit exclusion of those individuals or entities who committed offenses directed against government-financed health care programs other than Medicare or State health care programs. The plain meaning of 42 U.S.C. 1320a-7(b)(1).

Sabbagh at 14.

Moreover, an appellate panel of the Departmental Appeals Board has stated that section 1128(b) applies to convictions for offenses other than those related to the delivery of an item or service under Medicaid. Samuel W. Chang, DAB App. 1198 at 8 (1990).

A straightforward interpretation of congressional intent as given in Reife, Sabbagh and Greene, coupled with a careful reading of section 1128(b)(1) in conjunction with Bornstein, reveals that section 1128(b)(1) is applicable to crimes outside of the Medicare program and not to the case before me.

It makes no difference under section 1128(a(1) that the crime perpetrated by Petitioner was against Medicaid, as opposed to Medicare. The section applies equally to criminal offenses related to the delivery of an item or service under either program. A conviction for presentation of a false Medicaid claim is a conviction of an offense related to the delivery of an item or service under Medicaid. Richard G. Phillips, DAB Civ. Rem. C-347 at 5 (1991), citing Greene, id. The Board has also held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Phillips at 5, citing Napoleon S. Maminta, DAB App. 1135 (1990).

Petitioner's conviction was for Medicaid fraud. Petitioner submitted claims for x-ray services that were not reimbursable under Medicaid. Moreover, Petitioner's crime victimized the Medicaid program as it caused Medicaid to financially reimburse for x-rays that were not covered under the program. Therefore, Petitioner's crime is a criminal offense within the meaning of section

1128(a)(1) of the Act. This result fits squarely within both the Phillips and Maminta cases.

2. The exclusion imposed and directed against Petitioner is required under sections 1128(a)(1) and 1128(c)(B)(3) of the Act.

Petitioner's conviction falls within the provisions of section 1128(a)(1) of the Act. This section mandates exclusion of any individual or entity convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. Section 1128(c)(3)(B) of the Act provides that, in the case of individuals against whom a mandatory exclusion is imposed, the minimum length of such an exclusion shall be five years. The I.G. properly imposed and directed a five-year exclusion against Petitioner.

3. I have no authority to change the effective date of Petitioner's exclusion.

Petitioner argues that the I.G. erred in not imposing its exclusion concurrently with that imposed by the Pennsylvania Department of Welfare (PDW). PDW imposed its exclusion on Petitioner effective August 23, 1990. Alternatively, Petitioner argues that the exclusion should be effective as of January 1, 1991, the date on which Petitioner voluntary ceased participation in the Medicare program. The I.G. argues that the ALJ does not have the authority to change the effective date of the exclusion.

My authority to hear and decide cases under section 1128 does not include authority to change the commencement date of an exclusion. Christino Enriquez, DAB Civ. Rem. C-277 (1991) citing Samuel W. Chang, DAB App. 1198 at 9 (1990). See, Richard G. Philips, DAB Civ. Rem. C-347 (1991). Therefore, Petitioner's request must be denied. Petitioner's exclusion date resultant from this proceeding will not run concurrent with PDW's exclusion, nor should it. Petitioner argues that his voluntary cessation of participation in Medicare should somehow serve to lessen his exclusion. Under section 1128(a)(1), there is no credit given for the exercise of a party's free choice not to participate in the program. Furthermore, even if I had the authority, which I do not, to change the date of the exclusion, Petitioner's voluntary cessation of participation in the program would not be a compelling reason to do so.

CONCLUSION

Based on the undisputed material facts, the parties' briefs, and the law, I conclude that Petitioner's conviction falls squarely within section 1128(a)(1). Section 1128(b)(1) is not applicable to this case. I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicaid for five years was mandated by law. I also conclude that I have no authority to change the effective date of Petitioner's exclusion. Therefore, I enter summary disposition in favor of the I.G. and sustain the five year exclusion imposed against Petitioner. I deny Petitioner's motion for summary disposition.

/s/

Steven T. Kessel
Administrative Law Judge