

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	DATE: January 13, 1992
Randall E. Wierzba,)	
)	
Petitioner,)	Docket No. C-353
)	Decision No. CR172
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letter dated December 20, 1990, the Inspector General (I.G.) notified Randall E. Wierzba, Petitioner herein, that he was being excluded for a period of five years from participation in the Medicare program and from participation in State health care programs as defined in section 1128(h) of the Social Security Act (Act). In this Decision, I refer to these State programs collectively as Medicaid. This exclusion, the I.G. contended, was mandated by section 1128(a)(1) of the Act, which was triggered by Petitioner's conviction of a criminal offense related to the delivery of services under Medicaid. Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion shall not be less than five years.

The I.G. moved for summary disposition of the case. Inasmuch as there are no material facts in dispute, I conclude that there is no need for oral testimony or the confrontation of witnesses and that summary disposition is appropriate. I further conclude that, under the facts of this case, a five-year exclusion is mandatory, and, accordingly, summary disposition is entered in favor of the I.G.

APPLICABLE LAW

Sections 1128(a)(1) and (c) of the Act (codified at 42 U.S.C. 1320a-7 (a)(1) and (c)) 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)(1) permits, but does not mandate, the exclusion from these same programs of any person whom the Secretary of Health and Human Services (HHS) (or his delegate, the I.G.) concludes is convicted of a criminal offense related to fraud, theft, or other financial misconduct. Before a person is excluded pursuant to this provision, he is entitled to a hearing before an administrative law judge. Section 1128(f)(2) of the Act.

BACKGROUND

The facts giving rise to the conviction are that in June 1988, Petitioner pled guilty in the New York State Supreme Court, Erie County, to attempted grand larceny against the Medicaid program.

After being informed of his exclusion, Petitioner filed the present action in which he contends that his conviction was not related to the delivery of services under Medicaid or Medicare and that the I.G.'s application of the mandatory exclusion provisions of the law was inappropriate. Instead, Petitioner suggests that the I.G. should have proceeded under the permissive exclusion provisions of section 1128(b)(1). Petitioner's second contention is that the onset date of the exclusion -- two and one half years after his criminal conviction and New York State's banning him from its Medicaid program -- unjustifiably extended the exclusion's overall length and caused him economic hardship. Furthermore, Petitioner argues that the I.G.'s tardiness deprived him of his right to a "reasonable" opportunity for a hearing, as provided by section 1128(f)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner, in his capacity as President of Courtesy Wheelchair Van Service, Inc., submitted fraudulent claims for Medicaid reimbursement for services which were not rendered. I.G. Ex. 1 & 2.*

2. On June 14, 1988, Petitioner pled guilty in the New York State Supreme Court, Erie County, to a single felony count of attempted grand larceny, consisting of submitting false invoices to the Erie County Department of Social Services for reimbursement under the Medicaid program. I.G. Ex. 1.

3. The State of New York excluded Petitioner from participation in Medicaid for a period of two years, effective June 1988. I.G. Ex. 4.

4. 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. 21662 (May 13, 1983).

5. On December 20, 1990, the I.G. notified Petitioner that, based upon his criminal conviction, he was being excluded for five years from the Medicaid and Medicare programs pursuant to section 1128(a)(1) of the Act. I.G. Ex. 6.

6. A criminal conviction for submitting fraudulent bills for services not rendered is sufficiently related to the delivery of an item or service under Medicare or Medicaid to justify application of the mandatory exclusion provisions of section 1128(a)(1).

7. The I.G. is under no obligation to proceed under the permissive exclusion provisions of section 1128(b)(1) against a person whom there might be reason to suspect of fraud. Once such person has been convicted, though, exclusion is mandatory.

* The I.G. filed seven exhibits with his memorandum accompanied by the required declaration and designated as Respondent's exhibits 1-7. These exhibits are admitted into evidence, but I have designated the exhibits as I.G. Ex. 1-7. Petitioner filed an attachment with his exhibit, accompanied by the required declaration, this exhibit is admitted into evidence, and I have designated it as P. Ex. 1.

DISCUSSION

First, as to the applicability of section 1128(a)(1), it has already been held that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley et al., DAB CR128 (1991); Marie Chappell, DAB CR109 (1990). These holdings comport fully with the intent of Congress (expressed when the mandatory exclusion provisions of section 1128 were added to the Act in 1977) that such suspensions should " . . . serve as a significant deterrent to fraudulent practices under Medicare and Medicaid" and combat the misuse of Federal and State funds. H. Rep. No. 393, 95th Cong., 1st Sess. 44, 69 (1977), reprinted in 1977 U.S. Code Cong. & Admin. News, 3039, 3047, 3072.

It is undeniable that there can be subject matter overlap between the mandatory exclusion for criminal conviction provisions of section 1128(a)(1) and the permissive exclusions for fraud or other financial misconduct authorized by section 1128(b)(1). Nevertheless, there is clear precedent holding that the Secretary is under no obligation to proceed under section 1128(b), but that once a person has been convicted of a program-related criminal offense, the exclusion is mandatory. See, e.g., Leon Brown, M.D., DAB CR83, aff'd, DAB 1208 (1990). Support for this rationale is also derived from the Act's legislative history. Exclusion hearings were apparently intended to allow accused persons the opportunity to clarify and explain their actions in cases where no criminal conviction had as yet been obtained. 133 Cong. Rec. 20,922 (1987). Thus, inasmuch as these exclusion proceedings were not instituted until after the criminal conviction, it was appropriate for the I.G. to invoke the mandatory exclusion rule.

It has also been expressly held that an administrative law judge has no authority to alter the designated effective date of a period of exclusion. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, M.D., DAB CR119 (1991).

CONCLUSION

The I.G. committed no error by not proceeding against Petitioner under the permissive exclusion provisions of Section 1128(b)(1). The language of these statutory provisions, as well as relevant precedent, show that the use of these provisions is discretionary and that the

I.G. is not obliged to take action against every person whom there might be grounds to suspect.

However, once Petitioner had been convicted (of an offense that I have found to be related to the delivery of items or services under Medicaid), the mandatory provisions of section 1128(a)(1) left the I.G. with no option but to exclude him.

The exclusion is AFFIRMED.

/s/

Joseph K. Riotto
Administrative Law Judge