Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Ian C. Klein, D.P.M.,	DATE: February 20, 1992
Petitioner,	
- v. -	Docket No. C-373 Decision No. CR177
The Inspector General.	

DECISION

By letter dated September 6, 1990, the Inspector General (I.G.) notified Petitioner Ian C. Klein, D.P.M. (Petitioner) that he was being excluded from participation in the Medicare program, and any State health care program, 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 a 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 and entities 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 a period of five years, the mandatory minimum under section 1128(c)(3)(B).

In a letter dated April 23, 1991, Petitioner requested a hearing and the case was assigned to me for hearing and decision. On June 3, 1991, I held a prehearing conference during which the I.G. indicated he would move to dismiss Petitioner's request for a hearing as being untimely filed. In my Ruling of July 30, 1991, I ruled

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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.

that good cause existed to give Petitioner an extended filing deadline of April 23, 1991.

I held a second prehearing conference on September 23, 1991. At this conference, Petitioner admitted that he had been convicted of a criminal offense within the meaning of section 1128(i) of the Act, but denied that his conviction was related to the delivery of an item or service under Medicare. I established a schedule for the I.G. to file a motion for summary disposition on the remaining issue of whether Petitioner's conviction was for an offense which was related to the delivery of an item or service under Medicare within the meaning of section 1128(a)(1) of the Act.

The parties timely filed their motions and briefs along with supporting exhibits. I have admitted all of the parties' exhibits into evidence.[2] I have considered the evidence, the parties' written briefs and supporting exhibits, and the applicable laws and regulations. There are no disputed issues of material fact in this case which would preclude the entry of summary disposition. I conclude that the I.G. was mandated by section 1128(a)(1) to exclude Petitioners for five years. I therefore sustain the exclusion.

ISSUE

The issue in this case is whether 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 Social Security Act (Act).

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[2]The parties' exhibits, briefs, and stipulations will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner Ian Charles Klein (Petitioner) was indicted in State court in New York for 2 counts of grand larceny in the second degree and 10 counts of offering a false instrument for filing in the first degree, a total of 12 counts. I.G. Ex. 1.

2. Under Count Two of the indictment, Petitioner was charged with having submitted and causing to be submitted to McAuto Systems Group, Inc., a fiscal agent of the State of New York, numerous Medicaid claim forms which falsely represented that Molded Plastazote Inlays, reimbursable at $220 a pair, had been provided to Medicaid recipients, whereas, in truth and in fact, as the defendants well knew, stock plastazote inlays that were not molded to patients feet were actually provided. Petitioner was charged, along with Arthur Minkoff, with intentionally causing the State of New York to pay the above-named entities approximately $95,420 to which they were not entitled. I.G. Ex. 1/3-4.

3. On August 29, 1988, Petitioner entered a plea of guilty under count two of the indictment. I.G. Ex. 2/3.

4. Petitioner admitted that he presented Medicaid reimbursement claims for custom made orthotics when in fact he had supplied patients with non-custom stock items and further admitted that he accepted a kickback for prescribing the orthotics. I.G. Ex. 2/12 - 13.

5. Petitioner was sentenced on October 28, 1988 to pay $7,500 in restitution to the Medicaid program and placed on five years probation.[3]

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[3]At the sentencing proceedings on October 28, 1992, the State Court mischaracterizes Petitioner's conviction. The court stated that Petitioner was convicted of grand larceny third degree under Count Two of the indictment. I.G. Ex. 3/4. However, Count Two of Petitioner's indictment states that Petitioner was indicted for grand larceny second degree. FFCL 2; I.G. Ex. 1/3. Additionally, when Petitioner pled guilty on August 29, 1988, the Court accepted Petitioner's plea of guilty to the charge of grand larceny second degree, in accordance with count two of the indictment. I.G. Ex. 2/3. Therefore, Petitioner was convicted for grand larceny in the second degree, not in the third degree.

6. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. Findings 1 - 5.

7. The Secretary of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128(a)(1) of the Act. 48 Fed. Reg. 21622 (May 13, 1983).

8. On September 6, 1990, the I.G. excluded Petitioner from participating in Medicare and directed he be excluded from Medicaid, pursuant to section 1128(a)(1) of the Act.

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

10. The exclusion imposed and directed against Petitioner is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

11. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 7; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. Petitioner is a podiatrist who supplied items or services to Medicaid recipients. P. Ex. 1. Petitioner was indicted for two counts of grand larceny in the second degree and ten counts of offering a false instrument for filing in the first degree. On August 29, 1988, Petitioner pled guilty to count two of the indictment, to the criminal offense of grand larceny in the second degree. Count two of Petitioner's indictment specifically states that Petitioner submitted and caused to be submitted Medicaid claim forms which falsely represented items provided to Medicaid recipients. Based on this conviction, the I.G. excluded Petitioner under section 1128(a)(1) of the Act.

Petitioner admits that his crime is a conviction within the meaning of section 1128(i). However, Petitioner disputes that his conviction is related to the delivery of an item or service under the Medicaid program within

the meaning of section 1128(a)(1).[4] Although Petitioner does not deny his conviction, he contends that he was not the party who actually committed an act of larceny against the New York Medicaid program. Petitioner asserts that, notwithstanding his conviction, the perpetrator of the offense was the laboratory which presented the false Medicaid reimbursement claims.

I disagree with Petitioner's contention. Irrespective of any contention now made by Petitioner concerning the facts of his case, the undisputed facts are that Petitioner was convicted of the criminal offense of larceny against the New York Medicaid program. That conviction is in and of itself sufficient to establish the requisite basis for the exclusion imposed and directed against Petitioner by the I.G. Furthermore, inasmuch as this is a case which falls within the mandatory exclusion provisions of section 1128, Petitioner must be excluded based on his conviction, regardless of any assertions he makes concerning his culpability for the offense of which he was convicted.

Section 1128(a)(1) of the Act requires the Secretary (or his lawful delegate, the I.G.) to impose and direct an exclusion against any individual or entity:

> that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under any . . . [Medicaid] program.

Section 1128(c)(3)(B) provides that the minimum term for any exclusion imposed under section 1128(a)(1) is five years.

The Act does not define the term "criminal offense related to the delivery of an item or service." In Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990), an appellate panel of the Departmental Appeals Board (Board) held that a conviction for submission of a false Medicaid claim was a conviction within the meaning of section 1128(a)(1). The appellate panel held that the offense

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[4] Section 1128(i) defines a conviction of a criminal offense to include the circumstance where a judgment of conviction has been entered against a party by a court. A judgment of conviction was entered against Petitioner. I.G. Exs. 2, 3.

was directly related to the delivery of an item or service under Medicaid:

> since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB App. 1078 at 7.

Petitioner's conviction is clearly detailed in the minutes of the plea agreement. Petitioner, represented by counsel, entered a guilty plea to the second count of his indictment for grand larceny in the second degree. I.G. Ex. 2/3. The second count of Petitioner's indictment specifically states that Petitioner, acting with others, "took, obtained and withheld property valued in excess of $1,500 by submitting numerous Medicaid claim forms which falsely represented that Molded Plastazote Inlays, reimbursable at $220 a pair, had been provided to Medicaid, whereas, in truth and in fact, as the defendants well knew, stock plastazote inlays that were not molded to patients feet were actually provided." I.G. Ex. 1/3.

The evidence leaves no doubt that the crime to which Petitioner pled guilty was submitting false Medicaid claim forms which claimed expensive custom inserts were provided, when, in fact, cheaper standard inserts were provided. The specific references made by the court in accepting the plea and Petitioner's attorney in offering the plea, make it clear that Petitioner's guilty plea was for submitting false bills to the Medicaid program. I.G. Ex. 2/3. Under the test enunciated in Greene, Petitioner's crime is related to the delivery of an item or service under Medicaid.

An appellate panel of the Board also has 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. Napoleon S. Maminta, M.D., DAB App. 1135 (1990). The petitioner in Maminta was convicted of converting a Medicare reimbursement check to his own use, when the check was intended to be paid to another health care provider. Moreover, in Richard G. Phillips, DAB Civ. Rem C-347 (1991) it was held that 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.

The rationale of Maminta and Phillips applies here. Both the indictment and the conviction specifically state that Petitioner's crime was willfully and knowingly submitting false Medicaid claims. I.G. Exs. 1/3; 2/3. The victim of Petitioner's criminal offense was the New York Medicaid program. Petitioner's criminal conviction therefore satisfies the tests enunciated in Maminta and Phillips.

Petitioner's contention that his conviction is not related to the Medicaid program is without merit. Essentially, Petitioner contends that he is not in fact guilty of the offense to which he pleaded and of which he was convicted. Rather, according to Petitioner, the actual perpetrator of the offense was the laboratory which presented false claims for Medicaid items or services. P. Br. at 4.

However, the issue in this case is not who billed Medicaid, or even whether there exist facts which exculpate Petitioner. The issue is whether Petitioner's conviction is related to the delivery of a Medicaid item or service within the meaning of section 1128(a)(1). As I find above, Petitioner pled guilty to count two of a criminal indictment which avers that he presented false claims to Medicaid. Petitioner was convicted of larceny against the New York Medicaid program. The mandate for exclusion contained in section 1128(a)(1) is premised on a conviction of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. Petitioner was convicted of such an offense. It is irrelevant that Petitioner now asserts that some third party is actually culpable for the offense of which Petitioner was convicted.

CONCLUSION

Based on the undisputed material facts, the evidence and the law, I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicaid for five years was mandated by law. Therefore, I enter summary disposition in favor of the I.G. and sustain the five year exclusion imposed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge