Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	
John J. Tolentino, M.D., Afzal Butt, M.D., and Rajinder S. Uppal, M.D.,	DATE: February 26, 1992
Petitioners,	Docket Nos. C-92-018, C-92-019, C-92-031
- v. -	
The Inspector General.	Decision No. CR180

DECISION

By letters dated November 4, 1991, John G. Tolentino, M.D.; Afzal Butt, M.D.; and Rajinder S. Uppal, M.D., the Petitioners herein, were notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that they would be excluded for five years from participation in the Medicare program and from participation in the State health care programs as defined in section 1128(h) of the Social Security Act (the Act), referred to in this decision as Medicaid. The I.G. stated that the exclusion was mandated by section 1128(a)(1) of the Act, based upon Petitioners having been convicted of criminal offenses related to the delivery of items or services under Medicaid or Medicare.

On April 27, 1990, Petitioners pled guilty and were convicted, in the U.S. District Court, Eastern District of New York, of violating 42 U.S.C. § 1320a-7b(b)(1)(B)d (1988) (section 1128B(b)(1)(B) of the Act). They admitted to knowingly and willfully soliciting and receiving remuneration for ordering or arranging for the ordering of items for which payment may be made under the Medicaid or Medicare programs. The remuneration was received from an officer of the company supplying inhalation therapy equipment which Petitioners had prescribed and which was reimbursable under Medicaid or Medicare.

Inasmuch as the three cases present almost identical facts, involve the same criminal offense, and advance the same legal defense (articulated by the same attorney), the cases were consolidated. The I.G. moved for summary disposition. I conclude that although certain non-outcome-determinative matters of fact -- such as the precise nature of Petitioners' motivations -- may be controverted, there are no material issues in dispute, and that summary disposition is appropriate. I further conclude that, under the facts of this case, the five-year exclusions are mandatory, and, accordingly, enter summary disposition 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) (1988) 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. Sections 1128(b)(7) and 1128B(b)(1) permit, but do not mandate, the exclusion from these same programs of any person whom the Secretary of HHS (or the I.G.) concludes is guilty of program-related fraud, kickbacks, or related activities. Before a person is excluded pursuant to these latter provisions, he is entitled to a hearing before an administrative law judge as provided for in section 1128(f)(2) of the Act.

Findings of Fact and Conclusions of Law[1]

1. At all times relevant herein, Petitioners were licensed physicians in New York state and were Medicare and Medicaid providers.

2. Petitioners accepted remuneration from an officer of the company supplying inhalation therapy equipment which Petitioners had prescribed or ordered and which was reimbursable under Medicaid or Medicare.

3. Petitioners were convicted (after having pled guilty) on April 27, 1990, in the U.S. District Court, Eastern District of New York, of violating 42 U.S.C. § 1320a-7b(b)(1)(B) (section 1128B(b)(1)(B) of the Act), by

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[1] The record of this case consists of seven documentary exhibits submitted by the I.G., Petitioner's brief, and the I.G.'s brief.

knowingly and willfully soliciting and receiving remuneration for ordering or arranging for the ordering of items for which payment may be made under the Medicaid or Medicare programs. Petitioners were fined and put on probation.

4. The Secretary 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. By letters dated November 4, 1991, Petitioners were notified by the I.G. that they would be excluded for five years from participation in the Medicare and Medicaid programs.

6. A criminal conviction for accepting kickbacks for authorizing the purchase of medical equipment 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 law proscribes all kickbacks given in exchange for ordering items or services for which payment may be made under Medicaid or Medicare -- there is no exception allowing a person to receive kickbacks for medically-justifiable transactions.

8. The mere fact of conviction of a relevant offense triggers exclusion; criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1).

9. The I.G. is under no obligation to proceed under the discretionary or permissive exclusion provisions of section 1128(b)(7) against a person who may be suspected of violating the anti-kickback law.

10. Once a person has been convicted of a program-related criminal offense, exclusion for at least five years is mandatory.

11. Regardless of the purportedly essential and irreplaceable nature of the services Petitioners render to the community, and the personal hardships they are suffering, an administrative law judge has no authority to waive exclusion or to reduce the statutory five-year exclusion which follows a program-related criminal conviction.

Argument

Petitioners argue that their convictions do not constitute program-related offenses and that, therefore, only permissive exclusion actions (pursuant to section 1128(b)) could be brought against them. Petitioners further note (1) that there was an undisputed legitimate medical need for the breathing devices, so they would have been ordered irrespective of the gifts given Petitioners; (2) that Petitioners themselves neither billed Medicaid/Medicare for the items at issue, nor had any connection with the supplier's doing so; and that (3) the exclusions imposed are unduly harsh in light of the absence of intentional wrongdoing, Petitioners' exemplary professional records of community service (i.e., Dr. Uppal is said to be the only internist in his neighborhood in New York City who can communicate with Indian, Pakistani, and Afghan patients in their own tongues; Dr. Tolentino's practice served an economically deprived area and he has been responsible for a hospital unit of pediatric AIDS patients; Dr. Butt's practice was primarily among poor geriatric patients), and Petitioners' need to work at their professions to support their dependent children.

Discussion

First, I note that a guilty plea to a criminal charge satisfies the requirement that a Petitioner have been convicted within the meaning of the Act. See section 1128(i) of the Act.

As to the argument that the present convictions are unrelated to the delivery of items or services under Medicaid or Medicare, and thus are not program-related offenses encompassed by the mandatory exclusion provisions of section 1128(a), 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. Finally, the law under which Petitioners were convicted shows by its very existence and plain language that Congress has

determined that kickbacks impede the proper functioning of the Medicaid and Medicare programs and the delivery of items and services thereunder. Applying this statutory background and case precedent to the case at hand, I conclude that the delivery of items under Medicaid/Medicare was an essential and integral part of Petitioners' criminal conduct and convictions. Without this connection, Petitioners would not have been offered and taken the kickbacks in question. Consequently, Petitioners' convictions fall within the parameters of section 1128(a) and mandate exclusion.

Based on the above reasoning, I reject the contention that there was no nexus between Petitioners' criminal conduct and the delivery of items or services under Medicaid/Medicare, and also find no merit in the suggestion that the absence of such a connection required the I.G. to proceed under the permissive exclusion provisions of section 1128(b).[2]

It was also argued that the equipment prescribed was medically necessary, and would have been prescribed irrespective of the remuneration. However, the law proscribes all kickbacks given in exchange for ordering items or services for which payment may be made under Medicaid or Medicare -- there is no exception allowing a person to receive kickbacks for medically-justifiable transactions.

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[2] To be sure, there is some subject matter overlap between the Act's provision of mandatory exclusion for any relevant criminal conviction (section 1128(a)(1)) and its authorization of permissive exclusion for fraud, kickbacks, etc. (sections 1128(b)(7) and 1128B(b)(1)). Nevertheless, case law has established that the I.G. is not obliged to proceed under section 1128(b), but that once there has been a conviction for a program-related offense, section 1128(a)(1) is controlling and exclusion must be imposed. See, e.g., Leon Brown, M.D., DAB CR83, aff'd. DAB 1208 (1990). This rationale is also supported by the Act's legislative history, which shows that pre-exclusion hearings in (permissive) kickback cases were intended to allow accused persons the opportunity to explain their actions where no criminal conviction had as yet occurred. In the case at hand, since proceedings were not instituted until after Petitioner's conviction, it was appropriate for the I.G. to utilize the mandatory exclusion rule.

Finally, as to the suggestion that Petitioners were motivated by their patients' best interests when prescribing the respiratory equipment, that they had no involvement in Medicaid/Medicare reimbursement, and that they were not influenced in any way by the remuneration received, it can only be said that Petitioners admitted having knowingly and willfully committed the criminal offense of soliciting and receiving cash in exchange for ordering or arranging for the ordering of items for which payment may be made under the Medicaid or Medicare programs. They cannot now challenge their criminal convictions or deny the motivation to which they admitted. And, in any event, it is the mere fact of conviction of a relevant offense that triggers exclusion; criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). See Richard G. Phillips CR133 (1991): "the conviction, and not the underlying conduct, is the triggering event which mandates the Secretary to impose and direct an exclusion." Also, see Dewayne Franzen, DAB 1165 (1990).

Lastly, Petitioners argue that the periods of exclusion imposed upon them should be reduced or waived altogether in light of the purportedly essential and irreplaceable nature of the services they render to the community and the personal hardships they are suffering. The law, however, gives the administrative law judge no authority to waive exclusion or to reduce the statutory five-year exclusion which follows a program-related criminal conviction. Section 1128(c)(3)(B) provides:

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years, except that...the Secretary may waive exclusion under subsection (a)(1) in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community. The Secretary's decision whether to waive the exclusion shall not be reviewable. (Emphasis added.)

Conclusion

The conduct for which Petitioners were convicted mandates five year exclusions pursuant to section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge