Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Merrill D. Van Patten, D.O.,	DATE: June 9, 1992
Petitioner,	Docket No. C-92-051
- v. -	Decision No. CR206
The Inspector General.	

DECISION

By letter dated July 22, 1991, Merrill D. Van Patten, D.O., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare and Medicaid programs (Medicaid here represents those State health care programs mentioned in section 1128(h) of the Social Security Act (the Act)). 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 Medicare or Medicaid.

Petitioner filed a timely request for review of the I.G.'s action. The I.G. moved for summary disposition of the case. Inasmuch as there is no dispute as to any material fact, and the only question is the legal interpretation of the facts, I find summary disposition appropriate.

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(i)(1) of the Act provides that an individual is deemed to have been convicted of a criminal offense when a judgment of conviction has been entered against the individual or entity by a federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged.

Sections 1128(b)(1) and (7) permit, but do not mandate, the exclusion from these same programs of any person who the Secretary of HHS (or his delegate, the I.G.) concludes is guilty, or has been convicted, of health care related fraud, kickbacks, false claims, or similar activities. Before a person is excluded pursuant to these provisions, he is entitled to a hearing before an administrative law judge (section 1128(f)(2)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

1. On June 5, 1990, following a trial in the Iowa District Court for Woodbury County, Petitioner, a licensed osteopath and a Medicaid provider, was convicted of two counts of fraudulent practice in the third degree (billing Medicaid for services not rendered). I.G. Ex. 1, 2.

2. Petitioner was given a suspended sentence, placed on probation for two years, ordered to perform 100 hours of community service, and required to make restitution of $2,627.15 to Iowa Medicaid. I.G. Ex. 2.

3. 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).

4. On July 22, 1991, Petitioner was notified by the I.G. that he would be excluded for a period of five years from participation in the Medicare and Medicaid programs because of his conviction of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. I.G. Ex. 4.

5. A criminal conviction for fraudulently billing Medicaid for services not rendered is sufficiently

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[1] Petitioner and the I.G. submitted documentary exhibits, briefs and reply briefs. I admitted all of the exhibits into evidence and refer to them herein as "P. Ex. (number)," and "I.G. Ex. (number)."

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).

6. 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 the Medicare or Medicaid programs.

7. The I.G. is under no obligation to proceed under the permissive exclusion provisions of section 1128(b)(7) of the Act against a person who might have committed fraud. Once such person has been convicted of a program-related offense, though, exclusion is mandatory under section 1128(a).

8. HHS exclusion actions barring a person or entity from participation in the Medicare and Medicaid programs do not violate constitutional rights to due process.

9. The five-year exclusion, besides being prescribed by statute, is not cruel and unusual or disproportionate.

10. The five-year exclusion does not violate the constitutional ban on double jeopardy because of the remedial nature of the HHS action and because federal proceedings are not barred by a prior State conviction.

ARGUMENT

First, Petitioner maintains that he "did nothing which warrants an exclusion." He also contends that "a five-year exclusion is truly cruel and unusual punishment for a misdemeanor offense" which resulted only in a small overpayment. Petitioner notes that the I.G. is also bringing a civil money penalty proceeding against him which, he feels, further emphasizes the disproportionate nature of his punishment. He states that, in other cases, physicians received lesser exclusions even though they had misappropriated much more money.

Petitioner's next contention is that exclusion is not mandated in his case, but rather is permissive. By this, he means that section 1128(b) should apply to his case because it expressly encompasses fraud.

Finally, Petitioner contends that "the summary process of exclusion" pursuant to which he was barred from the Medicare/Medicaid programs, "is a denial of due process under the law." He also states "he has been once

punished and thus cannot be twice punished for the same offense."

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a) is that the the individual or entity in question be convicted of a criminal offense under federal or State law. In the present case, the record shows that Petitioner was found guilty and that a conviction was entered against him, thus satisfying the Act's definition of "convicted" (1128(i)).

I also find that the requirement of section 1128(a)(1) that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid has been satisfied. Specifically, it is well-established in Departmental Appeals Board (DAB) precedent that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley, et al., DAB CR128 (1991) and 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.C.C.A.N. 3039, 3047, 3072. Thus, the I.G.'s use of mandatory exclusion here had a sound legal basis.

Petitioner has argued that the I.G. should have proceeded under the permissive exclusion laws. In this regard, although there appears to be subject matter overlap between the mandatory exclusion provisions of section 1128(a) and the permissive exclusion provisions of section 1128(b), section 1128(a) is more sharply focused in that it addresses only program-related crimes and requires action by HHS. Permissive exclusions, by contrast, may be based upon a much wider spectrum of misdeeds and their invocation is wholly discretionary.

This distinction was central to the decision of the appellate panel in Samuel W. Chang, M.D., DAB 1198 (1990), which 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." Precedent dealing with the scope of the Secretary's discretion holds that HHS is under no

obligation to institute a permissive exclusion under section 1128(b), but that once a person has been convicted of a program-related criminal offense, exclusion is mandatory. See, e.g., Leon Brown, M.D., DAB CR83 (1990), aff'd, DAB 1208 (1990).

Petitioner's contention that exclusion by HHS constitutes a denial of due process has been rejected by the courts. Rodabaugh v. Sullivan, 943 F.2d 855 (8th Cir. 1991); Lavapies v. Bowen, 883 F.2d 465 (6th Cir. 1989).

Finally, with regard to the allegations of cruel and unusual or disproportionate treatment, Petitioner produced a letter from the I.G. dated February 28, 1992, (P. Ex. 3), which states that the I.G. proposes to levy penalties and assessments against him amounting to nearly $300,000. This proposed action, however, is not included in the matter before me and has a completely separate statutory basis. For these reasons, I find that the proposed penalties and assessments are not factors to be considered when evaluating the validity of the five-year exclusion. Petitioner also did not document his charge that similarly situated medical practitioners were treated more leniently by the Secretary and the I.G. Based on the above, I conclude that Petitioner's five-year exclusion, besides being prescribed by statute, is not unusual or disproportionate.

As to double jeopardy, the constitutional ban does not preclude a civil sanction being imposed against a person who has been convicted of a criminal offense arising out of the same facts. An exception to this rule is that there could be a double jeopardy bar to such civil action if the civil penalty so far exceeds actual harm to the government that it cannot be characterized as remedial. U.S. v. Halper, 490 U.S. 435 (1989). In the case at hand, regardless of what may eventually be decided about the money penalty, the exclusion advocated by the I.G. here is not out of proportion to the harm done by Petitioner to the Medicaid program, and the need to preclude repetition of his behavior, and thus may be deemed remedial. Furthermore, under the dual sovereignty doctrine, double jeopardy does not attach to a federal prosecution based on facts which previously led to a State conviction. See, e.g., U.S. v. A Parcel of Land, 884 F.2d 41 (1st Cir. 1989).

CONCLUSION

Petitioner's conviction requires his exclusion under section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge