Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sanford Orloff, R.Ph.,	DATE: June 16, 1992
Petitioner,	Docket No. C-92-058
- v. -	Decision No. CR209
The Inspector General.	

DECISION

By letter dated January 13, 1992, Sanford A. Orloff, R.Ph., 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 Medicaid.

Petitioner filed a timely request for review of the I.G.'s action.

The parties agreed that I should decide the case on the basis of written submissions in lieu of an in-person hearing.

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.

Section 1128(b) et seq. permits, but does not mandate, the exclusion from these same programs of any person whom 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 (1128(f)(2)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

1. During the period relevant herein, Petitioner, a registered pharmacist, was part owner of Kaplan Pharmacy, of Brooklyn, New York, a Medicaid provider.

2. During 1984 and 1985, Petitioner invested in Marcy Vernon Soul Shoes, a retail store which participated in the Medicaid program. Petitioner held a 20 percent ownership interest and had management responsibilities and/or control. P. Ex. 1; I.G. Ex. 1, 2, 7.

3. Marcy Vernon Soul Shoes defrauded Medicaid of approximately $200,000 by submitting claims for orthopedic shoes when, in fact, it had only provided ordinary shoes. P. Ex. 1; I.G. Ex. 1, 2.

4. Petitioner received a share of the proceeds of the Medicaid fraud amounting to at least $50,000. P. Ex. 1; I.G. Ex. 2, at 6-7.

5. On September 24, 1990, Petitioner pleaded guilty in New York State Supreme Court to Grand Larceny in the Second Degree. P. Ex. 1; I.G. Ex. 2-5.

6. Petitioner was sentenced to a conditional discharge and paid restitution of $50,000 to Medicaid. P. Ex. 1; I.G. Ex. 3-5.

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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)" or "I.G. Ex. (number)."

7. 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).

8. On January 13, 1992, Petitioner was notified by the I.G. that it had been decided to exclude him 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 Medicaid.

9. A criminal conviction for fraudulently billing Medicaid for services not rendered or goods not delivered 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).

10. The I.G. is under no obligation to proceed under the permissive exclusion provisions of sections 1128(b)(1) or (7) of the Act against a person who might have committed fraud. However, once there has been a conviction of a program-related offense, a five-year exclusion is mandatory under section 1128(a).

11. The mandatory minimum exclusion provisions of section 1128(a) apply to all exclusions based on convictions occurring after August 18, 1987, the effective date of the Medicare and Medicaid Patient and Program Protection Act of 1987.

12. After an extensive investigation, the New York Attorney General (A.G.) concluded there was no indication that Petitioner, in his capacity as a pharmacist, violated any regulations relating to Medicare or Medicaid. P. Ex. 1.

13. Petitioner cooperated with the A.G. in the prosecution of the instigator of the Marcy Vernon scheme, a Dr. Robert Rosenblitt. P. Ex. 1.

ARGUMENT

Petitioner's principal contention is that exclusion is not mandated in his case, but rather is permissive. Specifically, he states that his "...conviction relates to the filing of false or improper claims by the corporate entity, Marcy Vernon Soul Shoes, for the occasions on which it dispensed non-conforming shoes and this conduct is classified in subpart C of Part 1001 of the regulations as grounds for permissive action." If

any action against him is taken under the permissive exclusion sections of the Act -- i.e., if he is no longer subject to a nondiscretionary five-year exclusion -- Petitioner believes that his history of cooperation with the New York Attorney General and the community's appreciation of his services as a pharmacist (see P. Ex. 2) will tend to mitigate the gravity of his offense.

In the alternative, he argues that the unlawful acts in his case occurred, and were known to the authorities, prior to the inception of the mandatory exclusion law on September 1, 1987. He maintains that it is unjust to retroactively apply such law to conduct which actually took place in 1984 and 1985 in that it denies him equal application of the law.

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 transcript of the New York Supreme Court proceedings and the certificate of the clerk of the court (I.G. Ex. 2, 5) prove that Petitioner pled guilty and that a conviction was entered against him, thus satisfying the definition of "convicted" in section 1128(i) of the Act.

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 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).

Petitioner argues that the I.G. should have proceeded under those sections of the Act that deal with permissive exclusion. In this regard, although there is apparent subject matter overlap between the mandatory exclusion provisions of section 1128(a) and the permissive exclusion section 1128(b), section 1128(a) 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, aff'd DAB 1208 (1990).

Lastly, Petitioner attacked his exclusion as an unlawful retroactive application of section 1128(a)(1). This point, however, has been repeatedly litigated and it has been established that the mandatory minimum exclusion provisions apply to all exclusions based on convictions occurring after August 18, 1987 -- the effective date of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. 100-93 § 15(b), 101 Stat. 698 (1987). See Francis Shaenboen, R.Ph., DAB 1249 (1991).

CONCLUSION

Petitioner's conviction requires his exclusion pursuant to section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge