Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Douglas Schram, R.Ph.	DATE: July 21, 1992
Petitioner,	Docket No. C-92-055
- v. -	Decision No. CR215
The Inspector General.	

DECISION

By letter dated December 3, 1991, Douglas Schram, 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 program and those State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I will use "Medicaid" hereafter in this Decision to represent those State programs.) 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, and the I.G. moved for summary disposition.

Because I conclude that there are no material and relevant factual issues in dispute, I have granted the I.G.'s motion and have decided 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period June 1975 to August 16, 1988, Petitioner was a registered pharmacist in Detroit, Michigan. P. Ex. 1.

2. Petitioner pled guilty in, and was sentenced by, the 30th Judicial District Court, State of Michigan, of attempted conspiracy to defraud Medicaid. I.G. Ex. 3, 5, 8: P. Br. at 5.

3. Petitioner had previously been deprived of his pharmacist's license and barred from the State Medicaid program by the State of Michigan. P. Ex. 3.

4. Judgment was entered against Petitioner on July 27, 1990, and amended November 2, 1990. The court sentenced him to probation for a period of five years and required him to pay restitution and costs totalling $26,000. I.G. Ex. 7, 8.

5. The Secretary of the Department 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).

6. A criminal conviction based upon attempted conspiracy to defraud Medicaid is related to the delivery of an item or service under Medicaid and justifies application of the mandatory exclusion provisions of section 1128(a)(1).

7. 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 Medicare or Medicaid.

8. The Secretary and his delegate, the I.G., are under no obligation to institute a permissive exclusion action under section 1128(b).

---

[1] Petitioner and the I.G. submitted written argument and documentary exhibits. I admitted all of the exhibits into evidence and refer to them herein as P. Ex. (number) or I.G. Ex. (number).

9. A defendant in a criminal proceeding does not have to be advised of every possible penalty or loss he may suffer as a consequence of being found guilty.

10. Petitioner was not deprived of his right to due process even if he was not told by the prosecutor or the court that his guilty plea would eventually lead to his mandatory exclusion.

11. The purpose of Section 1128 is remedial in nature -- to protect federally-funded health care programs and their beneficiaries from untrustworthy providers.

12. The exclusion proposed by the I.G. herein is not disproportionate 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.

13. 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.

ARGUMENT

Petitioner makes a number of arguments opposing summary judgment in favor of the I.G. He contends: 1) he was not convicted, because the offense to which he pled guilty is not a crime under Michigan law; 2) even if it were, it was not related to the delivery of an item or service under Medicaid; 3) his should have been a permissive exclusion under one of the provisions of section 1128(b) of the Act; 4) his exclusion is punitive and thus in violation of the Double Jeopardy Clause of the United States Constitution; 5) the acts on which his "conviction", and thus his exclusion, was based occurred prior to the enactment of the statute under which he is being excluded, and thus violates the Ex Post Facto Clause of the Constitution; and 6) the delay between the time that the I.G. knew of Petitioner's alleged infractions and the imposition of the exclusion prejudiced Petitioner in a variety of ways to the extent that he is denied equal protection of the laws.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a

criminal offense under federal or State law. Petitioner argues that the offense to which he admittedly pled guilty is not a cognizable offense under the laws of Michigan. P. Br. at 5 - 10. Even assuming, as I must here, that he is correct, I conclude that he was "convicted" within the meaning of section 1128(i) of the Act. Petitioner pled guilty to what the court papers represent as a crime and was sentenced by a court of competent jurisdiction. This satisfies the definition of "convicted" within the meaning of section 1128(i) of the Act.

If, as Petitioner argues, "attempted conspiracy" is an inherent impossibility and not an offense under Michigan law, the place for him to seek his remedy likely would be the State appellate courts. In this review of his exclusion, Petitioner may not collaterally attack the criminal conviction on which the exclusion is based. The indictment and other court documents establish beyond dispute the nature of Petitioner's criminal conduct and the fact that he voluntarily pled guilty to a bargained-down offense predicated upon such conduct. Even assuming that the conviction is erroneous as a matter of Michigan law, the I.G. is authorized to exclude Petitioner on the basis of that conviction.

I find also 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. Petitioner argues that his was not a related offense because the only cognizable crime -- false billing -- was committed well after the delivery of the health care item or service. P. Br. at 10 - 12. However, it is well-established in decisions by appellate panels of the Departmental Appeals Board (DAB) that financial misconduct directed at these programs in the course of the delivery of items or services constitutes a program-related offense invoking mandatory exclusion. David D. De Fries, D.C., DAB 1317 at 3 (1992). In particular, fraud involving Medicare or Medicaid claims has been held to constitute program-related conduct. Marie Chappell, DAB CR109 at 10 - 11 (1990); Russell E. Baisley, et al., DAB CR128 at 10 (1991). Thus, the fact that Petitioner attempted to conspire to defraud Medicaid is sufficient to bring his conviction within the ambit of the program-related financial misconduct discussed above.

Petitioner argues that the I.G. should have treated his criminal conduct as the basis of a permissive exclusion action. In this regard, although the literal language of the Act may cause some confusion between the mandatory

exclusion provisions of section 1128(a) and the permissive exclusions authorized by section 1128(b), it has long been held that section 1128(a) addresses Medicare or Medicaid related crimes. Permissive exclusions, by contrast, can be based upon a much wider spectrum of conduct (which may or may not involve convictions for crimes against the government). This distinction was central to the appellate decision in Samuel W. Chang, M.D., DAB 1198 at 8 (1990), which held: "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." There is also precedent dealing with the scope of the Secretary's discretion, holding 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).

Next, Petitioner contends that the proposed exclusion is essentially punitive in nature. P. Br. at 15 - 18. The purpose of section 1128 of the Act is remedial in nature, i.e., to protect federally-funded health care programs and their beneficiaries from untrustworthy providers. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682. In this case, the I.G. has proposed excluding a provider who defrauded the Medicaid program. Such action, on its face, fully comports with the remedial nature of the statute. That the I.G. did not seek more than the minimum period of exclusion does not suggest that there was a punitive motivation.

As a matter of law, the constitutional ban on double jeopardy does not preclude a federal civil sanction being imposed against a person who has been convicted by a State of a criminal offense arising out of the same facts. Where the sanction is based on a federal conviction, 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, 447 - 51 (1989). In the case at hand, though, I reiterate that the exclusion advocated by the I.G. is proportionate 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.

Also, Petitioner alleges that the conduct being penalized pre-dated the enactment of the mandatory exclusion law,

so that such law is being applied in an unlawful ex post facto manner. 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 at 5, 6 (1991).

Finally, Petitioner contends that the I.G. did not act within a reasonable time to effect his exclusion. P. Br. at 18 - 23. He argues that the I.G. could have imposed a permissive exclusion as early as his termination from the Medicaid program in October 1988. He contends that, as a result of the delay, the permissive exclusion became mandatory, and a five year exclusion, in effect, caused him to be barred from the Medicaid program for nine years. He asserts that had he known the consequences, he would have pled differently, and, therefore, the delay also resulted in the denial of his right to effective counsel and to appeal his conviction.[2]

Petitioner's reliance on these equal protection arguments is misplaced. His exclusion was predicated on his conviction of a crime, not on the underlying conduct, and the record shows that such conviction occurred only five months before the I.G. informed Petitioner that an exclusion might be imposed. I.G. Ex. 9. A defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his plea of guilty. See, U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985). Thus, even if I were authorized to review Petitioner's conviction, the alleged failure of the court or the prosecutor to fully advise him of the consequences would not be a basis for me to throw out the conviction.

Neither the I.G. nor this judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 at 12 - 14 (1989), aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). An administrative law judge also lacks the authority to alter the effective date of

---

[2] In his request for hearing, Petitioner asserted that the delay deprived him of the right to call witnesses on his behalf. He never identified who these witnesses were or what testimony they might provide. He appears to have abandoned this argument in his brief.

exclusion designated by the I.G. Christino Enriquez, DAB CR119 at 7 - 9 (1991). Similarly, the exclusion of providers from the Medicare and Medicaid programs is expressly required by statute in cases such as this, and I am not authorized to nullify or reduce it.

CONCLUSION

Petitioner's conviction requires his exclusion for a period of at least five years, pursuant to section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge