Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Nabil Zawaideh, R.Ph.,	DATE: November 4, 1992
Petitioner,	Docket No. C-92-112
- v. -	Decision No. CR239
The Inspector General.	

DECISION

The case comes to me on the timely request for hearing filed by Nabil Zawaideh, R.Ph. ("Petitioner" herein), under 42 C.F.R. § 1005.2 (1992). Petitioner contests the sanctions imposed by the Inspector General (I.G.) of the Department of Health and Human Services (DHHS) under section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a). By delegation from the Secretary of DHHS, the I.G. has the authority to determine and impose sanctions under said law. 48 Fed. Reg. 21662 (May 13, 1983). Petitioner takes issue with the I.G.'s determination that he should be excluded from participating in the Medicare and relevant State health care programs for the minimum period of five years mandated by law due to his conviction for a program-related crime.[1] See, 42 U.S.C. § 1320a-7(a), (c)(3)(B), and (i).

It is undisputed that the I.G. had initially sought to notify Petitioner of the five-year exclusion by notice dated April 14, 1992. On receiving Petitioner's protest concerning the nonreceipt of this April 14, 1992 letter, the I.G. reinformed Petitioner of this mandatory five-

---

[1] "State health care plans," defined at section 1128(h) of the Act, denotes various State health care programs receiving federal funds under Titles XIX, V, and XX of the Act. Unless the context indicates otherwise, Medicaid, which is funded under Title XIX, will be used as an abbreviation for "State health care plans" when discussing sanctions under section 1128 of the Act.

year exclusion by letter dated May 13, 1992. Further, the I.G. denied Petitioner's request for staying the exclusion pending the disposition of Petitioner's assets. The effective date of the exclusion was changed to the date of the reissued notice, May 13, 1992. Petitioner then requested a hearing by letter dated May 27, 1992.

On July 15, 1992, the I.G. moved for summary disposition, with a supporting brief and the various attachments detailed below. Petitioner responded on August 14, 1992. The I.G. chose not to file a reply brief.

In the absence of any genuine issue of material fact, and in consideration of the record, the relevant laws and regulations, and legal precedents that are controlling, I enter summary judgment in favor of the I.G..

ISSUE

As specified by section 1128(a)(1) of the Act, the sole issue is whether a basis for the imposition of the sanction exists; that is,

> a. whether Petitioner was "convicted" of a criminal offense,
>
> and
>
> b. whether Petitioner's "conviction" related to the delivery of an item or service under the Medicare or Medicaid Programs

as required by section 1128(a)(1) of the Act.

APPLICABLE LAW

Section 1128 of the Act mandates that persons or entities convicted of a program-related crime (i.e., "criminal offense related to the delivery of item or service under Title XVIII or under any State health care program") be excluded from participation in the Medicare and Medicaid Programs for a period of not less than five years. Sections 1128(a)(1) and (c)(3)(B) of the Act. For purposes of the law, "convicted" includes "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court . . . ." Section 1128(i) of the Act.

Section 1102 of the Act, 42 U.S.C. § 1302(a), authorizes the Secretary of DHHS to "make and publish such rules and

regulations not inconsistent with this Act, as may be necessary to the efficient administration of the functions" with which he has been charged.

The final regulations promulgated by the Secretary of DHHS on January 29, 1992, limit the issues in hearings before administrative law judges in exclusion cases. At most, individuals may raise only the following two issues:

> 1. Whether the basis for the imposition of the sanction exists.
>
> and
>
> 2. Whether the length of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). The same regulation also specifies that, where the I.G. has imposed sanctions pursuant to the mandatory provisions of the statute, and the exclusion is for the minimum period of five years, there is no right to a hearing on the issue of whether the length of exclusion is reasonable. 42 C.F.R. § 1001.2007(a)(2).

Other sections of the regulations reemphasize the statutory mandate that no exclusion imposed for any program-related conviction shall be for less than five years. 42 C.F.R. § 1001.102(a). Therefore, no mitigation factor shall be considered in any case where the I.G. has imposed the minimum exclusion. 42 C.F.R. § 1001.102(c).

As especially relevant to many of the arguments made by Petitioner, the final regulations promulgated by the Secretary of DHHS also state:

> The OIG [Office of I.G.] will exclude any individual or entity that --
>
> (a) Has been convicted of a criminal offense related to the delivery of an item or service under Medicare or State health care program, <u>including the performance of management or administrative services related to the delivery of items or services under any such program</u>
> . . . .

42 C.F.R. § 1001.101 (emphasis added).

> When the exclusion is based on the existence of a conviction . . . , the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d).

Finally, it is well settled that all components of an agency are bound by duly promulgated substantive rules, which have the force of law. See, e.g., Dyer v. Secretary of Health and Human Services, 889 F.2d 682, 685 (6th Cir. 1989) (discussion of differences between an agency's policy statements and substantive rules).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the time period relevant to these proceedings, Petitioner was a registered pharmacist and the owner of Seven-Van Pharmacy in the State of Michigan. I.G.'s Brief at p. 1 and Petitioner's Brief at p. 3.

2. As owner of Seven-Van Pharmacy, Petitioner has had a Medicaid provider number, which was used to file claims with the State of Michigan under the Medicaid Program. I.G. Exhibit (Ex.) 2 at p. 29 and Petitioner's Brief at p. 3.

3. On June 21, 1991, Petitioner pled nolo contendere in the Circuit Court of Michigan to 10 counts of filing false Medicaid claims during the period from August 22, 1986 to January 2, 1987, in violation of the State's Medicaid False Claim Act. I.G. Ex. 2.

4. Petitioner's nolo contendere plea to the 10 counts was accepted by a court of competent jurisdiction. I.G. Ex. 2, 3.

5. The statute directs the I.G. to consider the State court's acceptance of Petitioner's nolo contendere plea as a "conviction" for purposes of determining and imposing sanctions under section 1128 of the Act.

6. The filing of false claims for reimbursement by the Medicaid Program, for which Petitioner was convicted, was related to the delivery of an item or service under the Medicaid Program.

7. In requesting and obtaining payments from the Medicaid Program for false claims, Petitioner has caused harm to the Medicaid Program.

8. Petitioner's criminal conviction in State court for the use of his Medicaid provider number to repeatedly file false claims, and in obtaining payments from the State Medicaid Program pursuant to these false claims, is a conviction for a program-related crime, within the meaning of section 1128(a)(1) of the Act.

9. The I.G. acted properly under the law by imposing the mandatory exclusion of not less than five years directed by statute for Petitioner's program-related criminal conviction.

ANALYSIS OF FACTS AND LAW

A. The Parties' Contentions

On July 15, 1992, the I.G. moved for summary disposition, contending that there exists no genuine issue of material fact and that, as a matter of law, the outcome of this case is controlled by section 1128 of the Act.

Petitioner agreed with the I.G. that he did plead nolo contendere to 10 counts of filing false Medicaid claims and that his plea had been accepted by the presiding judge. Petitioner's Brief at p. 3. Petitioner opposed his exclusion, however, on the basis that he was not convicted of a criminal offense related to the delivery of an item or service under section 1128(a)(1) of the Act. Further, Petitioner argued that imposition of the mandatory five-year exclusion is punitive in nature and violative of his rights under the U.S. and Michigan Constitutions. He contended also that the I.G. has caused him harm by having taken an excessive amount of time in notifying him of the exclusion.

Both parties seem to be in agreement that the moving party is entitled to summary judgment only when, even by viewing the evidence and the inferences arising therefrom in favor of the nonmoving party, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

B. The Supporting Documents Tendered by the Parties

As earlier noted, the parties have attached to their briefs various documents marked as exhibits in support of

their respective arguments. The I.G. originally relied on four exhibits but later withdrew Ex. 4 by letter dated July 21, 1992. Petitioner also attached as support a copy of the document that duplicates I.G. Ex. 2. I admit I.G. Ex. 2 and 3 but will not admit Petitioner's duplicative exhibit. Even though neither side has objected to the admission of any exhibit, I will analyze the relevancy of each of the three remaining non-duplicative exhibits and especially explain why I am rejecting I.G. Ex. 1.

I.G. Ex. 1 is irrelevant. This exhibit is a copy of the nine-count Complaint filed against Petitioner on August 10, 1988. This Complaint does not jibe with the I.G.'s assertion that Petitioner had pled nolo contendere to 10 counts of filing false Medicaid claims (I.G. brief at p. 1), nor with the Petitioner's acknowledgement of this same plea (Petitioner's brief at p. 3). In fact, the transcript of the plea proceedings, submitted by the I.G. as Ex. 2 and also adopted as an exhibit by the Petitioner in his own support, makes quite clear that Petitioner had only pled nolo contendere to the 10 counts contained in the amended Information filed June 4, 1991 in Circuit Court. See I.G.'s Ex. 2 at p. 10. Neither party has indicated that the nine-count Complaint dated August 10, 1988 has any bearing on the dispute before me. Accordingly, this exhibit does not give rise to any triable issue and is stricken for its irrelevancy.

I.G. Ex. 2, a copy of the transcript of Petitioner's plea proceedings in the Circuit Court for the County of Ingham, Michigan, is clearly relevant and admissible. Neither side questions its reliability, and both draw from its contents to support their respective positions.

I.G. Ex. 3, a copy of the Order of Probation and Judgment of Sentence dated September 4, 1991, is also material and reliable for the same reasons.

Even though neither party has submitted a copy of the amended Information filed on June 4, 1991 in the Circuit Court of Michigan (i.e., the 10 charges to which Petitioner pled nolo contendere and for which he was convicted), the transcript of the plea proceedings together with Petitioner's admissions in his brief provide all the facts material to resolution of this case under the laws and regulations that are binding on me. See especially Petitioner's Brief at pp. 3-4 and I.G. Ex. 2 at p. 10. The amended Information, had it been submitted, would have provided some additional background details. Its absence from the record does not give rise to any issue of material fact.

C. The Relationship Between Petitioner's Conviction and the Medicaid Program

Petitioner argued that he should not have been excluded for a program-related conviction because, among other reasons, his "conviction is no more than a crime of fraud which occurred after the delivery of the item or service rather than one related to the delivery of an item or service." Petitioner's Brief at p. 6. He asserted that "the billing performed in connection with the fraud more correctly constitutes the crime of obtaining money under false pretense" under another Michigan criminal statute cited in his brief. Id.. He contended, therefore, that the I.G. should have acted under the permissive exclusion provisions, section 1128(b) of the Act, because his conviction was for fraud unrelated to the delivery of an item or service.

In rejecting Petitioner's position, I will first point out that neither the I.G. nor I can substitute Petitioner's preferred conviction for his actual conviction. The question of whether or not Petitioner has violated another Michigan statute as well, such as the one cited in his brief, is not litigable before me. Petitioner's actual conviction, the only one reflected by the record, decides whether the I.G. had the proper basis for imposing the mandatory exclusion for a period of not less than five years.

Even though the Act does not list examples of what constitute criminal offenses related to the delivery of a program item or service, the commentaries to the current regulations have made clear that it was the Secretary's intent that the I.G. continue to analyze the program-relatedness of each conviction on a case-by-case basis as he has done over the years. 57 Fed. Reg. 3298, 3303 (Jan. 29, 1992). There is no indication that the I.G. has abused his discretion in this case. In fact, the I.G.'s application of the law was in accord with the Departmental Appeals Board's interpretations of the statutory test.

The Board has held that the statutory test is met when the Medicare or Medicaid Program is the victim of the criminal offense. Napoleon S. Maminta, M.D., DAB 1135 (1990). A criminal offense also meets the statutory test where the delivery of an item or service is an element in the chain of events giving rise to the item or service. See, e.g., Jack W. Greene DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990) (Greene); Travers v. Sullivan, 2 MMLR Para. 144 (E.D. Wash. 1992) (Greene). In Greene, the petitioner

was convicted of filing a fraudulent Medicaid reimbursement claim (prescription for a Medicaid-covered drug), and an appellate panel of the Board held that the offense was within the meaning of section 1128(a)(1) of the Act. In Travers, also, the petitioner was convicted for filing a false Medicaid reimbursement claim (using the wrong billing code number), and the court affirmed the Board's holding that the offense was program-related.

The record in the case before me leaves no doubt that Petitioner's offense has met the statutory test. Petitioner was in fact prosecuted by the Michigan Attorney General's Health Care Fraud Division under the Michigan Medicaid False Claims Act for using his Medicaid provider number to file multiple false claims with Medicaid and thereby receive Medicaid money to which neither he nor his pharmacy was legally entitled. Medicaid reimburses only for covered items or services actually rendered under the Program; Petitioner, who owned Seven-Van Pharmacy, received Medicaid payments only because certain claims falsely asserted that items or services had been delivered under the Program. The transcript of the plea proceedings shows that Petitioner was fully apprised of his rights -- including his right to be presumed innocent until the State proves him guilty beyond a reasonable doubt under the criminal statute -- and that Petitioner knowingly waived his rights in pleading nolo contendere to 10 counts of filing false Medicaid claims. Since the Judgment of Sentence requires Petitioner to pay the State of Michigan $85,900.00 in restitution, I also conclude that he had derived financial benefit at the expense of the Medicaid Program. The Program had been injured and victimized by Petitioner's criminal activities. Therefore, even if I were to believe Petitioner's arguments that his actions constituted another type of criminal offense as well, the facts have already established that Petitioner's conviction was "program-related" within the meaning of section 1128(a)(1) of the Act.

Petitioner's assertions of personal innocence under State law and his references to his efforts to set aside the Michigan Medicaid False Claims Act in State proceedings have created no legally cognizable issue before me. As already noted in the "Applicable Law" section, Petitioner has no right to be heard by me on the validity of his conviction, and he may not collaterally attack his conviction in appealing his exclusion from the Medicare and Medicaid Programs. 42 C.F.R. § 1001.2007(d). See, also, Peter J. Edmonson, DAB 1330 (1992). Also, the regulations direct the I.G. to consider the conviction "related to the delivery of an item or service" even if

the convicted individual had been performing only the management or administrative services involved therewith. 42 C.F.R. § 1001.101(a).

D. The Applicability of Mandatory Sanctions

I further reject Petitioner's arguments that the I.G. should have limited his actions to the permissive exclusion provisions of section 1128 of the Act and imposed the permissive exclusion first. Where, as here, the only conviction was program-related, the law directed the I.G. to impose an exclusion of not less than five years. Even where the same conviction could give rise to mandatory as well as permissive exclusions, the Board has already decided that the I.G. must impose the mandatory exclusion when the conviction falls within the meaning of section 1128(a). See, e.g., Niranjana B. Parikh, M.D., et al., DAB 1334 at 6-7 (1992), and DAB cases cited therein.

In Travers, the court had occasion also to address arguments very similar to the ones presented to me: that the permissive exclusion provisions, instead of the mandatory exclusion provisions, applied to a conviction for filing false Medicaid claims. The court rejected these arguments by reasoning that the permissive exclusion issue became moot once the prerequisites of the mandatory exclusion have been satisfied: "[i]t is only after the Secretary determines that the individual's conviction was not for a 'program related crime' that the permissive exclusion statutes become relevant." 2 MMLR Para. 144 at p. 579. I therefore find no basis for accepting Petitioner's contentions concerning the applicability of permissive sanctions to this case.

I have been unable to find any authority for Petitioner's contention that a doctrine of lenity exists or is applicable in this case. Nor has Petitioner cited any support for his proposition. I note, however, that Congress has already specified five years as the most lenient exclusion the I.G. could impose under the facts of this case. Neither I nor the I.G. has the discretion to create a more lenient standard even if a doctrine of lenity generally exists as asserted.

E. Petitioner's Constitutional Arguments

As for Petitioner's constitutional arguments and the remedy he seeks based thereon, I would first note that as an administrative law judge, I am without legal authority

to declare a statute unconstitutional or to alter the clear mandate of Congress. Moreover, it has been well settled by the Board that the statutory sections at issue are not punitive in nature. See, e.g., John A. Crawford, M.D., DAB 1324 at 5-9 (1992). The constitutionality of administrative exclusions based on criminal convictions has also been extensively discussed in the commentaries to the new regulations. 57 Fed. Reg. 3298, 3300-01 (Jan. 29, 1992). The published rationale of the agency, including the court decisions cited therein, have further persuaded me that summary disposition must be entered in the I.G.'s favor notwithstanding Petitioner's constitutional claims.

To the extent that Petitioner has tied his constitutional theory to his factual contention that the exclusion will deprive him of a living (Petitioner's Brief at p. 10), I feel constrained to point out that the Constitution does not guarantee any individual the right to make a living as a Medicare or Medicaid supplier. How Petitioner might be able to earn his living as a pharmacist or otherwise outside the Medicaid or Medicare Programs is not an issue of constitutional proportions. No citizen has been required to earn his living by participating in either Program, and the Constitution does not guarantee anyone the right to make his living from these federally funded programs.

Generally, pharmacists and other vendors in the health care field may apply to participate in these programs by agreeing to follow the rules set by Congress and the Secretary. As a condition of participation, they also agree that should they breach the rules, they would abide by the consequences specified by Congress and the Secretary. Like other vendors, Petitioner had voluntarily subjected himself to the jurisdictions of those federal laws governing Medicare and Medicaid participants. On its face, the I.G.'s exclusion determination does not deprive Petitioner of his right to make a living; it merely keeps Petitioner from receiving Medicare or Medicaid funds in making his living for five years. Due to Petitioner's failure to abide by his obligations, the government has merely revoked a privilege it had voluntarily granted to him.

F. Petitioner's Arguments Concerning Prejudicial Delay

Petitioner also contended that he has been harmed by the I.G.'s excessive delay. To support his contention that excessive delay had occurred, he asserted that he entered his plea in June 1991, and the I.G. did not issue his

exclusion notice until April 1992. I am unable to construe the contentions of excessive delay and ensuing harm as raising any valid issue that might be resolved in Petitioner's favor.

First, it is not within my authority to consider the amount of time taken by the I.G. to impose and direct exclusions. See Samuel W. Chang, M.D., DAB 1198 (1990). The regulations do not authorize an administrative hearing on this matter.

Even if Petitioner has a right to a hearing on the amount of time taken by the I.G. to impose the exclusion, I would find against Petitioner on the basis of other relevant undisputed chronology of record. According to the I.G.'s exhibits, Petitioner violated the Medicaid False Claims Act from August of 1986 to January of 1987, but did not enter his plea until June 21, 1991 (I.G. Ex. 2 at p. 10); it then took until September 9, 1991 before the "Order of Probation and Judgment of Sentence" was entered (I.G. Ex. 3); the I.G. first issued an exclusion notice on April 14, 1992, which Petitioner said he did not receive; and the I.G. then reissued the exclusion notice on May 13, 1992. Since the Act does not specify any time limits under which the I.G. must act, the length of time taken by the I.G. to issue his notice of exclusion in this case does not appear excessive or unreasonable.

I point out to Petitioner also that his arguments concerning prejudicial delay seem totally disingenuous given that previously he had asked the I.G. to stay the exclusion. According to the I.G.'s letter of May 13, 1992, Petitioner wanted the exclusion delayed so that he could have more time to disburse his assets. At that time, Petitioner's request implied that "delay" had been and would be to his benefit. It was the I.G. who refused to delay the effective date of the exclusion.

It seems that faulty arithmetic has given rise to Petitioner's argument that "[i]f respondent is allowed to exclude petitioner for the mandatory five years as it now contends, respondent's belated notice will have effected [sic] petitioner's exclusion from participation in the program for almost one year longer than contemplated by the Social Security Act." Petitioner's Brief at p. 14. The exclusion mandated by law runs for five years after its starting date, not before. That is to say, Petitioner was able to participate in the Programs until the I.G.'s letter informed him that the exclusion was to begin May 13, 1992. There is no factual basis for Petitioner's suggestion that being excluded until May 13,

1997 prejudices him, whereas having the five-year exclusion begin immediately upon his entering his plea on June 21, 1991, or, for example, having it stayed pending the distribution of his assets, as he had requested, would not have prejudiced him.

Conclusion

For the foregoing reasons, I have concluded that there exists no genuine issue of fact on the sole legal issue before me: whether the I.G. had a basis for imposing the minimum five-year exclusion specified by law for a program-related conviction. The record as presently constituted contains all the facts necessary to decide the case. Even though Petitioner has opposed summary disposition, he has failed to establish any real issue of material fact with his submissions. Controlling laws, regulations, and Board precedents require rejection of Petitioner's legal arguments and characterization of the facts he has sought to place into controversy. There is no basis for Petitioner to prevail on any legally cognizable issue of law or fact before me, and there is no legitimate interest to be served by proceeding to an in-person hearing. In sum, I find that the I.G. is entitled to summary judgment as a matter of law.

/s/

Mimi Hwang Leahy
Administrative Law Judge