Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Norman E. Hein, D.D.S.,	DATE: February 26, 1993
Petitioner,	Docket No. C-92-124
- v. -	Decision No. CR251
The Inspector General.	

DECISION

By letter dated June 9, 1992, Norman E. Hein, D.D.S., 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). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that an exclusion of at least five years is 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, and what must be decided is the legal significance of the undisputed facts, I have decided the case on the basis of written submissions in lieu of an in-person hearing.[1]

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[1] The I.G. filed a brief in support of his motion for summary disposition accompanied by eight exhibits. Petitioner has not contested the authenticity or relevancy of these documents. I am admitting these exhibits into evidence and hereafter I will refer to them

(continued...)

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years and I enter summary disposition in favor of the I.G.

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(b) permits, but does not mandate, the exclusion of any person whom the Secretary of HHS concludes is guilty, or has been convicted, of health care related fraud, kickbacks, false claims, or similar activities. It incorporates, as bases for exclusion, offenses described in sections 1128A and 1128B of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a licensed dentist in the State of Washington. P. Ex. 1.

2. Petitioner was charged by the Washington State Attorney General with the crime of theft (third degree) for having allegedly induced a woman to pay him money for dental services he rendered to her niece, even though Petitioner was required by contract and State regulations to accept payment from Medicaid as his sole payment. I.G. Exs. 1, 2.

3. On January 27, 1992, pursuant to a plea bargain with the prosecution, Petitioner entered an "Alford" plea (in which he averred that he was not guilty of the offense charged, but that he would plead guilty to avoid the risks, time, and expense of a trial) to the charge of theft (third degree) in the Seattle District Court. I.G. Exs. 3, 6.

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as I.G. Ex. (number). Petitioner filed a reply brief accompanied by an affidavit signed by Petitioner. I am admitting Petitioner's affidavit into evidence and hereafter I will refer to it as P. Ex. 1.

4. On January 27, 1992, the judge presiding over Petitioner's criminal case found that there was a factual basis for Petitioner's plea and that Petitioner was guilty as charged. The judge issued an Order captioned "Judgment and Sentence" which declared that Petitioner's sentence would be deferred for a period of 12 months, and ordered Petitioner to pay restitution in the amount of $1200, perform community service, and pay court costs of $15 and the victim's penalty of $75. I.G. Exs. 4, 6.

5. Petitioner complied with the court's conditions, and, on April 15, 1992, the court granted Petitioner's request to withdraw his guilty plea, ordered the conviction vacated, and dismissed the action. I.G. Exs. 6, 7.

6. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

7. By letter dated June 9, 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 Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

8. An "Alford" plea constitutes a plea of guilty within the meaning of section 1128(i) of the Act.

9. The court's acceptance of Petitioner's "Alford" plea to a criminal charge constitutes a conviction within the meaning of section 1128(i) of the Act. The fact that the court subsequently permitted Petitioner to withdraw his guilty plea and agreed to vacate the conviction is irrelevant.

10. The conviction of a criminal offense based upon Petitioner's requesting and receiving "donations" on behalf of an individual being treated by him under Medicaid constitutes a conviction of a criminal offense related to the delivery of services under Medicaid within the meaning of section 1128(a)(1) and therefore justifies application of that exclusion provision.

11. Petitioner may not utilize this administrative proceeding to collaterally attack his criminal conviction.

12. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

13. The minimum mandatory period for exclusions pursuant to section 1128(a)(1) of the Act is five years.

14. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

15. Neither the I.G. nor the administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

ARGUMENT

Petitioner admits that he did receive cash "donations" from an individual who was not a Medicaid recipient and acknowledges that his doing so constituted the basis of a theft charge to which he entered an Alford plea. He admits that he had been informed that he could not bill Medicaid patients for the difference between what Medicaid allowed and his normal charge for the item or service. He asserts, however, that he had never been informed that it was illegal to solicit "donations" and that the "donations" were not a precondition to treatment or continued treatment of any patient. He states also that when he received payments from Medicaid recipients, such monies were for services not covered by Medicaid.

As to legal argument, Petitioner contends that Washington law prohibits the solicitation or receipt of money in addition to monies received through the Medicaid program only if the additional money is a precondition to the treatment or continued treatment of a Medicaid recipient. According to Petitioner, he was charged with asking an individual who was not a Medicaid recipient to donate monies. Petitioner argues that the necessary legal elements of a criminal offense were not alleged or established and the criminal offense of which he was convicted did not relate to Medicaid because: (1) the allegations which formed the basis for his conviction involved soliciting and receiving monies from an individual who was not a Medicaid recipient; (2) there were no allegations that the donations were a precondition to the treatment or continued treatment of a Medicaid recipient; and (3) he never admitted guilt or intended to obtain money wrongfully. In the alternative, Petitioner argues that if he is guilty of a health care related offense, it is one which must be dealt with under section 1128(b) of the Act, which authorizes permissive exclusion, rather than section 1128(a) of the Act.

DISCUSSION

The first statutory requirement for the imposition of 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. Prior decisions of the Departmental Appeals Board (DAB) have established that acceptance by a State court of an "Alford" plea to a criminal charge constitutes a conviction within the meaning of section 1128(i) of the Act. Russell E. Baisley and Patricia Mary Baisley, DAB CR128 (1991); Raymond R. Veloso, M.D., DAB CR124 (1991). This precedent is controlling in the instant case.

The fact that the court permitted Petitioner to withdraw his guilty plea and agreed to vacate the conviction is irrelevant. Subsection 1128(i)(1) of the Act provides that an individual will be regarded as having been convicted, regardless of whether his judgment of conviction or criminal record is subsequently expunged. This provision has been interpreted as meaning that all arrangements which provide for "post-pleading erasures of convictions [are] included within the statutory definition of conviction." James F. Allen, M.D.F.P., DAB CR71, at 10 (1990).

Next, it is required by section 1128(a)(1) that the crime at issue be related to the delivery of an item or service under Medicaid or Medicare. This criterion is met where there is a commonsense connection between the criminal offense and the Medicaid or Medicare programs. Clarence H. Olson, DAB CR46 (1989). Case law has consistently held that a criminal offense falls within the reach of section 1128(a)(1) of the Act where the delivery of an item or service is an element in the chain of events giving rise to the offense. Larry W. Dabbs, R.Ph. and Gary L. Schwendimann, R.Ph., DAB CR151 (1991).

In the case at hand, Petitioner was convicted of theft in the third degree. I.G. Ex. 4. It is not possible to ascertain from the name of the offense alone whether it relates to the delivery of a health care item or service under the Medicaid program. However, it is consistent with congressional intent to admit limited evidence concerning the facts upon which the conviction was predicated in order to determine whether the statutory criteria of section 1128(a)(1) have been satisfied. As stated in H. Gene Blankenship, DAB CR42, at 11 (1989):

> The test of whether a "conviction" is "related to" Medicaid must be a common sense determination based on all relevant facts as determined by the finder of

> fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court.

Relying on the holding in Blankenship, an appellate panel of the DAB held that:

> [T]he ALJ, the finder of fact, can look beyond the findings of the state court to determine if a conviction was related to Medicaid. Therefore the ALJ's characterization of an offense is not limited to the state court's or the violated statute's precise terms for purposes of determining whether a conviction related to Medicaid.

DeWayne Franzen, DAB 1165, at 6 (1990).

Accordingly, in considering whether the offense of which Petitioner was convicted is related to the delivery of an item or service under the Medicaid program, I may consider all relevant documents pertaining to the criminal court proceeding. In this case, the criminal complaint charged Petitioner with the offense of theft in the third degree and alleged that the offense occurred between January 18, 1990 and March 8, 1990. I.G. Ex. 1. In addition, the I.G. has submitted a probable cause statement which describes more fully the circumstances upon which the complaint was based.

The probable cause statement asserts that as part of his contract to provide dental services to Medicaid recipients, Petitioner agreed to accept payment from Medicaid for covered services he provided as payment in full for those services. The probable cause statement asserts also that Petitioner told an individual who was the aunt of one of his Medicaid patients that Medicaid did not pay him in full for his dental services. According to the probable cause statement, Petitioner asked the Medicaid recipient's aunt to donate the difference, and the aunt did so on behalf of the Medicaid recipient on three separate occasions during the period from January 18, 1990 through March 8, 1990. I.G. Ex. 2.[2]

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[2] The probable cause statement alleged also that Petitioner "routinely obtained funds from Medicaid recipients in addition to having them surrender their Medicaid coupon for covered services. Contact with numerous Medicaid patients seen by [Petitioner] confirms that [Petitioner] regularly solicited and received

(continued...)

It is undisputed that Medicaid prohibits a provider from billing patients for the difference between what the Medicaid program pays for a service and what the provider charges non-Medicaid patients for those services. P. Ex. 1. The fact that Medicaid prohibits such conduct shows that the Medicaid program regards any additional payments linked to transactions reimbursable by Medicaid as inimical to the integrity of the program.

Petitioner contends that the offense of which he was convicted was not related to the Medicaid program because the additional payment for Petitioner's services was made by an individual who was not a Medicaid recipient. I disagree. Common sense shows that the delivery of Petitioner's dental services to a Medicaid patient played an essential and integral role in Petitioner's criminal offense and conviction. Petitioner allegedly asked a relative of a Medicaid recipient to "donate" the difference between the full value of dental services he provided to the Medicaid recipient and the amount of money Medicaid paid him for these services. The Medicaid recipient's relative allegedly paid this difference on behalf of the Medicaid recipient. Based on these allegations, the delivery of dental services to a Medicaid recipient is an element in the chain of events giving rise to the offense. But for the delivery of Petitioner's dental services to a Medicaid recipient, Petitioner would not have solicited the "donations" from the recipient's relative.

I note that the case Marshall J. Hubsher, M.D., DAB CR188 (1992), aff'd, DAB 1353 (1992) involved a similar offense. In that case, a State court convicted Dr.

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[2](...continued)
additional funds from them." I.G. Ex. 2. The complaint, however, did not refer to these allegations of obtaining monies from Medicaid recipients. Instead, it specifically referred to the incidents during the period from January 18, 1990 to March 8, 1990 involving the receipt of monies from the individual who was the aunt of a Medicaid recipient. Since Petitioner entered an Alford plea to the charges in the complaint, I base my finding that Petitioner was convicted of a program-related offense on that part of the probable cause statement involving the receipt of monies from the aunt of a Medicaid recipient. The allegations involving the receipt of monies from Medicaid recipients were not referred to in the complaint, and I do not base my finding that Petitioner was convicted of a program-related offense on these allegations.

Hubsher of the offense of grand larceny because he accepted reimbursement for his medical services from Medicaid in addition to accepting direct payment for the same services from his patients. The law in effect as of the date of Dr. Hubsher's conviction required the Secretary to exclude individuals convicted of a criminal offense related to such individual's "participation" in the delivery of medical care or services under Medicare or Medicaid. Dr. Hubsher admitted that his criminal offense was related to his participation in the Medicaid program, but contested the length of the exclusion.

Hubsher differs from the case at hand in that Dr. Hubsher's conviction was based on his acceptance of payments from Medicaid recipients rather than relatives of Medicaid recipients. In addition, Dr. Hubsher conceded that his offenses were program related; thus the ALJ and the appellate panel of the DAB did not specifically hold that they were. Nevertheless, Hubsher is an example of an instance where a conviction of the offense of accepting payments from individuals for health care services while also receiving compensation from Medicaid was the basis of a mandatory exclusion for a program-related offense.

Petitioner contends also that under Washington law it is illegal to solicit monies from individuals in addition to monies received through the Medicaid program only if the solicited money is a precondition to the treatment or continued treatment of a patient. According to Petitioner, there were no specific allegations that the donations were a precondition to treatment or continued treatment of any patient. Based on this, Petitioner asserts that the necessary legal elements of a criminal offense have not been properly alleged.

Petitioner asserts that the monies he received were lawful donations which were applied to those services which were not covered by the program. Petitioner states that he inquired about the propriety of accepting donations and that no one ever told him that accepting donations were prohibited. Petitioner claims that he never intended to obtain money wrongfully and he never has admitted his guilt. Based on this, Petitioner argues that the necessary legal elements of a criminal offense have not been established and he has not been convicted of a criminal offense within the meaning of section 1128(a)(1).

These arguments constitute a collateral attack on Petitioner's State criminal conviction. According to Petitioner, the necessary legal elements of a criminal

offense have not been properly alleged or established. Petitioner asserts that he was not guilty of a criminal offense because the monies he received were lawful donations. Petitioner reasons that the I.G. is without authority to exclude him because he has not committed any crime and he has not admitted that he has committed any crime.

It is a settled principle that a petitioner cannot challenge the I.G.'s authority to exclude him by denying that he is guilty of that for which he has been convicted. The I.G.'s authority to exclude a party under section 1128(a)(1) arises by virtue of that party's conviction of a criminal offense, as described in the Act. The law does not authorize the Secretary to look behind the conviction to determine whether it is valid. Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). It is not relevant to the issue of the I.G.'s authority to exclude that the criminal conviction may have been defective or that Petitioner may have been innocent of the charges of which he was convicted. Petitioner may not utilize this administrative proceeding to collaterally attack his criminal conviction. He may have recourse within the State court system, but not here. Baisley at 10.

Petitioner argues additionally that, if the I.G. had to proceed against him at all, the I.G. should have treated his conviction as grounds for a permissive exclusion action only -- rather than as a basis for mandatory exclusion. This position, however, is contrary to precedent and without merit. For example, the decision rendered in Samuel W. Chang, M.D., DAB 1198, at 8 (1990), 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." In another relevant case, it was decided that, where a criminal conviction satisfies the statutory criteria of section 1128(a)(1), then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion which the statute provides. The fact that the criminal conviction may appear also to fall within the broader criteria for permissive exclusion found in section 1128(b) is irrelevant. Boris Lipovsky, M.D., DAB 1363 (1992). In the present case, I conclude that, inasmuch as Petitioner's criminal conviction related to the delivery of an item or service under Medicare or Medicaid, the law imposes a non-discretionary requirement that he be excluded from participation in such programs for a period of at least five years.

CONCLUSION

Section 1128(a)(1) of the Act requires that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of his conviction of a program-related criminal offense. The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge