Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Oscar Klein, M.D.,	DATE: March 4, 1993
Petitioner,	Docket No. C-92-142
- v. -	Decision No. CR253
The Inspector General.	

DECISION

By letter dated June 17, 1992, Oscar Klein, M.D., 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 from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I use the term "Medicaid" in this Decision when referring to the 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 Medicare or Medicaid.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition.

I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). Accordingly, I have decided the case on the basis of written submissions in lieu of an in-person hearing.

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

LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for an 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 1128B(a) of the Act (codified as 42 U.S.C. § 1320a-7b) makes it a criminal offense, inter alia, for a person to willfully make false representations in order to fraudulently secure Medicare/Medicaid benefits, or to knowingly and willfully conceal knowledge relevant to a person's entitlement to such benefits and/or unlawful attempts to secure them.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

1. During the period relevant to this case, Petitioner was a licensed physician in the State of Florida. His practice was known as the Westbay Medical Walk-In Clinic (Westbay). I.G. Exhibit (Ex.) 2; P. Ex. 1.

2. In 1988, Petitioner arranged with Healthlift, Inc., for "free" medical tests to be offered to the public at Westbay. Petitioner claimed that he hoped thereby to attract new patients to his clinic. I.G. Ex. 2; P. Ex. 1.

3. Healthlift, through its executive director, Wesley Blevins, submitted claims to Medicare seeking payment for performing these tests. I.G. Ex. 2.

4. Inasmuch as Medicare requires that diagnostic tests be ordered by a treating physician, Blevins fraudulently entered physicians' names -- including Petitioner's name -- on the claim forms, even though these doctors had not ordered the tests in question. I.G. Ex. 2; P. Ex. 1.

5. Petitioner knew of this unlawful billing, but failed to report it and assisted in concealing the truth. I.G. Ex. 2; P. Ex. 1.

6. By means of an information, Petitioner was charged with Medicare Fraud under 42 U.S.C. § 1320a-7b for

---

[1] Petitioner and the I.G. submitted written argument and documentary exhibits. I admitted all of the exhibits into evidence.

having concealed and failed to disclose that false representations were being made to Medicare, namely that tests which were performed at Westbay had been duly ordered by a referring physician who had actually examined the patients, when in fact that had not been done. I.G. Ex. 1; P. Ex. 2.

7. Pursuant to a plea bargain in which he agreed to cooperate with the government, Petitioner entered a plea of guilty to the information in the United States District Court, Middle District of Florida. I.G. Ex. 2.

8. The district court entered a judgment against Petitioner, fined him, placed him on probation, and required him to perform community service. I.G. Ex. 3.

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

10. Petitioner's voluntary guilty plea and subsequent criminal conviction of an offense clearly described as "Medicare Fraud," which consisted of his having knowingly concealed misrepresentations made on Medicare/Medicaid claims, constitutes an offense related to the delivery of items or services under Medicare or Medicaid, within the meaning of section 1128(a)(1) of the Act.

11. HHS is not authorized to look beyond the fact of conviction and Petitioner may not utilize its administrative proceedings to collaterally attack his criminal conviction by seeking to show that he did not do the act charged, or that there was no criminal intent.

12. It is no defense that Petitioner did not physically deliver an item or service, inasmuch as there is a commonsense connection between his criminal conduct and the Medicare reimbursement process and Medicare was the intended victim of the crime.

PETITIONER'S ARGUMENT

Petitioner asserts that he cooperated in initiating a health screening program at his clinic because he wished to attract new patients, but that he was unaware that Healthlift -- which actually performed the tests -- planned to bill the government for them. Petitioner contends also that he did not know that Healthlift would sign his name to documents making it appear that he ordered tests to be performed. Petitioner declares that

when he learned of this, he returned from an overseas vacation and ordered Healthlift to desist. P. Ex. 1.

Petitioner notes that the only crime attributed to him is failing to report and assisting in concealing false billing by another. He contends that, inasmuch as he himself did not provide the services in question or submit false bills, his offense was not related to the delivery of a health care item or service under Medicare or Medicaid. Petitioner contends that "such passive, after-the-fact activity" is insufficient to invoke the mandatory exclusion law. He suggests also that his acts were not directly related to, or integral parts of, the delivery of goods or services and that he had no "guilty knowledge of the purpose or methods of the Healthlift screenings at the time . . .." Petitioner's letter of August 6, 1992; Petitioner's Memorandum, pp. 9 - 10.

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 must have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty and a judgment of conviction was entered against him by the court. Section 1128(i) of the Act indicates that these facts are doubly sufficient to constitute a conviction.

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 Medicare or Medicaid. This criterion is met where there is a commonsense connection between the criminal offense and the Medicare or Medicaid programs. Clarence H. Olson, DAB CR46 (1989). It is also well-established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims constitutes program-related misconduct. Jack W. Greene, DAB CR19, aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

HHS is not authorized to look beyond the fact of conviction and Petitioner may not utilize its administrative proceedings to collaterally attack his criminal conviction by seeking to show that he did not do the act charged, or that there was no criminal intent, or that the criminal conviction was tainted by legal error. Petitioner may have recourse in the courts to rectify such matters, but not here. Richard G. Philips, D.P.M., DAB CR133 (1991); Peter J. Edmonson, DAB 1330 (1992). In particular, it has been emphasized on many occasions that

proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1); e.g., " . . . the level of intent of the individual in committing the offense is not relevant under section 1128(a)." Janet Wallace, L.P.N., DAB 1326, at 5 n.5 (1992); see also DeWayne Franzen, DAB 1165 (1990).

It is also no defense that an individual did not physically deliver the item or service, particularly where there is a commonsense connection between his criminal conduct and the standard treatment-reimbursement cycle under Medicare/Medicaid and the program was the intended victim of the crime. Niranjana B. Parikh, M.D., et al., DAB 1334, at 5 (1992); Napoleon S. Maminta, M.D., DAB 1135 (1990).

Applying these principles to the case at hand, I note that Petitioner voluntarily pled guilty to an offense clearly described as "Medicare Fraud," which consisted of his having knowingly concealed misrepresentations made on Medicare claims. Congress thought such activity to be so inherently inimical to these programs that it enacted section 1128B of the Act [42 U.S.C. § 1320a-7b] to specifically outlaw it. I, similarly, find this crime to be clearly program related in that it facilitates the filing of false claims and the collection of unjustified payments, which burden the programs and impede the delivery of items and services. (In the present case, of course, substantial false claims were, in fact, filed, and their existence was -- at least initially -- concealed by Petitioner.)

As to Petitioner's assertions that he did not himself deliver items or services or file claims, the precedent previously cited shows such argument to be unavailing. Neither of these elements is indispensable to a finding that Petitioner has violated section 1128(a)(1), there is a commonsense connection between his criminal conduct and the Medicare reimbursement process, and Medicare was the intended victim of the crime.

Next, his theory that his criminal conduct was so "passive" as to exempt him from the terms of the mandatory exclusion law is not supported by any authority Petitioner cited. With regard to Petitioner's alleged lack of "guilty knowledge," I have already noted that the case law indicates that the I.G. need not prove that Petitioner had criminal motivation and that Petitioner cannot now argue that he did not intend to commit a crime or that he was otherwise innocent.

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