Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Robert C. Greenwood,	DATE: April 20, 1993
Petitioner,	Docket No. C-93-016
- v. -	Decision No. CR258
The Inspector General.	

DECISION

By letter dated October 20, 1992, Robert C. Greenwood, 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, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services Programs. The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (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 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), I have granted the I.G.'s motion and decide 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.

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]

1. At all times relevant and material to this case, Petitioner was employed as a home health aide, providing home health care services. I.G. Ex. 1.

2. Petitioner provided home health care services on behalf of, and was paid by, the Visiting Nurses Association of Central New York (VNA) and the Medical Personnel Pool of Syracuse (MPP). I.G. Ex. 1.

3. From September 1988 to April 1989, Petitioner submitted time sheets to VNA and MPP which indicated that he had provided home health care services to someone when, in fact, he had not done so.

4. Petitioner wrongfully obtained payments for services not rendered. FFCL 3; I.G. Ex. 1, 3.

5. The person that Petitioner falsely claimed to have treated on behalf of VNA and MPP was a Medicaid recipient. I.G. Ex. 1.

6. VNA and MPP subsequently submitted claims to Medicaid for reimbursement for the home health care services that Petitioner claimed he provided but, in fact, did not provide to Medicaid. I.G. Ex. 1.

7. VNA and MPP were reimbursed by Medicaid in the amounts of $440.48 and $415.44 for the services which Petitioner claimed to have provided but, in fact, did not provide. I.G. Ex. 1, 3.

8. On February 13, 1990, Petitioner pled guilty to one count of petit larceny. I.G. Ex. 1, 4.

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[1] Petitioner and the I.G. both submitted written briefs supported by exhibits. I admit the exhibits into evidence and refer to them herein as P. Ex. (number) or I.G. Ex. (number).

9. In pleading guilty to petit larceny, Petitioner admitted that he had knowingly obtained monies to which he was not entitled. I.G. Ex. 1, 4.

10. Petitioner's plea to one count of petit larceny was accepted by a Syracuse (New York City) Court. I.G. Ex. 1.

11. Pursuant to his guilty plea, Petitioner was required to pay a fine of $1,000. I.G. Ex. 1, 3.

12. Pursuant to his guilty plea, Petitioner was required by the court to pay $941.88 in restitution to a Medicaid fraud restitution fund. I.G. Ex. 3.

13. Petitioner's restitution of $941.88 represents the sum of the amounts that he had claimed ($440.48 and $415.44) for the services he did not provide to a Medicaid recipient, plus nine percent interest. I.G. Ex. 1, 3.

14. The Secretary of Health and Human Services delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21622 (1983).

15. On October 20, 1992, the I.G. notified Petitioner that he had been excluded for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services Programs because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid. I.G. Ex. 4.

16. Petitioner's February 13, 1990 guilty plea to one count of petit larceny in a New York State court is a "conviction" within the meaning of section 1128(i) of the Act.

17. Petitioner's submission of time sheets to VNA and MPP for services he falsely claimed to have provided caused VNA's and MPP's filing of Medicaid reimbursement claims for these services.

18. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCL 1 - 17.

PETITIONER'S ARGUMENT

Petitioner argues that he was not convicted of a program-related offense because, although he pled guilty to larceny against his employers, he was unaware that there was any connection between his actions and the Medicaid program, and he never "intended to improperly obtain payment" from these programs. He notes that he neither submitted documents to Medicaid nor conspired with others to do so, and declares, in an affidavit, that he did not even know that the person he falsely claimed to have served was a Medicaid recipient. Referring to the transcript of his plea and sentencing hearing in the Syracuse City Court, he notes that the judge made reference only to his theft of fees from VNA and MPP and that there was nothing to suggest that his conviction in any way involved a Medicaid-related crime.

Petitioner objects also to the I.G.'s use of "new" (January 29, 1992) regulation 42 C.F.R § 1320a-7 in his case, maintaining that doing so amounted to unconstitutional retroactivity. He argues further that the I.G.'s unreasonable delay in bringing this exclusion action harmed him in that it made it impossible for him to call the person involved as a defense witness since that gentleman is now dead.

Finally, Petitioner produced several statements from persons to whom he provided care. These individuals commended him for competence and compassion. Petitioner suggests that there should be a waiver of exclusion in his case because of the shortage of persons willing to care for the seriously disabled.

Petitioner objected to I.G. Ex. 1, which consists of an affidavit by State auditor Michael LaCasse explaining how his review of Petitioner's timesheets, of patients' medical records, and payroll records kept by VNA and MPP revealed to him that Petitioner had claimed to have rendered in-home treatment to a patient on days when such patient was away from home, and that VNA and MPP in turn were compensated by Medicaid for these nonexistent services. I.G. Ex. 1 also includes a transcript of Petitioner's plea and sentencing by the Syracuse court and copies of records referred to by the affiant. Petitioner contends that, except for the transcript, he never previously had an opportunity to see any of this material and that he objects to material in this exhibit relating to Medicaid reimbursements to VNA and MPP, because he should not be bound by actions that were taken by these organizations outside of his knowledge or influence.

DISCUSSION

The law relied upon by the I.G. in the instant case requires, initially, that the person to be excluded have been convicted of a crime. Petitioner herein was charged with larceny. Petitioner pled guilty to the charge. The court accepted his plea and he was sentenced. Section 1128(i)(3) of the Act provides that when a person enters a plea of guilty to a criminal charge and the court accepts such plea, the individual will be regarded as having been "convicted," within the meaning of the mandatory exclusion provisions of the Act.

The next requirement is that the crime be program-related, i.e., that Petitioner's criminal offense be related to the delivery of an item or service under Medicaid or Medicare. It is well-established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

In this regard, Petitioner notes that he, personally, did not file any Medicaid claims. The claims were filed by VNA and MPP. Petitioner (a) denies any involvement with such filings, and, indeed, maintains that he had no knowledge whatever of any connection between Medicaid and his patient and/or his employers;[2] (b) admits that he committed larceny, but insists that the I.G. did not prove that his falsifications related to Medicare or Medicaid; (c) objects to the admission of any evidence regarding Medicaid claims and reimbursements to VNA and MPP, on the theory that such evidence did not include anything directly relating to him; and (d) that he should

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[2] It is interesting to note that, as evidence of his purported ignorance of any Medicaid involvement, Petitioner makes reference to the transcript of his plea and sentencing hearing in Syracuse. He states that the judge discussed his theft of fees from VNA and MPP only, and that there was nothing in the court proceeding to suggest that his conviction in any way involved a Medicaid-related crime. However, during the hearing, Petitioner, his counsel, the State's attorney, and the judge concurred that Petitioner, in addition to paying a fine, would be required, as part of his sentence, to make restitution of approximately $941, which Petitioner did, by check ". . . payable to the Medicaid Fraud Restitution Fund." (Emphasis added). I.G. Ex. 1 at p. 4.

not be bound by actions that were taken by these organizations outside of his knowledge or influence.

However, it has been established in DAB appellate decisions that a judge may consider extrinsic or other relevant evidence in determining whether a person should be excluded pursuant to section 1128(a) of the Act. See, e.g., Bruce Lindberg, D.C., DAB 1280 (1991), holding that a judge may look beyond "the Judgment Entry and plea transcript," and "examine the full circumstances surrounding a conviction to determine whether the statutory elements . . . are met . . . ." In the present case, I find that the auditor's affidavit, the providers' records, and the Medicaid records[3] establish that Petitioner's fraudulent time reports were the cause of the unjustified Medicaid claims submitted by VNA and MPP.

More generally, an established principle has been that we can conclude that a criminal conviction is program-related within the meaning of section 1128(a) where there is a "common-sense connection" between the offense and the delivery of Medicare/Medicaid benefits; i.e., that there is some "nexus" between the crime and the functioning of the programs. Thelma Walley, DAB 1367 (1992). In the case at hand, I determine that there is a very evident connection between the health care employee's falsely claiming to have provided service and the eventual submission of false Medicaid claims.

Petitioner insists that he never "intended to improperly obtain payment" from Medicaid, and was unaware that the monies he wrongfully obtained from VNA and MPP would ultimately be reflected in Medicaid claims. This argument, however, is irrelevant. Petitioner admits having knowingly and wilfully committed a crime, and being convicted for so doing, and I have determined that his offense related to the delivery of an item or service under Medicaid. Once it is shown that an appropriate program-related criminal conviction has occurred, exclusion is mandatory under section 1128(a) as a purely derivative action. The DAB has determined that the intent of the individual committing the offense is not

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[3] As noted in the "Petitioner's Argument" section of this decision, Petitioner claims never to have seen this evidence before. Since the record shows that these documents were served upon him by the I.G., he apparently means that he had not seen them before this case. However, inasmuch as he had the opportunity to respond to the I.G.'s submission, I conclude that there has been no procedural irregularity or prejudice to his case.

relevant under section 1128(a), and that it also will not consider assertions that Petitioner is actually innocent, that his trial was unfair, that the mandatory exclusion specified in 1128(a) should be modified because of mitigating circumstances. See, e.g., Janet Wallace, L.P.N., DAB 1326 (1992); DeWayne Franzen, DAB 1165 (1990); Richard G. Philips, D.P.M., DAB CR133 (1991); Peter J. Edmonson, DAB 1330 (1992).

Petitioner's objection to having his case adjudicated pursuant to the January 1992 HHS regulations is without merit. First, I note that the regulations themselves state their effective date (57 Fed. Reg. 3298). Second, in a case such as Petitioner's, where the I.G. is seeking only to impose the mandatory minimum (five year) exclusion, the new regulations do not materially differ from their predecessors. Thus, there has been no showing of harm to Petitioner, and the suggestion that his constitutional rights have been infringed is not sustainable.

Similarly, his allegation that he was harmed by the I.G.'s alleged failure to act within a reasonable time on his exclusion are speculative and unsupported. I must point out also that an administrative law judge has no authority to remedy the I.G.'s tardiness or misfeasance by altering the I.G.'s designated effective date of an exclusion. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, M.D., DAB CR119, at 7 - 9 (1991). It should be noted also that the exclusion of providers from the Medicare and Medicaid programs is expressly required by statute where there has been a relevant criminal conviction, and 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).

Lastly, Petitioner argues that the period of exclusion imposed upon him should be waived in light of the purportedly essential and irreplaceable nature of the services he renders to the community. The law, however, gives the administrative law judge no authority to waive an exclusion or to reduce the statutory five-year exclusion which follows a program-related criminal conviction. Section 1128(c)(3)(B) provides:

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years, except that . . . the Secretary may waive exclusion under subsection (a)(1) in the case of an individual or entity that is the sole community physician or sole

> source of essential specialized services in a community. The Secretary's decision whether to waive the exclusion shall not be reviewable. (Emphasis added.)

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