Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Prabha Prakash, M.D.,	DATE: May 24, 1993
Petitioner,	Docket No. C-93-032
- v. -	Decision No. CR265
The Inspector General.	

DECISION

By letter dated November 16, 1992, Prabha Prakash, 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 her 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. (I use the term "Medicaid" in this Decision when referring to the programs other than Medicare.) 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), and because Petitioner has agreed that I should hear this case via an exchange of briefs in lieu of an

in-person hearing, I am deciding this case on the basis of the parties' written submissions.[1]

Based on the parties' submissions, I am granting the I.G.'s motion for summary disposition and affirming the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid 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.

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.

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[1] The I.G. submitted a motion for summary disposition on February 8, 1993, with attached exhibits. I refer to the I.G.'s brief as I.G. Br. (at page). I refer to the I.G.'s exhibits as I.G. Ex. (at page). On February 26, 1993, the I.G. submitted a signed copy of the Superior Court Information, which he originally submitted as I.G. Ex. 2. Attached to this exhibit were signed copies of Petitioner's Waiver of Indictment and the Felony Complaint in Petitioner's criminal case. In the absence of objection, I am substituting the I.G.'s February 26, 1993 submission in place of the original I.G. Ex. 2. As the I.G. did not mark or paginate his February 26, 1993 submission, I am marking the new I.G. Ex. 2 and consecutively numbering it as pages 1 - 7. Petitioner submitted her response, with one attached exhibit, on March 2, 1993. I refer to her brief as P. Br. (at page). I refer to her exhibit as P. Ex. 1 (at page). Petitioner did not paginate her brief or her exhibit. I have consecutively numbered Petitioner's brief as pages 1 - 4 and her exhibit as pages 1 - 13. The I.G. also submitted a reply to Petitioner's brief. I refer to it as I.G. R. Br. (at page).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the relevant period herein, Petitioner was a duly-licensed physician, specializing in psychiatry, and a Medicaid provider in Yonkers, New York. I.G. Ex. 2 at 2.

2. Petitioner was accused, in a Superior Court Information filed in the Westchester County Court, of one count of Grand Larceny (third degree) and one count of Offering A False Instrument For Filing (second degree). I.G. Ex. 2 at 1 - 3.

3. Specifically, the State alleged with regard to the charge of Grand Larceny that, during the period from January 1, 1989 to on or about September 30, 1991, Petitioner had intentionally submitted to New York authorities numerous Medicaid claims which contained false statements and false information and by which she claimed (and subsequently received) $8,238 in reimbursement for having provided a service described as "procedure code 90844," even though she had, in fact, not done so. With regard to the charge of Offering A False Instrument For Filing, the State alleged that Petitioner submitted to New York authorities a Medicaid claim which she knew contained false statements and false information. This claim reflected that on June 6, 1991, Petitioner provided a service described as "procedure code 90844" to a patient who was a Medicaid recipient, even though she had, in fact, not done so. I.G. Ex. 2 at 1 - 3.

4. Procedure code 90844 is "a psychiatric therapy procedure code for a session of approximately 45 to 50 minutes (37 minutes to 1 hour)." I.G. Ex. 2 at 2 - 3.

5. On February 6, 1992, Petitioner pled guilty in the Westchester County Court to one count of Offering a False Instrument for Filing (second degree). I.G. Ex. 1.

6. Petitioner admitted to the judge presiding over her criminal case that she had, knowingly and with the intention of defrauding the State, presented to the New York Department of Social Services a written instrument which contained false statements and false information. Petitioner also admitted that the false filing was one of a series of such filings resulting in the State paying her $8,238 to which she was not entitled. In addition, Petitioner returned to the State a $450 check which she had not yet cashed. I.G. Ex. 1 at 8 - 9; I.G. Ex. 2 at 2 - 3.

7. The Westchester County Court accepted Petitioner's guilty plea and sentenced her to a one year conditional discharge (revocable if another offense is committed), in addition to requiring her to make restitution of $8,238. I.G. Ex. 1 at 10, 13 - 14; I.G. Ex. 3.

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

9. Petitioner's guilty plea, and its acceptance by the Westchester County Court, constitutes a conviction of a criminal offense within the meaning of section 1128(i)(3) of the Act. Findings 1 - 7.

10. Petitioner's offense -- filing false Medicaid claims -- constitutes program-related misconduct. Findings 1 - 7, 9.

11. Where a criminal conviction meets the criteria of section 1128(a)(1), then section 1128(a)(1) is controlling and the I.G. must impose a mandatory five-year exclusion pursuant to section 1128(c)(3)(B) of the Act. The permissive provisions of section 1128(b) apply only to convictions for offenses other than those related to the delivery of an item or service under Medicare or Medicaid.

12. Petitioner was convicted of a criminal offense related to the delivery of a service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 11.

13. The new regulations at 42 C.F.R. §§ 1001.101(a) and 1001.102(a) do not affect the basis for or the length of Petitioner's exclusion from what was required by the Act prior to the promulgation of the new regulations.

14. The exclusion of individuals or entities from Medicare and Medicaid is unalterably required once a relevant criminal conviction has occurred, and neither the I.G. nor the administrative law judge (ALJ) may reduce the five-year minimum exclusion, regardless of the presence of factors which might otherwise be regarded as mitigating.

15. The I.G. properly imposed and directed an exclusion against Petitioner from participation in Medicare and Medicaid for the minimum mandatory period of five years. Findings 1 - 14.

PETITIONER'S ARGUMENT

Petitioner states that she "... is not disputing the fact that she had been convicted as per the I.G.'s statement of facts. She is, however, disputing the reasonableness of the exclusion in light of the mitigating factors involved." P. Br. at 2. Among the factors Petitioner cited are her age (64), her previously good professional record, her restitution of the monies involved, her having been found not to have billed patients when she did not provide professional services to them, and the fact that the judge who sentenced her believed that she was "truly sorry" and issued a conditional discharge, as well as the fact that the State Board For Professional Medical Conduct had determined that a reprimand and censure constituted sufficient corrective action. Petitioner stresses that, due to her advanced age, excluding her for five years is tantamount to excluding her for the remainder of her professional career. P. Br. at 2 - 3; P. Ex. 1.

As to substantive law, Petitioner argues that "this conviction should be considered under the permissive section 1128(b)(1) of the Act," and that "... the I.G.'s action was essentially punitive in nature and not remedial." P. Br. at 2 - 3. Further, Petitioner argues that her five year exclusion, "will not provide the Secretary with adequate opportunity to determine whether there is reasonable assurance that the types of offenses for which [she] was excluded will not re-occur." P. Br. at 3. Petitioner argues that her participation in the programs with a monitor would be the best method by which to make such an evaluation. Lastly, Petitioner objects to the I.G.'s citation of current federal regulations (new regulations) at 42 C.F.R. §§ 1001.101(a) and 1001.102(a) (published at 57 Fed. Reg. 3331 (January 29, 1992)) on the theory that such regulations had not been promulgated at the time she committed her offense. P. Br. at 3.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question had to have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty and the New York court, after careful inquiry, accepted the plea. Section 1128(i)(3) of the Act provides that when an individual enters a plea of guilty, and the court accepts that plea,

such person is considered to have been convicted of a criminal offense.

Next, it is required by section 1128(a)(1) that Petitioner's criminal offense be related to the delivery of an item or service under Medicare or Medicaid. It is well-established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims constitutes program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Also, see Francis Shaenboen, DAB 1249 (1991), in which an appellate panel of the DAB found that false Medicaid billing is inextricably intertwined with, and, therefore, related to, the delivery of items or services, as specified by the Act.

Consequently, I conclude that Petitioner's action in the present case -- billing Medicaid for services that were not provided as alleged -- constitutes criminal activity related to the delivery of Medicaid services. Thus, I find that as Petitioner was convicted of a criminal offense related to the delivery of Medicaid services, the I.G. had a basis upon which to exclude her.

Petitioner contends, however, that her five-year exclusion is unreasonable in light of mitigating factors which exist in her case. I find, however, that whether or not mitigating factors exist is irrelevant. Under sections 1128(a)(1) and 1128(c)(3)(B) of the Act, the exclusion of providers from Medicare and Medicaid is unalterably required once a program-related criminal conviction has occurred. Neither the I.G. nor this judge may reduce a five-year minimum exclusion, regardless of the presence of factors which might otherwise be regarded as mitigating. Greene.

Petitioner contends also that her criminal conviction should be assessed pursuant to the permissive exclusion provision at section 1128(b)(1) of the Act, rather than under the mandatory exclusion provision at section 1128(a)(1) of the Act. However, where a criminal conviction meets the 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 calls for. The fact that the criminal conviction may appear also to fall within the criteria for permissive exclusion found in section 1128(b)(1) is irrelevant. Travers v. Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992); Douglas Schram, R.Ph., DAB CR215 (1992), aff'd, DAB 1372 (1992);

Boris Lipovsky, M.D., DAB CR208 (1992), aff'd, DAB 1363 (1992); Greene.

Petitioner contends further that the proposed exclusion is punitive in nature and not remedial. Petitioner did not cite any basis for this contention. Petitioner apparently is referring to the constitutional ban against double jeopardy, as discussed in United States v. Halper, 490 U.S. 435 (1989). See, Schram, DAB 1372 at 14-18. However, both Halper and Schram involved a federal conviction. Double jeopardy is not applicable in Petitioner's case, as Petitioner was convicted by a State court.

Petitioner contends moreover that the only way for the Secretary to evaluate whether or not the conduct for which she was excluded will occur again is not to exclude her but to allow her to participate in Medicare and Medicaid with "a monitor." P. Br. at 3. However, I do not have the discretion to order such a remedy. As I stated above, once I have determined that a petitioner's conviction is for an offense related to the delivery of an item or service under section 1128(a)(1), it is the mandate of Congress that the petitioner be excluded for five years. Social Security Act, sections 1128(a)(1), 1128(c)(3)(B).

Finally, Petitioner objects to the I.G.'s citation of the new regulations, noted supra. With reference to exclusions imposed pursuant to section 1128(a)(1) of the Act, the new regulations do not affect the basis for exclusion from what is required by the Act, nor do they alter the five-year exclusion mandated by the Act. Thus, the new regulations in no way substantively alter Petitioner's position from what it was prior to the new regulations' promulgation. Petitioner pled guilty to the criminal charges against her on February 6, 1992. Consequently, the August 18, 1987 amendments to Section 1128 of the Act, which instituted the mandatory five-year minimum exclusion for program-related convictions, are applicable to her case (Betsy Chua, M.D., DAB CR76, aff'd, DAB 1204 (1990)), and the 1992 regulations have no effect on this statutory scheme.

CONCLUSION

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

/s/

Joseph K. Riotto
Administrative Law Judge