Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: June 25, 1993
Gary Gregory,	)	
	)	
	)	
Petitioner,	)	Docket No. C-92-139
	)	Decision No. CR274
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

By letter dated July 13, 1992, Gary Gregory, 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 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 an exclusion for at least five years 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 Medicaid.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition. I denied the motion because the I.G. had not shown that any of the patients whose funds were misapplied by Petitioner (the offense of which Petitioner was convicted) were Medicaid recipients at the time, or that the funds were supplied by Medicaid. I gave the I.G. the opportunity to correct this deficiency, and the I.G. filed another motion for summary disposition, accompanied by a supporting brief and exhibits.

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.

Petitioner submitted one exhibit, accompanying his letter of August 31, 1992. I have marked and identified it as Petitioner's exhibit (P.Ex.) 1. The I.G. submitted three sets of exhibits -- one numbered 1 through 6, one numbered 1 through 12, and one numbered 1 through 5 -- plus two affidavits by I.G. Program Analyst William J. Hughes and a "declaration" by Sharon E. Thompson, a supervisor with the Texas Department of Human Services. Also, the I.G. had marked the first two sets incorrectly with the docket number of another unrelated case. Consistent with my prehearing order dated October 8, 1992, and to dispel the confusion caused by the I.G.'s carelessness, I have corrected the docket number markings, renumbered some of the exhibits, and given numbers to the affidavits and the declaration. The exhibits in the first set, filed with the I.G.'s motion for summary disposition on November 3, 1992, are still identified as I.G. exhibits (Ex.) 1 through 6; the Hughes affidavit of that date is identified as I.G. Ex. 7. The exhibits in the second set, filed with the I.G.'s motion for summary disposition on March 29, 1993, are identified as I.G. Ex. 8 through 19; the Thompson declaration of March 27, 1993 is identified as I.G. Ex. 20. The exhibits in the third set, filed with the I.G.'s reply brief on May 24, 1993, are identified as I.G. Ex. 21 through 25; the Hughes affidavit of that date is identified as I.G. Ex. 26. I admit into evidence P. Ex. 1 and I.G. Ex. 1 through 4, 7 through 20, and 23 through 26. In doing so, I note that although the I.G. identified I.G. Ex. 3 as a three-page document, the I.G. submitted only the first and third pages. I reject I.G. Ex. 5 and 6 because they are the I.G.'s Notice letter and Petitioner's request for hearing and are already in the record. In my prehearing order, I directed the parties not to file such duplicative material as exhibits. I reject I.G. Ex. 21 and 22 because they duplicate I.G. Ex. 1 and 2.

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. From August 21, 1989 until November 28, 1989, Petitioner was under contract to provide administrative (business management) services to the West Texas Care Center (Center), Midland, Texas, a nursing facility participating in the Medicaid program. Petitioner's brief of April 13, 1993 at page 2; I.G. Ex. 8 and 20.

2. In a criminal information filed October 17, 1990 in the District Court of Midland County, Texas, Petitioner was charged with violating his duties as a fiduciary while he was administering the Center, by transferring property he had a duty to protect -- the patient funds -- thereby putting patient monies at risk. The date of the alleged offense was November 16, 1989. I.G. Ex. 1.

3. Also on October 17, 1990, Petitioner pled nolo contendere to the charge of Misapplication Of Fiduciary Property. The date of the offense to which he pled was November 16, 1989. I.G. Ex. 2.

4. In an order dated October 17, 1990, the court accepted the plea, noting that Petitioner had stipulated to "facts constituting a judicial confession." Pursuant to a deferred adjudication program, the court placed Petitioner on probation, fined him, and required him to make restitution to Medicaid. I.G. Ex. 2 and 7.

5. When Petitioner satisfied the court that he had substantially complied with his probation, the court released him from all penalties and disabilities. Petitioner's letter dated March 31, 1992, at page 2.

6. Based on Petitioner's conviction for misapplication or misuse of Medicaid-patient trust property, the State of Texas barred Petitioner from participation in Medicaid. I.G. Ex. 4.

7. Medicaid was paying for the care and treatment of seven of the Center's residents whose funds Petitioner was convicted of unlawfully misapplying. I.G. Ex. 10 -

20.

8. The funds in question were amounts which Medicaid allowed each such recipient to retain out of their personal income, to be used for personal needs. Id.

9. Medicaid rules required the Center to establish and maintain a system that assures a full and complete accounting of each resident's personal funds entrusted to the facility on the resident's behalf, which system must preclude any commingling of resident funds with facility funds. 42 C.F.R. § 483.10(c)(4).

10. A Texas Medicaid audit revealed that, on November 16 and 24, 1989, Petitioner wrote checks totalling more than $17,000, drawn on residents' trust funds, and that these checks were deposited in the Center's own bank account. I.G. Ex. 23.

11. Petitioner was never the Center's administrator of record. I.G. Ex. 3, 23.

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

13. The court's acceptance of Petitioner's plea of nolo contendere and of the deferred adjudication plan satisfy the requirement that Petitioner had to have been convicted of a criminal offense.

14. The protection by a nursing facility of funds held in trust for Medicaid recipients who are residents of the facility is an integral element of the delivery of health care services under Medicaid.

15. Petitioner's conviction for criminal subversion of the Center's fiduciary responsibilities relates to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act.

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

17. The I.G. is required to initiate an exclusion whenever the I.G. has conclusive information that a person has been convicted of a program-related crime; however, no deadline is imposed on the I.G. for such action.

18. An administrative law judge has no authority to alter the effective date of exclusion designated by the I.G. where the I.G. acted within the discretion afforded by statute and regulation in setting the effective date.

19. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion.

PETITIONER'S ARGUMENT

Petitioner asserts (1) that he had never pled guilty or been found guilty by a court; (2) that the government had no right to treat his plea of nolo contendere as a guilty plea; (3) that the HHS I.G. did not become involved in this process until nearly two years after the events at issue, thereby denying him prompt justice, and that the I.G.'s attorney improperly delayed the instant case; (4) that he had no power of control of the Center, but merely provided business management services for a fee; (5) that the I.G.'s contentions that patient and institutional funds were commingled, and that the patient funds were personal in nature, are untrue and inflammatory; and (6) that the patient funds were transferred solely for the legitimate purpose of applying them to patient obligations.

DISCUSSION

The provision of the Act under which the I.G. imposed and directed the imposition of Petitioner's exclusion -- section 1128(a)(1) -- contains two requirements. It requires that an individual (1) be convicted of a criminal offense, and (2) that such conviction be related to the delivery of items or services under Medicare or Medicaid.

As to the requirement that Petitioner had to have been convicted, section 1128(i) of the Act indicates that a person will be considered to have been "convicted" of a criminal offense if a court enters a judgment of conviction, or makes a formal finding of guilt, or accepts a guilty plea or a plea of nolo contendere, or approves a deferred adjudication plan to allow a guilty defendant who complies with certain conditions to preserve a clean record. In the present case, the court's acceptance of Petitioner's nolo contendere plea and the deferred adjudication plan satisfy the requirement of section 1128(i) of the Act.

I next conclude that Petitioner's conviction for criminal subversion of the Center's fiduciary responsibilities relates to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act. In Jerry L. Edmonson, DAB CR59 (1989), it was determined that the excluded party in that case, a nursing home administrator, also had been convicted of misapplying funds held in a fiduciary capacity for a Medicaid recipient who was a patient in the nursing home. The decision held that section 1128(a)(1) encompasses far more than just the theft of Medicaid or Medicare funds, or frauds directed against these programs, and that the protection of patients' funds is an integral element of Medicaid services delivered by nursing facilities. In the present case, as in Edmonson, unrebutted evidence establishes that a substantial number of patients whose funds Petitioner was convicted of misapplying were Medicaid recipients. Finding 7; I.G. Ex. 10 - 20.

Petitioner's arguments that he was never formally designated administrator of record, that he did not have the power to control the Center, that he was merely an employee, and that the funds in question were transferred for legitimate and proper reasons are, essentially, an attempt to dispute the holding of the Texas court that he was guilty of the crime of misapplication of fiduciary property. However, it is well established that HHS is not authorized to look beyond the fact of conviction and Petitioner may not use its administrative proceedings to collaterally attack his criminal conviction. Petitioner has recourse to the court system to rectify errors; they will not be considered here. Richard G. Philips, D.P.M., DAB CR133 (1991); Peter J. Edmonson, DAB 1330 (1992).

Petitioner's contentions that the I.G. did not act within a reasonable time to effect his exclusion, and that the I.G. is delaying the instant proceeding, are without legal or factual support. The regulations require the I.G. to initiate an exclusion if the I.G. has conclusive information that a person has been convicted of a program-related crime, but no deadline is imposed for such action. 42 C.F.R. § 1001.123; and see, Douglas Schram, R.Ph., DAB 1372 (1992). Furthermore, an administrative law judge has no authority to alter the effective date of exclusion designated by the I.G. where the I.G. acted within the discretion afforded by statute and regulation in setting the effective date. Shanti Jain, M.D., DAB 1398 (1993). I find nothing in the conduct of the I.G.'s counsel which suggests that dilatory or otherwise improper tactics were employed.

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. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 (1989). The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge