Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Larry E. Edwards, M.D.,	DATE: July 28, 1993
Petitioner,	Docket No. C-93-024
- v. -	Decision No. CR278
The Inspector General.	

DECISION

By letter dated October 21, 1992, Larry E. Edwards, 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). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. asserted 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 the Medicare and Medicaid programs.

Petitioner filed a timely request for review of the I.G.'s action. On November 30, 1992, I issued an Order and Notice of Prehearing Conference. I instructed the parties that the prehearing conference would be conducted by telephone.

By letter dated December 4, 1992, Petitioner stated that he was unable to participate in a telephone prehearing conference without an attorney because he is hearing impaired. Petitioner averred that he could not afford the services of an attorney, and thus he had no choice but to withdraw his hearing request.

This office subsequently provided Petitioner with the name and telephone number of an organization in his community which could make arrangements for Petitioner to have the use of a special device which permits hearing impaired individuals to participate in telephone conferences. Petitioner declined this offer, but said that he would like his case to be decided on written arguments and documentary evidence, without an in-person hearing. Petitioner indicated that, because of his hearing problem, he did not want to be subjected to the pressures of even a prehearing conference.

The I.G. did not object to waiving the prehearing conference and going forward with a hearing based on written arguments and documentary evidence. The I.G. subsequently filed a motion for summary disposition, accompanied by a supporting brief with one attachment and seven exhibits. I have marked and identified these exhibits as I.G. Ex. 1 through 7.[1]

Petitioner subsequently submitted a letter in which he set forth his position in this case. He did not submit any exhibit evidence with this document. Several weeks later, this office received a document which appeared to be a copy of a transcript of proceedings in the Connecticut Superior Court captioned State of Connecticut vs. Larry Edwards, M.D. This document was not accompanied by a cover letter or other identifying information. Petitioner subsequently indicated by telephone that he wished to offer this document as exhibit evidence. I have marked and identified this exhibit as P. Ex. 1. In addition, Petitioner requested additional time to submit supplemental arguments pertaining to this document.

The I.G. did not object to Petitioner's request to file supplemental arguments, and Petitioner subsequently submitted a letter in which he set forth his arguments pertaining to P. Ex. 1. The I.G. declined to file a reply brief.

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[1] In my February 1, 1993 prehearing order I instructed the parties that copies of administrative law judge and Departmental Appeals Board appellate panel decisions or published court decisions should be included not as exhibits, but as attachments, if at all. Attached to the I.G.'s brief is a copy of the decision Thelma Walley, DAB 1367 (1992). Pursuant to the instructions contained in my prehearing order, the I.G. does not offer this document as an exhibit, but instead refers to it as "Attachment A."

Petitioner has not contested the authenticity of the seven exhibits submitted by the I.G. I admit into evidence I.G. Ex. 1, and 4 through 7. I reject I.G. Ex. 2 and 3 because they are the I.G.'s Notice letter and Petitioner's request for a hearing and are already in the record. In my prehearing order, I directed the parties not to file such duplicative material as exhibits. The I.G. has not contested the authenticity of the one exhibit submitted by Petitioner, and I am admitting this exhibit into evidence.

I have considered the parties' written arguments and supporting exhibits, and the applicable laws and regulations. I conclude 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 conclude also that Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and 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. At all times relevant to this case, Petitioner was a licensed medical doctor in the State of Connecticut. I.G. Ex. 5 at page 4.

2. On September 27, 1990, a Connecticut State prosecutor filed with the Connecticut Superior Court an application for a warrant for the arrest of Petitioner. The arrest warrant application was based on an affidavit which was signed and attested to by an inspector with the Connecticut Medicaid Fraud Control Unit. I.G. Ex. 5.

3. The affidavit accompanying the arrest warrant application alleged that an investigation of Petitioner revealed that during the period from June 12, 1984 through November 10, 1988, Petitioner submitted or caused to be submitted 337 false claims on behalf of seven

Medicaid recipients for which Petitioner received an overpayment in the amount of $3071.50. I.G. Ex. 5 at page 25.

4. The affidavit accompanying the arrest warrant application alleged also that during the period October 10, 1984 through February 27, 1989, Petitioner submitted or caused to be submitted 569 false claims on behalf of 10 Medicare beneficiaries for which Petitioner received an overpayment of $6838.78. I.G. Ex. 5 at page 37.

5. The affidavit accompanying the arrest warrant asserted that, based on Petitioner's alleged offenses, there was probable cause to charge Petitioner with two counts of larceny in the first degree by defrauding a public community. I.G. Ex. 5 at pages 37 - 38.

6. On September 27, 1990, the Connecticut State Attorney filed an Information in the Connecticut Superior Court charging Petitioner with two counts of larceny in the first degree by defrauding a public community. I.G. Ex. 4 at page 1.

7. Pursuant to plea negotiations between Petitioner and the Connecticut State Attorney, the Connecticut State Attorney subsequently filed a substituted Information charging Petitioner with two counts of larceny in the fourth degree. The first count involved false claims submitted to the Medicare program and the second count involved false claims submitted to the Medicaid program. I.G. Ex. 4 at page 2, I.G. Ex. 5; P. Ex. 1.

8. As part of the plea agreement, Petitioner filed an application for accelerated rehabilitation in relation to count one of the substituted Information and he pled nolo contendere to count two of the substituted Information. P. Ex. 1.

9. On July 1, 1992, the Connecticut Superior Court granted Petitioner's application for accelerated rehabilitation on count one of larceny in the fourth degree. The court placed Petitioner on probation, pending notification that Petitioner had fully paid restitution to the Medicare program in the amount of $6838.78. I.G. Ex. 7; P. Ex. 1.

10. On July 1, 1992, the Connecticut Superior Court entered a judgment of guilty on count two of larceny in the fourth degree, based on its acceptance of Petitioner's nolo contendere plea. The court imposed an unconditional discharge based on the representation that

Petitioner paid restitution to the Medicaid program in the amount of $3071.50. I.G. Ex. 7; P. Ex. 1.

11. 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).

12. Petitioner's nolo contendere plea, and the court's acceptance of that plea, constitutes a "conviction" within the meaning of the mandatory exclusion provisions of the Act.

13. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

14. A defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his nolo contendere plea.

15. Sections 1128(a)(1) and 1128(i) of the Act, read together, provide adequate notice of the consequences which could result from conviction of an offense related to the delivery of an item or service under the Medicaid program.

16. Petitioner may not utilize this administrative proceeding 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.

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

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

19. 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.

20. 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.

PETITIONER'S ARGUMENT

Petitioner does not dispute that he was convicted of a criminal offense; nor does he dispute that the offense underlying his conviction was related to the delivery of an item or service within the meaning of section 1128(a)(1) of the Act. Petitioner's central argument is that he should not be subject to an exclusion under section 1128(a)(1) because his civil rights were violated at the time he entered into his plea agreement. Petitioner argues that his civil rights were violated because "the Judge who presided over the case encouraged me, as did my Attorney, to make a plea of nol[o] contendere for the Medicaid charge not knowing that if I did that I would be excluded from Medicaid and Medicare for five years." Petitioner's April 7, 1993 Response Letter. Petitioner asserts that he has a right to be tried under the law with a judge and an attorney who know the law.

Petitioner asserts also that the Medicare and Medicaid billing systems are "unclear, inconsistent and arbitrary." Petitioner's November 23, 1992 Hearing Request. He contends that he made good faith efforts to verify what procedure code he should use in completing his claim forms, but that members of the staff of the Medicaid program provided him with incorrect information.

DISCUSSION

The evidence adduced by the I.G. and not disputed by Petitioner amply demonstrates that 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. For this reason, Petitioner's five-year exclusion is required as a matter of law.

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the person to be excluded must have been convicted of a criminal offense under federal or State law. Section 1128(i)(3) of the Act expressly provides that when a person enters a plea of nolo contendere 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.

In the case at hand, the undisputed evidence establishes that the State of Connecticut charged Petitioner with two counts of larceny in the fourth degree. Finding 7.

Petitioner pled nolo contendere to the second count of larceny in the fourth degree. Finding 8.[2] Additionally, the undisputed evidence establishes that the court found Petitioner guilty of the offense, based on his plea. Finding 10. The evidence of record shows that Petitioner pled nolo contendere in order to dispose of the criminal charge against him, and the court disposed of the case based on its receipt of Petitioner's nolo contendere plea. That transaction amounts to "acceptance" of a plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore "convicted" of a criminal offense within the meaning of that provision. See Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd DAB 1104 (1989).

The statute further requires that the criminal offense in question must have been "program-related," i.e., related to the delivery of items or services under Medicaid or Medicare. It is well-established in decisions of the Departmental Appeals Board that filing false Medicare or Medicaid claims relates to the delivery of items or services under such programs and clearly constitutes 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). I find that the offense underlying Petitioner's criminal conviction -- intentionally billing Medicaid for services in excess of those actually provided -- likewise constitutes criminal fraud related to the delivery of Medicaid services.

Petitioner asserts that he did not intend to defraud Medicaid. However, under section 1128(a) of the Act, proof that an appropriate criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is called for; the intent or state of mind of the individual committing the crime is not material. DeWayne Franzen, DAB 1165 (1990). Also, these administrative proceedings cannot be used to attack the substantive decision arrived at by the court. In sum, the law does not permit HHS to look behind the fact of conviction. When an individual has been convicted of a

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[2] The evidence establishes that Petitioner applied for accelerated rehabilitation with respect to the first count of larceny in the fourth degree and that the court granted Petitioner's application for accelerated rehabilitation on this count. Findings 8 and 9. The I.G. did not argue that the court's disposition of the first count of larceny in the fourth degree constitutes a conviction within the meaning of the Act, and I do not address that issue in this Decision.

crime encompassed by section 1128(a)(1), exclusion is mandatory; such individual's subsequent claim of innocence will not be considered. Russell E. Baisley and Patricia Mary Baisley, DAB CR128 (1991).

Petitioner argues also that he should not be subject to an exclusion under section 1128(a)(1) because his attorney, and also the judge in the underlying criminal proceeding, encouraged him to plead nolo contendere without informing him that he would be excluded from the Medicare and Medicaid programs as a result of his conviction. Petitioner asserts that he was denied his civil rights during the course of the criminal proceedings because the judge and his attorney did not know the law, and, as a result, he was prejudiced because he was not fully advised of the consequences of entering a nolo contendere plea.

This argument is essentially the same as an argument made by a petitioner in the case Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992). In that case, the petitioner argued that his due process rights were violated because he was deprived of the notice necessary to understand the possible consequences of his guilty plea. The petitioner asserted that had he known of the consequences of his plea, he would have pled differently. I rejected this argument. In rejecting this argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985) for the proposition that a defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his plea of guilty. DAB CR215, at 6. An appellate panel of the Departmental Appeals Board affirmed my decision, finding that I "correctly held that, as a defendant, Petitioner did not have to be advised of all the possible consequences of his plea." DAB 1372, at 11. The appellate panel also went on to say:

> More importantly, Petitioner was on notice that his guilty plea could lead to a mandatory exclusion. Sections 1128(a)(1) and 1128(i), read together, provide adequate notice of the consequences which could result from conviction of a program-related offense. If Petitioner's complaint is with the actions of the [State] prosecutor . . . the proper forum for this complaint is . . . [the] State court.

DAB 1372, at 12. The Departmental Appeals Board has held in other cases that arguments about the process leading

to a Petitioner's criminal conviction are completely irrelevant to an exclusion proceeding. Charles W. Wheeler, DAB 1123 (1990). In view of the foregoing, Petitioner's argument that the I.G. is precluded from imposing an exclusion in this case because Petitioner did not know that his conviction would result in an exclusion is without merit.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require 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, at 12 - 14 (1989).

The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge