Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Douglas L. Reece, D.O.,	DATE: August 12, 1993
Petitioner,	Docket No. C-93-048
- v. -	Decision No. CR280
The Inspector General.	

DECISION

By letter dated January 12, 1993, Douglas L. Reece, D.O., 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 Medicaid.[1]

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

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[1] The I.G.'s notice letter mistakenly cited section 1128(a)(2) of the Act, but counsel for the I.G. corrected this to section 1128(a)(1) at the prehearing conference.

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. Petitioner is an osteopathic physician practicing in the State of Texas.

2. On June 14, 1990, a grand jury in Lubbock, Texas, indicted Petitioner for the felony offense of Tampering with Government Records. I.G. Ex. 2.[2]

3. The grand jury decided that there was probable cause to believe that on or about November 25, 1988, Petitioner knowingly and intentionally made a false claim for reimbursement by Medicaid based upon Petitioner's purportedly having provided an "office visit" to a certain individual when, in fact, Petitioner knew that such individual had not had an office visit. I.G. Ex. 2.

4. The indictment states that the claim was submitted to the National Heritage Insurance Company on a form used by

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[2] The I.G. submitted six exhibits and the affidavit of I.G. investigator William Hughes with the Motion for Summary Disposition. Petitioner submitted his own affidavit and an attached document with his response. Neither party objected to the other's exhibits. I am marking the affidavit of investigator Hughes as I.G. Exhibit (I.G. Ex.) 7 and the affidavit of Petitioner, including the attachment, as Petitioner's Exhibit (P. Ex.). I am admitting I.G. Ex. 1 through 5, and 7, and P. Ex. I reject I.G. Ex. 6 because it (the Notice letter) is already in the record and I directed the parties in my Prehearing Order not to submit such duplicative material.

the Texas Department of Human Services in determining eligibility for Medicaid benefits. I.G. Ex. 2.

5. The National Heritage Insurance Company was, on November 25, 1988, the Medicaid carrier (fiscal intermediary) for the State of Texas. See, Brief in Support of the Inspector General's Motion for Summary Disposition, p. 5.

6. On May 5, 1992, in the 237th District Court, Lubbock County, Texas, Petitioner "pleaded guilty to the charge contained in the indictment," and the court accepted the plea. I.G. Ex. 1.

7. The Texas court determined that the evidence "substantiates the Defendant's guilt for the offense charged against him to-wit: Tampering with Government Records, a third-degree felony committed on November 25, 1988." I.G. Ex. 1.

8. The court declared that the "best interest of society and the defendant" would be served by deferring entry of a formal adjudication of guilt. I.G. Ex. 1.

9. The court placed Petitioner on probation for a period of 10 years and required him to pay a substantial fine ($5000), plus restitution and costs.

10. The Secretary of Health and Human Services 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).

11. In making a discretionary determination, in the name of the State, to credit Petitioner's plea, thereby formally resolving an outstanding criminal charge, the judge was engaged in the "acceptance" process, within the meaning of section 1128(i)(3) of the Act.

12. The court's decision that formal entry of Petitioner's guilt should be deferred is a common situation, anticipated by Congress, which, the statute declares, does not undo the guilty plea.

13. That other federal statutes treat situations involving deferred adjudication differently is irrelevant, particularly in light of the clear intent of Congress with regard to mandatory exclusions.

14. Filing false Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion.

PETITIONER'S ARGUMENT

Petitioner contends that the I.G. failed to prove that he, Petitioner, was "convicted," within the meaning of section 1128(a)(1) of the Act, or that the convicton was a "final conviction." Petitioner asserts that thus there is a factual dispute which makes summary judgment inappropriate.

Petitioner cites the Immigration Reform and Control Act, which he maintains does not treat a criminal defendant as having been convicted when final adjudication of his case has been deferred. Petitioner argues that it is improper for federal law to utilize two different standards for the same type of determinations.

Next, Petitioner asserts that the District Court's Order for Deferred Adjudication does not provide sufficient detail as to the government records, the type of tampering, or the governmental program involved. He contends that because the indictment does not explicitly state that the Medicaid or Medicare program has been defrauded, the I.G. has not proven the required nexus between his alleged conviction and the program.

Lastly, Petitioner maintains that a five-year exclusion would probably put him out of business permanently -- at the very least, would cost him $500,000 in lost fees -- and that it would, therefore, be so disproportionate a sanction as to amount to an unconstitutional second punishment, citing United States v. Halper, 490 U.S. 435 (1989). Petitioner argues that he is entitled to an in-person hearing on whether his exclusion constitutes such prohibited punishment.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question have been convicted of a criminal offense under federal or State law.

As to the requirement that Petitioner had to have been convicted, the relevant statute, section 1128(i) of the Act, indicates that there are essentially four sets of actions which Congress regards as legal equivalents of conviction. These are: when a court enters a judgment of conviction (it is immaterial whether there is an appeal pending or whether the judgment is ultimately expunged); or when a court makes a formal finding of guilt; or a court accepts a guilty or nolo plea; or a court defers

judgment to allow a guilty defendant (who complies with certain conditions) to preserve a clean record.

In the case at hand, Petitioner appeared in court and "pleaded guilty to the charge contained in the Indictment." (Emphasis added.)

The court carefully questioned Petitioner about his actions and motivation. It thereupon "received" the guilty plea and "entered [it] of record upon the minutes of the Court as the plea of said defendant." The court then considered the evidence and found "that it substantiates the Defendant's guilt for the offense charged against him to-wit: Tampering with Government Records . . ." (Quotations mark the words of the State judge; underscoring has been inserted for emphasis in this Decision).

Lastly, the court decided that, in the interest of justice, entry of a formal adjudication of guilt should be deferred.

Based on the above, I conclude that Petitioner must be regarded as having been convicted, in context of these statutory criteria. Specifically, the Petitioner herein entered a guilty plea and the court accepted it.

The court's order (I.G. Ex. 1) clearly establishes that Petitioner declared himself to be guilty and that the judge found a real factual basis for the plea and found no coercion or other improper motivation. In the judge's own words, he "received" the plea. The judge then made a written entry in court records that Petitioner admitted he was guilty of the charge brought by the grand jury.

Thus, the judge evaluated Petitioner's plea and exercised a real option to accept it or reject it. Upon deciding that there was a genuine basis for the plea, the judge then noted Petitioner's admission of guilt on an official judicial document. I conclude that the court thereby satisfied the essence of the statutory standard -- that is, the judge made a truly discretionary determination, in the name of the State of Texas, as to whether or not to credit a particular plea, thereby formally resolving an outstanding criminal charge. The fact that the judge then decided that formal entry of Petitioner's guilt should be deferred is a common situation, anticipated by Congress, which, the statute declares, does not undo the guilty plea which gave rise to the conviction.

Petitioner's reliance on the decisions in Travers v. Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992) and Martinez-Montoya v. Immigration and Naturalization Service, 904 F.2d 1018 (5th Cir. 1990) is misplaced. In Travers, which involved an I.G.-imposed-and-directed exclusion also, the State court whose action on the plea was in question not only had not formally "accepted" it, but had also stated that it was taking the plea under advisement and that plea acceptance would require a further petition by the parties. Thus, the facts of the present case differ significantly from Travers and are sufficient to support the inferences and conclusion I have drawn.

In Martinez-Montoya, the Fifth Circuit held that the Immigration and Naturalization Service had improperly ignored its own precedents and regulations in not recognizing that a Texas deferred adjudication determination was not a conviction for purposes of the immigration laws. I find not relevant Petitioner's argument that in another area of federal law deferred adjudication is treated differently. In this area of exclusion law, Congress has defined conviction to include a deferred adjudication, and it is not within the authority of an administrative law judge to disregard or hold invalid federal statutes or regulations. For that matter, it is unlikely that a federal court would do so when there is no better reason than that different policies exist in immigration law. Furthermore, Petitioner is mistaken when he maintains that this is a factual question which makes summary disposition unwarranted. Rather, it is a question of law, which may readily be resolved without the elucidation of additional facts.[3]

The other requirement of section 1128(a)(1) of the Act is that the conviction must 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 clear program-related misconduct, sufficient to mandate exclusion. 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). I find that Petitioner's actions in the present case -- intentionally

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[3] Petitioner has emphasized also that the I.G. did not prove that there was a "final conviction" in his case. Inasmuch as this phrase does not appear in section 1128(a) of the Act, there is no merit to Petitioner's argument.

billing Medicaid for services that were not provided as Petitioner alleged -- similarly constitute criminal fraud related to the delivery of Medicaid services.

Petitioner asserts also that the District Court's Order does not provide sufficient details of the conduct which led to charges being brought against him. I find that the opposite is true.

As noted above, Petitioner "pleaded guilty to the charge contained in the indictment," and it was found by the court that the evidence "substantiates the Defendant's guilt for the offense charged against him." Thus, he must be regarded as having been convicted of exactly the offenses for which he was indicted.

Turning to the Indictment, I find that such document is reasonably clear. It charges that Petitioner knowingly and intentionally falsified a claim form provided to the Texas Department of Human Services through a private company, National Heritage Insurance. I find it reasonable to infer that this latter entity was a Medicaid carrier (fiscal intermediary) for the State of Texas. Moreover, the I.G. noted in the Brief in Support of the Motion for Summary Disposition (page 5) that the private company was the Medicaid fiscal intermediary, and Petitioner did not dispute it. Had his crime not been discovered, the data from the form would have been transmitted to the State, and payment would have been made from Medicaid funds to Petitioner for work he did not perform.

Petitioner's reliance on the Double Jeopardy clause is also misplaced. In the first place, his was a State conviction and a federal administrative sanction, even if sufficiently punitive, would not violate the Double Jeopardy clause. Also, an appellate panel of the DAB has held explicitly that " . . . the mandatory exclusion provision is not comparable to the civil penalty imposed in United States v. Halper , but is remedial in nature" and, therefore, constitutionally inoffensive. Janet Wallace, L.P.N., DAB 1126 (1992). Also, see Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992).

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 an administrative law 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