Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sonia M. Geourzoung, M.D.,	DATE: September 20, 1993
Petitioner,	Docket No. C-93-019
- v. -	Decision No. CR286
The Inspector General.	

DECISION

By letter dated September 17, 1992, Sonia M. Geourzoung, M.D., 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 Petitioner for a period of five years from participation in the Medicare program and from participation in the the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by 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. The I.G. moved for summary disposition. Petitioner opposed the motion. I heard oral argument on July 20, 1993.

Because I have determined that there are no genuine issues of material fact, I have granted the I.G.'s motion and have decided the case on the basis of the parties' written submissions.

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. During the period relevant to this case, Petitioner was a physician licensed by the State of New York, and a Medicare and Medicaid provider. I.G. Proposed Finding 1; Petitioner's Memorandum in Opposition to Inspector General's Motion for Summary Disposition at 10.

2. On April 24, 1991, Petitioner was indicted for: 1) aiding and abetting the unauthorized practice of medicine; 2) Grand Larceny in the Third Degree; and 3) Offering a False Instrument for Filing in the First Degree. I.G. Ex 1.[1]

3. On October 3, 1991, Petitioner pled guilty in New York State Supreme Court to Attempted Grand Larceny in the Fourth Degree and Offering a false instrument for Filing in the Second Degree. The acts which gave rise to these charges consisted of Petitioner's submitting claims for Medicaid reimbursement for her professional services. These claims were false and fraudulent in that she knowingly sought and collected payments for treatment which had actually been rendered by her employees, who were not licensed physicians. I.G. Ex. 2 & 3.

4. The court accepted Petitioner's plea and, on November 18, 1991, sentenced her to conditional discharge and required her to make restitution in the amount of $14,000 to Medicaid. I.G. Ex. 2 & 3.

5. 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. 21662 (1983).

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[1] The I.G. submitted five exhibits with the Motion for Summary Disposition. Petitioner did not submit any exhibits. I am admitting I.G. Exhibits (Ex.) 1 through 5.

6. Petitioner's guilty plea, plus the judge's acceptance thereof, constitute a "conviction" within the meaning of section 1128(i) of the Act.

7. The acts leading to Petitioner's conviction in the present case constitute criminal offenses related to the delivery of Medicaid services.

8. Where a program-related conviction is the basis for an exclusion, that exclusion must be for a mandatory minimum period of five years and whether the conviction may also be a basis for a permissive exclusion under section 1128(b) of the Act is not a relevant consideration.

9. Petitioner's argument that her conduct was justified by the New York Education Law is an impermissible collateral attack upon her confession and conviction.

10. In a mandatory minimum case such as this, I am not authorized to consider Petitioner's contentions regarding her trustworthiness and the good care she purportedly gave her patients, these being essentially arguments for mitigation.

PETITIONER'S ARGUMENT

Petitioner asserts that her conduct was justified by Section 6530(25) of the New York Education Law, which permits the delegation of certain professional responsibilities.

She contends that, in the years that have passed since her conviction, she has shown that she is trustworthy, and that to exclude her at this time would be disproportionate and vindictive.

She further insists that her actions in no way diminished the quality of care received by patients.

She maintains that, if she is to be subjected to an exclusion action, it should be under section 1128 (b) of the Act, which does not mandate a minimum five-year period.

Lastly, she argues that imposition of a five-year exclusion in her case violates her constitutional right to equal protection under the law.

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. In the case at hand, Petitioner pled guilty and the court, after careful inquiry, accepted the plea. Section 1128(i)(3) of the Act expressly states that when an individual enters a plea of guilty, and the court accepts the plea, such person is considered to have been convicted of a criminal offense.

Next, it is required by section 1128(a)(1) of the Act that Petitioner's criminal offense be related to the delivery of an item or service under Medicaid or Medicare. Case precedent clearly establishes a general rule that all crimes involving financial misconduct directed at the Medicaid/Medicare programs are, by their very nature, related to the delivery of items or services under such programs, within the meaning of 1128(a)(1). Samuel W. Chang, M.D., DAB 1198 (1990); Carlos E. Zamora, M.D., DAB 1104 (1989). Napoleon S. Maminta, M.D., DAB 1135 (1990). As to the exact offense involved herein, it is also well-established in DAB decisions that filing false Medicare or Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion. See, e.g., Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990). I find that the actions for which Petitioner was convicted in the present case -- making false representations in claims for Medicaid reimbursement (resulting in her receiving thousands of dollars in payments to which she was not entitled) -- constitute criminal offenses related to the delivery of Medicaid services.

In Boris Lipovsky, M.D., DAB 1363 (1992), an appellate panel of the DAB held that where a criminal conviction satisfies the requirement of section 1128(a)(1) that it be related to the delivery of an item or service under Medicare or Medicaid, then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion established by the statute. The fact that the criminal conviction may also appear to fall within the criteria for permissive exclusion found in section 1128(b)(1) is irrelevant. Id.

Petitioner was convicted of Attempted Grand Larceny in the Fourth Degree and Offering a false instrument for Filing in the Second Degree. Her argument that her conduct was justified by Section 6530(25) of the New York Education Law evidently did not impress the State court

and will not be considered here, because it would constitute an impermissible collateral attack upon her confession and conviction.

DAB administrative law judges and appellate panels have determined that proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1) and that arguments that a petitioner is actually innocent, or that the trial was unfair, or that the mandatory exclusion should be modified because of mitigating circumstances will not avail to reduce the mandatory minimum period. See, e.g., Janet Wallace, L.P.N., DAB 1126 (1992); Dewayne Franzen, DAB 1165 (1990); Richard G. Philips, D.P.M., DAB CR133, aff'd DAB 1279 (1991); Peter J. Edmonson, DAB 1330 (1992).

Petitioner contends that her exclusion should be shortened because the I.G. did not act within a reasonable time to effect her exclusion. The I.G. must initiate an exclusion whenever the I.G. has conclusive information that a person has been convicted of a program-related crime; no deadline is imposed upon the I.G. for such action. 42 CFR § 1001.123. See Douglas Schram, R.Ph., DAB 1372 (1992). 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).

Finally, Petitioner argues that imposition of the mandatory minimum five-year exclusion violates her constitutional right to equal protection under the law. Her argument appears to be that a five-year exclusion is so disproportionate to the crimes of which she was convicted as to deprive her of equal protection. Whatever may be the merit of Petitioner's constitutional argument, I am without authority to address it here. See, e.g., John A. Crawford, Jr., M.D., DAB 1324 (1992).

CONCLUSION

Sections 1128(a)(2) 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 her conviction for larceny and misrepresentation. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Greene, DAB CR19, at 12 - 14.

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

/s/

Joseph K. Riotto
Administrative Law Judge