Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Robert C. Mohr, M.D.,	DATE: October 25, 1993
Petitioner,	Docket No. C-93-067
- v. -	Decision No. CR292
The Inspector General.	

DECISION

By letter dated February 23, 1993, the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), notified Robert C. Mohr, M.D., the Petitioner herein, that it had been decided to exclude Petitioner 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, which I refer 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 by the Departmental Appeals Board (DAB) of the I.G.'s action. The I.G. moved for summary disposition.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are legal, I have granted the I.G.'s motion and 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. Petitioner is a licensed psychiatrist in the State of Utah who owns and operates the Mohr Clinic, a mental health facility. P. Br. 3.[1]

2. Petitioner was charged, in a Count I of the criminal information (Information), the only count in said Information, with knowingly filing claims for medical benefits, which claims misrepresented the type, quality, or quantity of services rendered. I.G. Ex. 1 at 1.[2]

3. Specifically, Petitioner was alleged to have received overpayment from the Medicaid program as a result of his filing of Medicaid claims in which he incorrectly claimed that services were provided by a physician when, in fact, services were provided by a non-physician employed by Petitioner. I.G. Ex. 1 at 2.

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[1] I use the following abbreviations when citing the parties' exhibits and briefs and my findings of fact and conclusions of law:

I.G.'s Exhibit	I.G. Ex. (number at page)
Petitioner's Exhibit	P. Ex. (number at page)
Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. R. Br. (page)
My Findings and Conclusions	Finding (number)

[2] Petitioner submitted one exhibit with his brief. The exhibit was marked as "Plaintiff's Exhibit A." I have re-marked this exhibit as Petitioner's Exhibit 1 and admit it into evidence. The I.G. submitted five exhibits, marked as I.G. Ex. 1 - 5. I admit all of the I.G.'s exhibits into evidence.

4. Petitioner entered into a plea agreement whereby he pled guilty to filing a false Medicaid claim, as charged in Count I of the Information. I.G. Ex. 1, 2, 3, 4.

5. On August 11, 1992, the Utah Third Circuit Court received Petitioner's plea agreement and agreed to handle it pursuant to a first offender program, whereby Petitioner's plea and sentencing would be held in abeyance until he satisfied all the conditions of the plea agreement, following which, the case could be dismissed. I.G. Ex. 2, 3, 4.

6. As part of his plea agreement, Petitioner was ordered by the Utah court to pay $17,000 to the Utah Bureau of Medicaid Fraud as follows: $12,000 in restitution, $2000 in investigation costs, and $3000 in penalties. I.G. Ex. 2, 3.

7. An individual who has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld is deemed "convicted" for purposes of section 1128(a) of the Act. Act, section 1128(i)(4).

8. 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 (May 13, 1983).

9. The actions of Petitioner which caused him to be charged and convicted (meaning his intentionally misrepresenting to Medicaid authorities the identity of the actual provider of certain medical services) constitute a criminal offense related to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 8.

10. Petitioner may not utilize these administrative proceedings to collaterally attack his criminal conviction by seeking to show that he did not do the act charged, or that he had no criminal intent.

11. Petitioner's contention that the Utah officials who handled his case were "agents" of the Secretary of HHS, so that the State's commitment not to punish Petitioner further estops the Secretary from acting against him, is wholly without basis.

12. Petitioner did not make any showing that he was subjected to cruel and unusual punishment or lack of due process; in any event, as an administrative law judge, I

have no authority to resolve such matters in this forum.

PETITIONER'S ARGUMENT

Petitioner asserts that he "...was not convicted of a crime...." Rather, he "...merely negotiated a plea bargain."

He maintains that his misdemeanor offense was unrelated to the delivery of health care since it amounted to nothing more than a technical billing dispute concerning whether Petitioner could bill Medicaid for the services of clinical social workers who helped care for his psychiatric patients, under his supervision. He contends that his position was legally justified and extensively cites statutes and regulations in support of his position.

Petitioner argues also that the State of Utah acts as an "agent" of the Secretary of HHS when it negotiates an agreement, such as the settlement arrived at in his case, and that when the State agreed that he would be subject to no additional penalties, this commitment was binding upon HHS.

Lastly, Petitioner is of the opinion that the actions taken against him denied him due process and equal protection, as guaranteed by Utah law, and subjected him to cruel and unusual punishment and double jeopardy (presumably referring to the U.S. Constitution).

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question must have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty. The court "received" Petitioner's plea, but did not enter it, choosing, instead, to place him in a first-offender program, pursuant to which his plea could be expunged if he complied with the terms of his bargain with the State.

The applicable law (section 1128(i) of the Act) indicates that there are essentially four sets of actions a court could take which would be regarded as a conviction for purposes of sections 1128(a) and (b) of the Act -- i.e., the court could enter a judgment of conviction (it is immaterial whether there is an appeal pending or whether

the judgment is ultimately expunged); or the court could make a formal finding of guilt; or the court could accept a guilty or nolo contendere plea; or the court could defer judgment to allow a guilty defendant (who complies with certain conditions) to preserve a clean record. It is apparent that the plea agreement of Petitioner herein satisfies this last criterion and that he has been convicted within the meaning of section 1128(i) of the Act.

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. In I.G. Ex. 2, Petitioner's "waiver of his right to a trial", he states that he is entering a plea of guilty to Count I of the Information, namely the charge of filing a false Medicaid claim. In I.G. Ex. 3, the actual plea agreement, Petitioner states that he is pleading guilty to the Class B misdemeanor of filing a false claim.

My assessment of all of the relevant facts and circumstances is that Petitioner's plea to the Class B misdemeanor of filing a false claim is the same offense, albeit less precisely stated, as the offense charged in Count I of the Information. I.G. Ex. 1, 3. The court, in accepting Petitioner's plea, incorporated by reference Petitioner's sworn admission that he was pleading to filing a false Medicaid claim, as specified in Count I of the Information. I.G. Ex. 1, 2, 3 at 2, 4.

It is well-established in DAB case precedent that filing false Medicare or Medicaid claims constitutes program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). In light of the above, it is my determination that the actions of Petitioner in the present case which caused him to be charged and convicted (meaning his intentionally misrepresenting to the Medicaid authorities the identity of the person who actually provided the medical services) constitute a criminal offense related to the delivery of items or services under Medicaid, thereby satisfying the second requirement for mandatory exclusion.

Furthermore, it has been held that a criminal offense meets the statutory test for program-related misconduct where either the Medicare or Medicaid program is the victim of the crime. Domingos R. Freitas, DAB CR272, at 30 (1993), citing Napoleon S. Maminta, M.D., DAB 1135 (1990). As part of Petitioner's plea agreement, the court compelled Petitioner to pay restitution to the Utah

State Bureau of Medicaid Fraud. The Information under which Petitioner was charged and convicted contains only one count. I.G. Ex. 1, 3. The Information states that the false claims that Petitioner filed were Medicaid claims. I.G. Ex. 1. When imposing sentence on Petitioner for that one count, the court required Petitioner to pay restitution to the Utah State Bureau of Medicaid Fraud. This indicates that the sole offense for which Petitioner was charged or convicted, Count I of the Information, had an adverse financial impact on the Medicaid program. Petitioner's offense victimized the Medicaid program because it compelled Medicaid to pay for services at a rate commensurate with a physician providing them when, in fact, a non-physician provided those services. Finding 3. Under the test enunciated in Maminta and reaffirmed in Freitas, this is convincing evidence sufficient for me to find that Petitioner's criminal conviction is program-related within the meaning of section 1128(a)(1).

Petitioner, as was noted above, insists that his actions were legally correct and that the State authorities who prosecuted him were wrong. However, HHS may not look beyond the fact of conviction and Petitioner may not utilize its administrative proceedings to collaterally attack his criminal conviction by seeking to show that he did not do the act charged, or that he had no criminal intent.
Petitioner may have recourse in the courts to rectify such matters, but not here. Richard G. Philips, D.P.M., DAB CR133 (1991); Peter J. Edmonson, DAB 1330 (1992).

Petitioner's contention that the Utah officials who handled his case were "agents" of the Secretary of HHS, so that the State's commitment not to punish Petitioner further estops the Secretary from acting against him, is wholly without basis. No evidence in the record suggests that such a delegation of authority ever occurred, and it is evident from provisions of the Act that Congress gave State and federal officials distinct and independent roles to play in sanctioning wayward health-care providers.

Petitioner claims also that the exclusion he is appealing here, if imposed, would unlawfully subject him to double jeopardy, since the State had already taken action against him for the same offense. However, an appellate panel of the DAB has held explicitly that the mandatory exclusion provision is not comparable to the civil penalty imposed in U.S. v. Halper, 490 U.S. 435 (1989), but is remedial in nature and, therefore, constitutionally inoffensive. Janet Wallace, L.P.N., DAB

1126 (1992). Second, as a matter of law, the constitutional ban on double jeopardy does not preclude a federal civil sanction being imposed against a person who has been convicted by a State of a criminal offense arising out of the same facts. See, e.g., Abbate v. U.S., 359 U.S. 187 (1959).

Lastly, with regard to the allegations of denial of due process and cruel and unusual punishment, Petitioner has merely listed these words and has offered no coherent argument or evidence indicating why they might apply to him. In any event, I, as an administrative law judge, have, essentially, no authority to resolve such matters in this forum. Shanti Jain, M.D., DAB 1398 (1993).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction for filing a false Medicaid claim, which conviction is related to the delivery of items or services under these programs. Neither the I.G. nor the administrative law judge is authorized to reduce the minimum term of five years for this mandatory exclusion. Greene.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge