Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
	DATE: December 21, 1993
Berton Siegel, D.O.,	
Petitioner,	Docket No. C-93-070
	Decision No. CR298
- v. -	
The Inspector General.	

DECISION

By letter dated March 23, 1993, Berton Siegel, 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 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. The I.G. explained that Petitioner's five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (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.

Because I have determined that there are no 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 Medicare and Medicaid for a period of five years.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for an individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program[1] to be excluded from participation in such programs, for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS STIPULATED BY THE PARTIES[2]

1. On October 1, 1982, the State of Arizona implemented the Arizona Health Care Cost Containment System (AHCCCS), an experimental, prepaid, capitated[3] Medicaid program. I.G. Br. 5; P. Br. 6.[4]

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[1] The definition of what constitutes a "State health care program" is contained at section 1128(h) of the Act. For the purposes of this Decision, my reference to the State health care programs defined at section 1128(h) of the Act means Medicaid.

[2] In his response to the I.G.'s motion for summary disposition, Petitioner stated specifically that he agreed with certain of the facts as set forth at pages 5 through 11 of the I.G.'s motion for summary disposition. Those undisputed material facts are set forth here.

[3] "Capitation" under AHCCCS is defined as fixed monthly payments which AHCCCS gives in advance to its contractors (health plans) for the full range of medical benefits available to each AHCCCS member. P. Ex. 1, Appendix C.

[4] The I.G. submitted 11 exhibits. I cite the I.G.'s exhibits as I.G. Exs. 1 - 11 (at page). The I.G. withdrew I.G. Exs. 3 and 6. Petitioner submitted one exhibit. I cite Petitioner's exhibit as P. Ex. 1 (at page). I admit into evidence I.G. Exs. 1, 2, 4, 5, 7 - 11 and P. Ex. 1. The I.G. submitted a motion for summary disposition to which Petitioner responded. The I.G. submitted a reply to Petitioner's response. I cite the I.G.'s motion for summary disposition as I.G. Br. (page). I cite Petitioner's response as P. Br. (page). I cite the I.G.'s reply as I.G. R. Br. (page).

2. AHCCCS is a State health care program as defined by section 1128(h) of the Act. I.G. Br. 5; P. Br. 6; I.G. Exs. 7 at 2, 8 at 6, 9 at 6; P. Ex. 1.

3. Arizona initially entered into agreements with four "prime contractors" to provide health care services to AHCCCS qualified patients. I.G. Br. 6; P. Br. 6.

4. The prime contractors received Medicaid funding through the AHCCCS program. I.G. Br. 6; P. Br. 6.

5. The prime contractors subcontracted with hospitals and other health care providers to fulfill their obligation to provide health care items and services to AHCCCS patients. I.G. Br. 6; P. Br. 6.

6. Health Care Providers of Arizona (HCPA) was incorporated on August 6, 1982 for the sole purpose of providing health care services as mandated by AHCCCS. I.G. Br. 6; P. Br. 6.

7. HCPA was an AHCCCS prime contractor from 1982 until 1984. I.G. Br. 6; P. Br. 6.

8. Petitioner is a licensed osteopathic physician. I.G. Br. 6; P. Br. 6.

9. Petitioner owned one-third of HCPA's shares and served, at various times, as HCPA's president, chairman of the board of directors, and co-medical director. I.G. Br. 6; P. Br. 6.

10. Under its contract with HCPA, AHCCCS was required to make monthly capitation payments to HCPA in advance of HCPA's performance of services. I.G. Br. 7; P. Br. 6.

11. This monthly payment constituted prepaid, per member, reimbursement for all of the covered services HCPA provided AHCCCS' members. I.G. Br. 7; P. Br. 6; Finding 10.

12. HCPA's contract with AHCCCS required that all funds paid to HCPA under the contract be accounted for separately. I.G. Br. 7; P. Br. 6.

13. The monthly checks which AHCCCS paid HCPA were deposited in HCPA's corporate checking account. I.G. Br. 7; P. Br. 6.

14. On or about July 28, 1989, a criminal indictment was filed in the Superior Court of Maricopa County, Arizona

(State court) against Petitioner and two other defendants. I.G. Br. 9; P. Br. 7.

15. The indictment alleged that Petitioner and the two other defendants had used AHCCCS funds to buy medical equipment which was to be used for their non-AHCCCS patients, constituting theft in violation of A.R.S. § 13-1802(A)(2). I.G. Br. 9; P. Br. 7.

16. The indictment alleged further that Petitioner had conspired with the two other defendants in a continuing scheme to:

> a. defraud HCPA, the primary care physicians under contract with HCPA, and AHCCCS;
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> b. divert, misappropriate, steal and convert funds entrusted to HCPA by AHCCCS;
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> c. use their HCPA positions for personal benefit, or for the benefit of their other businesses or ventures in disregard of HCPA's financial condition;
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> d. pay themselves or their other businesses or ventures excess money, i.e., by purchasing medical equipment for the benefit of their private medical practice; and
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> e. conceal from AHCCCS the money they were taking for their personal benefit or for the benefit of their other businesses or ventures.

I.G. Br. 9 - 10; P. Br. 7.

17. On July 1, 1992, Petitioner pled guilty to three felony counts (amended counts 12, 13, and 14) of facilitation of theft in violation of A.R.S. §§ 13-1004, 13-1802(A)(2). I.G. Br. 10; P. Br. 7; I.G. Ex. 1 at 2, 3, I.G. Ex. 11.

18. Based on his guilty plea, Petitioner was convicted of three counts of facilitation of theft. I.G. Br. 11; P. Br. 7; I.G. Ex. 1 at 2, 3; Finding 17.

19. The Secretary of HHS delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. I.G. Br. 11; P. Br. 7.

OTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

20. HCPA's primary source of income consisted of AHCCCS payments. I.G. Ex. 9 at Appendix B, paragraph 1(d); I.G. Ex. 10 at 2.

21. The facts upon which Petitioner's conviction was based -- admitted by Petitioner in signed statements attached to his plea agreement -- are the following:

a. During 1982 - 1984, HCPA was a State contracted provider of indigent health care under AHCCCS;

b. AHCCCS paid monthly checks to HCPA which were deposited into HCPA's corporate checking account;

c. The checking account was controlled by HCPA's principals, Petitioner and the two other defendants identified in the indictment;

d. Petitioner ordered, and countersigned a check with a codefendant to pay for liposuction (fat suction) equipment. The check was written on HCPA's checking account, despite the fact that Petitioner knew that the liposuction equipment was to be used for his non-AHCCCS cosmetic surgery patients. Cosmetic procedures are not covered by AHCCCS;

e. Petitioner ordered and then aided and directed the two other defendants indicted with him to pay for dermabrasion equipment, despite knowing that the equipment was to be used for his non-AHCCCS cosmetic or non-cosmetic surgery patients; and

f. Petitioner ordered and countersigned a check with a codefendant to pay for surgical knife equipment. The check was written on HCPA's checking account, despite the fact that Petitioner knew the surgical knife equipment was to be used for his non-AHCCCS cosmetic or non-cosmetic surgery patients.

I.G. Ex. 11 at 3 - 5.

22. The State court judge granted the motion for dismissal contained in Petitioner's plea agreement regarding any and all charges arising out of Petitioner's relationship with HCPA and AHCCCS (which included counts

1 - 11 and 15 - 17 of the indictment). I.G. Ex. 1 at 5; I.G. Ex 11 at 1.[5]

23. Petitioner was sentenced to probation for three years; fined $14,000; ordered to pay $8,619.40 in restitution to the victim of his crime;[6] ordered to pay $100,000 as reimbursement for the costs of prosecution; and assessed miscellaneous fees. I.G. Ex. 1 at 3 - 5.

24. Petitioner acknowledged in writing that, as a result of his plea agreement, he was subject to a minimum five-year exclusion from Medicare and Medicaid. I.G. Ex. 11 at 6.

25. Petitioner's guilty plea, which was accepted by the State court, satisfies the Act's requirement that Petitioner has been "convicted." Act, section 1128(i)(3); Findings 17, 18.

26. Petitioner's conviction relates to the delivery of health care items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 25.

27. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for five years, as required by section 1128(c)(3)(B) of the Act.

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[5] The judge's order indicated that his prohibition of charges relating to AHCCCS and HCPA did not affect the three convictions arising out of Petitioner's thefts from HCPA (amended counts 12, 13, and 14), which the court had just entered. I.G. Ex. 1 at 5.

[6] The I.G.'s exhibits are unclear as to who was the recipient of this restitution. I.G. Ex. 2, a document entitled, "Restitution Ledger," is on file in the State court. It sets forth Petitioner's financial obligations and reflects that he owes $8,619.40 to AHCCCS. However, in the State court order constituting the judgment against Petitioner, the State court judge ordered Petitioner to pay $8,619.40 to HCPA's trustee in bankruptcy. I.G. Ex. 1 at 4.

Here, however, the entity receiving Petitioner's restitution is immaterial. The identity of that recipient does not alter the criminal nature of Petitioner's misconduct or the fact that his crimes were directed at the Medicaid program.

28. The fact that Petitioner's conviction may fall within the criteria for permissive exclusion found at section 1128(b)(1) of the Act is irrelevant.

ARGUMENT

Petitioner maintains that his conviction is not program related and, therefore, that the only appropriate sanction is a permissive exclusion. He observes that the State court order entering judgment against him also provides that charges arising out of his relationship with HCPA and AHCCCS be dismissed. I.G. Ex. 1 at 5. Petitioner contends that the State court's holding amounts to a dismissal of the program-related charges and leaves a conviction that does not relate to the delivery of items or services under Medicare or Medicaid.

Petitioner asserts also that he did not intend to commit any offenses against Arizona law and that he entered his guilty plea without legal counsel. Furthermore, Petitioner asserts that if I find that his exclusion is permissive, I should consider in mitigation of the length of his exclusion that he is not a financial threat to Medicare and Medicaid; that he pled guilty many years after the activity on which his plea is based took place; and that, as a physician, he is, overall, an asset to the community and to his profession.

DISCUSSION

The first requirement for mandatory exclusion under section 1128(a)(1) of the Act is that the individual in question has been "convicted" of a federal or State criminal offense. In the case at hand, Petitioner pled guilty to a three-count criminal charge. Finding 17. The State court accepted the plea, entered judgment against Petitioner, and imposed a significant penalty upon him. Findings 18, 23. 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," within the meaning of section 1128(a)(1) of the Act.

Next, it is required by section 1128(a)(1) that Petitioner's criminal offense be related to the delivery of items or services under Medicare or Medicaid. A criminal conviction is program related within the meaning of this section when there is a "common sense connection" between the criminal offense and the delivery of Medicare or Medicaid benefits; i.e., that there is some "nexus"

between the criminal offense and the functioning of the Medicare and Medicaid programs. Thelma Walley, DAB 1367, at 9 (1992).

The theft of Medicare and Medicaid assets relates to the delivery of health care items or services by diminishing Medicare and Medicaid's efficiency and ability to supply benefits to their beneficiaries and recipients. Indeed, Departmental Appeals Board (DAB) case precedent has established a general rule that all crimes involving financial misconduct directed at Medicare or Medicaid are, by their very nature, related to the delivery of items or services under such programs, within the meaning of section 1128(a)(1). Samuel W. Chang, M.D., DAB 1198 (1990) (false billing); Carlos E. Zamora, M.D., DAB 1104 (1989) (false billing); Napoleon S. Maminta, M.D., DAB 1135 (1990) (conversion of a Medicare reimbursement check).

Petitioner does not dispute that AHCCCS constitutes a State health care program within the meaning of section 1128(h) of the Act. Finding 2. Moreover, as HHS approved AHCCCS' creation (initially as a "demonstration project") in 1982, and thereafter provided it with substantial financing through Title XIX[7] of the Social Security Act, and considering that the program and its contractors were generally expected to comply with Title XIX (P. Ex. 1; I.G. Ex. 9 at 6), I conclude that AHCCCS should be regarded as a State health care program. Accordingly, those who are convicted of a criminal offense related to the delivery of an item or service under AHCCCS are subject to a five-year exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

In the case at hand, Petitioner did not convert funds directly from the State. However, Petitioner did convert (or facilitate the conversion of) funds that had been entrusted to HCPA, a State contractor established solely to provide health care services as mandated by AHCCCS and a company Petitioner helped to establish and over which he had a shared power of control. Findings 6, 7, 9, 17, 18, 21. Specifically, HCPA worked for the State (via HCPA's contract with AHCCCS) arranging for the provision of health care services to a designated group of State residents and using AHCCCS funds to pay for those services. I.G. Ex. 9. HCPA's primary revenue source appears to have been the funds it received from AHCCCS (a

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[7] Title XIX established and continues to govern the Medicaid program.

Medicaid program). Findings 1 - 7, 20. In sum, Petitioner misappropriated public funds from an entity which was, in essence, an agent of the State.

Petitioner's contention that the dismissal of many of the criminal charges against him proves that his offenses could not have been program related is without merit. His signed admissions of the facts supporting his guilty pleas to amended counts 12, 13, and 14, are sufficient to establish his commission of program-related offenses. Specifically, Petitioner admitted that: 1) HCPA was a State controlled provider of indigent care under AHCCCS; 2) AHCCCS paid monthly checks to HCPA which were deposited into HCPA's checking account; and 3) Petitioner either paid from HCPA's checking account, or directed that others pay from HCPA's checking account, for the purchase of medical equipment to be used for Petitioner's non-AHCCCS patients. Finding 21.

Petitioner asserts further that he did not intend to commit any crime when he undertook the acts which resulted ultimately in his conviction. Petitioner's intention, however, is irrelevant. It is Petitioner's conviction of a program-related criminal offense that triggers exclusion; proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). DeWayne Franzen, DAB 1165, at 8 (1990).

Moreover, with regard to Petitioner's contention that he was without the benefit of counsel when he pled guilty, if Petitioner's intention is to challenge the propriety of his State court conviction, he must challenge that conviction in State court. Petitioner may not use this proceeding to collaterally attack the State conviction forming the basis for his exclusion. Norman E. Hein, D.D.S., DAB CR251, at 9 (1993). Further, Petitioner cannot argue that because he was without benefit of counsel he did not understand the consequences of his guilty plea with regard to his Medicare and Medicaid participation. Petitioner knew when he entered into his plea agreement that he might be subject to a five-year exclusion. Finding 24.

Lastly, although Petitioner argues that his exclusion should fall under the permissive exclusion section of the Act (section 1128(b)), rather than under the mandatory exclusion section of the Act (section 1128(a)(1)), Petitioner's argument is not supported by the relevant law. In Boris Lipovsky, M.D., DAB 1363, at 8 (1992), an appellate panel of the DAB held that where a criminal conviction satisfies the requirement of section

1128(a)(1) of the Act 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 Act. The fact that the criminal conviction may also appear to fall within the criteria for permissive exclusion found at section 1128(b)(1) is irrelevant. Id.

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 an administrative law judge is authorized to reduce the five-year minimum mandatory period of 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).

/s/

Joseph K. Riotto
Administrative Law Judge