Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Paul R. Scollo, D.P.M.	DATE: January 4, 1994
Petitioner,	Docket No. C-93-058
- v. -	Decision No. CR300
The Inspector General.	

DECISION

By letter dated February 12, 1993, Paul R. Scollo, D.P.M., 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 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. 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.

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, and that the only matter to be decided is the legal significance of the undisputed facts, I agree that it is appropriate to 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]

1. At all times relevant to this proceeding, Petitioner was a podiatrist, licensed to practice in New Jersey.

2. During 1988 and 1989, the U.S. Attorney for the Eastern District of Pennsylvania investigated certain unlawful practices connected with laboratory testing of Medicare patients. The

---

[1] Initially, pursuant to my March 25, 1993 Prehearing Order and Schedule for Filing Motions for Summary Disposition, the I.G. submitted a brief, Petitioner submitted a response and the I.G. submitted a reply. Accompanied with the parties' submissions were I.G. Exhibits (referred to hereafter as I.G. Ex.) 1 - 10 and Petitioner Exhibits (referred to hereafter as P. Ex.) 1 - 14.

On September 20, 1993, I issued a Ruling denying the I.G.'s motion for summary disposition. This was based on my determination that, although the I.G. had submitted substantial evidence in support of the exclusion, there was insufficient undisputed evidence, and there were material matters in dispute, all of which made summary disposition unwarranted at that time. The problems noted included the use by the I.G. of an unsigned copy of what was purported to be the indictment; also lacking was the docket number, which might link the indictment to the conviction and plea documents. In addition, other documents were only partially legible, obscuring information which might show that Petitioner's conviction was related to the delivery of an item or service under Medicare.

However, since the I.G. had shown that there was substantial evidence in support of the exclusion, I afforded the I.G. another opportunity to submit evidence and Petitioner the opportunity to respond. Accordingly, the I.G. submitted two additional exhibits (I.G. Ex. 11 and 12). The I.G. moved to withdraw I.G. Ex. 3 and 7 and replace them with new I.G. Ex. 3 and 7. Petitioner did not submit any additional exhibits.

I grant the I.G.'s motion to withdraw the previously submitted I.G. Ex. 3 and 7 and replace them with I.G. Ex. 3 and 7. I admit I.G. Ex. 1 - 12 and P. Ex. 1 - 14 into evidence at this time.

tests were to assess vascular functioning and were performed by a related group of firms, collectively referred to here as Medical Diagnostic Service ("MDS"). I.G. Ex. 1, 2.

3. The U.S. Attorney concluded that MDS was paying illegal kickbacks to medical practitioners who referred patients to MDS for testing. I.G. Ex. 1, 2.

4. The U.S. Attorney determined also that MDS submitted false information to Medicare, enabling it to bill for tests of a type Medicare did not sanction, as well as for tests which had not been ordered. I.G. Ex. 1.

5. MDS was charged with defrauding Medicare of more than $100,000. P. Ex. 2.

6. MDS entered into a plea bargain with the government under which it pled guilty to some charges, paid restitution and damages, and cooperated with the investigators. I.G. Ex. 2; P Ex. 2.

7. In or about January 1984, Petitioner was paid $1000 by MDS in connection with 20 individuals covered by Medicare, who were tested by MDS during December of 1983. I.G. Ex. 1, 2, 3, 7, 11.

8. MDS was reimbursed by Medicare for the $1000 in referral fees that it paid to Petitioner in connection with 20 Medicare beneficiaries. I.G. Ex. 2, 3, 7, 11.

9. In mid-1988, the U.S. Attorney wrote to approximately 400 doctors who had been identified (through examination of MDS's cancelled checks and other business records) as having received payments from MDS. The U.S. Attorney offered to release each of them from civil liability should kickbacks be proven if the doctors voluntarily paid treble damages. I.G. Ex. 3, 10.

10. Doctors cooperating with this offer also would, in effect, be immunized from criminal prosecution, since the U.S. Attorney decided that individuals who had given up the monies received from MDS and had also been subjected to additional financial sanctions would have been punished enough. I.G. Ex. 4, 11 at 20 - 23.

11. Several doctors, who had hired a single attorney to represent them, replied to the government's proposal by arguing that the payments they received were not kickbacks, but were rent that MDS paid them so that MDS could use their examination rooms to do the vascular tests. I.G. Ex. 2, 4, 5.

12. Because the payment of rent for space used to conduct Medicare-reimbursed tests in a doctor's office was thought not unlawful, the U.S. Attorney offered to excuse from repayment any

doctor who would swear either that he or she had only one examination/treatment room and that MDS used it for conducting tests, or would swear that he or she stayed with the individual being tested throughout the entire duration of the test. I.G. Ex. 7, 11 at 3 - 10.

13. Three or four doctors opted to submit affidavits pursuant to the U.S. Attorney's offer. I.G. Ex. 11 at 8.

14. In August 1988, Petitioner submitted such an affidavit, swearing that the money he received from MDS constituted rent for the use of his examination/treatment room. I.G. Ex. 1, 2, 7, 11.

15. However, it was soon discovered that the 20 named Medicare patients, with regard to whom Petitioner was paid $1000 by MDS, were not tested by MDS in any office maintained by Petitioner, but, instead, were tested in the Green Briar Home or Newton Home where they resided (and where Petitioner himself came on a regular basis to treat their foot problems). I.G. Ex. 3.

16. On January 24, 1991, Petitioner was indicted in the U.S. District Court, Eastern District of Pennsylvania. The indictment stated that MDS was reimbursed by Medicare for conducting laboratory tests; that some of such monies were paid to doctors, including the Petitioner herein, as unlawful remuneration for referring individuals for testing; that in January 1984 Petitioner received approximately $1000 from MDS for referring 20 Medicare patients for testing; that such tests were not conducted in Petitioner's office or examination/treatment rooms; that Petitioner, in order to take advantage of the government's offer to excuse practitioners from liability for taking payments from MDS, swore, in an affidavit submitted to the U.S. government, that the MDS payments constituted rent for the use of his examination/treatment room; and that thereby Petitioner willfully made a false statement in relation to a matter within the jurisdiction of a Department of the United States, in violation of 18 U.S.C. 1001. I.G. Ex. 3, 7, 11 at 35; P. Ex. 5, 6.

17. On April 3, 1991, Petitioner pled nolo contendere in federal court to the charge of knowingly and willfully making a false and fictitious representation and statement as to a material matter within the jurisdiction of the U.S. Department of Justice, in violation of 18 U.S.C. § 1001. I.G. Ex. 11.

18. When questioned by the judge at the time he entered his plea, Petitioner admitted having had a specific intention to break the law; admitted receiving the payments from MDS; acknowledged that, were there a trial, the government would be able to prove that the settlement was offered to him because of his taking kickbacks from MDS, and admitted that an MDS representative would testify that MDS did not represent to Petitioner that the fees he received from MDS were rental

payments; and lastly, Petitioner acknowledged, without reservation, that he did what was charged in the indictment. I.G. Ex. 11 at 18 - 37.

19. On July 17, 1991, Petitioner was sentenced to probation, community service, and restitution. I.G. Ex. 8, 12.

20. Petitioner's plea of nolo contendere to a criminal charge, and the United States District Judge's acceptance thereof, is a "conviction" for purposes of mandatory exclusion. Act, Section 1128(i).

21. 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).

22. Petitioner is subject to a mandatory minimum exclusion of five years for his conviction of a criminal offense related to the delivery of an item or service under Medicare. Act, Section 1128(a)(1), Findings 1 - 21.

PETITIONER'S ARGUMENT

Petitioner contends that he did not intentionally file a false affidavit and that he was never charged with, much less convicted of, taking kickbacks. The inaccuracies in his affidavit, he explains, were the result of poor memory and poor record keeping on his part. Furthermore, Petitioner avers that the tests which were performed were necessary and that the Medicaid and Medicare programs were not harmed. Petitioner contends that his conviction is not program-related.

Petitioner argues that it is unfair that the I.G. should direct and impose an exclusion against him when other doctors who received payments from MDS were not excluded. Petitioner contends that he is being singled out by the I.G. because he submitted an affidavit instead of paying treble damages.

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 crime. In the case at hand, Petitioner pled nolo contendere to a federal criminal offense and a United States District Court entered judgment and imposed a sentence against him.

Sections 1128(i)(1) and (3) of the Act expressly state that when an individual pleads nolo contendere to a criminal charge, and a court accepts the plea and/or enters a judgment of conviction,

such person is considered to have been convicted of a criminal offense.

It is further required by section 1128(a)(1) that such criminal offense be program-related; that is, related to the delivery of an item or service under Medicaid or Medicare.

A criminal conviction is program-related within the meaning of section 1128(a) where there is a common-sense connection between the offense and the delivery of an item or service under Medicaid or Medicare; in other words, there must be some "nexus" between the crime and the functioning of the programs. Thelma Walley, DAB 1367 (1992); Clarence H. Olson, DAB CR46 (1989).

When the totality of facts and circumstances which comprise and relate to Petitioner's criminal offense are taken into account, I conclude that Petitioner's conviction relates to the delivery of Medicare services.[2]

First, I note that the indictment states that Petitioner accepted unlawful remuneration from MDS in return for referring Medicare patients to MDS for testing and that Petitioner admits this in his plea. I.G. Ex. 7, 11. Second, the transcript of the plea colloquy shows that an Assistant U.S. Attorney asserted that he could prove that the $1000 paid to Petitioner, which Petitioner falsely swore constituted rent, actually represented illegal kickbacks; that the settlement offered by the U.S. Attorney to Petitioner also arose out of the alleged acceptance of kickbacks by Petitioner; and, finally, that a government witness, formerly with MDS, would testify that Petitioner was not told by MDS that the payments he had received from MDS were rent. When questioned by the judge at his plea, Petitioner admitted that he did what was charged in the Indictment and acknowledged that the government would have been able to prove all the facts it was alleging if the case had gone to trial. I.G. Ex. 11, pages 32, 35, 37, 39.

Petitioner's admissions and other documentary evidence are sufficient to show that he, in fact, accepted remuneration for the referral of Medicare patients. To be sure, the government never indicted or tried him on a kickback charge. Petitioner concludes from this fact that, since he was not convicted of receiving kickbacks, but instead was convicted of false swearing, his conviction cannot serve as a basis for the I.G. to exclude

---

[2] When determining whether a person should be excluded pursuant to section 1128(a)(1) of the Act, the administrative law judge may look beyond "the judgment entry and plea transcript," and "examine the full circumstances surrounding a conviction to determine whether the statutory elements . . . are met . . ." See, Bruce Lindberg, D.C., DAB 1120 (1991).

him. However, it is my determination that, under these circumstances, the false affidavit submitted by Petitioner was the direct result of Petitioner obtaining payments from MDS for the testing of 20 Medicare patients and his subsequent misrepresentation that the payments were legitimate rent when, in fact, they were not.[3] This is relevant to any assessment of the effect of his criminal conviction upon the Medicaid and Medicare programs.

There is no doubt that Petitioner accepted remuneration for the testing of 20 Medicare beneficiaries residing either at the Green Briar facility or the Newton Rest Home. I.G. Ex. 3, 7. It was Petitioner's attempt to avoid prosecution under the anti-kickback statute that caused him to attempt to legitimize the payments he received for the 20 Medicare beneficiaries by stating they were rent. I.G. Ex. 3, 4, 5, 7. For purposes of this Decision, the relevance of whether Petitioner received kickbacks is that it provides background information that shows that it was Petitioner's attempt to avoid prosecution under the anti-kickback statute for referring 20 Medicare beneficiaries that caused him to submit a false affidavit. I.G. Ex. 3, 7, 11, 12.

Consequently, Petitioner's criminal conviction need not be analyzed in a factual vacuum or on the basis of uninformative statutory language. The question to be resolved is whether Petitioner's making a false statement under oath is related to the delivery of an item or service under Medicare. The evidence shows that Petitioner was convicted of willfully and falsely

---

[3] The I.G. established that Petitioner received remuneration from MDS for his treatment of 20 Medicare recipients in an amount totalling $1000. I.G. Ex. 3. Of the 20 Medicare recipients, 11 were residents of a facility called Green Briar and nine were residents of the Newton Rest Home. I.G. Ex. 3. Petitioner was reimbursed for his services to the 11 Medicare recipients residing at Green Briar by check number 356, in the amount of $550. I.G. Ex. 3. Petitioner was reimbursed for his services to the nine Medicare recipients residing at Newton Rest Home by check number 377, in the amount of $450. While there is additional evidence that could be construed to support that Petitioner treated other Medicare recipients, namely checks 2428 and 521, there is no evidence in the record from which I can conclude that either of these checks served as a basis for the charges contained in the Indictment. I.G. Ex. 3. Only the 20 Medicare recipients who were residents of the Green Briar and Newton Rest Home were listed in the Indictment to which Petitioner pled. I.G. Ex. 3, 7. Therefore, for purposes of my determination that Petitioner's conviction is program-related, I consider only the 20 Medicare recipients mentioned in the Indictment and the payments Petitioner received for them.

stating under oath that 20 Medicare beneficiaries were treated in his office when, in fact, they were not. I.G. Ex. 3, 7, 11. Petitioner's false statement is, therefore, a material misrepresentation related to his medical treatment of these Medicare beneficiaries. Accordingly, Petitioner's conviction is program related because it is related to services Petitioner provided to these 20 Medicare beneficiaries.

Petitioner places mistaken reliance on his argument that he did not intentionally file a false affidavit and that errors in his statement are the result of poor memory and poor record keeping. Upon questioning from the U.S. District Court Judge who accepted Petitioner's plea, Petitioner admitted that his false statement was made willfully, with specific intent to violate the law and with knowledge of its falsity. I.G. Ex. 11. Moreover, in his plea Petitioner admitted that he did what was charged in the Indictment, namely that he received approximately $1000 in fees for referring 20 named Medicare beneficiaries for testing. I.G. Ex. 7, 11 at 32, 41. It has been frequently held that when an individual has been convicted of a program-related offense encompassed by section 1128(a)(1), exclusion is mandatory and such individual's subsequent claim of innocence is irrelevant and will not be considered. Peter J. Edmonson, DAB 1330 (1992).

Petitioner's suggestion that similarly situated doctors were more leniently treated is irrelevant to the issues in this case. I must decide this case based on the evidence before me and whether that evidence supports that Petitioner was convicted of a program-related offense, rather than delve into the collateral issue of whether the I.G. has similarly sanctioned all alleged wrongdoers who received payments from MDS. Moreover, Petitioner's suggestion that other doctors received more lenient treatment from the I.G. is unfounded and amounts to mere last-minute speculation because, on the record before me, none of the doctors whom Petitioner contends received favorable treatment from the I.G. were convicted, as Petitioner was, of making a false statement to an agency of the United States.

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 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