Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Paul D. Weinstein, M.D.,	DATE: July 20, 1994
Petitioner,	Docket No. C-94-012
- v. -	Decision No. CR323
The Inspector General.	

DECISION

By letter dated September 13, 1993, Paul D. Weinstein, M.D., 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, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] The exclusion was to be in effect as of 20 days from the date of the notice letter.

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 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. 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 the legal implications of undisputed facts, I have decided the case on the basis of the parties' written submissions, in lieu of an in-person hearing.

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[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years is supported by substantial evidence.

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 a State health care program to be excluded from participation in such programs for a period of at least five years. The definition of what constitutes a "State health care program" is set forth in section 1128(h) of the Act, and it includes the Medicaid program.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. On December 20, 1993, Petitioner and the I.G. entered into a stipulation of agreed upon facts and conclusions of law. Agreed Upon Facts and Conclusions of Law, dated December 20, 1993. I adopt the significant and material elements of this stipulation which are relevant to my decision and summarize them below.[2]

2. The parties stipulated that Petitioner was a physician licensed by, and practicing in, Massachusetts.

3. The parties stipulated that, on February 28, 1992, Petitioner was indicted on 136 counts relating to violations of the Massachusetts Medicaid False Claims Act, as well as two counts of larceny.

4. The parties stipulated that Petitioner negotiated a plea agreement with the prosecution, pursuant to which he entered, and the court accepted, a plea of guilty on October 8, 1992, to one count of larceny and two counts of filing false Medicaid claims.

5. The parties stipulated that the court sentenced Petitioner to two years in the Middleton House of Correction (one year to be suspended) and supervised

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[2] I cite the I.G.'s brief as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)." Neither party introduced any additional evidence apart from the jointly submitted stipulation of agreed upon facts and conclusions of law.

probation thereafter, as had been agreed upon as part of the plea agreement.

6. The parties stipulated that Petitioner voluntarily surrendered his medical license to the Commonwealth of Massachusetts Board of Registration in Medicine (Registration Board) on October 8, 1992.

7. The parties stipulated that, on December 16, 1992, the Registration Board revoked Petitioner's license to practice medicine for a period of five years.

8. The parties stipulated that, on or about January 13, 1993, the Commonwealth of Massachusetts notified the Office of the Inspector General, U.S. Department of Health and Human Services (OIG), of Petitioner's conviction.

9. The parties stipulated that, by letter dated January 15, 1993, the I.G. informed Petitioner that he was subject to an impending five-year exclusion from the Medicare and State health care programs, under the authority of section 1128(a) of the Act, based upon his conviction of offenses related to the delivery of an item or service under the Medicaid program.

10. The parties stipulated that, by letter dated September 13, 1993, the I.G. informed Petitioner of the imposition of said exclusion, effective 20 days from the date of the notice letter.

11. The parties stipulated that, by letter dated October 24, 1993, Petitioner requested an administrative hearing solely upon the issue of the effective date of his exclusion.

12. The parties stipulated that Petitioner was "convicted" within the meaning of section 1128(i) of the Act.

13. The parties stipulated that section 1128(c)(3)(B) of the Act required the I.G. to exclude Petitioner for not less than five years.

14. Petitioner does not dispute that the Act and applicable regulations mandate a five-year exclusion in his case. FFCL 1-13.

15. Inasmuch as Petitioner entered a plea of guilty to larceny and to filing false Medicaid claims, and the court accepted his plea and sentenced him, Petitioner was

"convicted" within the meaning of section 1128(i)(3) of the Act.

16. A conviction for financial misconduct directed at the Medicare or Medicaid programs constitutes a program-related offense (i.e., an offense related to the delivery of items or services under Medicare or Medicaid) within the meaning of section 1128(a)(1) of the Act, justifying mandatory exclusion.

17. The parties stipulated that the filing of false Medicaid claims is a criminal offense "related to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act.

18. Petitioner's conviction for filing false Medicaid claims precisely satisfies the statutory requirement of a program-related criminal offense. FFCL 1-17.

19. The I.G. did not have any regulatory or statutory deadline by which she had to commence the exclusion action against Petitioner.

20. There is no evidence or basis in law for concluding that the I.G. exceeded the authority delegated to her, that she acted contrary to law, or that she deprived Petitioner of some protected right or interest.

21. There is no evidence or basis in law for concluding that it is legally required that a federal exclusion be coterminous with a State-imposed sanction based upon the same program-related misconduct.

22. The Secretary of the Department of Health and Human Services has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

23. An administrative law judge does not have the authority or discretion to reduce the length of a five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act. 42 C.F.R. § 1001.2007(a).

24. An administrative law judge does not have the authority or discretion to alter the effective date of an exclusion imposed by the I.G. 42 C.F.R. § 1001.2007(a).

25. The I.G. properly excluded Petitioner for a period of five years, as required by the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 1-24.

PETITIONER'S ARGUMENT

Petitioner acknowledges that, on October 8, 1992, he pled guilty to larceny and to filing false claims under the Massachusetts Medicaid program.[3] He contends, though, that, inasmuch as he voluntarily surrendered his (only) license to practice medicine on the date of his plea, he has effectively been excluded since such date.[4] Petitioner's Request for Hearing, dated October 24, 1993; P. Br. at 2. In his brief, Petitioner contended further that the effective date of his exclusion "should run from the time of initial notification by the Boston office of the HHS, January 23, 1993." P. Br. at 2. Petitioner argued also that the length of time between the initial notification by the Boston office of HHS and the issuance of the exclusion letter was unreasonable. Id.

Petitioner contends that for the I.G. to commence his exclusion as of October 3, 1993 (the effective date), would transform his five-year exclusion into a six-year exclusion, which is not what Congress intended for offenses such as his. Further, Petitioner asserts that this would constitute punitive - rather than remedial - action. Petitioner's Request for Hearing; P. Br. at 2.

THE I.G.'s ARGUMENT

The I.G. contends that an administrative law judge has no authority to review the commencement date of an exclusion. I.G. Br. at 5. In any event, the I.G. asserts that the exclusion herein cannot be deemed unreasonable, inasmuch as Petitioner does not dispute that the facts of his case and the relevant law and regulations require that he be excluded from Medicare and Medicaid for five years. I.G. Br. at 4-5. The I.G.

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[3] Initially, in his Request for Hearing, Petitioner stated that he had pled guilty on October 5, 1992. However, this date appears to be incorrect. The correct date on which Petitioner pled guilty appears to be October 8, 1992, the date given in the stipulation signed by the parties.

[4] At the prehearing telephone conference held on November 23, 1993, Petitioner argued that, in the alternative, his exclusion should begin from the time when he was notified by the State of his exclusion from Medicaid. Order and Schedule for Filing Briefs and Documentary Evidence, dated December 3, 1993.

contends also that she exercised reasonable discretion within her statutory and regulatory authority. I.G. Br. at 6.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question must have been convicted of a criminal offense. The term "convicted" is defined at section 1128(i) of the Act. This section sets forth four alternative definitions of the term "convicted." An individual or entity which satisfies any one of the four definitions in section 1128(i) is regarded as having been "convicted" of a criminal offense within the meaning of the Act.

Section 1128(i) of the Act provides that an individual or entity will be convicted of a criminal offense:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

In the present case, the parties stipulated that Petitioner was "convicted" within the meaning of section 1128(i) of the Act. FFCL 12. The facts agreed upon by the parties clearly establish that Petitioner entered a plea of guilty on October 8, 1992 to one count of larceny and two counts of filing false Medicaid claims, and that the court accepted his plea and sentenced him. Thus, I find that Petitioner was "convicted" within the meaning of section 1128(i)(3) of the Act. FFCL 15.

I find also that the second requirement of section 1128(a)(1) -- i.e., that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied. It is well-established that a conviction for financial misconduct directed at the Medicare or Medicaid programs constitutes a program-related offense within the meaning of section 1128(a)(1), justifying mandatory exclusion. FFCL 16. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute program-related misconduct. 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). Thus, Petitioner's conviction for filing false Medicaid claims precisely satisfies the statutory requirement of a program-related criminal offense. FFCL 18.

Petitioner contends, however, that the determination by the I.G. to commence his exclusion as of October 3, 1993, unlawfully transforms his five-year exclusion into a six-year exclusion. Petitioner contends further that this is, somehow, punitive. I find no legal support for such a theory.

In fact, the argument advanced by Petitioner has already been thoroughly considered by an appellate panel of the Departmental Appeals Board in the case of Samuel W. Chang, M.D., DAB CR74 (1990), aff'd in part and rev'd in part, DAB 1198 (1990). In Chang, the I.G. had issued an exclusion notice to the petitioner some 17 months after learning of the petitioner's conviction. Chang, DAB CR74, at 9. The administrative law judge determined that "[t]his was not timely and not reasonable notice." Id. The administrative law judge ruled that the petitioner's exclusion would be regarded as having commenced one year after the I.G. received notice of the petitioner's conviction. Id. at 10.

The administrative law judge's decision was appealed. On appeal, the appellate panel disallowed the administrative law judge's remedy. The panel concluded that "the ALJ had no authority to change the effective date of the exclusion." Samuel W. Chang, M.D., DAB 1198, at 2.[5] Thus, the appellate panel held that not only is the administrative law judge without authority to alter the length of the mandatory exclusionary period set forth in sections 1128(a) and 1128(c)(3)(B) of the Act -- he or

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[5] The appellate panel uses the abbreviation "ALJ" to mean "administrative law judge."

she also may not adjust the commencement date of such exclusion. Id. at 9-10.

The principle enunciated in Chang is consistent with the applicable law and regulations and has been upheld in later cases. In Shanti Jain, M.D., DAB CR237 (1992), aff'd, DAB 1398 (1993), the appellate panel held that "[a]n 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." Jain, DAB 1398, at 7.

The regulations provide that, in exclusion cases, the only issues the ALJ may decide are whether "the basis for the imposition of the sanction exists," and whether "the length of exclusion is unreasonable." 42 C.F.R. § 1001.2007. The regulations further state that where an exclusion is based on the mandatory exclusion provisions of the Act, and the length of the exclusion is not in excess of five years, an administrative law judge is no longer called upon to decide the issue of the reasonableness of the length of the exclusion. 42 C.F.R. § 1001.2007(a)(2).

By contrast, regulatory constraints upon the I.G. are few. 42 C.F.R. § 1001.2001-.2002, which sets forth procedures for the I.G. to follow in imposing exclusions, neither requires the I.G. to act within a particular number of days after learning of an individual's criminal conviction, nor sets any "limitations period," beyond which new charges based upon old facts would be barred. Thus, the I.G. did not have any regulatory or statutory deadline by which she had to commence the exclusion action against Petitioner. FFCL 19.

Assessing the undisputed facts herein in light of the relevant law, I find that Petitioner was convicted of financial crimes directed at the Medicaid program and must, therefore, be excluded from participation for not less than five years.

Finally, I find no evidence or basis in law for concluding that the I.G. exceeded the authority delegated to her, that she acted contrary to law, or that she deprived Petitioner of some protected right or interest. FFCL 20. I note, in particular, that Petitioner, notwithstanding his assertions, submitted no evidence at all to show that the I.G.'s action was contrary to legislative intent. There is no evidence or basis in law for concluding that it is legally required that a federal exclusion be coterminous with a State-imposed sanction

based upon the same program-related misconduct.[6] FFCL 21.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction for filing false Medicaid claims.

There is no evidence or basis in law for concluding that the I.G. exceeded the authority delegated to her, that she acted contrary to law, or that she deprived Petitioner of some protected right or interest.

I do not have the authority or discretion to reduce the length of a five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act. FFCL 23. Further, I do not have the authority or discretion to alter the effective date of an exclusion imposed by the I.G. FFCL 24.

I conclude that the I.G. properly excluded Petitioner for a period of five years, as required by the minimum

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[6] In fact, an appellate panel of the DAB has stated that an individual who has been sanctioned by State authorities is still subject to exclusion by the federal government under section 1128(a)(1) of the Act, for the full mandatory exclusion period under that section. Jain, DAB 1398, at 6 n.4. Specifically, in Jain, the appellate panel asserted that the State's earlier suspension of Petitioner from State health care programs was "irrelevant under section 1128" and that Petitioner would not be entitled to any reduction in the mandatory exclusion period based on a prior State-imposed suspension or exclusion. Id.

mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 25.

The five-year exclusion, in effect as of 20 days from September 13, 1993, is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge