Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Muhammad R. Chaudhry, M.D.,	DATE: August 12, 1994
Petitioner,	
- v. -	Docket No. C-94-019 Decision No. CR326
The Inspector General.	

DECISION

By letter dated October 15, 1993, Muhammad R. Chaudhry, 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. 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, and the I.G. moved for summary disposition.

Because I have determined that there is no dispute as to any material fact, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' 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 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 contained at section 1128(h) of the Act, and it includes the Medicaid program. I use the term Medicaid to represent all of the State health care programs from which Petitioner was excluded.

Sections 1128(b)(7) and 1128B(b)(1)(B) of the Act permit, but do not mandate, the exclusion from these same programs of any person whom the Secretary of HHS concludes is guilty, or has been convicted, of health care related fraud, kickbacks, false claims, or similar activities. It incorporates by reference, as bases for exclusion, the offenses described in sections 1128A and 1128B of the Act. Relevant to the Petitioner herein is section 1128B(b)(1)(B), which proscribes the soliciting or receiving of any remuneration in return for purchasing, ordering, or arranging for the acquisition of goods or services for which payment may be made under Medicare or Medicaid. Section 1128(f)(2) of the Act provides that, under certain circumstances, before a person may be excluded pursuant to these actions, he or she is entitled to a hearing before an administrative law judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW(FFCL)[1]

1. On May 1, 1991, Petitioner was indicted for six counts of violating section 1128B(b)(1)(B) of the Act by "unlawfully, willfully and knowingly solicit[ing] and receiv[ing] . . . kickbacks, in return for ordering and arranging for the ordering of items of durable medical equipment . . . , for which payment could have been made

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[1] The I.G. submitted three exhibits. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) at (page)." I admit into evidence I.G. Exs. 1 - 3. The I.G. submitted a motion and brief for summary disposition to which Petitioner responded. I cite the I.G.'s brief for summary disposition as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)." The I.G. also submitted a reply to Petitioner's response which I cite as "I.G. R. Br. at (page)."

in whole or in part under the Medicaid Program." I.G. Ex. 1.

2. A plea is accepted within the meaning of section 1128(i)(3) of the Act whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter. Section 1128(i)(3) of the Act.

3. Petitioner pled guilty to count five of the indictment to willfully receiving "a kickback in the amount of $300, in return for ordering or arranging for the ordering [of aerosol compressors], for which payment could have been made in whole or in part under the Medicaid Program." I.G. Ex. 2, 3.

4. In consideration of Petitioner's plea, the Office of the United States Attorney for the Southern District of New York dismissed the remaining counts of the indictment. I.G. Ex. 2, 3.

5. Petitioner was sentenced to three years of probation, 600 hours of community service and a $4,500 fine. I.G. Ex. 3.

6. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. FFCL 2-5.

7. The offense of which Petitioner was convicted -- receiving kickbacks in exchange for patient referrals -- is related to the delivery of items or services under Medicaid within the meaning of section 1128(a)(1) of the Act. FFCL 1-6.

8. The Secretary 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).

9. The I.G. is under no obligation to proceed under the permissive exclusion provisions of sections 1128(b)(1) or (7) of the Act against a person who might have committed fraud.

10. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.
FFCL 1-9.

11. I do not have the authority or discretion to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act. 42 C.F.R. § 1001.102.

12. Petitioner was not entitled to a pre-exclusion hearing in accordance with section 1128(f)(2) of the Act because he was not excluded pursuant to section 1128(b)(7) of the Act. Section 1128(f)(2) of the Act.

13. Petitioner was not entitled to an in-person hearing since there was no disputed issue of material fact.

PETITIONER'S ARGUMENT

Petitioner does not deny that he was convicted of violating section 1128B(b)(1)(B) of the Act by entering a guilty plea for knowingly and willfully receiving a $300 kickback. Petitioner admits that he received this kickback in exchange for referring patients to a health care provider, for the purpose of ordering certain medical equipment for which payment could have been made under the Medicaid program. P. Br. at 3. Petitioner's principal argument, based on his analysis of the law, is that he should be sanctioned under the permissive exclusion provision of section 1128(b)(7) of the Act, rather than the mandatory exclusion provision of 1128(a)(1). P. Br. at 2. Petitioner contends that his conduct does not fall under section 1128(a)(1) because his conviction does not relate to the "delivery of an item or service" under Medicare, Medicaid or any other State health care program. Id. Petitioner asserts that, instead, his conduct falls under the "Fraud, Kickbacks, and other Prohibited Activities" provision of section 1128(b)(7) of the Act because this provision sanctions "[a]ny individual or entity that the Secretary determines has committed an act which is described in section 1128A or section 1128B" and, as stated above, Petitioner was admittedly convicted of violating section 1128B(b)(1)(B). Id.

Petitioner argues also that, because he should be excluded under section 1128(b)(7) of the Act, he is entitled to a pre-exclusion hearing in accordance with section 1128(f)(2).[2] P. Br. at 4. In addition,

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[2] Petitioner argues that he is "entitled to a hearing before his exclusion takes effect." P. Br. at 4. This articulation of his argument fails to recognize that Petitioner already has been excluded from the Medicare and Medicaid programs. Thus, I take Petitioner's

(continued...)

Petitioner asserts, in essence, that he is entitled to an in-person post-exclusion hearing in accordance with section 1128(f)(1). Petitioner contends that an in-person hearing is necessary for him to present evidence of mitigating factors in accordance with 42 C.F.R. § 1001.102(c). Id. 42 C.F.R. § 1001.102(c) allows individuals to present evidence of certain mitigating factors as a basis for reducing the period of exclusion. Petitioner argues that he should be afforded an in-person hearing so that he may prove that the five-year exclusion is not warranted. Id.

DISCUSSION

I. Petitioner was properly excluded under section 1128(a)(1) of the Act.

Despite Petitioner's assertions to the contrary, I find that Petitioner's conviction does relate to the "delivery of an item or service" under Medicaid and that he should be excluded under section 1128(a)(1) of the Act. I have considered Petitioner's arguments that he merely referred patients with pulmonary disorders to a provider of medical equipment (who could be reimbursed under the Medicaid program) and that he did not provide medical services nor bill the Medicare or Medicaid programs. However, I find that Petitioner's offense was program-related. P. Br. at 3. A person may be guilty of a program-related offense even if he or she did not physically deliver any items or services. Napoleon S. Maminta, M.D., DAB 1135 (1990); Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990); Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). An offense is program-related if there is a common sense connection between the offense and the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467 (1994). Petitioner admits that he was convicted of violating section 1128B(b)(1)(B) of the Act by knowingly and willfully receiving a $300 kickback in exchange for "ordering and arranging for the ordering" of certain medical equipment from a health care provider who would seek reimbursement from the Medicaid program. See I.G. Ex. 2. Thus, Petitioner's receipt of the kickback was directly related to the program that paid for the equipment which was the subject of the kickback. Niranjana B. Parikh, M.D., DAB 1334 (1992).

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[2](...continued)
argument to be that he should have been granted a pre-exclusion hearing before the exclusion here took effect.

Applying a mandatory exclusion under these circumstances also comports with the intent of Congress to strengthen the mandatory exclusion provision by amendment of the exclusion laws in 1987. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 4(a)-(c), 101 Stat. 688, 689 (1987) (codified at 42 U.S.C. § 1396); Maminta. In Maminta, an appellate panel of the DAB examined the legislative history of the mandatory exclusion provision and found that Congress intended mandatory exclusions to be instituted whenever the covered programs were victimized by the offense at issue whether or not this offense involved actual delivery of medical care by the convicted individual or entity. Id. at 12.[3]

I reject also Petitioner's argument that he should be sanctioned under section 1128(b)(7) of the Act, which provides for the exclusion of individuals who have committed an act described in section 1128B(b)(1)(B). P. Br. at 2. It is undeniable that there is some subject matter overlap between the mandatory exclusion for criminal conviction authorized by section 1128(a)(1) and the permissive exclusion for fraud or kickbacks authorized by section 1128(b)(7). Parikh, at 4. Nevertheless, it has consistently been held that the Secretary is under no obligation to proceed under section 1128(b) of the Act; once a person has been convicted of a program-related criminal offense, exclusion is mandatory. Id. at 4 (citing Leon Brown, M.D., DAB CR83, aff'd, DAB 1208 (1990)). Thus, once the I.G. determined that Petitioner's convictions were within the meaning of section 1128(a)(1), there was no obligation to consider whether section 1128(b)(7) was applicable.

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[3] It is irrelevant whether the Medicaid program was actually harmed by Petitioner's actions because the determinative factor in this case is whether Petitioner's criminal conviction is related to the delivery of a Medicaid item or service. Yet, to the extent that Petitioner argues that his actions did not perpetrate any fraud or cause financial harm to the Medicaid program, I find that his actions were detrimental to the program. Petitioner did not base his referrals on the best interests of the patients but upon his ability to obtain a kickback from a particular provider. In doing so, Petitioner has undercut and tainted the public's perception of the honesty and integrity of other program providers. Furthermore, choice based primarily on the receipt of remuneration potentially raises the cost of the equipment to the program.

I have previously considered this issue, in cases which were upheld by a DAB appellate panel and which were factually similar to the case at hand, and found that a conviction for receiving kickbacks in violation of section 1128B(b)(1)(B) of the Act justifies mandatory exclusion pursuant to section 1128(a)(1). Parikh; Boris Lipovsky, M.D., DAB CR208 (1992), aff'd, DAB 1363 (1992).

As I did in Parikh, I reject also Petitioner's assertion that he should be permissively excluded because in Syed Hussaini, DAB CR193 (1992), the I.G. previously considered similar conduct to fall under the permissive exclusion provision. P. Br. at 3. Petitioner's allusion to the outcome in Hussaini is without any merit. In Hussaini, Petitioner was convicted under a different statute and the I.G.'s initial determination that the conviction did not fall within the parameters of section 1128(a) of the Act allowed the I.G. to consider whether the conviction merited a permissive exclusion. In the present case, the I.G. properly determined that Petitioner was convicted of a program-related crime pursuant to section 1128(a)(1) of the Act, thereby foreclosing the possibility of a permissive exclusion. Parikh, at 7-8.

Additionally, since Petitioner's conviction was "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a) of the Act, the I.G. was required to exclude Petitioner for a mandatory minimum of five years. Section 1128(c)(3)(B) of the Act. Since the five-year exclusion is the shortest period of exclusion for his offense permitted by law, an administrative law judge cannot reduce it. Jack W. Greene, DAB 1078 (1989), aff'd sub nom., 731 F. Supp. 835 and 838 (E.D. Tenn. 1990); See Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990), at 9.

II. Petitioner was not entitled to either a pre-exclusion hearing under section 1128(f)(2) of the Act or to an in-person post-exclusion hearing pursuant to section 1128(f)(1).

Petitioner's contention regarding his right to a pre-exclusion hearing under section 1128(f)(2) of the Act is related to his arguments above regarding the applicability of the permissive exclusion provisions and is rejected for the same reasons. P. Br. at 4. Under section 1128(f)(2), any individual or entity excluded under section 1128(b)(7) is entitled to a pre-exclusion administrative hearing. Section 1128(b)(7) provides for permissive exclusions when the I.G. determines that an

individual or entity has committed an act which is described in section 1128A or section 1128B of the Act. The right to a section 1128(f)(2) pre-exclusion hearing, however, is limited solely to those receiving permissive exclusions pursuant to section 1128(b)(7). As the legislative history of section 1128(f)(2) makes clear, one of the primary purposes of a pre-exclusion hearing is to afford the party to be excluded an opportunity to present evidence regarding whether he or she "knowingly and willfully" committed the acts for which he or she is excluded. Parikh (citing S. Rep. No. 109, 100th Cong. 1st Sess. 13 (1987), reprinted in 1987 U.S.C.C.A.N. 682). It is regarded as a due process safeguard. Id. at 9. In the case of mandatory exclusions, this due process safeguard is not necessary since a conviction under section 1128B(b)(1)(B) establishes that the "knowingly and willfully" standard has been met. Thus, in the present case, Petitioner has neither a right nor a reason for a pre-exclusion hearing under section 1128(f)(2), since Petitioner has already admitted in his guilty plea to "knowingly and willfully" violating the law, pursuant to section 1128B(b)(1)(B). Id.

Also, Petitioner is not entitled to an in-person hearing pursuant to section 1128(f)(1) of the Act. While section 1128(f)(1) provides that individuals who have been excluded are entitled to "reasonable notice and opportunity for a hearing," an in-person hearing is not automatically required. The applicable regulations provide that an ALJ "has the authority to . . . decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact." 42 C.F.R § 1005.4(b)(12) (1992). Since there are no disputed issues of material fact in this case, I find that an in-person hearing is not justified. As the I.G. has correctly noted, the only issues in this case are -- (1) whether Petitioner was convicted of a crime, and (2) whether that crime is related to the Medicare or state health care programs. I.G. Br. at 11-12. As for the first issue, Petitioner admitted that he was convicted of violating section 1128B(b)(1)(B) by entry of a guilty plea (I.G. Ex. 2), and the second issue, whether Petitioner's conviction was program-related, is a question of law. Thus, I find that Petitioner's case can be decided without an in-person hearing.

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. An administrative law judge is not authorized to

reduce the five-year mandatory minimum exclusion. Greene, DAB CR19, at 12-14.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge