Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ernest Mullen,	)	DATE: October 5, 1994
	)	
Petitioner,	)	
	)	
- v.-	)	
	)	Docket No. C-94-299
The Inspector General.	)	Decision No. CR337
	)	

DECISION

By letter dated February 8, 1994, Ernest Mullen, the Petitioner herein, was notified by the Inspector General (I.G.) of the United States Department of Health and Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to in this decision 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 of the I.G.'s action by an administrative law judge (ALJ) of the Departmental Appeals Board (DAB). The I.G. moved for summary disposition. Petitioner opposed the motion and requested an in-person evidentiary hearing.

I have determined that there are no facts of decisional significance genuinely in dispute, and that the I.G. is entitled to prevail even if all the facts alleged by Petitioner are accepted as true. Therefore, I am granting the I.G.'s motion and deciding this case based on the parties' written submissions.

I find no reason to disturb 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.

Section 1128(b)(3) permits, but does not mandate, the exclusion of any individual or entity that has been convicted, under federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

PETITIONER'S POSITION

Petitioner contends that his conviction was not related to the delivery of an item or service under Medicaid because he was never engaged in the delivery of Medicaid items or services. He alleges that he is not a provider of services under Medicare or Medicaid and receives no direct reimbursement from those programs. Petitioner points out that a Physician's Assistant can only render services under the direct supervision of a licensed physician, and it is the physician, not the Physician's Assistant, who participates as a provider with Medicare or Medicaid. Therefore, according to Petitioner, it is the physician, not the Physician's Assistant, who is engaged in delivering Medicare or Medicaid items or services.

Petitioner asserts that, because his conviction was not related to the delivery of an item or service under Medicaid, mandatory exclusion pursuant to section 1128(a)(1) of the Act is inapplicable to his case. Petitioner argues, instead, that the criminal offense of which he was convicted was related to the unlawful prescription of a controlled substance. Thus, according to Petitioner, he should be subject to a permissive exclusion pursuant to section 1128(b)(3) of the Act.

Petitioner argues that the permissive exclusion provision of section 1128(b)(3) applies to his case because the acts for which he was convicted involved, essentially, his improper prescription of a controlled substance.

Petitioner acknowledges that a Physician's Assistant may not prescribe controlled substances. Petitioner also acknowledges that he authorized the refill of a prescription for Tylenol with codeine -- a controlled substance. Petitioner asserts that, in authorizing the refill, he was acting in accordance with longstanding written instructions from his supervising physician. Petitioner does not dispute that the patient for whom the Tylenol with codeine was prescribed was a Medicaid recipient, nor that a claim for the prescription was presented to Medicaid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Undisputed Findings of Fact

1. During the period relevant to this case, Petitioner was a Physician's Assistant in the State of Michigan. I.G. Br. at 3; P. Br. at 3.[1]

2. Notwithstanding the fact that a Physician's Assistant may not lawfully prescribe controlled substances, Petitioner prescribed a controlled substance for a patient. I.G. Ex. 1; P. Ex. 1; P. Br. at 3-4.[2]

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[1] I cite to the parties' submissions as follows:

I.G. Brief (I.G. Br.) at (page)
Petitioner's Brief (P. Br.) at (page)
I.G. Exhibit (I.G. Ex.)
Petitioner's Exhibit (P. Ex.)
I.G. Proposed Finding (I.G. PF #)
Petitioner's Proposed Finding (P. PF #)

[2] With her brief, the I.G. offered five exhibits; with his brief, Petitioner offered two exhibits. Neither party objected to the other's exhibits. I therefore admit I.G. Ex. 1-5 and P. Ex. 1 and 2 into evidence. By letter dated September 28, 1994, received in this office on September 30, 1994, Petitioner offered two additional documents. I have marked as P. Ex. 3 the document entitled "Petition and Order for Discharge from Probation," dated September 12, 1994. I have marked as P. Ex. 4 a letter dated September 13, 1994, from Karen L. Ryan, Probation Officer, to LuAnn Cheyne Frost, Assistant Attorney General. In a telephone contact of October 4, 1994, the I.G. stated that she had no objection to my admitting these exhibits. Therefore, I admit these exhibits in evidence. I accord P. Ex. 3 and 4 no weight, however. These documents are relevant, if at all, to the

(continued...)

3. On or about July 16, 1993, a felony complaint was issued in the District Court for Michigan's Judicial District 54-A, charging Petitioner with one count of violating Michigan Comp. Laws § 400.607(1)(Michigan's Medicaid False Claims Act). I.G. Ex. 1; I.G. PF #1; P. PF #1.

4. The complaint alleged that Petitioner prescribed a controlled substance (Tylenol with Codeine #3) without statutory authority, thereby causing a false Medicaid claim to be made or presented. I.G. Ex. 1; P. PF #1.

5. On or about August 11, 1993, Petitioner entered a plea of nolo contendere to the offense charged in the complaint. I.G. PF #2; P. PF #2.

6. On or about September 23, 1993, the 30th Circuit Court, State of Michigan, entered judgment sentencing Petitioner to one year of probation and to pay a Crime Victims Fund assessment and costs. I.G. PF #3; P. PF #3.

7. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act. P. PF #3.

B. Findings on Disputed Matters

8. Because the offense to which Petitioner pled nolo contendere describes on its face a relationship to the Medicaid program, I need not look to the facts underlying the conviction.

9. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1) of the Act. FFCL 3-8.

10. Mandatory exclusion is applicable to any individual or entity convicted of a program-related crime; such exclusions are not limited to physicians or those with Medicare or Medicaid provider agreements.

11. Where an individual is convicted of a criminal offense which falls within the mandatory exclusion provisions of section 1128(a) of the Act, the I.G. is

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[2](...continued)
length of the exclusion imposed and directed against Petitioner. As discussed more fully below, I need not consider any evidence as to the length of Petitioner's exclusion because the I.G. has imposed the minimum exclusion permitted under the circumstances of this case.

required to impose a mandatory exclusion; it is irrelevant that the offense arguably could fall also within the provisions for permissive exclusions under section 1128(b).

12. The five-year exclusion imposed and directed by the I.G. against Petitioner was required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 9-11.

13. Neither the I.G. nor an administrative law judge has authority to reduce the length of a five-year minimum mandatory exclusion.

DISCUSSION

To establish that there is a basis for imposing on Petitioner a mandatory five-year exclusion from participation in the Medicare and Medicaid programs, the I.G. must prove that: (1) Petitioner was convicted of a criminal offense, and (2) the offense was related to the delivery of an item or service under Medicare or Medicaid. In the present case, Petitioner has admitted that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act.[3] However, Petitioner contends that his conviction was not related to the delivery of an item or service under Medicaid, as the I.G. argues.

The I.G. moved for summary disposition. Petitioner opposed the I.G.'s motion and requested an in-person evidentiary hearing. The I.G. is entitled to summary disposition. First of all, it is not clear that the I.G. disputes any of the facts Petitioner would seek to establish at hearing. But even if Petitioner succeeded in establishing these facts, the I.G. nevertheless would be entitled to prevail as a matter of law.

Petitioner argues that the only illegal conduct he engaged in was prescribing controlled substances outside the scope of his license as a Physician's Assistant. The

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[3] Section 1128(i) of the Act defines the term "conviction" to include four types of dispositions: (1) a court enters a judgment of conviction; (2) a court makes a finding of guilt; (3) a court accepts a plea of guilty or nolo contendere; or (4) a court withholds entry of a judgment of conviction under a first offender or other deferred adjudication program. Petitioner's plea of nolo contendere and the court's action on that plea fit within the definition of conviction at 1128(i)(3).

allegations recited in the complaint, as well as the probation report offered by Petitioner, support this contention. I.G. Ex. 1; P. Ex. 1. Yet, even accepting as true Petitioner's characterization of the facts underlying his conviction, the I.G. would nevertheless be required to impose the minimum mandatory exclusion.

Petitioner must be excluded for the mandatory minimum of five years because in pleading nolo contendere to the charge of presenting a false claim to Medicaid, he acknowledged, in effect, that the State would be able to establish the elements of the offense charged in the complaint. One of the elements of the offense charged is that Petitioner presented or caused to be presented to the State Medicaid program a claim that he knew to be false.

A criminal conviction is program-related within the meaning of section 1128(a)(1) where there is a common-sense connection between the offense and the delivery of Medicare or Medicaid items or services; i.e. there is some "nexus" between the crime and the delivery of an item or service under Medicare or Medicaid. Paul R. Scollo, D.P.M., DAB 1498, at 12-13 (1994); Thelma Walley, DAB 1367, at 9 (1992); H. Gene Blankenship, DAB CR42 (1989). In the case at hand, there is an obvious connection or nexus between causing false Medicaid claims to be presented and the delivery of items or services under Medicaid. False claims affect the program's ability to pay genuine claims and are also generally inimical to public confidence and sound administration of the program. Moreover, it is well-settled in DAB case precedent that presenting false Medicaid claims is an offense related to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1). Travers v. Sullivan, 801 F. Supp. 394, 403 (E.D. Wash. 1992), aff'd sub nom Travers v. Shalala, 20 F.3d 993 (9th Cir. 1994).

Petitioner contends also that his conviction is not related to the delivery of an item or service under Medicaid because he is not a provider and does not receive any direct reimbursement from the Medicaid program. This argument is unavailing, however, since it is well-established that mandatory exclusion is not restricted to health care providers or physicians; it is applicable to any individual or entity convicted of a program-related crime. Mary K. Lyons, DAB CR49, at 6 (1989).

Once it is shown that an individual has been convicted of a program-related crime, exclusion is mandatory under

section 1128(a)(1) as a purely derivative action. In other words, it is the fact of conviction of a relevant offense that triggers exclusion. Consequently, the administrative law judge need not look beyond such a conviction. Robert H. Davis, R.Ph., DAB CR285, at 6 (1992). Nor may Petitioner utilize these administrative proceedings to, in effect, collaterally attack his conviction by arguing that he was guilty of a different crime than the one to which he pled nolo contendere. See Peter J. Edmonson, DAB 1330, at 4-5 (1992).

Petitioner argues that he should be excluded, if at all, pursuant to section 1128(b)(3) of the Act, because his conviction was related to the unlawful prescription of a controlled substance. It is certainly possible to characterize the offense of which Petitioner was convicted as related to the unlawful prescription of a controlled substance, within the meaning of section 1128(b)(3). However, because Petitioner's conviction is related also to the delivery of an item or service under Medicaid, I need not decide whether section 1128(b)(3) is applicable.

As I have stated, Petitioner's conviction for causing a false Medicaid claim to be submitted is sufficient in itself to invoke the mandatory exclusion provisions of section 1128(a)(1). If an individual is convicted of a criminal offense which satisfies the requirements of section 1128(a)(1), then that section is controlling and the I.G. must exclude the individual for a period of not less than five years. Boris Lipovsky, M.D., DAB 1363, at 8 (1992). The fact that the criminal conviction may also appear to satisfy the permissive exclusion criteria of section 1128(b) is irrelevant. Id. Neither the I.G. nor the administrative law judge has the discretion to choose, instead, to impose a permissive exclusion pursuant to section 1128(b). Id.

Petitioner has requested an in-person hearing at which he could present mitigating evidence. Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicaid subjects him to a mandatory period of exclusion of not less than five years. In the present case, the I.G. has imposed the minimum statutory period of exclusion. Thus, any mitigating evidence which Petitioner might offer at an in-person hearing would be irrelevant, since I lack authority to reduce the exclusion below five years.

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 causing a false Medicaid claim to be submitted. Such a conviction is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1). Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory exclusion.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge