Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Nicholas J. Penna, D.M.D.,	DATE: October 26, 1994
Petitioner,	
- v. -	Docket No. C-94-306 Decision No. CR338
The Inspector General.	

DECISION

By letter dated January 14, 1994 (Notice), the Inspector General (I.G.) of the United States Department of Health and Human Services (HHS) notified Nicholas J. Penna, D.M.D. (Petitioner) that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.[1] The I.G. advised Petitioner that he was being excluded as a result of his conviction 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 Social Security Act (Act). The I.G. advised Petitioner that exclusions of individuals convicted of program-related offenses are mandated by section 1128(a)(1) of the Act. The I.G. further advised Petitioner that section 1128(c)(3)(B) of the Act requires a five-year minimum period of exclusion.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. During an April 5, 1994 prehearing conference, the parties agreed to proceed in this case by submitting written arguments supported by documentary evidence.

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

Thereafter, the I.G. filed a brief, including a statement enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s brief was accompanied by 11 exhibits which I identify as I.G. Ex. 1 through 11. Petitioner responded with a brief, including a response to the I.G.'s proposed findings of fact and conclusions of law.[2] Petitioner's responsive brief was accompanied by one exhibit which I identify as P. Ex. 1. The I.G. filed a reply brief.

Petitioner has not contested the admissibility of the 11 exhibits submitted by the I.G. I admit into evidence I.G. Ex. 1 through 8 and 11. I.G. Ex. 9 and 10 consist of the I.G's Notice letter and Petitioner's request for a hearing. I reject these exhibits because both of these documents are already in the record. In my April 20, 1994 prehearing order, I directed the parties not to file such duplicative material as exhibits.

The I.G. has not contested the admissibility of P. Ex. 1, and I am admitting this exhibit into evidence.

I have considered the parties' written arguments and supporting exhibits, and the applicable statutes and regulations. I conclude that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). I conclude also that Petitioner is subject to the mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and 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 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.

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[2] In this Decision I will cite to Petitioner's responsive brief as P. Br., p. __ and to his response to the I.G.'s proposed findings of facts and conclusions of law as P.'s Response to I.G.'s Proposed FFCLs, paragraph __.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. Petitioner is a dentist. P.'s Response to I.G.'s Proposed FFCLs, paragraph 1.

2. Prior to his conviction, Petitioner owned and operated a professional corporation that provided mobile dental services to nursing homes. I.G. Ex. 6.

3. An investigation conducted by Financial Investigator Billy D. Luther of the North Carolina Medicaid Investigations Unit revealed that Petitioner's corporation would bill Medicaid for dental services, mostly consisting of examinations and prophylaxis. Based on the time spent and the number of patients for which the corporation billed services, Investigator Luther determined that Petitioner spent less than four minutes with each Medicaid recipient. Consultants opined that in such a short period of time Petitioner could not have provided the type of services for which he billed Medicaid. I.G. Ex. 6, I.G. Ex. 8.

4. In order to resolve the issues raised by the investigation of the North Carolina Medicaid Investigations Unit, Petitioner chose to enter into a plea bargain agreement. P. Br., p. 4.

5. Petitioner agreed to plead guilty to a one count misdemeanor charge of receiving stolen goods, to pay restitution to Medicaid in the amount of $8,600.21 before sentencing, and to pay a fine of $8,600.00 and court costs in full at sentencing. In exchange for this, the State of North Carolina agreed not to prosecute Petitioner for any other act relating to the submission of claims to the North Carolina Medicaid program occurring prior to the entry of the plea. I.G. Ex. 4.

6. Pursuant to the plea bargain agreement, on June 22, 1993, in the District Court of North Carolina in Wake County, Petitioner pled guilty to a one count misdemeanor charge of receiving stolen goods. The Misdemeanor Statement of Charges to which Petitioner pled guilty alleged that Petitioner had submitted a fraudulent claim to the North Carolina Medicaid program for reimbursement for a dental service. From this I conclude that the monies Petitioner obtained as a result of this criminal activity constituted the "stolen goods" referred to in the charge. I.G. Ex. 1, I.G. Ex. 4; P. Br., p. 3.

7. On June 22, 1993, the court accepted Petitioner's plea and entered a judgment finding that there was a factual basis to the charge and that Petitioner was guilty as charged. I.G. Ex. 5, I.G. Ex. 7.

8. The court sentenced Petitioner to a term of imprisonment for two years, but suspended this sentence on the condition that Petitioner be placed on unsupervised probation for three years and that he pay a fine in the amount of $8,600 and costs. The judgment indicated that Petitioner had already paid restitution in the amount of $8,600.21, and, therefore, ordered no further restitution. I.G. Ex. 5.

9. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

10. On January 14, 1994, the I.G. issued a Notice stating that Petitioner was being excluded from participation in Medicare and Medicaid for five years, pursuant to section 1128(a)(1) of the Act.

11. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a "conviction", within the meaning of sections 1128(a)(1) and 1128(i) of the Act. FFCLs 6 - 8.

12. 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. FFCLs 3 - 8.

13. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

14. The minimum mandatory period of exclusion pursuant to section 1128(a)(1) is five years. Act, section 1128(c)(3)(B).

15. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

16. The determination of the I.G. to impose and direct a five-year exclusion in this case does not violate the prohibition against double jeopardy under the United States Constitution.

17. The determination of the I.G. to impose and direct a five-year exclusion in this case does not violate Petitioner's right to due process and equal protection of the law under the United States Constitution.

18. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

The Act mandates exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Act, section 1128(a)(1).

The Act requires further that, in the case of an exclusion imposed and directed pursuant to section 1128(a)(1), the minimum term of such exclusion "shall be not less than five years." Act, section 1128(c)(3)(B).

The I.G. asserts that Petitioner was convicted of a criminal offense that falls within the meaning of section 1128(a)(1) of the Act. The I.G. asserts therefore that Petitioner's exclusion is mandatory, and that Petitioner must be excluded for at least five years pursuant to section 1128(c)(3)(B).

In order for imposition of a five-year exclusion to be proper in this case, the following two statutory criteria must be met: (1) Petitioner must be convicted of a criminal offense; and (2) the criminal offense must be related to the delivery of an item or service under Medicare or Medicaid.

I. Petitioner was convicted of a criminal offense.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under sections 1128(a)(1) and 1128(c)(3)(B) of the Act is that Petitioner must have been convicted of a criminal offense. Section 1128(i) of the Act defines when a person has been convicted for purposes of an exclusion. That provision defines the term "convicted" of a criminal offense to include those circumstances "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court; . . ." Act, section 1128(i)(3).

In the case at hand, evidence adduced by the I.G. establishes that the State of North Carolina charged Petitioner with the misdemeanor offense of receiving stolen

goods. I.G. Ex. 1. On June 22, 1993, Petitioner pled guilty to this offense in the District Court of North Carolina in Wake County. I.G. Ex. 4. The court's acceptance of Petitioner's guilty plea is demonstrated by the fact that, on June 22, 1993, it entered a judgment finding that there was a factual basis to the charge and that Petitioner was guilty as charged. The court sentenced Petitioner to a term of imprisonment for two years, but suspended this sentence on the condition that Petitioner be placed on unsupervised probation for three years and that he pay a fine in the amount of $8,600 and costs. The judgment indicated that Petitioner had already paid restitution in the amount of $8,600.21 and, therefore, ordered no further restitution. I.G. Ex. 5. The evidence adduced by the I.G. is clear and not subject to conflicting interpretation. It establishes that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

In his response to the I.G.'s proposed findings of fact and conclusions of law, Petitioner stated that he "objects" to the following statement: "Petitioner pled guilty, was adjudged guilty, and was sentence[d], and therefore he was 'convicted' of a criminal offense within the meaning of Section 1128." P.'s Response to I.G.'s Proposed FFCLs, paragraph 8. While Petitioner objected to this statement, he did not specifically identify the reason for his objection. Petitioner does not state whether he objects to the factual assertions of the I.G. that he pled guilty, was adjudged guilty, and was sentenced, or to the legal conclusion that he was "convicted" based on these facts.

The documents submitted by the I.G. are sufficiently clear on their face to establish the facts as asserted by the I.G. Petitioner did not challenge the authenticity of any of these documents and he did not offer any evidence supporting a different view of the facts. On the contrary, in the first two pages of his brief, Petitioner admitted that he pled guilty to a misdemeanor offense and that this plea was accepted by the District Court of North Carolina in Wake County.

If Petitioner is objecting to the legal conclusions to be drawn from these facts, he does not discuss his objections in his brief. Petitioner's brief does not even address the issue of whether the facts, as established by the record, lead to the conclusion that he was convicted of a criminal offense within the meaning of section 1128 of the Act.

Thus, in spite of Petitioner's broad objection to the I.G.'s proposed finding of fact and conclusion of law, I conclude that he has not raised a genuine dispute of

material fact or law on the issue of whether he was convicted of a criminal offense. The uncontroverted evidence adduced by the I.G. supports the conclusion that Petitioner was convicted of a criminal offense.

II. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under sections 1128(a)(1) and 1128(c)(3)(B) of the Act is that the criminal offense in question must be "program-related," i.e., related to the delivery of an item or service under Medicare or Medicaid. Throughout this proceeding, Petitioner has consistently maintained the position that the criminal offense for which he was convicted was not related to the delivery of an item or service under Medicare or Medicaid.

The name of the criminal offense which formed the basis of Petitioner's conviction is receiving stolen goods. This offense does not mention Medicare, Medicaid, or any other State health care program, and, on its face, there is no indication that it is related to the delivery of an item or service under Medicare or Medicaid. However, an appellate panel of the Departmental Appeals Board has previously held that it is not the particular label assigned to the crime of which a petitioner is convicted that determines whether the offense is related to the delivery of an item or service under Medicare or Medicaid, but rather the actions and circumstances surrounding the offense. Berton Siegel, D.O., DAB 1467, at 6 - 7 (1994).

Thus, it is consistent with congressional intent for me to examine the facts underlying Petitioner's conviction in order to determine whether the statutory criteria of section 1128(a)(1) have been satisfied. In construing the language "related to the delivery of an item or service," the administrative law judge stated in the case of H. Gene Blankenship:

> The test of whether a 'conviction' is 'related to' Medicaid must be a common sense determination based on all relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court.

DAB CR42, at 11 (1989).

The question before me here is whether Petitioner's criminal offense is related to the delivery of an item or

service under Medicare or Medicaid, not whether Petitioner was convicted under a criminal statute expressly criminalizing fraud against Medicare or Medicaid. My task is not simply to examine the judgment and State criminal statute to determine whether they specifically refer to Medicaid fraud. Rather, my task is to examine the circumstances surrounding the offense to determine if there is a relationship between the judgment of conviction and Medicaid. Had Congress intended a different result, it would have used the phrase conviction "for" or conviction "restricted to" instead of "related to." An examination of whether a conviction is "related to" Medicaid necessarily involves an inquiry into the circumstances underlying Petitioner's criminal conviction.

In his response to the I.G.'s proposed findings of fact and conclusions of law, Petitioner stated that he "objects" to several factual assertions of the I.G. relating to the circumstances surrounding his conviction. P.'s Response to I.G.'s Proposed FFCLs, paragraphs 3, 4, 5, 9. While Petitioner said he objected to various factual assertions of the I.G., he did not specifically identify the reasons for his objections. Moreover, Petitioner did not offer any evidence supporting an alternative view of the facts. On the contrary, Petitioner did <u>not</u> object to the authenticity or relevance of any of the documents offered by the I.G.

Notwithstanding Petitioner's objections to the I.G.'s factual assertions, the arguments set forth in Petitioner's brief did not focus on factual disputes with the I.G. Instead, Petitioner's arguments addressed the legal conclusions to be drawn from the facts. Petitioner did not dispute the facts as set forth in the exhibits offered by the I.G. Instead, Petitioner argued that these documents do not provide sufficient evidence to lead to the legal conclusion that he 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.

I disagree. The evidence adduced by the I.G. in this case shows that an investigation conducted by Financial Investigator Billy D. Luther of the North Carolina Medicaid Investigations Unit revealed that Petitioner, a dentist, owned and operated a professional corporation that provided mobile dental services to nursing homes. Petitioner's corporation would bill Medicaid for dental services, mostly consisting of examinations and prophylaxis. Based on the time spent and the number of patients for which the corporation billed services, Investigator Luther determined that Petitioner spent less than four minutes with each Medicaid recipient. Consultants stated that, in their

opinion, in such a short period of time Petitioner could not have provided the type of services for which he billed Medicaid. I.G. Ex. 6, I.G. Ex. 8.

Petitioner states that, when "faced with the full weight of the resources of the State of North Carolina in investigating him for alleged Medicaid irregularities," he chose to enter into a plea bargain agreement. P. Br., p. 4. Petitioner agreed to plead guilty to a one count misdemeanor charge of receiving stolen goods, to pay restitution to Medicaid in the amount of $8,600.21 before sentencing, and to pay a fine of $8,600.00 and court costs in full at sentencing. In exchange for this, the State of North Carolina agreed not to prosecute Petitioner "for any other act relating to the submission of claims to the N.C. Medicaid Program occurring prior to the entry of the Plea." I.G. Ex. 4. Pursuant to this plea bargain agreement, Petitioner pled guilty to receiving stolen goods and judgment was entered against him. I.G. Ex. 4, I.G. Ex. 5.

The Misdemeanor Statement of Charges to which Petitioner pled guilty reads as follows:

> [Petitioner] did unlawfully and willfully receive a payment of $18.63 from the North Carolina Medicaid Program which was included as part of a reimbursement check for claim number 1091339609930 submitted by Nicholas J. Penna, D.D.S., P.A. to the North Carolina Medicaid Program in reference to the alleged provision of a dental service consisting of prophylaxis to Medicaid recipient Eva Cline on October 27, 1991, said payment being the property of the North Carolina Medicaid Program, valued at $18.63, which property was stolen, taken, and fraudulently obtained by Nicholas J. Penna, D.D.S., P.A. . . . under circumstances amounting to Medical Assistance Provider Fraud in violation of N.C.G.S. § 108A-63 . . .

I.G. Ex. 1.

I conclude that the evidence adduced by the I.G. establishes that the criminal offense underlying Petitioner's conviction was related to the delivery of an item or service under Medicaid. Critical to my conclusion is that Petitioner admits pleading guilty to the allegations in the Misdemeanor Statement of Charges. P. Br., p. 3. The charges to which Petitioner pled guilty assert that Petitioner obtained money under circumstances amounting to Medical Assistance Provider Fraud. This document explicitly charges Petitioner with fraudulently obtaining money from Medicaid as result of submitting a claim for the "alleged provision of a dental service

consisting of prophylaxis" to a Medicaid recipient. This document establishes that the activity which resulted in Petitioner's criminal conviction was the submission of a Medicaid claim which was, at least in part, fraudulent. The monies Petitioner obtained as a result of this criminal activity constituted the "stolen goods" referred to in the charge.

The terms of the plea bargain agreement provide additional evidence that Petitioner's offense was related to the submission of a fraudulent Medicaid claim. By entering into a plea agreement, Petitioner avoided prosecution of "any other act relating to the submission of claims to the N.C. Medicaid Program." The use of the word "other" demonstrates that the act to which Petitioner pled guilty also related to the submission of claims to Medicaid. In addition, the fact that Petitioner agreed to pay restitution to Medicaid as part of his plea agreement is evidence that the conduct underlying his conviction resulted in financial harm to Medicaid.

I find a very evident connection between Petitioner's offense and the delivery of items or services under Medicaid. It is well-established in decisions of appellate panels of the Departmental Appeals Board that a criminal conviction based on filing fraudulent claims for reimbursement from Medicare or Medicaid relates to the delivery of items or services under such programs within the meaning of section 1128(a) of the Act. 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). I find that the offense underlying Petitioner's conviction in this case -- intentionally submitting to Medicaid claims that misrepresented the services provided -- similarly constitutes financial fraud related to the delivery of Medicaid services.

III. Petitioner's constitutional challenges to the exclusion are without merit.

Petitioner argues that application of the mandatory exclusion provisions to this case violates the Double Jeopardy Clause of the United States Constitution because he has already been punished in the criminal case, and the effect of his exclusion is so extreme as to constitute a second punishment. P. Br., p. 5.

The purpose of the minimum mandatory exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) is remedial, not punishment or restitution. The minimum mandatory exclusion provisions serve to protect beneficiaries from an individual or entity whose trustworthiness Congress has

deemed questionable based on a conviction of a program-related crime. Federal courts have specifically found that exclusions under section 1128 are remedial in nature, rather than punitive, and do not violate the prohibition against double jeopardy of the United States Constitution. Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990); Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992). The Greene court noted the "apt comparison between the exclusion remedy and professional license revocations for lawyers, physicians, and real estate brokers which have the function of protecting the public and have routinely been held not to violate the double jeopardy clause." 731 F. Supp. 838, 840. In view of the remedial nature of the exclusion, I reject Petitioner's argument that his exclusion violates the Double Jeopardy Clause.

In addition, Petitioner points out that in the case of Syed Hussaini, DAB CR193 (1992) the I.G. imposed a five-year permissive exclusion under section 1128(b)(1) of the Act after a pharmacist was convicted of conspiracy to commit Medicaid fraud in violation of 18 U.S.C. § 371.[3] Petitioner asserts that, based on the I.G.'s action there, he should also receive only a permissive exclusion. Petitioner argues that the "arbitrary imposition of different types of sanctions upon Medicaid providers for closely similar offenses" violates his constitutional right to due process and equal protection of the law. P. Br., p. 6.

I disagree. Where, as here, an individual has been convicted of a program-related offense, the law directs the I.G. to impose an exclusion of not less than five years. Even where the same conviction could give rise to mandatory as well as permissive exclusions, it is well settled that the I.G. must impose the mandatory exclusion when the conviction falls within the meaning of section 1128(a)(1). Douglas Schram, R.Ph., DAB 1372, at 12 - 13 (1992).

I am not persuaded by Petitioner's argument that Hussaini is relevant to this proceeding. The petitioner in Hussaini was convicted under a different statute than Petitioner, and I assume that the I.G. determined that the conviction did not fall within the parameters of the mandatory

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[3] Section 1128(b)(1) permits exclusion for convictions of criminal offenses relating to fraud, theft, embezzlement, breach of fiduciary responsibility or financial abuse, if the offense was committed either in connection with the delivery of a health care item or service or with respect to a program, operated or financed, at least partially, by federal, State, or local government.

exclusion provisions of section 1128. Once that determination was made, the I.G. was free to determine whether the conviction merited a permissive exclusion. Since the parties in Hussaini did not raise the issue of whether the I.G. should have treated the petitioner's conviction as the basis for a mandatory exclusion action, the I.G.'s choice to proceed under the permissive exclusion authority was not subjected to the scrutiny of the administrative law judge in Hussaini.

In this case, the I.G. made the determination that Petitioner's conviction was governed by section 1128(a)(1). Once that determination was made, the I.G. had no discretion to impose anything but a mandatory exclusion. Niranjana B. Parikh, M.D., et al., DAB 1334, at 7 (1992). I conclude that in this case the I.G. properly classified Petitioner's conviction as falling under the minimum mandatory exclusion authority of sections 1128(a)(1) and 1128(c)(3)(B). The law requires that Petitioner be excluded for at least five years. It is possible that the I.G. should have treated the petitioner's criminal conviction in Hussaini as the basis for a mandatory exclusion. However, even if the I.G. misapplied the law in that case, that does not invalidate the exclusion in this case.

I see nothing unreasonable or inequitable in the I.G.'s exclusion of Petitioner. The I.G. is merely carrying out the specific directive of section 1128 of the Act that a criminal conviction related to the delivery of a Medicaid item or service mandates a five-year exclusion. There is no basis for concluding that Petitioner's right to due process and equal protection of the law was violated by the I.G.'s imposition of an exclusion under the mandatory exclusion provisions of the Act in this case.

IV. A five-year exclusion is required in this case.

Petitioner argues that if an exclusion is warranted, it should be reduced below five years due to mitigating circumstances. Petitioner points out that the misdemeanor to which Petitioner pleaded guilty was the wrongful taking of $18.63, a small amount of money. Petitioner points out that he has fully complied with the sentence imposed, including the payment of restitution. P. Br., p. 7.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from Medicare and Medicaid for a minimum period of five years, when such individuals have been convicted of a criminal offense related to the delivery of an item or service under

Medicare or Medicaid, within the meaning of section 1128(a)(1) of the Act.

Since Petitioner was convicted of a criminal offense and it was related to the delivery of an item or service under Medicaid, within the meaning of sections 1128(a)(1) and (i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum of five years. Neither the I.G. nor an administrative law judge has discretion to reduce the mandatory minimum five-year period of exclusion.

CONCLUSION

Based on the evidence and the law, I conclude that 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. The five-year exclusion which the I.G. imposed and directed against Petitioner was mandated by law. Therefore, I sustain the exclusion.

/s/

Joseph K. Riotto
Administrative Law Judge