Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Maximo Levin, M.D.,	)	DATE: November 10, 1994
	)	
Petitioner,	)	
	)	
- v.-	)	Docket No. C-94-057
	)	Decision No. CR343
The Inspector General.	)	
	)	

DECISION

By letter dated November 18, 1993, Maximo Levin, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner 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 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 the Medicaid or Medicare programs.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board (DAB). During a prehearing conference call on February 4, 1994, the parties agreed that there was no need for an in-person hearing and that the case could be decided on written submissions.

Thereafter, the I.G. filed a memorandum enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s memorandum was accompanied by two exhibits which I admit and identify as I.G. Exs. 1 and 2. Petitioner responded with a memorandum in

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[1] I use the term "Medicaid" hereafter to represent all programs, other than Medicare, from which Petitioner was excluded.

opposition to the I.G.'s position. Petitioner's memorandum was accompanied by two exhibits marked as "A" and "B." I remark Petitioner's exhibits as Petitioner's Exhibits 1 and 2. I admit and identify Petitioner's Exhibits as P. Exs. 1 and 2. The I.G. submitted a reply also.

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 Medicaid or Medicare 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 Medicaid or Medicare to be excluded from participation in such programs for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a physician practicing in the State of New York. I.G. Ex. 1 at 20.

2. Petitioner was indicted in the United States District Court for the Southern District of New York on nine counts of receiving unlawful remuneration in return for ordering or arranging for the ordering of items of durable equipment which could have been eligible for payment by Medicaid or Medicare, "in violation of 42 U.S.C. § 1320a-7b(b)(1)(B)." The nine counts were identical, except that each referred to a different incident. I.G. Ex. 1.

3. On June 5, 1991, Petitioner pled guilty to count nine of the indictment. He admitted that he knowingly and willfully received remuneration in the amount of $30.00 in exchange for ordering or arranging for ordering one or more items paid for under Medicaid or Medicare programs. I.G. Exs. 1, 2.

4. 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.

5. The district court accepted Petitioner's guilty plea and he was formally adjudged guilty.

6. On February 19, 1993, the district court sentenced Petitioner to a two-month period of imprisonment, followed by supervised probation; he was required also to pay an assessment and fine.

7. 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. Findings 3 - 6.

8. 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. Findings 3 - 7.

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

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

11. 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.

12. The mandatory exclusion provision is remedial in nature and not violative of the Fifth and Eighth Amendments to the United States Constitution.

PETITIONER'S ARGUMENT

Petitioner acknowledges having accepted a $30.00 kickback from a manufacturer of breathing equipment in exchange for prescribing such devices for a patient, which may be paid for by Medicaid or Medicare.

Petitioner contends also that excluding him, under the circumstances present herein, violates the Fifth Amendment to the Constitution, since the financial effect of his exclusion is so disproportionate to the dollar value of his crime that the exclusion has taken on the characteristics of a punishment and amounts to placing him in double jeopardy. He contends further that, for essentially the same reason, exclusion is forbidden by the Eighth Amendment's prohibition against excessive fines. Lastly, he maintains that his patients genuinely needed the medical equipment he prescribed.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act is that the individual or entity in question was 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 . . . ." Section 1128(i)(3) of the Act.

In the present case, evidence adduced by the I.G. shows that Petitioner pled guilty to one count of violating section 1128B(b)(1)(B) of the Act by knowingly and willfully receiving remuneration in exchange for ordering or arranging for ordering one or more items paid for under Medicaid or Medicare. I.G. Exs. 1, 2. Petitioner entered his plea of guilty to this offense in the United States District Court for the Southern District of New York. The court's acceptance of Petitioner's guilty plea is demonstrated by the fact that, on February 19, 1993, it entered a judgment in which Petitioner was adjudged guilty of count nine of the indictment -- "Medicaid/Medicare Kickbacks -- in violation of 42 U.S.C. § 1320a-7b(b)(1)(B)." I.G. Ex. 2. The court sentenced Petitioner to a two-month period of imprisonment, followed by supervised probation. Petitioner was required also to pay an assessment and fine. 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.

The evidence establishes also that the second requirement of section 1128(a)(1) -- 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 in decisions of appellate panels of the DAB that violation of the antikickback provisions of the Act, set forth in section 1128B(b)(1)(B), constitutes a clear program-related offense invoking mandatory exclusion. Niranjana B. Parikh, M.D., et al., DAB 1334 (1992); Boris Lipovsky, M.D., DAB 1363 (1992).

Petitioner contends that excluding him violates the Fifth and Eighth Amendments to the Constitution, since the financial effect of his exclusion is so disproportionate to the dollar value of his crime that the exclusion has taken on the characteristics of a punishment and amounts to placing him in double jeopardy. He further argues that, because of what he defines as the punitive nature of the mandatory exclusion process, its application herein violates the Eighth Amendment's prohibition against excessive fines. In making this argument, he relies primarily on the principles established in U.S. v. Halper,[2] 490 U.S. 435 (1989), and Austin v. U.S., 113 S.Ct. 2801 (1993). These arguments, however, have already been considered and rejected by federal district courts and the DAB. See, e.g., Manocchio v. Kusserow, 961 F. 2d 1539 (11th Cir. 1992); Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990); John N. Crawford, M.D., DAB 1324 (1992).

As to the contention that exclusion would subject Petitioner to unconstitutional double jeopardy, the primary purpose of the exclusion sanction is remedial rather than punitive. When an exclusion is imposed pursuant to section 1128 of the Act, its purpose is to

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[2] Halper involved a defendant who was penalized under the federal criminal False Claims Act for submitting multiple false claims for reimbursement under Medicare. After conviction and sentencing, the government, in a separate action against the defendant, imposed additional civil remedies that bore no rational relation to the government's actual loss. The Court found that this constituted a violation of the defendant's right against double jeopardy. Halper, 490 U.S. at 452.

protect the integrity of the programs and their beneficiaries and recipients from persons who have been shown to be guilty of program-related or patient-related crimes. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991). As a DAB appellate panel held ". . . the mandatory exclusion provision is not comparable to the civil penalty imposed in Halper but is remedial in nature" and, therefore, constitutionally inoffensive. Janet Wallace, L.P.N., DAB 1326 (1992). With regard to Austin,[3] the DAB's finding that the statute is, in essence, remedial is highly relevant. In addition, I doubt whether the standards applied in a civil forfeiture case, where the government is seeking to seize a person's house, car, business, or the like are applicable to matters like the instant case, where the government is seeking merely to avoid doing business with a person or entity it regards as untrustworthy.

For all these reasons, I do not regard Petitioner's constitutional arguments as controlling here.

Petitioner maintains also that the equipment prescribed was medically necessary. However, the law proscribes all kickbacks given in exchange for ordering items or services for which payment may be made under Medicaid or Medicare -- there is no exception allowing a person to receive kickbacks for medically justifiable transactions.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from Medicare and Medicaid for a period of at least five years because of his criminal conviction for receiving a kickback, a conviction that is related to the delivery of items or services under these programs. Neither the I.G. nor an

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[3] Austin addressed the issue of whether the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 881) is subject to the limitations of the excessive fines clause of the Eighth Amendment. The Court reasoned that a forfeiture that could be considered a monetary punishment is subject to the excessive fines clause. The Court held that 21 U.S.C. § 881 was subject to the excessive fines clause because, although it served some remedial purpose, it served also as a monetary punishment.

administrative law judge is authorized to reduce the five-year mandatory minimum exclusion. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 331 F. Supp. 835, 838 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge