# Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

| | | |
|---|---|---|
| In the Case of: | ) | |
| | ) | |
| Bobby D. Layman, D.D.S., | ) | DATE: September 16, 1997 |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-97-224 |
| | ) | Decision No. CR491 |
| The Inspector General. | ) | |
| | ) | |

## DECISION

By letter dated November 22, 1996, Bobby D. Layman, D.D.S., the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health and Human Services, of her determination 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 herein 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 request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board. The I.G. moved for summary disposition.

Because I 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 the undisputed facts, I have granted the I.G.'s motion and decided the case on the basis of the parties' written submissions. The I.G. has submitted eight proposed exhibits (I.G. Exs. 1-8). Petitioner did not object to these exhibits. Petitioner has submitted 75 proposed exhibits. (P. Exs. 1-75) The I. G. has not objected to these exhibits. I base my decision in this case on these exhibits, the applicable law, and the arguments of the parties.

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.

## I. Petitioner's Argument

Petitioner contends that his conviction falls within the parameters of the permissive exclusion authority of section 1128(b)(1) of the Act. He also maintains that the length of exclusion is excessive under the circumstances of his case. He further contends that his exclusion should be waived because he is the only dentist in the region that accepts Medicaid patients and also that the Puna area, where Petitioner practices, would "suffer greatly" as a result of his exclusion. Finally Petitioner asserts that to exclude him would "be to convict and sentence him twice."

## II. Findings of Fact and Conclusions of Law

1. During the time relevant to this case, Petitioner was a dentist licensed to practice in the State of Hawaii.

2. On November 3, 1994, a three-count complaint was filed against Petitioner in the Circuit Court of the First Circuit for the State of Hawaii, charging Petitioner with filing false Medicaid claims in violation of section 346-43.5, Hawaii Revised Statutes. I.G. Ex. 1.

3. Count 1 of the November 3, 1994 complaint charged that, on or about January 20, 1993, Petitioner made a false claim for reimbursement from the State of Hawaii's Medicaid program in the treatment of patient Henry M. I.G. Ex. 1 and 2.

4. On November 15, 1994, Petitioner was convicted, on his plea of no contest, to Count 1 of the November 3, 1994 complaint. I.G. Ex. 3.

5. As a result of his conviction, Petitioner was sentenced to a 5-year term of probation and ordered to make restitution in the amount of $1,732.68 and to perform 50 hours of community service. I.G. Ex. 3.

6. Petitioner's plea of no contest which was accepted by the court and the entry of a judgment of conviction both satisfy the definition of conviction found in section 1128(i) of the Act for purposes of mandatory exclusion.

7. Petitioner's criminal conviction for filing false Medicaid claims is related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

8. The Secretary is required by section 1128(a)(1) of the Act to exclude Petitioner from participation in Medicare and to direct the State to exclude him from participation in State health care programs because of his conviction in a program-related offense.

9. The mandatory minimum period of an exclusion of a person convicted of a program-related offense is five years. Section 1128(c)(3(B) of the Act.

10. The Secretary has delegated to the I.G. the duty to impose the mandatory exclusion on a person convicted of a program related offense. 48 Fed. Reg. 21,661 (1983); 42 C.F.R. § 1001.101.

11. Petitioner is subject to a minimum mandatory exclusion of five years for his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

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

**IV. Discussion**

The law relied upon by the I.G. to exclude Petitioner requires, initially, that he be convicted of a crime. Section 1128(i) of the Act provides that an individual will be deemed convicted under any of the following circumstances:

> (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;
>
> (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 this case, sections 1128(i)(1) and (3) of the Act are clearly applicable. The Circuit Court of the First Circuit of Hawaii on November 15, 1994, accepted Petitioner's plea of no contest and entered a judgment of conviction against him for medical assistance fraud in violation of section 346-43.5 of the Hawaii Revised Statutes. The fact Petitioner pled no contest to a crime and the court accepted his plea constitutes a conviction within the meaning of section 1128(i)(3) of the Act. Also, the entry of the judgment of conviction by the court is within the definition of conviction as set forth in section 1128(i)(1) of the Act. Petitioner was therefore convicted of a criminal offense within the meaning of both section 1128(i)(1) and (3) of the Act.

Petitioner's conviction was also related to the delivery of items or services under the Medicaid program, as required by section 1128(a)(1) of the Act. Petitioner himself concedes that he was "convicted of medical assistance fraud in state court in connection with the delivery of a health care service or item under the Medicaid program." P. Br. at 3. Petitioner's crime, defrauding the Medicaid program by billing for dental appliances and fittings that were never provided, is related to the delivery of Medicaid services even though no services were in fact rendered with respect to Petitioner's misconduct. Jack W. Greene, DAB CR19 (1989), aff'd DAB No. 1078 (1989); aff'd Greene v. Sullivan, 731 F.Supp. 835 (E.D. Tenn. 1990). Exclusion under section 1128(a)(1) is mandated whenever, as here, an individual is convicted in state court of a criminal offense related to the delivery of items or services under the Medicaid program. Section 1128(a)(1) of the Act.

Petitioner is therefore incorrect in his assertion that he should be excluded under the permissive exclusion provision of section 1128(b)(1) of the Act rather than the mandatory exclusion provision of section 1128(a)(1). The DAB has consistently held that the Secretary is under no obligation to proceed under the permissive exclusion provisions of section 1128(b) of the Act; once a person has been convicted of a program-related criminal offense, exclusion is

mandatory. Muhammad R. Chaudhry, M.D., DAB CR326 (1994); Leon Brown, M.D., DAB CR83, aff'd DAB No. 1208 (1990).

> [It] is well settled that the I.G. has no discretion to impose a permissive exclusion for conduct that is program-related and falls within the ambit of the mandatory exclusion provision of section 1128(a), even if the conduct also can be fairly characterized under either the permissive or mandatory exclusion provisions.

Jack W. Greene, DAB No. 1078, at 9-11 (1989), aff'd Greene v. Sullivan, 731 F. Supp 835, 838 (E.D. Tenn. 1990). In other words, when a mandatory exclusion is appropriate, "it is irrelevant that a petitioner's conduct might also satisfy the permissive exclusion provisions of section 1128(b)." Brenda J. Motley, DAB CR414 (1996), at 6.

Accordingly, Petitioner was appropriately excluded under the mandatory exclusion provision of section 1128(a) because his exclusion was based on a conviction for a Medicaid related crime. "Proof that a criminal conviction had occurred, and that the offense was program-related, ends the inquiry as to whether the mandatory exclusion is justified." Sudarshan K. Singla, M.D., DAB CR332 (1994), at 4.

I further find that the length of the exclusion imposed on Petitioner is appropriate because the minimum mandatory length of exclusion under section 1128(a)(1) is five years. Section 1128(c)(3)(B) of the Act; 42 C.F.R. section 1001.102(a). Despite the fact that the five-year minimum is mandatory under section 1128(a)(1), Petitioner argues that the actions that resulted in his criminal conviction are not so egregious as to justify a five-year program exclusion. I find no merit in his contention. The facts underlying Petitioner's conviction are not relevant in this inquiry; Petitioner's plea provides the requisite basis for his mandatory exclusion and any arguments relating to the nature or magnitude of his crime have no bearing on the I.G.'s exclusion authority. Petitioner may not challenge the I.G.'s authority to exclude him from the Medicare and State health care programs by denying that he is guilty of the action for which he was convicted at the state level. The I.G. and the ALJ are not authorized to look behind the conviction to determine whether it is valid and may not consider evidence to mitigate the exclusion. Peter J. Edmondson, DAB No. 1330 (1992). Petitioner may not collaterally attack his criminal conviction in this administrative forum. Sonia M. Geourzoung, M.D., DAB CR286 (1993); Douglas Schram, M.D., DAB No. 1372 (1992).

Petitioner also maintains that his exclusion should be modified because his crime did not "rise to the same level" as some of the offenses committed by others who have been excluded under section 1128(a)(1) of the Act. I reject this argument also. All exclusions imposed under section 1128(a)(1) must be imposed for a minimum period of five years regardless of the facts surrounding the underlying conviction. "It is not unlawful for the same exclusionary period to be imposed upon individuals who commit crimes of varying severity." Singla, at 3 (Petitioner was appropriately excluded for five years under section 1128(a)(1) although he argued that he was convicted only of a misdemeanor and was not convicted of having acted with criminal intent); see also Maria M. Melendez, M.D., 8 (1995) (doctor excluded for five years under section 1128(a)(1) based on conviction for writing a false prescription for which Medicaid was billed); Jack W. Greene, supra, (pharmacist excluded for five years under section 1128(a)(1) based on conviction for billing the Medicaid program for brand name drugs while he dispensed cheaper, generic medication).

Petitioner further maintains that his exclusion should be shortened because the community where he practiced will suffer as a result and he has submitted numerous statements of support from his former patients. I find that I have no authority to consider Petitioner's alleged standing in the community nor the community's need for dental services in a section 1128(a)(1) exclusion. In Maria M. Melendez, M.D., supra, a petitioner's similar argument that any violation of law on her part was more than offset by her community service was irrelevant to the ALJ's review of her exclusion. In Benjamin P. Council, M.D., DAB CR391 (1995), it was held that the ALJ had no authority to consider statements attesting to petitioner's extensive pro bono work and exemplary conduct as a basis for reducing the mandatory minimum term of exclusion. See also Roberta E. Miller, DAB CR367 (1995) (ALJ had no authority to consider petitioner's successful completion of probation and the statements attesting to her good character). The sole issue is whether Petitioner was convicted of a program related criminal offense and if so, then he must be excluded for at least five years.

Petitioner also claims that his exclusion must be moderated because he is the sole source of essential dental services in his community who accepts Medicaid patients. Pursuant to section 1128(c)(3)(B) of the Act, the Secretary may, at the request of a State, waive an exclusion imposed under section 1128(a)(1) of an individual who is the sole community physician or the sole source of essential specialized services in a community. Petitioner does not assert that any waiver request has been made by the State of Hawaii's

Medicaid director on his behalf. A waiver request must come from the State Medicaid director and it is not sufficient that the Petitioner requests the waiver. The I.G. can consider a waiver request only upon "a request from a State health care program" and this request "must be in writing and from an individual directly responsible for administering the State health care program." 42 C.F.R. § 1001.1801(a). The ALJ has no authority to grant a waiver. Benjamin P. Council, M.D., supra; Richard G. Philips, D.P.M., DAB No. 1279 (1991).

Finally, Petitioner maintains that "[t]o exclude him from the program would be to convict and sentence him twice" because he has made restitution, performed community service, and abided by the terms of his probation, pursuant to the sentence imposed by the State of Hawaii. Such claim is an argument that exclusion following a state conviction violates the Constitutional protection against double jeopardy. The ALJ, however, has no authority to rule on the constitutionality of the I.G.'s actions. See Roberta Miller, DAB CR367 (1995). Moreover, the appellate panel of the DAB and federal courts have both found that exclusions imposed under section 1128 of the Act are remedial in nature, rather than punitive, and do not violate the double jeopardy provisions of the Constitution. Id. at 6-7; Manocchio v. Kusserow, 961 F.2d 1539, 1541 (11th Cir. 1992); Kahn v. Inspector General of the U.S. Dept. of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994); Westin v. Shalala, 845 F.Supp. 1446 (D. Kan. 1994). Because the purpose of Petitioner's exclusion is to protect program beneficiaries from future misconduct from a provider who has proven himself to be untrustworthy, and not to punish Petitioner, this exclusion is remedial in nature and not violative of double jeopardy. Paul Karsch, DAB CR454 (1997).

## V. Conclusion

Petitioner's exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because of his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

/s/

**Joseph K. Riotto**
**Administrative Law Judge**