

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

In the Case of:)	
)	
Soon Jack Leung)	DATE: June 25, 1990
)	
Petitioner,)	
)	
- v. -)	Docket No. C-209
)	DECISION CR 86
The Inspector General.)	

DECISION

Petitioner requested a hearing before an Administrative Law Judge (ALJ) to contest a December 4, 1989 determination by the Inspector General (I.G.) to exclude Petitioner from participating in the Medicare program and certain federally-assisted State health care programs (including Medicaid) for a period of five years, under the authority of section 1128(a)(1) of the Social Security Act (Act).¹

The I.G. moved for summary disposition and, based on the written submissions by both the I.G. and Petitioner, I conclude that there are no material facts at issue and that the law requires that I uphold the exclusion. I reach this conclusion because I find that Petitioner is subject to the mandatory exclusion provisions of section 1128(a)(1) of the Act and the provisions of section 1128(c)(3)(B) of the Act, requiring a minimum exclusion period of five years.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed programs (including Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or the social services program.²

BACKGROUND

The Inspector General (I.G.) notified Petitioner on December 4, 1989 that he was being excluded from participation in the Medicare program, and any State health care programs for a period of five years. The I.G.'s Notice alleged that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare and advised Petitioner that the law required a five-year minimum exclusion from participation in the Medicare and Medicaid programs for individuals convicted of a program-related offense.

²The I.G.'s Notice allows an additional five days for receipt.

Petitioner requested a hearing to contest the I.G.'s determination and the case was assigned to me for a hearing and decision.

I conducted a prehearing conference in this case on March 15, 1990, and issued a prehearing Order on March 22, 1990, which established a schedule for filing motions and responses. The I.G. filed a motion for summary disposition, brief, reply brief, and exhibits in support thereof. Petitioner filed a response and brief in opposition to the I.G.'s motion.

ADMISSIONS

Petitioner admits he was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act, of one felony count of mail fraud. P. Br. 1.

ISSUES

The issues are:

1. Whether Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) of the Act.
2. Whether Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.
3. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

1. Petitioner is a licensed medical doctor practicing in New York State. P. Br. 2.

2. A criminal information charged that Petitioner, in April, 1986, as part of a scheme to obtain reimbursement for acupuncture treatments which were not allowable under the Medicare program, "falsely and fraudulently indicated that reimbursable medical services had been provided" and "did place and cause to be placed in an authorized depository for mail, Medicare claim forms to be sent and delivered by the Postal Service." I.G. Ex. 2.

3. On April 27, 1989, Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to the criminal offense of mail fraud, under 18 U.S.C. 1341, for the use of the mail for Medicare claim forms representing that he had administered injections which he did not, in fact, administer. The Court accepted his plea. I.G. Ex. 1, pp. 10-12.

4. Section 1128(a)(1) of the Act requires the I.G., as the delegate of the Secretary of the Department of Health and Human Services, to exclude individuals "convicted of a criminal offense related to the delivery of an item or service" under Medicare or Medicaid programs.

5. Section 1128(i)(3) of the Act defines "conviction" to include when a "plea of guilty . . . has been accepted by a federal, state or local court."

6. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i)(3) of the Act. I.G. Ex. 1 and FFCL 3.

³ The citations to the record in this Decision and Order are designated as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply	I.G. Rep. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)
ALJ's Findings of Fact and Conclusions of Law	FFCL (number)

7. Petitioner admitted, in the course of this proceeding, that his criminal offense was "related to the Medicare program." P. Br., p. 4.

8. Petitioner's criminal offense was "related to the delivery of an item or service" under the Medicare program, within the meaning of section 1128(a)(1) of the Act. FFCL 2 and 7.

9. The I.G. was required to exclude Petitioner for five years under section 1128(a)(1) of the Act and did so in his Notice of December 4, 1989. FFCL 2-8.

10. Section 1128(c)(3)(B) of the Act requires a minimum five-year period for exclusions under the authority of section 1128(a)(1) of the Act.

11. There is no authority or discretion under federal law to reduce the exclusion period in this case. FFCL 2-10.

12. Since the material facts presented above are undisputed and support the five-year exclusion, the I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

I. The I.G. is Required To Exclude Petitioner Under Section 1128(a)(1) Of The Act.

Section 1128(a)(1) and 1128(c)(3)(B) of the Act requires the I.G. to exclude individuals and entities from the Medicare and Medicaid programs when individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. See Greene v. Sullivan, Civ. No. 3-89-758 (E.D. Tenn. Feb. 8, 1990), affirming Jack W. Greene, DAB App. 1078 (1989).

Petitioner admits and I find that he entered a plea of guilty to a criminal offense "related to" the Medicare program. Petitioner Brief, p. 4; FFCL 7, 8. That plea was accepted by the District Court on April 27, 1989. I.G. Ex. 1; FFCL 3. In his plea, Petitioner admitted that the offense involved claims for services under the Medicare program when those services were not, in fact,

rendered as claimed.⁴ Id. Convictions for criminal offenses involving false or fraudulent claims, such as the offense here, are clearly "related to the delivery of items or services" within the ambit of section 1128(a)(1) because such claims "directly and necessarily follow . . . from the delivery of the item or service." Dewayne Franzen, DAB No. 1165 (1990); Jack W. Greene, supra, pp. 7 and 12.

Since it is undisputed that Petitioner was "convicted" within the meaning of section 1128(i)(3) of the Act and the criminal offense was "related to the delivery of an item or service" under Medicare, I conclude that Petitioner is an individual within the scope of section 1128(a)(1) and the I.G. was required to exclude him from the Medicare and Medicaid programs.

Petitioner argues, however, that even though the I.G. has authority to exclude under section 1128(a)(1) of the Act, the I.G. could instead exclude under section 1128(b). An exclusion under section 1128(b) would not be subject to a five-year minimum exclusion period. Petitioner argues that this would be more appropriate in light of mitigating factors which he alleges made a five-year exclusion period unreasonable. P. Br. 1-9.

Petitioner's argument is based on a misreading of the statute. Section 1128(a) mandates that the Secretary "shall" exclude individuals identified in it. As the Board stated in Napoleon S. Maminta, M.D. DAB No. 1135 (1990): "While it is possible that an individual or entity might fit within both the mandatory or permissive categories, the statute provides the Secretary with no option to choose between them. Under section 1128(a), if an individual or entity is convicted of a program-related criminal offense, then the Secretary must impose an exclusion under that section."

Furthermore, permissive authority to exclude based on fraud would not be appropriate in this case, since this authority applies to convictions for offenses not related to Medicare or Medicaid. Section 1128(b)(1) of the Act;

⁴ During the plea proceedings, Petitioner mistated that he submitted the claims to the Medicaid program, while the criminal information, his attorney, and the court refer to Medicare. For the purposes of this hearing, it is not material to which program the claims were submitted, since presentation of a fraudulent claim to either program brings the criminal offense within the ambit of section 1128(a)(1).

see S. Rep. No. 109, 100th Cong., 1st Sess. 7, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 687. The mandatory authority under section 1128(a)(1) of the Act applies, by its terms, to convictions for offenses in which the Medicare or Medicaid program, are victims of crime. See Napoleon S. Maminta, M.D., supra, pp. 12-13. Petitioner admitted in his guilty plea that the Medicare or Medicaid program were the victims of the criminal offense here. I.G. Ex. 1; FFCL No. 3-8.

In sum, the I.G. was required to impose Petitioner's exclusion under section 1128(a)(1).

II. A Minimum Mandatory Five Year Exclusion Is Required In This Case.

Petitioner submitted evidence of mitigating factors which he alleges would support imposition of a shorter exclusion period than five years. Petitioner seeks to distinguish this case from others under section 1128(a)(1) by arguing that he did not intend to defraud the Medicare or Medicaid programs, and did not personally profit from the fraud which did occur. P. Br. 7-8.

Section 1128(C)(3)(B) provides for a minimum exclusion period of five years for exclusions authorized under section 1128(a). Congressional intent on this matter is clear:

A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. The minimum exclusion provides the Secretary with adequate opportunity to determine whether there is a reasonable assurance that the types of offenses for which the individual or entity was excluded have not recurred and are not likely to do so. Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, supra, at 5.

Since this exclusion is required by section 1128(a)(1), the minimum exclusion period must be applied. There is no authority to reduce the exclusion.

IV. Summary Disposition Is Appropriate In This Case.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded that the undisputed documentary evidence in the record supports findings and conclusions that, as a matter of law, Petitioner was properly excluded and that the length of his exclusion is mandated by federal law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Rule 56 F.R.C.P.; Wheeler and Todd, DAB App. 1123 (1990).

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to section 1128(a)(1) and 1128(c)(3)(B) of the Act.

/s/

Charles E. Stratton
Administrative Law Judge