

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	)	
Niranjana B. Parikh, M.D.,	)	DATE: January 7, 1992
Mohammed Akhtar, M.D.,	)	
George Tsakonas, M.D.,	)	
Chandra B. Singh, M.D.,	)	Docket Nos. C-414
	)	C-429
Petitioners,	)	C-430
	)	C-449
- v. -	)	
	)	Decision No. CR171
The Inspector General.	)	

DECISION

By letters dated July 2 and August 9, 1991, the Inspector General (I.G.) notified the Petitioners herein, Niranjana B. Parikh, M.D., Mohammed Akhtar, M.D., George Tsakonas, M.D., and Chandra B. Singh, M.D., that they were being excluded for five years from participation in the Medicare program and from participation in State health care programs enumerated in Sec.1128(h) of the Social Security Act (the Act), referred to collectively herein as Medicaid. These exclusions, the I.G. stated, were mandated by section 1128(a)(1) of the Act, which was triggered by each Petitioner's conviction of a criminal offense related to the delivery of an item under the Medicaid program.

The specific facts underlying all of the convictions were that Petitioners authorized the purchase of certain breathing aids covered by Medicaid. Thereafter, the supplier of these devices made cash payments to Petitioners. Petitioners subsequently pled guilty to the offense of accepting kickbacks with regard to Medicare or Medicaid claims, in violation of section 1128B(b)(1)(B) of the Act.

Petitioners contend that since the doctors "played no role in the delivery of the item or service," their convictions were not "...related to the delivery of an item or service under...any State health care program" as

required by the statute. Consequently, the I.G.'s application of the mandatory exclusion law (section 1128(a)(1)) was inappropriate. Instead, Petitioners argue, the I.G. should have proceeded under the permissive exclusion provisions of section 1128(b)(7) (which makes reference to the substantive offense described in section 1128B(b)(1)). Had these sections of the statute been utilized, Petitioners continue, they would be entitled to pre-termination hearings at which they could have offered evidence in mitigation of their offenses. By contrast, where the I.G. proceeds under the mandatory exclusion provisions of the Act, as he did here, mitigating factors are irrelevant, since the minimum period of exclusion is fixed and is brought about by the mere fact of conviction.

Inasmuch as these appeals involve violations of the same criminal statute, present similar legal issues, and are handled by the same counsel, the parties agreed that they should be consolidated. Since the parties did not dispute any material facts, I determined that there was no need for in-person hearings, that the cases could be decided on the basis of documentary submissions, and that the exclusions should be upheld.

#### APPLICABLE LAW

Sections 1128(a)(1) and (c) of the Act (codified at 42 U.S.C. 1320a-7(a)(1) and (c)) make it mandatory for the Secretary of HHS to exclude from participation in the Medicare and Medicaid programs, for a period of not less than five years, any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program.

Sections 1128(b)(7) and 1128B(b)(1) permit, but do not mandate, the exclusion from these same programs of any person whom the Secretary concludes is guilty of fraud, kickbacks, or certain other prohibited activities. Section 1128(f)(2) provides that, under most circumstances, before a person may be excluded pursuant to these sections, he or she is entitled to a hearing before an administrative law judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant here, Petitioners Niranjana B. Parikh, Mohammed Akhtar, George Tsakonas, and Chandra B. Singh were licensed doctors of medicine in the State of New York, and were Medicare and Medicaid providers. Joint stipulation.
2. In 1990, each of these four physicians pled guilty to violating 42 U.S.C. 1320a-7(b)(1)(B) -- codified as section 1128B(b)(1)(B) of the Act -- by knowingly and wilfully receiving kickbacks related to the purchase of medical supplies that were paid for by Medicaid. Joint stipulation.
3. The Secretary of Health and Human Services has delegated the authority to determine and impose exclusions from the Medicare and Medicaid programs, pursuant to section 1128 of the Act, to the I.G. Joint stipulation.
4. On July 2 and August 9, 1991, the I.G. formally notified Petitioners that they were being excluded from the Medicare and Medicaid programs under section 1128(a)(1) of the Act, as a consequence of their criminal convictions. Joint stipulation.
5. A criminal conviction for accepting kickbacks for authorizing the purchase of medical equipment is sufficiently related to the delivery of an item or service under Medicare or Medicaid to justify application of the mandatory exclusion provisions of section 1128(a)(1).
6. The I.G. is under no obligation to proceed under the discretionary or permissive exclusion provisions of section 1128(b)(7) against a person who may be suspected of violating the anti-kickback law. Once such person has been convicted, though, exclusion is mandatory.

DISCUSSION

First, as to Petitioners' contention that the doctors played no role in the delivery of an item or service under Medicaid or Medicare, this standard -- required by section 1128(a)(1) -- is met where there is a common-sense connection between a criminal offense and the Medicaid or Medicare programs. Clarence H. Olson, DAB CR46 (1989). A person may be guilty of a program related offense even if he or she did not physically deliver items or services. Jack W. Greene, DAB 1078 (1989).

Applying these standards to the instant case, it is concluded that the acts which gave rise to the criminal convictions of Petitioners herein are integral parts of, and directly related to, the delivery of items under Medicaid, thus satisfying the statutory definition and justifying application of the mandatory exclusion provisions.

It is undeniable that there can be subject matter overlap between the mandatory exclusion for criminal conviction provisions of section 1128(a)(1) and the permissive exclusions for fraud or kickbacks authorized by section 1128(b)(7) (which references section 1128B(b)(1)). Nevertheless, there is clear precedent holding that the Secretary is under no obligation to proceed under section 1128(b), but that once a person has been convicted of a program-related criminal offense, exclusion is mandatory. See e.g., Leon Brown, M.D., DAB CR83, affd DAB 1208 (1990). There is also precedent directly relevant to the criminal offense involved here. Mandatory exclusion based upon a criminal conviction for accepting kickbacks was sustained by an administrative law judge and affirmed by an appellate panel of the Departmental Appeals Board. Betsy Chua, M.D., DAB CR76, affd DAB 1204 (1990). Support for this rationale is also derived from the Act's legislative history. As the I.G.'s brief notes, exclusion hearings in kickback cases were apparently intended to allow accused persons the opportunity to clarify and explain their actions in cases where no criminal conviction had as yet been obtained. 133 Cong. Rec. 20,922 (1987). Thus, inasmuch as the exclusion proceedings against Petitioners herein were not instituted until after their criminal convictions, it was appropriate for the I.G. to invoke the mandatory exclusion rule.

#### CONCLUSION

The I.G. committed no error by not proceeding against the Petitioners under the discretionary or permissive exclusion provisions of Section 1128(b)(7). It has not been argued, much less proven, that the Secretary or the I.G. had "determined" -- prior to their criminal convictions -- that Petitioners had been receiving kickbacks. Furthermore, the language of these statutory provisions, as well as relevant precedent, show that the use of these provisions is discretionary and that the Secretary is not obliged to take action against every person whom there might be grounds to suspect.

However, once Petitioners had been convicted (of offenses that I have found to be related to the delivery of items under Medicaid), the mandatory provisions of Section 1128(a)(1) left the I.G. with no option but to exclude them.

The exclusions are AFFIRMED.

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Joseph K. Riotto  
Administrative Law Judge