

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Magdi Z. Fahmy, M.D.,	)	DATE: February 19, 1992
Petitioner,	)	
- v. -	)	Docket No. C-92-014
The Inspector General.	)	Decision No. CR176
	)	

DECISION

By letter dated October 22, 1991, the Inspector General (I.G.) of the U.S. Department of Health & Human Services notified Magdi Z. Fahmy, M.D., Petitioner, that he was being excluded for a period of five years from participation in the Medicare program and from participation in the State health care programs identified in section 1128(h) of the Social Security Act (Act). (Hereinafter, these State health care programs are referred to collectively as Medicaid.) The I.G. stated that the exclusion was mandated by section 1128(a)(1) of the Act, based upon Petitioner's conviction of a criminal offense related to the delivery of services under Medicaid.

The record indicates that Petitioner made false or fraudulent representations, relating to unnecessary medical services (breathing tests), on claims for Medicaid reimbursement. On April 15, 1991, Petitioner entered a plea, "pursuant to North Carolina v. Alford," in the Franklin Circuit Court, Commonwealth of Kentucky, to the offense of knowingly making false or fraudulent representations in claims or applications for government benefits. I.G. Exhibit (hereinafter I.G. Ex.) 2.

After being informed of his exclusion, Petitioner filed the present action in which he contends that the I.G.'s reliance upon the mandatory exclusion provisions of the Act was inappropriate. Petitioner contends that instead the I.G. should have proceeded under the permissive exclusion provisions of section 1128(b) which permit the exclusion of persons convicted of an offense "in

connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by ... government." Petitioner contends also that he performed genuine medical procedures which benefitted his patients -- he merely failed to document their necessity, purportedly without any fraudulent intent. Lastly, Petitioner argues that he should not be excluded at all, in light of his having made restitution, having reimbursed the costs of investigation, and having undergone a period of probation.

I conclude that no issues have been raised which necessitate oral testimony or the confrontation of witnesses, and that summary disposition is appropriate. I further conclude that, under the facts of this case, a five-year exclusion is mandatory, and, accordingly, enter summary disposition in favor of the I.G.

#### 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 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. Section 1128(b)(7) permits, but does not mandate, the exclusion from these same programs of any person whom the Secretary of HHS (or the I.G.) concludes is guilty of program-related fraud, kickbacks, or related activities. Before a person is excluded pursuant to the "b" provisions, he is entitled to a hearing before an administrative law judge (1128(f)(2)).

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner knowingly submitted criminally false or fraudulent representations, relating to unnecessary medical services, on claims for Medicaid reimbursement. I.G. Ex. 1.
2. On April 15, 1991, Petitioner entered a plea "pursuant to North Carolina v. Alford" in the Franklin Circuit Court, Commonwealth of Kentucky. I.G. Ex. 2, 4, 5.
3. Based upon this plea, the court entered a "judgment of conviction" and sentenced Petitioner to restitution (\$35,000 to Kentucky Medicaid, plus \$10,000 to reimburse investigative costs), and probation. I.G. Ex. 4.

4. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

5. On October 22, 1991, the I.G. notified Petitioner that, based upon his criminal conviction, he was being excluded for five years from the Medicaid and Medicare programs. I.G. Ex. 8.

6. An "Alford" plea to a criminal charge satisfies the requirement that Petitioner has been convicted within the meaning of section 1128(i) of the Act.

7. A criminal conviction for knowingly making false representations on Medicaid claims constitutes a scheme to defraud Medicaid, for which is manifestly "related to the delivery of an item or service" under such program and justifies the application of section 1128(a)(1).

8. That Petitioner may have actually performed services of some value is irrelevant.

9. Once a person has been convicted of a program-related criminal offense, exclusion is mandatory.

#### DISCUSSION

First, it must be noted that prior decisions of the Departmental Appeals Board have unequivocally held that an "Alford" plea to a criminal charge satisfies the requirement that Petitioner have been convicted within the meaning of section 1128(i) of the Act. Russell E. Baisley, DAB CR128 (1991); Raymond R. Veloso, DAB CR124 (1991). This precedent is controlling in the instant case.

As to the applicability of section 1128(a)(1), it has already been held that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley, DAB CR128 (1991); Marie Chappell, DAB CR109 (1990). These holdings comport fully with the intent of Congress (expressed when the mandatory exclusion provisions of section 1128 were added to the Act in 1977) that such suspensions should "...serve as a significant deterrent to fraudulent practices under Medicare and Medicaid" and combat the "misuse of Federal and State funds." H. Rep. No. 393, 95th Cong., 1st Sess. 44, 69 (1977), reprinted in 1977 U.S. Code Cong. & Admin. News, 3039, 3047, 3072.

That Petitioner may have actually performed services of some value is irrelevant. His suggestion that his only offense was merely failing to adequately document such services' value is unconvincing. Petitioner acknowledged, in plea documents, having knowingly made criminally false representations on Medicaid claims (apparently regarding the extent, nature, or value of his services), and it is evident from the record and the amount of restitution imposed upon him that he profited considerably thereby. (It should be noted that Petitioner offered no affidavit or other evidence to support his suggestion of inadvertence or to dispute the court records submitted by the I.G.) I therefore find that the essence of the conduct Petitioner pled to was a scheme to defraud Medicaid, the conviction for which is "related to the delivery of an item or service" under such program, and justifies the application of section 1128(a)(1). Indeed, once a person has been convicted of a program-related criminal offense, exclusion is mandatory. See e.g., Leon Brown, M.D., DAB CR83, aff'd DAB 1208 (1990).

#### CONCLUSION

Petitioner's conduct mandated exclusion pursuant to section 1128(a)(1). The I.G. correctly chose not to proceed against Petitioner under the permissive exclusion provisions of Section 1128(b).

/s/

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Joseph K. Riotto  
Administrative Law Judge