

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Zenaida Macapagal, R.N.)	DATE: February 24, 1992
Petitioner,)	
- v. -)	Docket No. C-445
The Inspector General.)	Decision No. CR179

DECISION

By letter dated August 9, 1991, Dr. Zenaida Macapagal, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that she would be 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 (the Act) (which are referred to in this decision as Medicaid). The I.G. stated that the exclusion was mandated by section 1128(a)(1) of the Act, because of Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicaid or Medicare.

On March 13, 1990, Petitioner was convicted (after entering a guilty plea) in the U.S. District Court, Eastern District of New York, of violating 42 U.S.C. § 1320a-7b(b)(1)(B) by knowingly and wilfully soliciting and receiving cash in exchange for ordering or arranging for the ordering of items for which payment may be made under the Medicaid or Medicare programs. The money was received from an officer of the company supplying inhalation therapy equipment which Petitioner had prescribed and which was reimbursable under Medicaid or Medicare.

Counsel for the I.G. moved for summary disposition of the case. Petitioner's counsel opposed it. I conclude that although certain non-outcome-determinative matters of fact -- such as the precise nature of Petitioner's motivation -- may be controverted, there are no material

issues in dispute, 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)(1988)) 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. 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 of HHS (or the I.G.) concludes is guilty of program-related fraud, kickbacks, or related activities. Before a person is excluded pursuant to these latter provisions, he is entitled to a hearing before an administrative law judge pursuant to section 1128(f)(2) of the Act.

Findings of Fact and Conclusions of Law¹

1. At all times relevant herein, Petitioner was a duly licensed physician in New York state and was a Medicare and Medicaid provider.
2. Petitioner accepted cash gifts from an officer of the company supplying inhalation therapy equipment which she had prescribed and which was reimbursable under Medicaid or Medicare.
3. Petitioner was convicted (pursuant to a guilty plea) on March 13, 1990 in the U.S. District Court, Eastern District of New York, of accepting an illegal kickback in violation of 42 U.S.C. § 1320a-7b(b)(1)(B). I.G. Ex. 5.
4. The State of New York excluded Petitioner from its Medicaid program. I.G. Ex. 6.
5. The Secretary of Health and Human Services has delegated the authority to determine and impose

¹ The record of this case consists of six documentary exhibits submitted by the I.G. (referred to as "I.G. Ex. 1," etc.), Petitioner's brief, the I.G.'s brief, and an I.G. rebuttal.

exclusions pursuant to section 1128 of the Act to the I.G. 48 Fed. Reg. 21662 (May 13, 1983).

6. By letter dated August 9, 1991, Petitioner was notified by the I.G. that she would be excluded for a period of five years from participation in the Medicare and Medicaid programs.

7. 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).

8. 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.

9. The mere fact of conviction of a relevant offense triggers exclusion; criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1).

10. 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.

11. Once a person has been convicted of a program-related criminal offense, exclusion for at least five years is mandatory.

Argument

Petitioner argues that her conviction does not constitute a program related offense and that, therefore, only a permissive exclusion (pursuant to section 1128(b)) could be brought against her. As her brief states, imposition of mandatory exclusion is not warranted "...since there is no nexus between the petitioner's activities and the Medicare program." Petitioner also declares (1) that the equipment prescribed was medically necessary, and would have been prescribed irrespective of the remuneration; (2) that her conduct was not motivated by Medicare coverage; and (3) that it did not adversely affect the Medicare program since the equipment was needed and its purchase was not contingent upon the kickbacks.

Discussion

First, I note that a guilty plea to a criminal charge satisfies the requirement that Petitioner have been convicted within the meaning of the Act. Section 1128(i) of the Act.

As to Petitioner's contention that her conviction is unrelated to the delivery of an item or service under Medicaid or Medicare, and thus is not encompassed by the mandatory exclusion provisions of section 1128(a), this standard is satisfied 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). Other relevant precedent holds that a criminal offense is deemed to be related to the delivery of an item or service under Medicaid or Medicare where the delivery of such Medicaid or Medicare item or service is an element in the chain of events constituting the offense. See Larry W. Dabbs & Gary L. Schwendimann, DAB CR151 (1991), and cases cited therein.

Additionally, the law under which Petitioners were convicted shows by its very existence that Congress has determined that kickbacks impede the proper functioning of the Medicaid and Medicare programs and the delivery of items and services thereunder. Applying this statutory background and case precedent to the case at hand, I conclude that the delivery of items under Medicaid or Medicare was an essential and integral part of Petitioner's criminal conduct and her conviction, absent which she would not have been offered and taken the monies in question, and that her conviction satisfies the requirements of section 1128(a) and mandates exclusion.

Based on the above reasoning, I reject Petitioner's argument that there was no "nexus" between her criminal conduct and the delivery of items or services under Medicaid/Medicare, and also find no merit in her contention that the absence of such a connection required the I.G. to proceed under the permissive exclusion provisions of section 1128(b).²

² To be sure, there is some subject matter overlap between the Act's provision of mandatory exclusion for any relevant criminal conviction (section 1128(a)(1)) and its authorization of permissive exclusion for fraud,

(continued...)

Petitioner also maintains that the equipment prescribed was medically necessary, and "...would have been prescribed irrespective of the remuneration." 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.

Finally, it is argued that Petitioner was motivated by her patients' best interests when she prescribed the nebulizers, that she had no particular knowledge that Medicaid/Medicare would reimburse the costs, and that she was not influenced by the remuneration she received. To this, it can only be said that Petitioner admitted having knowingly and wilfully committed the criminal offense of soliciting and receiving cash in exchange for ordering or arranging for the ordering of items for which payment may be made under the Medicaid or Medicare programs. She cannot now challenge her criminal conviction or deny the motivation that she admitted. And, in any event, it is the mere fact of conviction of a relevant offense that triggers exclusion; criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). Dewayne Franzen, DAB 1165 (1990).

²(...continued)

kickbacks, etc. (sections 1128(b)(7) and 1128B(b)(1)). Nevertheless, case law has established that the I.G. is not obliged to proceed under section 1128(b), but that once there has been a conviction for a program-related offense, section 1128(a)(1) is controlling and exclusion must be imposed. See, e.g., Leon Brown, M.D., DAB CR83, aff'd. DAB 1208 (1990). This rationale is also supported by the Act's legislative history, which shows that pre-exclusion hearings in (permissive) kickback cases were intended to allow accused persons the opportunity to explain their actions where no criminal conviction had as yet occurred. In the case at hand, since proceedings were not instituted until after Petitioner's conviction, it was appropriate for the I.G. to utilize the mandatory exclusion rule.

Conclusion

The conduct for which Petitioner was convicted mandates five year exclusion pursuant to section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge