

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	DATE: March 11, 1992
Larry White, R.Ph.,)	
)	
Petitioner,)	Docket No. C-415
)	Decision No. CR183
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letter dated April 18, 1991, Larry White, R.Ph., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that he would be excluded for 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), referred to in this decision as Medicaid.

The I.G. stated that the exclusion was mandated by section 1128(a)(1) of the Act, based upon Petitioner's having been convicted of a criminal offense related to the delivery of items or services under Medicaid or Medicare.

On August 21, 1990, Petitioner entered a plea of guilty and was convicted in the Circuit Court, Cook County, Illinois, of theft (vendor fraud) against the State of Illinois. The specific facts were that Petitioner, acting for Larr Pharmacy, falsely billed Illinois Medicaid for medicines which were not actually provided to Medicaid recipients.

Petitioner was sentenced to five years probation. Petitioner was also obliged to make restitution to the Illinois Department of Public Aid in the amount of \$52,401.67.

The trial court vacated Petitioner's conviction on October 11, 1990 upon his enrollment in the Treatment

Alternatives To Street Crimes program, in compliance with a pre-sentencing agreement.

Counsel for the I.G. moved for summary disposition.¹ I conclude that 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.

Subsection 1128(i)(1) of the Act provides that an individual is deemed to have been convicted of a criminal offense "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."

Issues

1. Is Petitioner subject to mandatory exclusion notwithstanding the expunging of his record of conviction?
2. Would Petitioner's exclusion constitute double jeopardy?

¹ The I.G. included seven exhibits with his submission. I admit them into evidence as I.G. Ex. 1 through 7. Petitioner's response did not include any exhibits.

Findings of Fact and Conclusions of Law

1. At all times relevant herein, Petitioner was a pharmacist in the State of Illinois.
2. Petitioner, acting for Larr Pharmacy, falsely billed Illinois Medicaid for medicines which were not actually provided to Medicaid recipients. I.G. Ex. 1, 5.
3. On August 21, 1990, Petitioner pled guilty to the offense of theft (vendor fraud) and was convicted in the Circuit Court, Cook County, Illinois. I.G. Ex. 1, 5
4. Petitioner was sentenced to probation and obliged to make restitution to the state. I.G. Ex. 2, 3, 4.
5. The trial court vacated Petitioner's conviction on October 11, 1990 upon Petitioner's enrollment in a supervised treatment program. I.G. Ex. 2, 3, 4.
6. 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).
7. By letter dated April 18, 1991, Petitioner was notified by the I.G. that he would be excluded for five years from participation in the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act.
8. An individual will be regarded to have been convicted, for purposes of the Act, where a judgment of conviction has been entered by a competent court, regardless of whether such judgment of conviction or criminal record is later expunged.
9. Criminal fraud accompanied by failure to provide items or services is a program-related offense calling for mandatory exclusion.
10. An exclusion will be regarded as putting its subject in double jeopardy only in certain cases where such sanction's purpose is essentially retributive or deterrent.
11. The purpose of this exclusion is to protect Medicaid/Medicare program integrity, beneficiaries and recipients, and the public from persons who have been shown to be guilty of program-related or patient-related crimes. Thus, it is remedial rather than punitive.

Argument

In this proceeding, Petitioner argues (1) that inasmuch as his criminal conviction was vacated by the trial court, he was never, in fact, convicted of an offense; and (2) that exclusion would be a second punishment, barred by the double jeopardy clause of the Constitution.

Discussion

First, I conclude that the criminal offense of which Petitioner was convicted is manifestly "related to the delivery of an item or service" under the Medicaid or Medicaid programs, thereby mandating exclusion. This conclusion is amply supported by Departmental Appeals Board (DAB) precedent. For example, in a case directly analogous to the instant proceeding (also involving a pharmacist who billed Medicaid for medicines that were not furnished as alleged), the administrative law judge held, and the appeals panel affirmed, that criminal fraud accompanied by failure to provide items or service constitutes a program-related offense. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991).

Petitioner's contention that, inasmuch as his criminal conviction was vacated by the trial court, he was never convicted of an offense, is without legal validity. Subsection 1128(i)(1) of the Act, quoted supra, expressly provides that an individual will be regarded to have been convicted, for purposes of the Act, where a judgment of conviction has been entered by a competent court, regardless of whether such judgment of conviction or criminal record has been expunged. Here, Petitioner pled guilty to a criminal offense against the laws of Illinois, and the Circuit Court entered judgment against him. That the judgment of conviction was subsequently expunged, based upon Petitioner's entry into a program of supervised probation, does not nullify the original conviction for purposes of determining his eligibility to participate in the Medicare and Medicaid programs. As stated in an earlier decision, "post-pleading erasures of convictions [are] included within the statutory definition of conviction." James F. Allen, M.D., DAB CR71 (1990).

As to Petitioner's argument that exclusion would be a second punishment, barred by the double jeopardy clause of the Constitution, this, too, is without basis. An exclusion, which is a civil, rather than criminal, sanction, is regarded as putting its subject in double jeopardy only in certain cases where such sanction's

purpose is essentially retributive or deterrent (see United States v. Halper, 490 U.S. 435 (1989)). However, the primary purpose of the sanction herein is remedial rather than punitive. When an exclusion is imposed pursuant to section 1128 of the Act, its purpose is to protect Medicaid/Medicare program integrity, beneficiaries and recipients, and the public from persons who have been shown to be guilty of program-related or patient-related crimes. See Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990); Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991). Additionally, this Petitioner was initially convicted in a State court, and it has been held that double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. Abbate v. United States, 359 U.S. 187 (1959).

Conclusion

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

/s/

Joseph K. Riotto
Administrative Law Judge