

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Eric Schwartz, D.P.M.,)	DATE: May 11, 1992
Petitioner,)	
- v. -)	Docket No. C-92-036
The Inspector General.)	Decision No. CR196
)	

DECISION

On December 9, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in Medicare and any State health care program for a period of five years.¹ The I.G. stated that Petitioner was being excluded as a result of his conviction of a criminal offense related to the delivery of an item or service under the New York Medicaid program. Petitioner was advised that the exclusion of an individual convicted of such an offense was mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years. The I.G. informed Petitioner that he was being excluded for the minimum period mandated by law.

Petitioner timely requested a hearing. The I.G. moved for summary disposition. Petitioner opposed the motion. I have considered the arguments made by the I.G. in his motion as well as those made in opposition to the motion by Petitioner. I have also considered the undisputed material facts of the case and applicable law. I

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

conclude that the five-year exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under a Medicaid program, within the meaning of section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a podiatrist in the State of New York. I.G. Ex. 2/18.²
2. On February 7, 1991, Petitioner was convicted in a New York State Court of the criminal offense of filing a false instrument. I.G. Ex. 1; I.G. Ex. 2/12.
3. Petitioner pleaded guilty to falsely presenting claims for Medicaid reimbursement for foot molds fabricated from casts, when in fact the devices which he had made for patients were made by a process other than casts. I.G. Ex. 2/18 - 19.
4. In pleading guilty, Petitioner admitted to having submitted 358 false claims for Medicaid reimbursement. I.G. Ex. 2/19 - 20.
5. Petitioner was sentenced to pay restitution of \$18,798.43. I.G. Ex. 1.
6. Petitioner was convicted of a criminal offense. Findings 2, 3; Social Security Act, § 1128(i).
7. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 2, 3; Social Security Act, § 1128(a)(1).

² The I.G. submitted four exhibits in support of his motion. I refer to these exhibits as "I.G. Ex. (number)/(page)." Petitioner submitted five exhibits in opposition to the I.G.'s motion. I refer to these exhibits as "P. Ex. (number)/(page)." Neither the I.G. nor Petitioner disputed the facts contained in any of these exhibits. For purposes of the record, I am admitting the I.G.'s exhibits and Petitioner's exhibits into evidence.

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

9. On December 9, 1991, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.

10. There are no disputed issues of material fact in this case and summary disposition is appropriate.

11. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required under the Act. Social Security Act, §§ 1128(a)(1) and 1128(c)(3)(B).

12. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 7; Social Security Act, §§ 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. Petitioner is a podiatrist who practices in New York. Petitioner pleaded guilty and was convicted of the criminal offense of filing a false instrument. In pleading guilty, Petitioner admitted to having presented 358 false claims for Medicaid reimbursement. The claims were false in that Petitioner represented that he had prepared orthotic devices for patients' feet from molds of these patients' feet, when in fact he had used another process. Based on this conviction, the I.G. excluded Petitioner under section 1128(a)(1) of the Act.

Petitioner does not deny that his offense is a conviction within the meaning of section 1128(i) of the Act.³ Nor, apparently, does Petitioner dispute that individuals convicted of criminal offenses within the meaning of section 1128(a)(1) of the Act must be excluded for at

³ Section 1128(i)(1) defines a conviction to include entry of a judgment of conviction against a party by a court. A judgment of conviction was entered against Petitioner. I.G. Ex. 1. Section 1128(i)(3) defines a conviction to include acceptance of a plea of guilty by a court. On February 7, 1991, a New York court accepted Petitioner's guilty plea. I.G. Ex. 2.

least five years. In this case, Petitioner was excluded for the minimum period.

Petitioner's opposition to the I.G.'s motion, and his assertion that he should not have been excluded, is based on three contentions. First, Petitioner argues that, regardless of his plea, there is no evidence of intent on his part to defraud the New York Medicaid program. Therefore, according to Petitioner, he was not in fact convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Second, Petitioner contends that the Act is being applied to him in an unlawful retroactive manner. He bases this argument on his assertion that the conduct for which he was convicted occurred prior to the enactment of the current version of section 1128 in 1987. Finally, Petitioner asserts that he is entitled to a waiver of the exclusion, based on his cooperation with Medicaid officials.

I disagree with Petitioner's contentions. The undisputed facts are that Petitioner was convicted of a criminal offense related to his admitted presentation of false Medicaid claims. That conviction is in and of itself sufficient to establish the requisite basis for the exclusion imposed and directed against Petitioner by the I.G. Furthermore, inasmuch as this is a case which falls within the mandatory exclusion provisions of section 1128, Petitioner must be excluded based on his conviction, regardless of any assertions he makes concerning his culpability for the offense of which he was convicted.⁴

⁴ On January 29, 1992, the Secretary published regulations which, among other things, govern exclusion determinations made by the I.G. pursuant to section 1128 of the Act. 42 C.F.R. Part 1001, 57 Fed. Reg. 3298, 3330 - 3342 (January 29, 1992). Neither party contends that these regulations are applicable to this case, and I have not considered their potential impact here. However, in Stephen J. Willig, M.D., DAB CR192 (1992), I found that the new Part 1001 regulations did not contain criteria which established standards for review of exclusions by administrative law judges.

Section 1128(a)(1) of the Act requires the Secretary (or his delegate, the I.G.) to impose and direct an exclusion against any individual or entity:

that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under any . . . [Medicaid] program.

The Act does not define the term "criminal offense related to the delivery of an item or service." In Jack W. Greene, DAB 1078 (1989), aff'd. sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990) (Greene), an appellate panel of the Departmental Appeals Board (Board) held that a conviction for submission of a false Medicaid claim was a conviction within the meaning of section 1128(a)(1). The appellate panel held that the offense was directly related to the delivery of an item or service under Medicaid:

since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB 1078 at 7.

The offense to which Petitioner pleaded guilty in this case is clearly detailed in the transcript of his plea. I.G. Ex. 2. Petitioner admitted that he had filed false Medicaid claims for orthotic devices. I.G. Ex. 2/18 - 19. He admitted that the claims were false in that he had alleged in the claims that the orthotics were prepared from molds of patients' feet when, in fact, they were prepared using a different process. Id. He admitted to having presented 358 such claims. As part of his plea, he agreed to pay restitution to New York Medicaid of over \$18,000. I.G. Ex. 1. Petitioner's admissions in pleading guilty make it clear that his plea was to the offense of submitting false claims to the Medicaid program. Under the test enunciated in Greene, Petitioner's crime is related to the delivery of an item or service under Medicaid.

An appellate panel of the Board also has held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Napoleon S. Maminta, M.D., DAB 1135 (1990) (Maminta). The petitioner in Maminta was convicted of converting a Medicare reimbursement check to

his own use, when the check was intended to be paid to another health care provider. The rationale of Maminta applies here. Petitioner admitted to having presented false Medicaid claims. The victim of Petitioner's criminal offense was the New York Medicaid program.

For purposes of deciding whether summary disposition ought to be entered against Petitioner, I am assuming as true Petitioner's contention that he is not culpable of the offense of which he was convicted. However, this contention is not relevant to the question of whether the I.G. had authority to exclude Petitioner under section 1128(a)(1) of the Act.

Essentially, Petitioner contends that he is not really guilty of the crime to which he pleaded and of which he was convicted. However, the Act mandates exclusions for parties who are convicted of criminal offenses related to the delivery of an item or service under Medicare or Medicaid. The fact that a party may subsequently argue that he was not, in fact, guilty of the offense of which he was convicted is irrelevant if in fact he was convicted of an offense within the meaning of the Act. Bernardo v. Bilang, M.D., DAB 1295 (1992); Christino Enriquez, M.D., DAB CR119 (1991) at 11 - 12. I find Petitioner's assertion that the Act is being unlawfully applied retroactively to him to be without merit. The 1987 version of the Act requires exclusions for convictions of program-related crimes. The conviction in this case was entered in February 1991, more than two years after the Act's effective date. Therefore, there was no retroactive application of the Act here, even though Petitioner may have engaged in the criminal misconduct for which he was convicted at a date prior to the Act's enactment. David S. Muransky, D.C., DAB CR95 (1990), aff'd, DAB 1227 (1991).

The authority to waive an exclusion is contained in section 1128(d)(3)(B)(i) of the Act, which provides that:

The Secretary may waive an . . . exclusion under . . . [Medicaid] . . . if the Secretary receives and approves a request for the waiver with respect to the . . . [excluded party] from the State agency administering or supervising the administration of the program.

This section does not provide for waivers of exclusions from participating in Medicare. It expressly conditions eligibility for a waiver from an exclusion from participating in a Medicaid program on a request by the State agency administering that program.

I do not have authority to decide Petitioner's contention that he is entitled to a waiver from his exclusion. The Act reserves to the Secretary the authority to grant waivers. The Secretary has not delegated to administrative law judges the authority to rule on waiver requests. I note, however, that Petitioner has made no showing that he has satisfied the statutory precondition for a waiver. There is no evidence to suggest that the agency which administers the New York Medicaid program has made a waiver request on Petitioner's behalf.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare, and to direct his exclusion from Medicaid, for five years was mandated by law. Therefore, I enter a decision in this case sustaining the five-year exclusion imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge