

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	DATE: May 22, 1992
Lloyd M. Kahn, D.P.M.,)	
)	
Petitioner,)	Docket No. C-92-037
)	Decision No. CR200
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letter dated December 9, 1991, Lloyd M. Kahn, D.P.M., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare and Medicaid programs ("Medicaid" here refers to the programs mentioned in section 1128(h) of the Social Security Act (the Act)). The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action.

The I.G. moved for summary disposition of the case. In the absence of disputed material facts, I granted the motion.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act 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(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.

Sections 1128(b)(1) et seq. permit, but do not mandate, the exclusion from these same programs of any person whom the Secretary of HHS concludes is guilty, or has been convicted, of health care related fraud, kickbacks, false claims, or similar activities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. During the period relevant here, Petitioner was a licensed podiatrist in the State of New York and a Medicaid provider.
2. On April 1, 1991, Petitioner pled guilty in New York State Supreme Court to attempted grand larceny, a misdemeanor. P. Ex. 3.
3. During a plea colloquy, Petitioner told the court that he was entering a guilty plea because he was, in fact, guilty. P. Ex. 3.
4. Petitioner was sentenced to conditional discharge. He was required to make restitution in the amount of \$5,910.
5. The facts underlying Petitioner's conviction are that, during the period 1985 - 1986, he submitted fraudulent bills to Medicaid claiming payment for having "provided foot molds fabricated from casts to various Medicaid recipients, when in fact he did not provide appliances made from a cast." I.G. Ex. 2, 3.
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).

¹ Petitioner and the I.G. filed briefs, attached to which were exhibits. I admitted the exhibits into evidence and refer to them as "P. Ex. 1" or "I.G. Ex. 1," et seq.

7. On December 9, 1991, Petitioner was notified by the I.G. that it had been decided to exclude him for a period of five years from participation in the Medicare and Medicaid programs because the criminal conviction. I.G. Ex. 1.

8. A criminal conviction for fraudulently billing Medicaid for services not rendered or goods not delivered 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).

9. The I.G. is not obliged to proceed under the permissive exclusion provisions of section 1128(b) of the Act against a person who committed fraud. Once such person has been convicted of a program-related offense, though, exclusion is mandatory under section 1128(a).

10. The permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid programs.

11. The mandatory minimum exclusion required by section 1128(a) applies to all exclusions based on convictions occurring after August 18, 1987, the effective date of the Medicare and Medicaid Patient and Program Protection Act of 1987.

12. It is not necessary for the I.G. to prove intent in an 1128(a)(1) exclusion action -- it is only necessary that a relevant conviction be shown.

ARGUMENT

Petitioner maintains that he pled guilty to something he did not do (by this, he means that he had no intention to defraud when he submitted his bills) because he was unable to deal with the financial and psychological stresses of a trial. He also argues that his conviction for a fraud-related offense should, if anything, give rise to a permissive exclusion action under section 1128(b) rather than to mandatory exclusion under section 1128(a). Petitioner further objects to the retroactive application of the mandatory exclusion law and regulations to conduct which occurred in 1985 and 1986.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a) is that the individual or entity in question be convicted of a criminal offense under federal or State law. In the present case, the transcript of the New York Supreme Court proceedings and the certificate of the clerk of the court (I.G. Ex. 3, 4) show that Petitioner pled guilty and that a conviction was entered against him, thus satisfying the Act's definition of "convicted" (1128(i)).

I also find that the requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied. Specifically, it is well-established in DAB precedent that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley and Patricia Mary Baisley, DAB CR128 (1991) and Marie Chappell, DAB CR109 (1990).²

This precedent comports fully with the intent of Congress 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. Thus, the I.G.'s use of mandatory exclusion here was legally justified.

Petitioner argues that the I.G. should have proceeded under those sections of the Act that deal with permissive exclusion. In this regard, although there is apparent subject matter overlap between the mandatory exclusion for criminal conviction provisions of section 1128(a) and some of the permissive exclusions authorized by section 1128(b), section 1128(a) addresses only program-related crimes and requires action by HHS. Permissive exclusions, by contrast, may be based upon a much wider spectrum of misdeeds and their invocation is wholly

² Decisions have recently been rendered that are exactly on point with the present proceeding. In Mark Gventer, D.P.M., DAB CR173 (1992) and Eric Schwartz, D.P.M., DAB CR196 (1992), it was determined that the mandatory exclusion provisions of section 1128(a) of the Act apply to podiatrists who defraud Medicaid by billing the program for custom casts and molds for orthotic devices, although they actually delivered appliances not made from three-dimensional casts.

discretionary. This distinction was central to the decision rendered by an appellate panel in Samuel W. Chang, M.D., DAB 1198 (1990), which held that "the permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid . . . programs." There is also precedent dealing with the scope of the Secretary's discretion, holding that HHS is under no obligation to institute a permissive exclusion under section 1128(b), but that once a person has been convicted of a program-related criminal offense, exclusion is mandatory. See Leon Brown, M.D., DAB CR83, aff'd DAB 1208 (1990).

Petitioner attacked the application of section 1128(a)(1) to his case, contending it was unlawful if applied retroactively. This point, however, has been litigated before administrative law judges and appellate panels of the Departmental Appeals Board. It has been established, based upon clear statutory language, that the mandatory minimum exclusion applies to all exclusions based on convictions occurring after August 18, 1987, the effective date of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. 100-93 § 15(b), 101 Stat. 698 (1987). See Francis Shaenboen, R.Ph., DAB 1249 (1991).

As to Petitioner's purported lack of intent to defraud, two things must be noted: The transcript of the plea proceedings in the New York court discloses that he admitted his guilt and did not profess ignorance or inadvertence. Furthermore, it is not necessary for the I.G. to prove intent in an 1128(a)(1) exclusion action -- it is necessary only that a relevant conviction be shown. Dewayne Franzen, DAB 1165 (1990).

In light of the evidence adduced and the reasoning cited, Petitioner must be excluded pursuant to section 1128(a)(1). Inasmuch as the exclusion and its minimum length are mandated by statute, there is no basis for the administrative law judge to consider mitigating evidence or to modify the term of exclusion. Howard B. Reife, D.P.M., DAB CR25 (1989).

CONCLUSION

Petitioner's exclusion based upon his criminal conviction is required by section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge