

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | DATE: June 10, 1992 |
| Boris Lipovsky, M.D., |) | |
| |) | |
| Petitioner, |) | Docket No. C-92-050 |
| |) | Decision No. CR208 |
| - v. - |) | |
| |) | |
| The Inspector General. |) | |

DECISION

By letter dated November 4, 1991, Boris Lipovsky, M.D., 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 represents those State health care 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, and the I.G. moved for summary disposition.

Because there are no disputed material issues of fact, I have granted the I.G.'s motion and have decided the case on the basis of written submissions in lieu of an in-person hearing.

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(b) permits, but does not mandate, the exclusion 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. It incorporates by reference, as bases for exclusion, the offenses described in sections 1128A and 1128B of the Act. Relevant to the Petitioner herein is 1128B(b)(1)(B), which proscribes the soliciting or receiving of any remuneration in return for purchasing, ordering, or arranging for the acquisition of goods or services for which payment may be made under Medicare or Medicaid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. During the period relevant to this decision, Petitioner was a duly licensed physician and Medicaid provider in the State of New York.
2. Petitioner pled guilty in the United States District Court for the Eastern District of New York to violating section 1128B(b)(1)(B) of the Act by knowingly and willfully receiving kickbacks from a supplier of medical equipment for authorizing the purchase of items paid for under the Medicaid program. I.G. Ex. 2, 3.
3. The District Judge found that there was a factual basis for Petitioner's plea. In a written statement to the New York Department of Health dated October 2, 1991, Petitioner reaffirmed that he had been guilty of receiving remuneration for ordering items paid for by Medicaid. I.G. Ex. 2,3.
4. Petitioner was sentenced to probation for three years and was fined \$5000. I.G. Ex. 2.
5. 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. submitted documentary exhibits, briefs and rebuttals. I admitted all of the exhibits into evidence and refer to them herein as "P. Ex. (number)" or "I.G. Ex. (number)."

6. On November 4, 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 of his conviction of a criminal offense related to the delivery of an item or service under Medicaid.

7. A criminal conviction for knowing acceptance of cash payments designed to influence purchasing decisions on medical equipment payable by Medicaid justifies application of the mandatory exclusion provisions of section 1128(a)(1).

8. Section 1128(a) addresses only Medicare or Medicaid related crimes and requires exclusion by HHS once there has been a relevant conviction. Permissive exclusions under 1128(b) can be based upon a much wider spectrum of misconduct (which may or may not involve crimes against the government), but their application is discretionary. Section 1128(b) may be applied to convictions only for offenses other than those related to the delivery of an item or service under Medicare or Medicaid.

9. The I.G. is under no obligation to proceed under the permissive exclusion provisions of sections 1128(b)(1) or (7) of the Act against a person who might have committed fraud. However, once there has been a conviction of a program-related offense, a five-year exclusion is mandatory under section 1128(a).

ARGUMENT

Petitioner acknowledges that he was "convicted" within the meaning of section 1128(i) of the Act. However, he argues that he pled guilty only to a Medicaid violation, specifically excluding any reference to Medicare, and that the conviction ought not to bar him from Medicare participation.

Petitioner's principal contention is that mandatory exclusion pursuant to section 1128(a)(1) is not applicable to the conduct for which he was convicted. He believes that any HHS proceedings relating to his offense, which he characterizes as fraud and/or financial misconduct, should be handled in the manner of permissive exclusions under section 1128(b). Petitioner states that when one considers mitigating factors relevant to a permissive exclusion, the gravity of his offense is lessened by the facts that his patients benefitted from the medical equipment here at issue, that the State did not revoke his license, and that his conduct reflected a

lack of appreciation of his responsibilities under Medicaid rather than any systematic scheme to make illicit gains.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a) is that the the individual or entity in question be convicted of a criminal offense under federal or State law. In the present case, Petitioner admits that he was convicted within the meaning of section 1128(i) of the Act.

I find also 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 Departmental Appeals Board (DAB) appellate precedent that "financial misconduct directed at the Medicaid program in the course of service delivery" constitutes a program-related offense invoking mandatory exclusion. David D. DeFries, D.C., DAB 1317 (1992). This holding well describes the situation in the case at hand, in which Petitioner knowingly accepted unlawful cash payments designed to influence his purchasing decisions on medical equipment payable by Medicaid. Applying mandatory exclusion under these circumstances also comports with the intent of Congress that mandatory exclusions 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.C.C.A.N. 3039, 3047, 3072. Finally, I would note that I have previously held, in a case that was factually similar to the instant matter and which was sustained by a DAB appellate panel, that a criminal conviction for receiving kickbacks in violation of section 1128B(b)(1)(B) of the Act justifies mandatory exclusion pursuant to section 1128(a)(1). Niranjana B. Parikh, M.D., et. al, DAB CR171 (1992), aff'd DAB 1334 (1992).

Petitioner argues that the I.G. should have treated his conviction as a possible basis for permissive exclusion. In this regard, although the literal language of the Act suggests subject matter overlap between the mandatory exclusion provisions of section 1128(a) and the permissive exclusion provisions of section 1128(b), it has long been held that section 1128(a) addresses only Medicare or Medicaid related crimes and requires action by HHS. Permissive exclusions, by contrast, can be based

upon a much wider spectrum of conduct (which may or may not involve crimes against the government) and their application is discretionary. This distinction was central to the decision of the 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." Precedent dealing with the scope of the Secretary's discretion holds 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 e.g., Leon Brown, M.D., DAB CR83, aff'd DAB 1208 (1990).

CONCLUSION

Petitioner's conviction requires his exclusion for a period of at least five years, pursuant to section 1128(a)(1). The statute also clearly provides that the exclusion must encompass Medicaid and Medicare. Neither the I.G. nor this judge is authorized to reduce the mandatory minimum exclusion, even if mitigating factors are present.

/s/

Joseph K. Riotto
Administrative Law Judge