

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: June 24, 1992
Gilbert Rubin, O.D.,	)	
	)	
Petitioner,	)	Docket No. C-92-057
	)	Decision No. CR211
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated December 9, 1991, Gilbert Rubin, O.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" 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

1. During the period relevant to this decision, Petitioner was a duly licensed optometrist and Medicaid provider in the State of New Jersey. I.G. Ex. 4/4.
2. On July 2, 1990, Petitioner pled guilty and was convicted in New Jersey Superior Court of Medicaid Fraud (making false claims to get unauthorized or excessive payments from Medicaid for optical appliances). I.G. Ex. 1, 2.
3. On August 10, 1990. Petitioner was sentenced to probation for a period of three years and was also ordered to make restitution in the amount of \$1300. I.G. Ex. 2.
4. Based upon this criminal conviction, the State of New Jersey excluded Petitioner from participation in its Medicaid program until the later of the following dates:
  - a. February 8, 1990, the date of his initial exclusion.
  - b. The date he is released from probation.
  - c. The date he makes full restitution of the \$1,300 the State found he had fraudulently received, including any interest and penalties that may be due.
  - d. The date he is reinstated by the I.G.

I.G. Ex. 4/17.

5. The Secretary of HHS 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).
6. On December 9, 1991, Petitioner was notified by the I.G. that it had been decided to exclude him for a period

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<sup>1</sup> Petitioner and the I.G. submitted briefs and the I.G. supported his brief with properly authenticated exhibits. I admitted all of the exhibits into evidence and refer to them herein as "I.G. Ex. (number)/(page)."

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 billing Medicaid for items that were not provided as claimed constitutes false billing and fraud related to the delivery of an item or service under Medicare or Medicaid, and triggers mandatory exclusion under section 1128(a)(1).

#### ARGUMENT

Petitioner seeks to have his period of exclusion reduced to three years and made retroactive to February 1990 in order to correspond with his New Jersey Medicaid suspension. He contends that this more lenient treatment is justified by his previously untainted 51-year practice, his advanced age, and the small monetary value of his offense, and the fact that he is one of only four of five optometrists in Camden, New Jersey.

#### DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a criminal offense under federal or State law. In the present case, it is undisputed that Petitioner pled guilty to a crime and was sentenced by a court of competent jurisdiction. This satisfies the definition of "convicted" within the meaning of section 1128(i) of the Act.

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 decisions by appellate panels of the Departmental Appeals Board (DAB) that financial misconduct directed at these programs in the course of the delivery of items or services constitutes a program-related offense invoking mandatory exclusion. David D. De Fries, D.C., DAB 1317 (1992). More narrowly, submitting fraudulent claims to Medicare or Medicaid has been held to constitute a clear example of such program-related financial misconduct. Marie Chappell, DAB CR109 (1990); Russell E Baisley, et al., DAB CR128 (1991). These holdings correspond closely to the situation in the case at hand, in which Petitioner knowingly submitted

false and excessive claims for Medicaid reimbursement on optical products he had supplied.

Lastly, neither the I.G. nor this judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR 19 (1989), aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). An administrative law judge also lacks the authority to alter the effective date of exclusion designated by the I.G. Christino Enriquez, DAB CR119 (1991).

#### CONCLUSION

Petitioner's conviction requires his exclusion for a period of at least five years, pursuant to section 1128(a)(1).

/s/

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Joseph K. Riotto  
Administrative Law Judge