

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	DATE: August 7, 1992
Randall T. Dow)	
)	
Petitioner,)	Docket No. C-92-061
)	Decision No. CR222
- v. -)	
)	
The Inspector General.)	

DECISION

By letter dated December 4, 1991, Randall T. Dow, 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 (in this decision, "Medicaid" means 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 Medicare or Medicaid.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition.

Counsel for the parties presented oral argument by telephone on August 5, 1992.

Petitioner contends that this case contains disputed issues of material fact which make summary disposition inappropriate. However, I find that the factual contentions advanced by Petitioner are legally irrelevant, and that the undisputed facts are sufficient to support summary judgment in favor of the I.G.

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) of the Act provides that an individual will be regarded as having been convicted when a judgment of conviction has been entered against him by a competent court (regardless of whether there is an appeal pending or whether the judgment is ultimately expunged); or when there has been a formal finding of guilt by a court; or when a court accepts a nolo or guilty plea; or when a court defers judgment to allow a guilty defendant who complies with certain conditions to preserve a clean record.

ARGUMENT

Petitioner raised several factual and legal arguments.

Petitioner contends that he merely did as he was instructed by his employer -- i.e., he reported the names of no show patients. He alleges that it was the employer who decided whether to bill Medicaid in each case. Petitioner states that he was never aware that it was improper to bill for no show patients. He alleges that Memorial's management and Board used him as a scapegoat by falsely stating that he was responsible for the unlawful claims.

Petitioner argues that where there is no delivery of a service, there is no basis for exclusion under section 1128(a)(1). He contends that by reporting only that a particular patient had not kept an appointment, Petitioner did nothing improper (since he rendered no treatment), even though a bill may have subsequently been submitted. He maintains also that the I.G. should have proceeded against him under the permissive exclusion provisions of section 1128(b), rather than the mandatory exclusion provisions of section 1128(a)(1). Petitioner asserts that, in a permissive exclusion action, he would be able to show that he was legitimately confused by Medicare/Medicaid billing rules.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ¹

1. Petitioner worked as a physical therapist at Memorial Medical Center during the period that the offenses to which he pled guilty occurred.
2. Petitioner pled guilty in the Third Circuit Court, State of Utah, Salt Lake County, Sandy Department, and was convicted of violating section 26-20-7(2)(b) of the Utah Code, a Class A misdemeanor. The law in question provides that no person shall knowingly file a claim for a medical benefit which misrepresents the type, quality, or quantity of the items or services rendered. P. Br. 1, 10; I.G. Ex. 3, 4.
3. Petitioner entered into a plea agreement which obliged him to pay the State restitution, investigatory costs, and penalties totalling \$12,000. The agreement further provided that Petitioner and the prosecution would request the court to hold in abeyance the plea and disposition of the case. I.G. Ex. 4.
4. Petitioner submitted to the court a document called a waiver, in which he attested that his guilty plea was entirely voluntary. I.G. Ex. 5.
5. The court accepted Petitioner's guilty plea on April 8, 1991. I.G. Ex. 6.
6. Acceptance of such plea is the equivalent of a conviction under section 1128(i) of the Act.
7. Petitioner's criminal conviction for filing false Medicaid claims is related to the delivery of an item or service under Medicaid.
8. 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).
9. The I.G. was required to impose and direct Petitioner's exclusion for a period of at least five years.

¹ Petitioner and the I.G. submitted briefs and documentary exhibits. I admitted all of the exhibits into evidence and refer to them herein as "P. Ex. (number)" or "I.G. Ex. (number)."

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.

11. The I.G. is under no obligation to institute a permissive exclusion action under section 1128(b).

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 that his plea was accepted by the Utah court. This satisfies the definition of "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. It is well-established that financial misconduct directed at these programs, connected with the delivery of items or services, constitutes a program-related offense invoking mandatory exclusion. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute clear program-related misconduct. Jack W. Greene, DAB 1078 (1990).

It is no defense that the subject individual did not actually deliver an item or service, as long as common sense shows his criminal conduct to constitute a link in the established treatment-reimbursement cycle and that one of the covered programs was the intended victim of the crime. Niranjana B. Parikh, M.D., et al., DAB 1334 (1992).

To be sure (although he pled guilty to knowingly filing false claims), Petitioner now contends that he merely did as he was told by his superiors, that he was ignorant as to the rules concerning billing for no show patients, and that it was the office manager who decided whether to bill Medicaid. This argument, though, is unavailing. The law does not permit HHS to look behind the fact of conviction. When an individual has been convicted of a crime encompassed by section 1128(a)(1), exclusion is mandatory; such individual's subsequent claim of innocence is irrelevant. Peter J. Edmonson, DAB 1330 (1992).

Petitioner argues also that the I.G. should have treated his criminal conduct as grounds for a permissive exclusion action. In this regard, although the literal language of the Act may cause some confusion between the mandatory exclusion provisions of section 1128(a) and the permissive exclusions authorized by 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 where there might not be a criminal conviction), and their application is discretionary. This distinction was central to the appellate decision rendered by the DAB 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 e.g., Leon Brown, M.D., DAB CR83, aff'd DAB 1208 (1990).

CONCLUSION

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

/s/

Joseph K. Riotto
Administrative Law Judge