

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Gary S. Evans, D.P.M.,)	DATE: August 7, 1992
Petitioner,)	
- v. -)	Docket No. C-92-072
The Inspector General.)	Decision No. CR223
)	

DECISION

By letter dated December 9, 1991, Gary S. Evans, 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 represents the federally assisted 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.

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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ¹

1. It is undisputed that, during the period relevant to this case, Petitioner was a licensed podiatrist in the State of New York and a Medicaid provider.
2. On April 8, 1988, Petitioner pled guilty in New York State Supreme Court to attempted grand larceny. I.G. Ex. 5.
3. On May 20, 1988, Petitioner was sentenced to three years' probation. He was also required to make restitution to the state of New York in the amount of \$40,307. I.G. Ex. 7; P. Ex. 1.
4. The facts underlying Petitioner's conviction are that, during the period 1983 - 1985, he submitted fraudulent bills to Medicaid claiming payment for goods and services that were not provided as Petitioner claimed. For example, he admitted in court that he "billed [Medicaid] for customized foot molds in certain instances when the foot molds were not properly customized." I.G. Ex. 3, 5, 6.
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).
6. A criminal conviction for fraudulently billing Medicaid for services not rendered or goods not delivered is related to the delivery of an item or service under Medicare or Medicaid and justifies application of the mandatory exclusion provisions of section 1128(a)(1).
7. 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 (MMPPPA) .

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.

ARGUMENT

Petitioner maintains that the I.G. did not bring the present exclusion action within a reasonable time after his State conviction. This, he states, harmed him by making his federal and State exclusions non-concurrent. He also asserts that the I.G.'s action is, essentially, punitive in nature. In this regard, Petitioner argues that "if the purpose of the sanction is to protect the public from fraud and abuse, the sanction must promptly be imposed lest those found guilty ... be free to again commit such acts." He also notes that the delay in this exclusion brought his case within the purview of the five year mandatory exclusion provisions of the MMPPPA. Prior to such legislation, he would have had a chance to be excluded for a lesser period.

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, it is undisputed that Petitioner pled guilty in a State court and that a conviction was entered, thus satisfying section 1128(i)'s definition of "convicted."

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) precedent that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Jack W. Greene, DAB CR19 (1989); aff'd DAB 1078 (1990), aff'd 731 F. Supp. 835 and 838 (E.D.Tenn. 1990). Furthermore, decisions have recently been rendered that are closely on point with the present matter. 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.

Next, Petitioner contends that the I.G. did not act within a reasonable time to effect his exclusion, and that such delay was harmful to him and suggests that the

exclusion had a punitive, rather than remedial, motivation. I reject this contention.

The purpose of section 1128 of the Act is remedial in nature, i.e., to protect federally-funded health care programs and their beneficiaries from untrustworthy providers. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682. In this case, the I.G. has proposed excluding a provider who defrauded the Medicaid program. Such action, on its face, even if not initiated as quickly as it might have been, fully comports with the remedial nature of the statute. That the I.G. did not seek more than the minimum period of exclusion does not suggest that there was a punitive motivation. The Petitioner herein has not shown that the imposition of non-concurrent State and federal exclusions is unlawful, particularly in the absence of any evidence of animus on the part of the prosecuting authorities.

Similarly, the fact that there was a change in statute during the pendency of Petitioner's exclusion does not establish that the I.G.'s lengthy processing of the case was improper, or that the statute is being given unlawful ex post facto effect. The plain language of the law, which is binding on this judge, requires the mandatory five-year minimum exclusion to be applied to all relevant exclusions which arise out of convictions occurring after August 18, 1987 -- the effective date of the MMPPPA (Pub. L. 100-93 § 15(b), 101 Stat. 698 (1987)). See Francis Shaenboen, R.Ph., DAB 1249 at 5, 6 (1991). Since the criminal conviction of Petitioner herein occurred after such date, this statutory language is dispositive.

Lastly, it has been explicitly held by appellate panels of the Departmental Appeals Board that an administrative law judge has no authority to change the effective date of a proposed exclusion as a remedy for delay by the I.G. See, e.g., Samuel W. Chang, M.D., DAB 1198 (1990).

CONCLUSION

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

/s/

Joseph K. Riotto
Administrative Law Judge