

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Asadollah Amrollahifar, Ph.D.,	)	DATE: October 21, 1992
	)	
Petitioner,	)	Docket No. C-92-087
	)	Decision No. CR238
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

By letter dated March 13, 1992, Asadollah Amrollahifar, Ph.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 program and those State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I will use "Medicaid" hereafter in this Decision to represent those State programs.) 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 I conclude that there are no material and relevant factual issues in dispute, 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.

#### ARGUMENT

In his brief opposing the I.G.'s motion for summary judgment, Petitioner states that he received "rebates" -- meaning money -- only for placing orders with a particular supplier. He avers that he had no corrupt or criminal intent and no knowledge of any fraud by the supplier. His only objective in making referrals was to obtain better service for patients. He also contends that there was no showing of harm to Medicaid/Medicare and that the sanctions imposed upon him were punitive in nature and, thus, put him in double jeopardy. Finally, he argues that the California statute under which he was convicted is unconstitutionally vague.

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

1. During the period relevant to this Decision, Petitioner was a psychologist and the operator of licensed "Board and Care" facilities in the State of California. I.G. Br. 5.
2. On February 4, 1991, Petitioner pled nolo contendere and was convicted of two felony violations of the California Welfare and Institutions Code, sections 14107.2(a) and (b). I.G. Ex. 3; P. Br. 1; P. Aff.
3. These sections provide, in pertinent part, that anyone who offers or receives remuneration for referring any person to another for the purpose of furnishing goods or services for which payment may be made by Medicaid, acts unlawfully and may be fined or imprisoned. Petitioner's plea also included the offense of conspiring to violate such law. I.G. Br. 6-7; P. Br. 1-2.
4. In the late 1980's, there was a conspiracy in the Los Angeles area to defraud the State's Medicaid program. The conspirators (who operated under the name Emooko Medical

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<sup>1</sup> Petitioner and the I.G. submitted written argument and documentary exhibits. Petitioner's brief is cited as P. Br. (page) and the I.G.'s brief is cited as I.G. Br. (page). I admitted all of the exhibits into evidence and refer to them herein as P. Aff. (for Petitioner's affidavit) and I.G. Ex. (number) at (page).

Supply Co.) employed individuals who would obtain, by various methods, often from the operators of Board and Care homes, the "stickers" which are used by Medicaid program beneficiaries to obtain goods and services. These stickers were then utilized by the conspirators to obtain payment from the State for medical supplies which were unauthorized and/or unneeded, and/or inflated in price, and which were frequently not even given to the individuals for whom they ostensibly were ordered. To add authenticity to their claims, the conspirators would sometimes forge medical prescriptions. I.G. Ex. 1, 2, 4.

5. Petitioner obtained numerous stickers which were used by Emooko, for which he was paid thousands of dollars in commissions. I.G. Ex. 5 at 12; I.G. Ex. 6; P. Aff.

6. Petitioner was sentenced to five years' probation, of which the first 24 days were to be spent in jail and the next 98 days under house arrest. He was also required to pay \$86,231.36 in restitution to the State. I.G. Ex 6, 13.

7. On September 11, 1991, Petitioner was excluded from participating in the California Medicaid program based upon this conviction. I.G. Ex. 7.

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. A criminal conviction for soliciting, offering, or receiving payments for referrals that lead to the furnishing of goods or services payable by Medicaid is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a), and thus mandates exclusion for at least five years.

10. It is irrelevant (1) that the items ordered may have been medically necessary; and (2) that Petitioner himself neither billed Medicaid, nor was directly involved with the supplier's doing so; and (3) that it was not proven that there was an intent to defraud the government.

11. Petitioner's exclusion is reasonable, proportionate to the offense, and remedial rather than punitive in nature. It does not place him in unlawful double jeopardy.

## DISCUSSION

The first statutory requirement for the imposition of 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 case at hand, Petitioner pled nolo contendere (a plea which section 1128(i) of the Act defines as the equivalent of a conviction), and he was sentenced by a State court. This, manifestly, satisfies the first criterion of section 1128(a)(1).

Next, it is required by section 1128(a)(1) that the crime at issue be related to the delivery of an item or service under Medicaid or Medicare. It has been held that a conviction for receiving remuneration for ordering or arranging for the ordering of items for which payment may be made under Medicaid or Medicare is indeed a program-related offense for which exclusion is mandatory even though (1) the items ordered may have been medically necessary; (2) Petitioner himself neither billed Medicaid, nor was directly involved with the supplier's doing so; and (3) it was not proven that there was an intent to defraud. See, e.g., Afzal Butt, M.D., et. al., DAB CR180 (1992).

It should be noted that the California Code's blanket prohibition of any remuneration (whether called a kickback, bribe, or rebate) which is paid for a Medicaid referral directly corresponds to section 1128B(b) of the Act, which also criminalizes soliciting or receiving payments for referrals that lead to the furnishing of goods or services payable by Medicaid or Medicare. This indicates that Congress, as well as the California legislature, chose to regard all irregular payments linked to transactions reimbursable by Medicaid/Medicare as inimical to the integrity of such programs.

Thus, in the instant case, there is a common-sense connection between a criminal offense and the Medicaid program. Clarence H. Olson, DAB CR46 (1989). I conclude that the delivery of items under Medicaid played an essential and integral role in Petitioner's criminal conduct and conviction. A preponderance of the evidence adduced indicates that, without this connection, Petitioner would not have obtained the stickers in question and would not have subsequently sold them to Emooko. Consequently, Petitioner's conviction falls within the parameters of section 1128(a) and mandates his exclusion.

As to the argument that Petitioner was motivated by his patients' best interests and that he had no corrupt intent when receiving money for the stickers, I note that he pled no contest to having committed a criminal offense. If he felt that he lacked the knowledge or state of mind required by law for conviction of a crime, he could have presented his position to a California judge or jury. He cannot relitigate the criminal case here. In any event, though, it is the mere fact of conviction of a relevant offense that triggers exclusion; criminal intent need not be proven to bring a conviction within the ambit of section 1128(a)(1). Dewayne Franzen, DAB 1165 (1990).

As to Petitioner's argument that exclusion would be a second punishment, barred by the double jeopardy clause of the Constitution, this, too, is without basis. An exclusion, which is a civil, rather than criminal, sanction, would put its subject in double jeopardy only in certain cases where the sanction's purpose is essentially retributive or deterrent (see United States v. Halper, 490 U.S. 435, 448 (1989)). However, the primary purpose of the sanction herein is remedial rather than punitive; i.e., its purpose is to protect Medicaid/Medicare program integrity, recipients and beneficiaries, from persons who have been shown to be guilty of program-related or patient-related crimes. Specifically, the I.G. here has excluded a person who committed multiple violations of a clearly program-related statute, designed to protect Medicaid funds. This 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. See Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990); Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd, DAB 1249 (1991). Thus, I conclude that the exclusion of this Petitioner is reasonable, proportionate to the crime, and remedial, rather than punitive in nature. It does not place him in unlawful double jeopardy. Additionally, Petitioner was initially convicted in a State court, and it has been held that double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a State conviction. Abbate v. United States, 359 U.S. 187 (1959).

Lastly, Petitioner's argument that the California statute should be held void for vagueness is misdirected. I have no authority to declare State laws unconstitutional.

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