

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: December 14, 1992
Roger Alan Johnson, M.D.	)	
	)	
Petitioner,	)	Docket No. C-92-071
	)	Decision No. CR246
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated January 14, 1992, Roger Alan Johnson, 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 program and from participation in the the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the 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 or Medicare.

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

Petitioner moved for, and was granted, the opportunity to present oral argument. The parties presented their arguments by telephone on October 14, 1992.

I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). Thus, I have decided the case on the basis of written submissions in lieu of an in-person hearing. I have decided the motion in favor of the I.G., upholding

the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

#### 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, as bases for exclusion, offenses described in sections 1128A and 1128B of the Act.

#### ARGUMENT

Petitioner asserts that the statutory terms "conviction" and "criminal offense," in section 1128(a) of the Act, are unconstitutionally vague (by this, he means that he was not warned about the effect that a guilty plea would have on his career); that the exclusion statute herein unconstitutionally infringes upon State sovereignty by "enhancing" penalties, thereby interfering with the States' rights under the Tenth Amendment to make their own decisions as to the hierarchy of penalties; and that the I.G.'s unreasonable delay in initiating his exclusion precludes the present action.

If he is subject to an exclusion, Petitioner argues, the controlling law should be that which authorizes permissive or discretionary exclusions (section 1128(b) of the Act) rather than the mandatory exclusion section (1128(a)).

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

1. It is undisputed that, during the period relevant to this case, Petitioner was a duly licensed physician (psychiatrist) in the State of Minnesota. I.G. Exhibit (Ex). 3.
2. Petitioner was indicted for the crime of Theft By False Representation, based upon his having allegedly submitted false claims (billing for non-compensable services or for therapy or office visits which never occurred) for Medicaid reimbursement during the years 1985 and 1986. I.G. Ex. 1; I.G. Ex. 3.
3. On February 15, 1990, Petitioner pled guilty in the Ramsey County District Court to the offense[s] with which he was charged.  
I.G. Ex. 1, 2.
4. The court found Petitioner guilty of theft by false representation. It sentenced him to a ten-year period of probation, a fine, restitution to the State, and community service. I.G. Ex. 2, 4.
5. The State of Minnesota excluded Petitioner from participation in its Medicaid program for a period of five years.
6. 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).
7. By letter dated January 14, 1992, 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 he had been convicted of a criminal offense related to the delivery of items or services under Medicare or Medicaid.
8. An administrative law judge has no authority to decide whether an exclusion is unconstitutional.

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<sup>1</sup> Petitioner and the I.G. both submitted argument and documentary evidence. I admitted all of the items offered.

9. The criminal offense for which Petitioner was convicted -- fraudulently failing to provide items or services for which Medicaid/Medicare was billed -- is related to the delivery of an item or service under Medicare or Medicaid and calls for mandatory exclusion.

10. Where a criminal conviction satisfies the requirement of section 1128(a)(1) that it be related to the delivery of an item or service under Medicare or Medicaid, then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion which the statute provides. The fact that the criminal conviction may appear also to fall within the broader criteria for permissive exclusion found in section 1128(b)(1) is irrelevant.

11. A defendant in a criminal proceeding does not have to be advised of all the possible consequences (such as being temporarily barred from participation in a government program) which may flow from his plea of guilty; he need be informed only of the direct and immediate results.

12. Petitioner was convicted of a criminal offense related to the delivery of items or services under the Medicare or Medicaid programs. Consequently, his exclusion from such programs for a minimum period of five years is mandated pursuant to sections 1128(a)(1) and 1128(c)(3)(B).

#### DISCUSSION

Firstly, I must note that I, as an administrative law judge, have no authority to decide whether the exclusion being directed against the Petitioner herein is unconstitutional. See, e.g., John A. Crawford, Jr., M.D., DAB 1324 (1992).

The section of the Act under which the I.G. seeks Petitioner's exclusion, 1128(a)(1), contains two requirements. It requires that an individual (1) be convicted of a criminal offense, and (2) that such conviction be related to the delivery of an item or service under Medicare or Medicaid. In the case at hand, Petitioner pled guilty and a judgment was entered against him. This, clearly, satisfies the definition of "conviction" set forth in 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) 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 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Criminal fraud consisting of a failure to provide items or services for which Medicaid/Medicare will be billed has been held to be directly on point with this rule, constituting a program-related offense which requires exclusion. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd, DAB 1249 (1991).

Petitioner argues additionally that the I.G. should have treated his criminal conduct as grounds for a permissive exclusion action. In this regard, the appellate decision rendered by the appellate panel in Samuel W. Chang, M.D., DAB 1198, at 8 (1990), 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."

An appellate panel further considered the relationship between section 1128(a)(1) and section 1128(b)(1) in Boris Lipovsky, M.D., DAB 1363, at 7-12 (1992). It concluded that where a criminal conviction satisfies the requirement of section 1128(a)(1) that it be related to the delivery of an item or service under Medicare or Medicaid, then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion which the statute provides. The fact that the criminal conviction may appear also to fall within the broader criteria for permissive exclusion found in section 1128(b)(1) is irrelevant. Thus, the I.G. did not err in acting to exclude Petitioner pursuant to the mandatory exclusion provisions of the law.

Petitioner asserts that had he known the consequences of the plea he entered, he would have pled differently. However, a defendant in a criminal proceeding does not have to be advised of all the possible consequences (such as being temporarily barred from participation in a government program) which may flow from his plea of guilty; he need be informed only of the direct and immediate results. See U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985).

As to Petitioner's contention that the I.G. did not act within a reasonable time to effect his exclusion, an administrative law judge has no authority to alter the

effective date of exclusion designated by the I.G. as a remedy for the latter's tardiness or misfeasance. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, M.D., DAB CR119 (1991). Indeed, since the exclusion of providers from the Medicare and Medicaid programs is expressly required by statute where there has been a relevant criminal conviction, neither the I.G. nor a judge can change or reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835, 838, (E.D. Tenn. 1990).

#### CONCLUSION

Petitioner is required to be excluded for a period of five years pursuant to section 1128(a)(1) of the Act.

/s/

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Joseph K. Riotto  
Administrative Law Judge