

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| Michael J. Kirkland, D.C. |) | DATE: May 7, 1993 |
| Petitioner, |) | |
| - v. - |) | Docket No. C-93-009 |
| The Inspector General. |) | Decision No. CR263 |

DECISION

By letter dated August 26, 1992, Michael J. Kirkland, D.C., 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 State health care programs described in section 1128(h) of the Social Security Act (Act). 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 the State of Oregon's Medicaid program.

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

Because 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), I have granted the I.G.'s motion and decide the case on the basis of written submissions in lieu of an in-person hearing.

I affirm 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties signed and jointly submitted a document captioned STATEMENT OF STIPULATED FACTS. Because they are material and undisputed, I adopt these facts as my findings

1 through 7 (with certain modifications, which are noted in brackets).

1. Michael J. Kirkland is a Chiropractic Physician licensed to practice in the State of Oregon.
2. Dr. Kirkland's practice is located in the city of Dallas, Polk County, Oregon, but he serves elderly clients from the surrounding counties as well.
3. On April 26, 1989, the District Attorney for Polk County filed an Information charging Dr. Kirkland with the offense of submitting a wrongful claim in violation of ORS [Oregon Revised Statutes] 411.675 and 411.990.
4. On April 26, 1989, [Dr.] Kirkland pleaded guilty to Submitting a Wrongful Claim [but only in violation of ORS 411.675 - see I.G. Ex. 3 at p. 6] in the Circuit Court of the State of Oregon for Polk County.
5. On August 26, 1992, more than three years later, HHS notified [Dr.] Kirkland that, because of this conviction three years earlier, he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social services programs for a period of five years, beginning 20 days from the date of the notice.
6. On October 20, 1992, [Dr.] Kirkland requested a hearing [to contest his exclusion.]
7. On December 15, 1992, [Dr.] Kirkland's conviction was vacated by the Oregon Circuit Court for Polk County.

8. The Oregon court which accepted Petitioner's guilty plea did so after concluding that the plea was informed and voluntary and that Petitioner had entered such plea because he was, in fact, guilty of submitting a wrongful claim. I.G. Ex. 2, 3.

9. The Oregon law which Petitioner was convicted of violating forbids a person from making a false or otherwise wrongful claim for payment from the State for having purportedly provided some benefit to a public assistance recipient. ORS 411.675.

10. Petitioner's specific offense was that he billed Medicaid for having allegedly furnished services to a particular Medicaid recipient, although the services had actually been provided to a relative of the recipient who was not covered by the program. I.G. Ex. 3.

11. Petitioner was placed on probation. He made restitution of the monies he had wrongfully received, and was required also to perform community service and to pay a fine. I.G. Ex. 3.

12. The Secretary of Health and Human Services delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

13. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(3) the Act.

14. Filing false Medicaid claims is program-related misconduct.

15. Petitioner was convicted of a criminal offense related to the delivery of items or services under Medicare or Medicaid, as required by the mandatory exclusion provisions of the Act.

16. Congress intended mandatory exclusion to apply to all situations in which a party pleads guilty to, or is otherwise convicted of, a program-related offense, and that a conviction remains a conviction, with regard to satisfying the requirements of section 1128(a), even if it is subsequently expunged or removed from the defendant's record.

17. An administrative law judge has no authority to alter the effective date of an exclusion where the I.G. acted within the discretion afforded by statute and regulation in setting the effective date.

PETITIONER'S ARGUMENT

Petitioner contends that inasmuch as his conviction was vacated pursuant to valid Oregon law, it should not serve as a basis for excluding him from the health care programs. In this regard, Petitioner notes also that 42 C.F.R. § 1001.136(a), which was in effect on April 26, 1989, the date Petitioner pled guilty and was convicted, provided that a person who had been excluded from participation in the Medicare and Medicaid programs would be reinstated if his conviction was reversed or vacated. Petitioner maintains, further, that the offense with which he was charged in the Information -- submitting a wrongful claim -- has not been shown to relate to the delivery of an item or service under Medicare or Medicaid, as required by section 1128(a)(1). Lastly, Petitioner states that he was harmed by the I.G.'s "three year delay in notifying him of the exclusion," since he might have sought "post-conviction relief" or withdrawn his plea and gone to trial. Had the I.G. acted sooner, Petitioner suggests, he could have benefitted also from section 1001.136(a), mentioned above.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty and the Oregon court, after careful inquiry, accepted the plea of guilty. Section 1128(i)(3) of the Act expressly states that when an individual enters a plea of guilty, and the court accepts the plea, such person is considered to have been convicted of a criminal offense.

Next, it is required by section 1128(a)(1) that Petitioner's criminal offense be related to the delivery of an item or service under Medicaid or Medicare. It is well-established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims constitutes program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). I find that Petitioner's actions in the present case - intentionally billing Medicaid for services that were not provided to the Medicaid patient Petitioner named - similarly constitute criminal fraud related to the delivery of Medicaid services.

Petitioner contends that he admittedly pled guilty to submitting a wrongful claim, but that the I.G. did not prove that such false claim related to Medicare or Medicaid. I disagree. The record indicates that the prosecutor detailed Petitioner's specific offenses -- billing the State on several occasions for health services purportedly provided to a Medicaid recipient whereas such services were actually provided to a relative of the recipient, who was not covered by Medicaid -- in open court in the presence of Petitioner and his attorney. Neither of these persons objected to the prosecutor's account of the facts and Petitioner proceeded to formalize his guilty plea. In light of the evidence presented and the controlling law, I conclude that Petitioner was convicted of a criminal offense related to the delivery of items or services under Medicare or Medicaid. Thus, the I.G. had the requisite basis for a mandatory exclusion.

Petitioner's reliance on former regulation 42 C.F.R. § 1001.136(a) is misplaced. First, such regulation applied to reinstatement decisions, which I cannot review, rather than to original exclusion actions. Second, Petitioner's theory does not comport with the intent of Congress. Petitioner pled guilty to criminal charges on April 26, 1989. Consequently, the 1987 amendments to section 1128 of the Act (which mandate the five-year minimum exclusion for program-related crimes) are applicable to his case. Betsy Chua, M.D., DAB CR76, aff'd, DAB 1204 (1990). It has been held by administrative law judges of this office, and affirmed by appellate panels of the DAB, that Congress intended mandatory exclusion to apply to all situations in which a person is convicted of a program-related offense and that a conviction remains a conviction, with regard to section 1128(a), even if it is subsequently expunged from a person's record. See, e.g., Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd, DAB 1104 (1989); James F. Allen, M.D., DAB CR71 (1990); also see 1986 U.S.C.C.A.N. 3665.

In the case at hand, the fact that the Oregon court vacated Petitioner's conviction several years after he had pled guilty does not undo the fact of conviction for purposes of section 1128(a). The affidavit Petitioner executed at the time he entered his plea shows that he had expectations of having his conviction expunged in three years. I.G. Ex. 6. There was also no evidence, in the court's order or otherwise, that the restitution or fine paid by Petitioner were returned, as would occur if his conviction were set aside on the merits, based upon legal error, factual mistake, etc. Petitioner's attorney asserts that there is no Oregon requirement that fines be

returned when a conviction is vacated and that Petitioner was not requesting a return of either. Letter of May 5, 1993. This does not mean that Petitioner could not have attempted to have these monies returned. Had his innocence truly been vindicated, he would likely have done so. Additionally, counsel was unwilling or unable to explain why the conviction should be vacated within the meaning of the Act. He stated that he merely requested the prosecutor to move to vacate the conviction and that the prosecutor and the judge complied, both allegedly without demanding any explanation. Tape of telephone conference of April 16, 1993).

I find it reasonable to conclude that the vacating or expungement of the conviction was the result of an understanding among the parties, and was akin to the "first offender" process mentioned in Section 1128(i)(4) of the Act, or similar programs designed to leave a convicted defendant without the handicap of a criminal record. It has been often held that a conviction undone in such manner has no effect upon the application of mandatory exclusion pursuant to Section 1128(a). Thus, I conclude, as stated in one of these earlier decisions, "post-pleading erasures of convictions [are] included within the statutory definition of conviction." James F. Allen, M.D., DAB CR71 (1990).

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. where the I.G. acted within the discretion afforded by statute and regulation in setting the effective date. Shanti Jain, M.D., DAB 1398 (1993). Nothing in the record herein shows the I.G.'s actions to have been ultra vires or unlawfully motivated. It should also be emphasized that the exclusion of providers from the Medicare and Medicaid programs is expressly required by statute where there has been a relevant criminal conviction, and neither the I.G. nor this judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 at 12 - 14 (1989).

CONCLUSION

Section 1128(a)(1) of the Act requires that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of his conviction of a program-related criminal offense. The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge