

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Robert H. Davis, R.Ph.,)	DATE: September 20, 1993
Petitioner,)	
- v. -)	Docket No. C-93-053
The Inspector General.)	Decision No. CR285

DECISION

By letter dated December 10, 1992, Robert H. Davis, R.Ph., 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 Petitioner 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). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G.'s rationale was that exclusion, for at least five years, is mandated by 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.¹

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

¹ The I.G.'s December 10, 1992 letter alleged that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare. However, during the March 1, 1993 prehearing conference, the I.G.'s counsel clarified that the I.G. intended to allege that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are legal, I have granted the I.G.'s motion and decided the case on the basis of the parties' written submissions.

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

1. During the period relevant to this case, Petitioner was a licensed pharmacist and owner/operator of Bill's Discount Drugs located in Jeffersonville, Indiana. Petitioner's May 10, 1993 response brief at 1.

2. On June 26, 1991, a criminal Information was filed in the United States District Court, Southern District of Indiana, alleging that Petitioner submitted "hundreds" of false and fraudulent claims for reimbursement during the period 1985 - 1988. I.G. Ex. 3.²

² The I.G. submitted four exhibits with the motion for summary disposition. I have marked these exhibits as I.G. Exs. 1 through 4. Petitioner submitted four exhibits with his May 10, 1993 response. I have marked these exhibits as P. Exs. 1 through 4. The I.G. did not submit any exhibits with the I.G.'s reply. Petitioner submitted one exhibit with his surreply. While Petitioner referred to this exhibit as P. Ex. 1, I am marking it as P. Ex. 5. Petitioner has not contested the authenticity of the four exhibits submitted by the I.G. I admit into evidence I.G. Exs. 1 through 3. I reject I.G. Ex. 4 because it is the I.G.'s Notice letter and it is already in the record. In my prehearing order, I directed the parties not to file such duplicative material. The I.G. has not contested the authenticity of the five exhibits submitted by Petitioner, and I admit into evidence P. Exs. 1 through 5.

3. The Information charged that Petitioner dispensed generic drugs, but billed for brand-name products. The Information charged also that Petitioner billed for drugs which had not been prescribed by a doctor and were never supplied to patients. I.G. Ex. 3.

4. Petitioner entered into a plea agreement with the prosecution whereby he would plead guilty to one count of Medicaid Fraud in violation of 42 U.S.C. 1396(h)(a)(1), which allegedly occurred on or about September 29, 1987 and involved the filing of a false Medicaid claim for reimbursement for drugs purportedly furnished to a Medicaid recipient. I.G. Exs. 1, 3.

5. The agreement further provided that a recommendation would be made that Petitioner receive a three-year suspended sentence, that he be placed on probation for three years, that he pay a \$50,000 fine, and that he pay restitution to Medicaid (\$3,000) and to Blue Cross (\$28,516.95). The prosecution agreed not to bring further charges, and not to oppose Petitioner's request for probation. I.G. Ex. 1.

6. On September 20, 1991, the court accepted Petitioner's guilty plea, convicted him of Medicaid Fraud, and imposed the penalties suggested in the plea agreement. I.G. Ex. 2.

7. The single count to which Petitioner pled guilty stated that he had knowingly misrepresented material facts when applying for Medicaid reimbursement for pharmacy services. Specifically, the count charged that he billed for providing the drug Hydergine to a Medicaid recipient, even though such drug was neither prescribed by her physician nor ever supplied to her. I.G. Ex. 3.

8. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. Findings 6 - 7.

9. 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. 21,662 (1983).

10. Mandatory exclusion pursuant to section 1128(a)(1) of the Act is warranted where a program-related conviction has occurred.

11. I am not authorized to consider allegations by Petitioner which are no more than attacks on his guilty plea and conviction by the court.

12. Since Petitioner's underlying criminal conviction occurred after August 18, 1987, the mandatory exclusion provisions are applicable in his case.

13. I am not authorized to consider the alleged failings of Petitioner's counsel in the criminal case as a basis for overturning Petitioner's exclusion.

PETITIONER'S ARGUMENT

Petitioner admits he was convicted, but contends:

1. He did not understand the charge to which he was pleading.
2. His attorney did not explain the ramifications of a conviction for Medicaid Fraud.
3. The person in whose name Petitioner purportedly filed a fraudulent claim was not a Medicaid recipient at all -- her drugs were paid for by Blue Cross.
4. The person's status is substantiated by relevant documents. P. Ex. 1 shows that her prescription for Hydergine bore the typed initials "BSK" (meaning Blue Cross/Blue Shield of Kentucky). P. Ex. 2 indicates that Petitioner's pharmacy claimed reimbursement from Blue Cross for this drug. P. Ex. 3 shows that Blue Cross paid \$46.14 for it.
5. Consequently, his conviction was not proven to be related to the delivery of items or services under Medicaid.
6. He should not be subject to exclusion for things done prior to the enactment of the mandatory exclusion sections of the Act in 1987 [Petitioner's alleged course of conduct dated back to 1985 -- see Finding 2].

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual subject to such action must have been convicted of a criminal offense under federal or State law. Section 1128(i)(3) of the Act expressly provides that when a person enters a guilty plea to a criminal charge and the court accepts such plea, the individual

will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act. In the case at hand, Petitioner admits that he entered a plea of guilty to one count of Medicaid Fraud and that the United States District Court for the Southern District of Indiana accepted his guilty plea. Petitioner's May 10, 1993 response brief at 1 - 2. Petitioner's admissions are supported by the evidence adduced by the I.G. and I find that Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. Findings 2 - 6.

Next, it is required by section 1128(a)(1) that the criminal offense in question be related to the delivery of an item or service under Medicaid or Medicare.

Petitioner does not dispute that he pled guilty to a one count Information which charged him with Medicaid Fraud. Specifically, the Information to which Petitioner pled guilty charged that on September 27, 1987 Petitioner:

knowingly and willfully made and caused to be made a false statement and representation of a material fact in application for benefit and payment of medicaid funds for pharmacy services provided to a medicaid recipient, to wit: that [Petitioner] dispensed the drug, Hydergine, to Florence Conner when he knew that such a drug was neither prescribed by her physician nor was the drug ever dispensed to her.

I.G. Ex. 3.

There is a well-established nexus between fraudulent billing of the Medicaid program and the delivery of goods or services under Medicaid and Medicare which justifies mandatory exclusion. Departmental Appeals Board (DAB) case law has long held that filing false Medicare or Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). I find that the offense which Petitioner was charged and convicted of in the present case -- willfully billing Medicaid for pharmacy services that were not authorized and not provided to the patient -- similarly constitutes criminal fraud related to the delivery of Medicaid services.

Petitioner contends that he admittedly pled guilty to submitting a wrongful claim, but that it had not been shown by the I.G. that the false claim which formed the

basis of his conviction related to Medicaid. Petitioner argues that the offense of which he was convicted was not related to the delivery of an item or service under the Medicaid program because the patient named in the Information was not, in fact, a Medicaid recipient. Petitioner's May 10, 1993 response brief at 2 - 4. Petitioner submits various documents in an attempt to prove that the Information incorrectly alleged that Ms. Conner was a Medicaid recipient. Petitioner contends that these documents establish that he did not actually commit the offense Medicaid Fraud.

I accept Petitioner's assertions of fact as true for purposes of deciding the I.G.'s motion for summary disposition. However, they are not relevant to the issue of whether the I.G. was required to impose and direct an exclusion against Petitioner. The mandatory exclusion which the I.G. imposed and directed against Petitioner resulted from Petitioner's conviction of a criminal offense within the meaning of section 1128(a)(1). The conviction, and not the underlying conduct, is the triggering event which mandates the imposition of the exclusion.

In this case, Petitioner pled guilty to a one count Information which charged him with filing a false Medicaid claim. He was convicted of Medicaid Fraud. It is a settled rule that, in mandatory exclusion cases brought pursuant to section 1128(a)(1) of the Act, exclusion is warranted by the mere fact that a program-related conviction has occurred. I am not authorized to look behind a conviction when adjudicating an exclusion appeal of this nature and will not permit a party to use this proceeding to collaterally attack his prior conviction. Peter J. Edmonson, DAB 1330 (1992). In circumstances where the court documents on their face describe an offense related to Medicaid, I do not look to the facts underlying the conviction. Accordingly, it is irrelevant to these proceedings that Petitioner now asserts that the offense of which he was convicted did not involve a Medicaid claim. If Petitioner desires to challenge the sufficiency of the facts which were used to support the conviction, this is not the proper forum.

As to Petitioner's other principal argument -- that the conduct being penalized pre-dated the enactment of the mandatory exclusion law -- the fact that there was a change in the statute is not fatal to the I.G.'s case. The plain language of the law mandates a five-year minimum exclusion in all cases where the statutory requirement of a program-related criminal conviction is met and such underlying criminal conviction occurred

after August 18, 1987. Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 15(b), 101 Stat. 680 (1987). See Francis Shaenboen, R.Ph., DAB 1249, at 5, 6 (1991). Since Petitioner's criminal conviction occurred considerably after this date, the mandatory exclusion provisions are applicable in his case. In any event, while the Information alleged that Petitioner submitted hundreds of false and fraudulent claims from 1985 to 1988, the specific count to which Petitioner pled guilty occurred on September 29, 1987, after the mandatory exclusion provision became effective on August 18, 1987.

Finally, the alleged failings of Petitioner's lawyer in the criminal case do not lessen Petitioner's responsibility in the present action. Petitioner argues that he should not be subject to an exclusion under section 1128(a)(1) because his attorney in the criminal proceeding did not inform him that he would be excluded from the Medicare and Medicaid programs as a result of his conviction. Petitioner stated that he "would never have pled guilty to a crime if I had known that such a plea would basically strip me of all ability to earn a living." Petitioner's May 10, 1993 response brief at 4.

This argument is essentially the same as an argument made by a petitioner in the case Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992). In that case, the petitioner argued that his due process rights were violated because he was deprived of the notice necessary to understand the possible consequences of his guilty plea. The petitioner asserted that, had he known of the consequences of his plea, he would have pled differently. I rejected this argument. In rejecting this argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985) for the proposition that a defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his plea of guilty. DAB CR215, at 6. An appellate panel of the DAB affirmed my decision, finding that I "correctly held that, as a defendant, Petitioner did not have to be advised of all the possible consequences of his plea." DAB 1372, at 11. The DAB has held in other cases that arguments about the process leading to Petitioner's criminal conviction are completely irrelevant to an exclusion proceeding. Charles W. Wheeler, DAB 1123 (1990).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require 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. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 at 12 - 14 (1989).

The I.G.'s five-year exclusion is, therefore, upheld.

/s/

Joseph K. Riotto
Administrative Law Judge