

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
Jeffrey Singer,)	DATE: October 20, 1993
)	
Petitioner,)	Docket No. C-93-082
)	Decision No. CR291
- v. -)	
)	
The Inspector General.)	
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DECISION

By letter dated May 7, 1993, Jeffrey Singer, 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, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs. (I use the term "Medicaid" in this Decision when referring to the programs other than Medicare from which Petitioner has been excluded.) 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. Both parties briefed the issues.¹

¹ During the June 28, 1993 telephone prehearing conference, Petitioner stipulated that he had been convicted of a criminal offense which was related to the delivery of an item or service under Medicaid. However, in his brief, Petitioner requested that I allow him to withdraw his stipulation. The I.G. noted this change, but did not object to his request. Therefore, I am granting Petitioner's request and allowing him to withdraw his stipulation.

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 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 Medicare and Medicaid 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 an audiologist, licensed by the State of New York. I.G. Ex. 2 at 7.²
2. On February 7, 1992, a Nassau County Court judge accepted Petitioner's guilty plea to the charge of offering a false instrument for filing (second degree), a misdemeanor. I.G. Ex. 1, 2.
3. Specifically, the "false instrument" Petitioner had "offered for filing" was a fraudulent claim for Medicaid reimbursement. The claim was false or fraudulent in that it overstated the cost of certain medical equipment. I.G. Ex. 2 at 7 - 8; 3 at 3 - 4.
4. Based on Petitioner's guilty plea, on April 6, 1992, the judge sentenced Petitioner to a conditional discharge and imposed a \$500 fine and a \$5 crime victims' assistance fee. I.G. Ex. 1, 3 at 4.

² The I.G. submitted three exhibits. Petitioner submitted one exhibit. In the absence of objection, I am admitting I.G. Exhibits 1 - 3 and Petitioner's Exhibit 1. I cite to the I.G.'s Exhibits as I.G. EX (at page). I cite to Petitioner's Exhibit as P. Ex. 1.

5. At sentencing also, the judge issued Petitioner a certificate of relief from disabilities. I.G. Ex. 1, 3 at 5; P. Ex. 1.
6. The certificate of relief from disabilities purports to "[R]elieve the holder . . . of all disabilities and bars to employment." P. Ex. 1.
7. A State-issued certificate of relief from disabilities does not bar the application of a federal statute.
8. The Secretary of HHS 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).
9. On May 7, 1993, Petitioner was notified by the I.G. that it had been decided to exclude him for a period of five years from participation in Medicare and Medicaid because of his criminal conviction.
10. Petitioner's guilty plea, plus the judge's acceptance thereof, amounts to a "conviction" for purposes of the Act. Finding 2; Act, section 1128(i)(3).
11. Petitioner's conviction for submitting a fraudulent claim for Medicaid reimbursement constitutes clear program-related misconduct, sufficient to mandate exclusion. Findings 2 - 3; Act, section 1128(a)(1).
12. Because Petitioner's criminal conviction satisfies the criteria for exclusion under section 1128(a)(1) of the Act, the I.G. must exclude him for a period of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B).

PETITIONER'S ARGUMENT

Petitioner contends that his criminal conviction was not related to the delivery of items or services under Medicare or Medicaid, within the meaning of section 1128(a)(1) of the Act. Instead, Petitioner asserts that his criminal conviction was for fraud or breach of fiduciary responsibility. Petitioner contends that convictions for fraud or for breach of fiduciary responsibility fall under section 1128(b)(1) of the Act, not section 1128(a)(1) of the Act, and constitute grounds for permissive exclusion only.

Petitioner contends further that since the court granted him a certificate of relief from disabilities (by which

Petitioner's conviction would not, among other things, act as a bar to employment or to the receipt of any license or permit), the I.G. should not have imposed and directed an exclusion against him under section 1128(a)(1) of the Act.

Finally, Petitioner raises several factors which he asserts mitigate the length of his exclusion.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question has been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty, and the court, after careful inquiry, accepted his plea. Finding 2. Section 1128(i)(3) of the Act expressly states that when an individual enters a plea of guilty, and a 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 Medicare or Medicaid. Departmental Appeals Board (DAB) case precedent clearly establishes a general rule that all crimes involving financial misconduct directed at Medicare or Medicaid are, by their very nature, related to the delivery of items or services under Medicare and Medicaid within the meaning of section 1128(a)(1) of the Act. Samuel W. Chang, M.D., DAB 1198 (1990) (false billing); Carlos E. Zamora, M.D., DAB 1104 (1989) (false billing); and Napoleon S. Maminta, M.D., DAB 1135 (1990) (conversion of a Medicare reimbursement check). As to the exact offense involved herein, it is well-established also in DAB decisions that filing false Medicare or Medicaid claims constitutes clear program-related misconduct, sufficient to mandate exclusion. Jack W. Greene, DAB CR19, 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 act which provided the basis for Petitioner's criminal conviction in the present case -- making a false representation in a claim for Medicaid reimbursement -- constitutes a criminal offense related to the delivery of an item or service under Medicaid.

As to Petitioner's contentions regarding permissive versus mandatory exclusions, appellate panels of the DAB have considered the relationship between sections 1128(a)(1) [mandatory] and 1128(b)(1) [permissive] of the

Act. These appellate panels have concluded that where a criminal conviction meets the requirements of section 1128(a)(1), then that section is controlling and the I.G. must impose the mandatory five-year exclusion. The fact that a petitioner's criminal conviction might also meet the more inclusive elements of section 1128(b)(1) does not remove it from the ambit of section 1128(a)(1). Boris Lipovsky, M.D., DAB 1363, at 6 - 12 (1992).

As to Petitioner's contentions regarding the certificate of relief from disabilities issued to him, an appellate panel of the DAB has explicitly held that a State-issued certificate of relief from disabilities does not take precedence over the application of a federal law enacted to protect a legitimate federal interest, such as safeguarding Medicare and Medicaid. Janet Wallace, L.P.N., DAB 1326, at 10 - 12 (1992). Moreover, the certificate issued Petitioner specifically states that it will "Not prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified . . . as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege." Thus, by its own terms, the certificate cannot be used to prevent a court or administrative agency from relying upon the conviction in carrying out its statutory authority. Here the statutory authority delegated to the I.G. is the authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Finally, neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion. Greene, DAB CR19, at 12 - 14. Thus, as the I.G. has excluded Petitioner for the minimum mandatory period only, I am unable to consider any of the mitigating factors raised by Petitioner regarding the reasonableness of the length of his exclusion.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that Petitioner be excluded from Medicare and Medicaid for a period of at least five years because of his conviction of a criminal offense related to the delivery of an item or service under Medicaid. The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge