

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Larry D. Warden,)	DATE: December 30, 1993
)	
Petitioner,)	Docket No. C-93-092
)	Decision No. CR299
- v. -)	
)	
The Inspector General.)	

DECISION

By letter dated June 18, 1993, Larry D. Warden (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), which are referred to herein as "Medicaid." 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 Medicare.

Petitioner filed a timely request for review of the I.G.'s action by the Departmental Appeals Board ("DAB"). The I.G. moved for summary disposition, which was opposed by Petitioner.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, 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 LAW¹

1. At all times relevant to this proceeding, Petitioner was a part owner and operator of a durable medical equipment supply company named Country Medical, Inc., located in Shakopee, Minnesota. I.G. Ex. 1.
2. On February 7, 1991, a criminal complaint was filed, alleging that Petitioner had intentionally tricked an individual Medicare beneficiary by misrepresenting the model and price of a wheelchair she purchased -- which was paid for with Medicare funds and private charitable contributions -- thereby defrauding several individuals, as well as the government. I.G. Ex. 1.
3. On January 21, 1992, pursuant to a plea agreement, Petitioner pled guilty in the Minnesota District Court of Scott County to the criminal offense of theft by swindle. I.G. Exs. 1, 2.
4. The district court judge accepted Petitioner's guilty plea and sentenced him to probation for three years, during which time he was required to perform community service and make restitution to Medicare, the beneficiary, and the charity he defrauded. I.G. Ex. 2 at 23, 24.
5. 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).

¹ The I.G. submitted seven exhibits. Petitioner submitted two exhibits. In the absence of objection, I am admitting all these documents as evidence and will refer to the I.G. Exhibits as I.G. Ex. (number at page) and Petitioner's Exhibits as P. Ex. (number at page).

6. Petitioner's guilty plea to a criminal offense, and the court's acceptance thereof, amounts to a "conviction" for purposes of the Act. Finding 4; Act, sections 1128(a)(1) and 1128(i)(3).

7. The criminal acts that resulted in the conviction of Petitioner in the case at hand -- i.e., overcharging a Medicare beneficiary for a wheelchair which was not what she had ordered and which apparently endangered her safety -- were directly related to the delivery of items under Medicare, and that exclusion was, therefore, appropriate and lawful.

PETITIONER'S ARGUMENT

Petitioner asserts, in essence, that he did not trick or defraud the beneficiary. He contends that he was unable to find the wheelchair model she was seeking, so he offered her a refund. She declined this, so Petitioner provided her with a reasonably comparable model. Petitioner chose to settle the criminal charges against him solely to avoid the costs of a trial.

He further contends in his brief that his reading of case precedent indicates that exclusions pursuant to section 1128 are only legitimate where multiple offenses -- i.e., a pattern of misconduct -- are involved, and that his single misdemeanor settlement does not, as a matter of law, warrant exclusion under section 1128.

Lastly, Petitioner maintains that there are factual disputes present which make summary disposition inappropriate. Specifically, he notes that the I.G. calls his offense a felony, whereas it was actually a misdemeanor, and that there is a legitimate question as to whether exclusion is lawful where a misdemeanant (such as Petitioner) has made full restitution and will soon have his conviction expunged by the court.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question has been convicted of a criminal offense under federal or State law. In the present case, it is undisputed that Petitioner pled guilty to a crime and that his plea was accepted by a State court. This is regarded as the equivalent of being "convicted" for purposes of section 1128(a)(1).

Furthermore, Congress provided that, even if such a conviction is subsequently expunged by the court, as Petitioner suggests will happen here, this does not affect the validity of the mandatory exclusion. See section 1128(i) of the Act.

I find also that the second requirement of section 1128(a)(1) -- that the criminal offense resulting in the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied.

The criminal acts that resulted in the conviction of Petitioner -- i.e., overcharging a Medicare beneficiary for a wheelchair which was not what she had ordered and which apparently endangered her safety -- were directly related to the delivery of items under Medicare, and that exclusion was, therefore, entirely appropriate and lawful. See I.G. Ex. 2.

It is well established also that financial misconduct directed at the Medicare or Medicaid programs warrants mandatory 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). In the case at hand, Petitioner was aware of his customer's status as a Medicare beneficiary before he delivered the wheelchair to her, and Medicare did, in fact, pay most of the cost of the intentionally overpriced, mislabeled, and unsuitable wheelchair that Petitioner tricked the beneficiary into buying. Thus, Petitioner's fraud was passed through, in part, to Medicare and resulted in the unjustified and unnecessary expenditure of Medicare funds.

I know of no rule, statute, or precedent which supports Petitioner's suggestion that only multiple offenses can be punished by exclusion. Also, one need only glance at a random sample of DAB decisions to see that both felony and misdemeanor convictions can and do result in exclusion, so Petitioner's purported outstanding question of fact -- i.e., whether his offense was classified as a felony or a misdemeanor -- is immaterial.

As to Petitioner's assertion that he did not trick or defraud anybody, he is not entitled to use these administrative hearings to collaterally attack his prior conviction. DAB decisions have explicitly held that when an individual has been convicted of a crime encompassed by section 1128(a)(1), exclusion is mandatory; such individual's subsequent claim of innocence is irrelevant. Peter J. Edmonson, DAB 1330 (1992).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction related to the delivery of items or services under these programs. Neither the I.G. nor the judge is authorized to reduce the five-year mandatory minimum exclusion. Greene, DAB CR19, at 12 - 14.

/s/

Joseph K. Riotto
Administrative Law Judge