

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Doina M. Buzea, M.D.,)	DATE: April 18, 1994
Petitioner,)	
- v. -)	Docket No. C-93-126
The Inspector General.)	Decision No. CR310

DECISION

By letter dated July 27, 1993, Doina M. Buzea, 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 Petitioner 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.¹ 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 Social Security Act (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. The I.G. moved for summary disposition.

Because I have 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 decided the case on the basis of the parties' written submissions.

¹ In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

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 LAW²

1. During the period relevant to this case, Petitioner, a physician, was employed by the Greenwich Acupuncture Center (GAC). I.G. Ex. 2 at 2.
2. Petitioner was charged, by means of a criminal information, with the federal misdemeanor offense of making a false statement in a claim for Medicare reimbursement, in violation of Title 42 of the United States Code (42 U.S.C. § 1320a-7b(a)(1)(ii)). I.G. Ex. 2.
3. Petitioner appeared in the United States District Court, District of Connecticut, and, pursuant to a plea agreement, entered a guilty plea to count one of the information - making a false statement in a claim for Medicare reimbursement. I.G. Exs. 1, 3.

² The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s Brief	I.G. Br. (at page)
Petitioner's Brief	P. Br. (at page)
My Findings and Conclusions	FFCL

The I.G. submitted three exhibits. I admit I.G. exhibits 1-3 into evidence. I cite the I.G.'s exhibits as "I.G. Ex. (number) (at page)." Petitioner submitted four exhibits. I admit Petitioner's exhibits 1-4 into evidence. I cite Petitioner's exhibits as "P. Ex. (number) (at page)."

4. The basis of the criminal charge brought against Petitioner was that, while a GAC employee, she caused GAC to submit a \$1500 bill for Medicare reimbursement which contained a "false statement and representation of a material fact" to HHS and its contractual intermediary. The bill was false in that it alleged that Petitioner had "personally performed or personally supervised" physical therapy services furnished to a Medicare patient, when, in fact, such services "could not have been personally performed or personally supervised" by Petitioner because they occurred before Petitioner's employment by GAC. I.G. Ex. 2 at 4.

5. On January 27, 1993, the court issued a judgment against Petitioner, noting Petitioner's guilty plea and declaring Petitioner guilty, as charged, of the criminal offense of making a false statement in a claim for Medicare reimbursement. I.G. Ex. 1.

6. The court suspended imposition of a term of imprisonment and, instead, sentenced Petitioner to a one-year period of probation and fined her \$2,000. The court also ordered Petitioner to pay a special assessment of \$25.00. I.G. Ex. 1.

7. Petitioner's guilty plea, and the actions taken by the court indicating acceptance of her plea, constitute a "conviction" within the meaning of section 1128(i)(3) of the Act. FFCL 3, 5-6.

8. For a conviction to subject an individual or entity to exclusion under section 1128(a)(1) of the Act, there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467, at 5 (1994).

9. There exists a nexus or common sense connection between Petitioner's conviction for making a false statement in a claim for Medicare reimbursement, and the delivery of an item or service under Medicare. FFCL 2-4.

10. The criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act. FFCL 2-5, 7-9.

11. The Act requires an exclusion of not less than five years if an individual or entity is convicted of a criminal offense related to the delivery of an item or

service under Medicare. Act, sections 1128(a)(1), 1128(c)(3)(B).

12. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory minimum five-year period of exclusion. Act, sections 1128(a)(1), 1128(c)(3)(B).

13. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Act, sections 1128(a)(1), 1128(c)(3)(B).

PETITIONER'S ARGUMENT

Petitioner, a licensed physician, was employed by GAC between approximately May 1987 and April 1989. FFCL 1; I.G. Ex. 2 at 2. Petitioner asserts that she "did not profit from the activities" of GAC. P. Br. at 2. Petitioner asserts that her status was merely that of an employee, following the directions of her superiors, who "manipulated" her. P. Br. at 2-4; September 23, 1993 letter from Petitioner's attorney. Petitioner further points out that, subsequent to her involvement with GAC, she spent approximately four years providing medical care to "chronically ill and multi-developmentally disabled" individuals. P. Br. at 2; P. Ex. 3. Thus, Petitioner asserts that, because of the minimal extent of her involvement in the criminal activity, her cooperation with prosecutors in the GAC case, and the value to society of the care she renders, "[n]either the Office of the United States Attorney nor the investigative branch of the Inspector General's Office" favors her exclusion. P. Br. at 3. Petitioner argues that, under these circumstances, there is no basis for the Secretary of HHS to adopt a more punitive policy and exclude her from the Medicare and Medicaid programs.

Further, Petitioner insists that depriving her of her profession would be so severe and disproportionate a sanction as to violate the spirit of the plea agreement entered into by her and the federal government. P. Br. at 5.

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 must have been convicted of a criminal offense under federal or State law. In the case at hand, I find that Petitioner pled guilty to a

federal misdemeanor offense. FFCL 2-3, 5. The court entered judgment against her and imposed a period of probation and a fine. FFCL 5-6. Petitioner's guilty plea, and the actions taken by the court indicating acceptance of her plea, constitute a "conviction" for purposes of the federal mandatory exclusion law. Act, section 1128(i)(3); FFCL 7.

I find further that the second requirement for mandatory exclusion pursuant to section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under the Medicare or Medicaid programs -- has been satisfied here.

For a conviction to subject an individual or entity to exclusion under section 1128(a)(1) of the Act, there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs. FFCL 8. Here, count one of the information, the count to which Petitioner pled guilty, explicitly stated that Petitioner had made "a false statement and representation of a material fact in a claim for a Medicare payment in the amount of \$1500 under the Medicare Program Part B in connection with the furnishing of services" to a Medicare patient.³ FFCL 3-4; I.G. Ex. 2 at 4. The bill was false in that it alleged that Petitioner had "personally performed or personally supervised" physical therapy services furnished to a Medicare patient, when, in fact, such services "could not have been personally performed or personally supervised" by Petitioner because they occurred before Petitioner's employment by GAC. FFCL 4.

The language of the count to which Petitioner pled guilty plainly establishes a direct connection between the criminal offense for which Petitioner was convicted and the Medicare program. Moreover, because Petitioner's false statement and representation in the claim for Medicare reimbursement related to the alleged furnishing of physical therapy services by Petitioner to a Medicare patient, I find that there exists a nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicare. FFCL 9. Further, as an appellate panel of the DAB pointed out in Niranjana B. Parikh, M.D., DAB 1334 (1992), the Board "has consistently recognized common sense connections between

³ The patient's name has been omitted for the sake of privacy.

an offense and the delivery of an item or service, even if the individual at issue did not physically deliver the item or service." Id. at 5. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute program-related misconduct. 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).

Thus, I find that the criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1). FFCL 10.

Petitioner's equitable arguments (for example, that the seriousness of her offense should be evaluated in light of her positive contributions to society) cannot prevail in this forum. The Act requires an exclusion of not less than five years if an individual is convicted of a criminal offense related to the delivery of an item or service under Medicare. Act, sections 1128(a)(1), 1128(c)(3)(B); FFCL 11. As the I.G. has excluded Petitioner for the minimum mandatory period only, I am not authorized under the regulations to consider her cooperation with the federal government in its prosecution of GAC and the individuals who owned and operated it. A mandatory exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act is not a matter of discretion.

Lastly, Petitioner's contention that a five-year exclusion would be incompatible with the plea agreement she negotiated with the federal government is not persuasive. P. Br. at 5. First, in determining whether to exclude Petitioner, the Secretary of HHS is obliged to follow the clear intent of Congress requiring exclusions of not less than five years in cases such as the one at hand, regardless of what agreements might have been entered into by a federal prosecutor. Second, here the agreement itself warned Petitioner that she might encounter adverse "collateral consequences" because of her plea; it in no way purported to immunize her from such adverse consequences. I.G. Ex. 3 at 3-4.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of her criminal conviction for making a false

statement in a claim for Medicare reimbursement, which conviction is related to the delivery of an item or service under that program. FFCL 11. Further, neither the I.G. nor an administrative law judge is authorized to reduce the five-year mandatory minimum exclusion.

Greene, DAB CR19, at 12-14 (1989); Stanley H. Guberman, D.C., DAB CR111, at 9 (1990) (citing Samuel W. Chang, M.D., DAB 1198 (1990)); FFCL 12.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge