

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Charles Addo Yobo, M.D.,	)	DATE: March 9, 1995
Petitioner,	)	
- v. -	)	Docket No. C-94-423
The Inspector General.	)	Decision No. CR361

DECISION

By letter dated June 27, 1994, Charles Addo Yobo, M.D., Petitioner herein, was notified by the Inspector General (I.G.), United States 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 for a period of five years.<sup>1</sup> The I.G. asserted that an exclusion of at least five years is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (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. The I.G. moved for summary disposition.

Because I have determined that there are no material factual issues in dispute, and that the only matters to be decided are the legal significance of the undisputed facts, I have decided the case on the basis of the parties' written submissions.<sup>2</sup>

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<sup>1</sup> In this decision, unless the context indicates otherwise, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

<sup>2</sup> The I.G. submitted a brief which I cite as "I.G. Br. at (page)," and five exhibits which I cite as "I.G. Ex. (number) at (page)." Petitioner did not file a response to the I.G.'s brief. Since Petitioner did not  
(continued...)

I conclude that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and 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. The I.G. has the authority to extend the length of a mandatory exclusion if any of the aggravating factors listed at 42 C.F.R. § 1001.102(b) (1992) are present. Only if the aggravating factors are found to be present, and an exclusion for longer than five years is justified, may the I.G. also consider the mitigating factors at 42 C.F.R. § 1001.102(c) to reduce the exclusion. The mandatory exclusion may not be reduced to less than five years. 42 C.F.R. § 1001.102(c).

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a physician, licensed by the State of New York. I.G. Ex. 1 at 5.
2. Petitioner was indicted by a grand jury of the United States District Court, Southern District of New York (the court), for conspiracy, mail fraud, racketeering, and money laundering. I.G. Ex. 1
3. The indictment charged that Petitioner participated in an unlawful plan in which he billed Medicaid for unwarranted diagnostic tests and examinations performed on Medicaid patients. The indictment charged also that Petitioner authorized physicians' assistants to write prescriptions for drugs which were medically unnecessary and billed the cost of the drugs to Medicaid. IG. Ex. 1.
4. Petitioner was charged by Superseding Information with conspiracy to commit Medicaid fraud and mail fraud. I.G. Ex. 3.

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<sup>2</sup>(...continued)

object to the exhibits offered by the I.G., I admit into evidence I.G. Ex. 1-5. Petitioner stated his position in his Request for a Hearing which I cite as "P. Hear. Req."

5. On May 14, 1993, pursuant to a plea agreement, Petitioner pled guilty to the charges of mail fraud (i.e., using the mails to receive Medicaid checks obtained through fraud), conspiracy to commit mail fraud and Medicaid fraud. I.G. Ex. 3 at 1; I.G. Ex. 5 at 2.
6. The court dismissed the remaining counts of the indictment. Ex. 4.
7. The court entered judgment against Petitioner for mail fraud and conspiracy to commit mail fraud and Medicaid fraud. I.G. Ex. 3; Ex. 4.
8. The court sentenced Petitioner to imprisonment for a period of one year and one day, and required him to make restitution to New York State in the amount of \$1,500,000. I.G. Ex. 4.
9. Petitioner cooperated with the government in its investigation into abuse of the Medicaid program. I.G. Ex. 3; I.G. Ex. 5 at 2.
10. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a conviction, within the meaning of sections 1128(a)(1) and 1128(i)(3) of the Act. FFCL 4-7.
11. Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCL 4, 6, 9.
12. Even if mitigating factors are present, the law requires that an exclusion imposed pursuant to section 1128(a)(1) and 1128(c)(3)(B) must be for at least five years. 42 C.F.R. § 1001.102.
13. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.
14. Neither the I.G. nor an administrative law judge (ALJ) has the authority to reduce a five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

#### PETITIONER'S ARGUMENT

Petitioner asserts that, in light of his cooperation with the government, a five-year exclusion is excessive.

## DISCUSSION

Petitioner's mandatory exclusion may not be reduced to less than five years.

An individual or entity must be excluded from participation in Medicare and Medicaid pursuant to section 1128(a)(1) when two elements are present: (1) the individual or entity has been "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act; (2) the criminal offense leading to the conviction is related to the delivery of an item or service under Medicare or Medicaid. In the present case, Petitioner admits that he was "convicted" of a criminal offense, within the meaning of section 1128(i)(3) of the Act. Section 1128(i)(3) states that "an individual is considered to have been 'convicted' of a criminal offense -- when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court." Petitioner pled guilty to mail fraud, and conspiracy to commit mail fraud and Medicaid fraud, and the court accepted his guilty plea.<sup>3</sup> I.G. Ex. 3; I.G. Ex. 4.

Petitioner also does not contest the I.G.'s determination that he was convicted of a criminal offense related to the delivery of a health care item or service. It is well-established in Departmental Appeals Board (DAB) decisions that filing false Medicare or Medicaid claims relates to the delivery of items or services under such programs and 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). Here, Petitioner conspired to commit Medicaid fraud, and his mail fraud and conspiracy to commit mail fraud offenses were related to the delivery of an item or service under Medicaid, because his conviction was for "billing the cost of . . .

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<sup>3</sup> The I.G. submitted a judgment of conviction to prove that Petitioner's guilty plea for mail fraud had been accepted by the court. See I.G. Ex. 4. The I.G. did not, however, submit any court documents to demonstrate that the court accepted Petitioner's guilty plea for conspiracy to commit mail fraud and conspiracy to commit Medicaid fraud. In any event, since Petitioner did not contest the I.G.'s assertion that the court accepted Petitioner's guilty plea for the two conspiracy charges, I accept this assertion as true. Thus, I find on the basis of the I.G.'s uncontested assertion that Petitioner was convicted of conspiracy to commit Medicaid fraud and mail fraud, within the meaning of section 1128(i)(3) of the Act.

unnecessary drugs to the Medicaid program." I.G. Ex. 1. I find, therefore, that the offenses underlying Petitioner's conviction constitute criminal fraud related to the delivery of Medicaid services.

Petitioner's only argument is that his cooperation with the government was substantial, and, therefore, his five-year exclusion is excessive and unjust. The I.G. does not dispute that Petitioner cooperated with federal officials in the prosecution of his co-defendants. Nor does the I.G. dispute that, under applicable regulations, such cooperation would be considered a mitigating factor, if the exclusion was for more than five years. In fact, the I.G. did consider Petitioner's cooperation as mitigating, to the extent that a five-year exclusion was imposed, even though Petitioner's offense involved several aggravating factors. June 27, 1994 Notice of Exclusion.

As stated above, however, mandatory exclusions may not be for less than five years. 42 C.F.R. § 1001.102. An ALJ may not consider mitigating factors such as cooperation when only the mandatory minimum period of exclusion has been imposed. Doina M. Buzea, M.D., DAB CR310 (1994). Neither the I.G. nor the ALJ is authorized to reduce the five-year mandatory minimum exclusion. Stanley H. Guberman, D.C., DAB CR111 (1990); Samuel W. Chang, M.D., DAB 1198 (1990). Thus, Petitioner's exclusion may not be reduced.

#### CONCLUSION

Sections 1128(a)(2) 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, due to his conviction of a criminal offense related to the delivery of an item or service under Medicaid.

Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Accordingly, the five-year exclusion is sustained.

/s/

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Joseph K. Riotto  
Administrative Law Judge