

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Charles Seide,)	Date: March 20, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-544
)	Decision No. CR525
The Inspector General.)	
)	

DECISION

By letter dated August 14, 1997, Charles Seide, the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health and Human Services (H.H.S.), 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.¹ The I.G. explained that the five-year exclusion was mandatory under 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 the Medicare program.

Petitioner filed a request for review of the I.G.'s action. I convened a telephone prehearing conference on October 7, 1997. During the conference, the parties stated that they did not think an in-person hearing would be necessary in this case, and they indicated they wished to proceed on the written record. Accordingly, I established a briefing schedule. The I.G. submitted a brief and five proposed exhibits (I.G. Exs. 1-5). Petitioner did not object to these exhibits. Petitioner filed a response brief and submitted two proposed exhibits (P. Exs. 1-2). The I.G. did not object to these exhibits. I admit I.G. Exs. 1-5 and P. Exs. 1-2 into evidence.

Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the

¹ In this decision, I use the term "Medicaid" to refer to these State health care programs.

legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. 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 and Medicaid to be excluded from participation in such programs for a period of at least five years.

ISSUE

The issue in this case is whether I have authority to change the effective date of an exclusion and, if so, whether the effective date of the exclusion is unreasonable.

PETITIONER'S ARGUMENTS

Petitioner contends that the I.G. acted improperly in having his exclusion begin more than two years after the date of his criminal conviction. He asserts that the district court's December 14, 1995 judgment in his criminal case specifically stated that he was prohibited from engaging in any occupation that "involves him directly in [M]edicare or [M]edicaid claims for reimbursements" for a period of three years. I.G. Ex. 5. Petitioner maintains that this court-imposed prohibition, coupled with the I.G.'s exclusion, results in an unfairly lengthy exclusion. He therefore asserts that the exclusion imposed by the I.G. should be modified so that the exclusion runs from the date of his criminal conviction, or, in the alternative, from the date "when the I.G. obtained conclusive information that [he] had been convicted." P.'s brief, at 8.

THE FOLLOWING FINDINGS OF FACT ARE UNCONTESTED BY THE PARTIES:

1. During the period relevant to this case (June 1990 through March 1993), Petitioner was president of a medical supply company known as Choice Care, Inc.
2. On May 25, 1995, a three count Criminal Information was filed against Petitioner charging him with one count of conspiracy to defraud Medicare, in violation of 18 U.S.C. § 371; one count of making false statements to H.H.S., in violation of 18 U.S.C. §

1001; and one count of mail fraud, in violation of 18 U.S.C. § 1341. I.G. Ex. 3.

3. The charges contained in the May 25, 1995 Criminal Information arose as a result of Petitioner's participation in a scheme to defraud Medicare by submitting false claims stating that medical supplies were sold to patients in states that paid the highest reimbursement rates when in fact no such sales occurred to such patients in those states as claimed. I.G. Ex. 3.

4. On June 15, 1995, Petitioner pled guilty to all counts in the Criminal Information. I.G. Ex. 4; See I.G. Exs. 2, 5.

5. On December 14, 1995, the United States District Court for the Eastern District of Pennsylvania entered a judgment in the criminal case finding Petitioner guilty of all three counts described in the Criminal Information. I.G. Ex. 5.

6. The December 14, 1995 judgment ordered that Petitioner be placed on probation for 5 years and that he pay an assessment of \$150 and a fine of \$25,000. I.G. Ex. 5.

7. Pursuant to the judgment, Petitioner was prohibited from engaging in any occupation that "involves him directly in [M]edicare and [M]edicaid claims for reimbursements" for a period of 3 years. I.G. Ex. 5, at 3.

8. On August 14, 1997, the I.G. notified Petitioner that he was being excluded from Medicare and Medicaid for a period of five years pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1.

9. The I.G.'s 8/14/97 letter to Petitioner stated that the exclusion was effective 20 days from the date of the letter. I.G. Ex. 1.

OTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW:

10. Petitioner's criminal conviction constitutes a conviction within the meaning of sections 1128(i)(1) and 1128(i)(3) of the Act.

11. Petitioner's conviction for the offenses of Medicare fraud, making false statements to H.H.S., and for mail fraud is related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act.

12. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in the Medicare and Medicaid programs.

13. Pursuant to section 1128(c)(3)(B) of the Act, the minimum mandatory period for an exclusion imposed pursuant to section 1128(a)(1) of the Act is five years.

14. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

15. An administrative law judge (ALJ) is without authority to change the effective date of an exclusion imposed and directed by the I.G.

16. Neither the I.G. nor the ALJ has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

Petitioner does not dispute that he was convicted of a criminal offense. Nor does he dispute that the offense underlying his conviction is program-related. Moreover, the undisputed evidence adduced by the I.G. establishes that Petitioner was convicted of 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. For this reason, Petitioner is required to be excluded for at least five years as a matter of law.

The first statutory requirement for the imposition of mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual to be excluded must have been convicted of a criminal offense under federal or State law. The record reflects that a judgment of conviction was entered on December 14, 1995, in Petitioner's case and he was sentenced by the United States District Court for the Eastern District of Pennsylvania. This judgment was based upon the court's acceptance of Petitioner's guilty plea. Petitioner was thus convicted within the meaning of sections 1128(i)(1) and 1128(i)(3) of the Act.

Next it is required under section 1128(a)(1) of the Act that the criminal offense at issue be related to the delivery of an item or service under Medicare or Medicaid. It is well established that financial misconduct directed at Medicare or Medicaid, in connection with the delivery of items or services under the programs, constitutes a program-related offense invoking mandatory exclusion. Alan J. Chernick, D.D.S., DAB CR434 (1996). Departmental Appeals Board (DAB) case law has long held that filing false Medicare or Medicaid claims constitutes program-related misconduct which warrants exclusion. Paul Karsch, DAB CR454 (1997); 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). The record establishes that Petitioner in

pleading guilty to the three counts contained in the Criminal Information admitted to submitting, or causing to be submitted, fraudulent claims to a Medicare carrier for reimbursement by Medicare. Thus, a necessary nexus links the facts underlying his crime with the delivery of items or services under Medicare. In Rosaly Saba Khalil, M.D., DAB CR353 (1995), the ALJ found that a criminal offense stemming from the fraudulent receipt of reimbursement checks from Medicaid provided a sufficient nexus between the offense and the delivery of items or services under Medicaid. Additionally, the ALJ in Khalil held that a nexus existed "despite the fact that Petitioner may not have provided items or services to Medicaid recipients personally or made reimbursement claims for those items or services." Id., at 8. In the present case, the nexus between Petitioner's offenses and the delivery of items or services under Medicare or Medicaid is firmly established by his guilty plea to the charges contained in the May 25, 1995 Criminal Information.

In his statement, Petitioner also asserts that it is unfair that his exclusion did not commence from the date of his criminal conviction. I find no merit in this claim. It is well-established that exclusions are remedial in nature and not punitive. Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992). The I.G. has the discretion to determine when to impose an exclusion. Laurence Wynn, M.D., DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. See Chander Kachoria, R.Ph., DAB CR220 (1992), aff'd, DAB 1380 (1993). It is clear that an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Section 1128(c)(1); 42 C.F.R. § 1001.2002. This means that Petitioner's exclusion must take effect 20 days from the date of the August 14, 1997 exclusion letter and not 20 days from the date of Petitioner's conviction. Although Petitioner maintains that his exclusion should be retroactive, an ALJ is without authority to change the effective date of an exclusion imposed against an individual by the I.G. Shanti Jain, M.D., DAB 1398 (1993); Stanley Karpo, D.P.M., DAB CR356 (1995); Chander Kachoria, R.Ph., supra; Laurence Wynn, M.D., DAB CR344 (1994); Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, M.D., DAB CR119 (1991). Similarly, the I.G. has no authority to make exclusions retroactive and neither an ALJ nor the I.G. can move the effective date of the exclusion back to Petitioner's date of conviction. See Karpo, at 12. In Kachoria, supra, there was a three-year delay between the date of the I.G.'s initial investigation and the date when the petitioner received the exclusion notice from the I.G. The petitioner argued that his rights were violated by the length of time between the conviction and the exclusion letter. An appellate panel of the DAB ruled, however, that neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual is convicted. Kachoria, DAB No. 1380, at 10 (1993).

I therefore find that the time which has elapsed between Petitioner's conviction and the receipt of the exclusion letter does not violate his due process rights. There is no existing statute or regulation that governs the time for program exclusions. The fact that the district court, as part of its sentence, prohibited Petitioner for three years from engaging in any occupation that involves the submission of Medicare or Medicaid claims for reimbursement is independent of any action that the I.G. took against him and in no way limits or circumscribes the I.G.'s duty to initiate exclusion proceedings under the Act.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because he has been convicted of a criminal offense related to the delivery of an item or service under Medicare. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge