

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Krishan Kumar Batra, M.D.,)	Date: June 17, 1998
Petitioner,)	
- v. -)	Docket No. C-98-096
The Inspector General.)	Decision No. CR537

DECISION

By letter dated October 31, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Krishan Kumar Batra, M.D. (Petitioner), that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grant to States for Social Services programs for a period of five years.¹ The I.G. explained to Petitioner that he was being excluded as a result of his conviction in the State of Florida of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. further advised Petitioner that the exclusion of individuals convicted of such program-related offenses for a period of at least five years is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act).

Petitioner filed a 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 and relevant factual issues in dispute (the only matter to be decided is the 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. Both parties submitted briefs in this matter. The I.G. submitted

¹ Unless the context indicates otherwise, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

five proposed exhibits (I.G. Exs. 1-5) and Petitioner submitted five proposed exhibits (P. Exs. 1-5). Neither party objected to the other party's exhibits. Thus, I admit I.G. Exs. 1-5 and P. Exs. 1-5 into evidence.

I grant the I.G.'s motion for summary disposition. 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.

PETITIONER'S ARGUMENTS

Petitioner contends that he was not guilty of the criminal conduct for which he has been convicted; rather, he merely pleaded nolo contendere to state criminal charges involving the Florida Medicaid program. He further challenges his criminal conviction, contending that he was not advised in the criminal proceeding that his acceptance of the plea agreement and entrance of a nolo contendere plea would result in his exclusion from participation in the Medicare and Medicaid programs. In his reply submission, however, Petitioner concedes that under the applicable statutes and regulation, his exclusion from the Medicare program is a mandatory and automatic consequence of his having pled nolo contendere to the criminal charges of Medicaid Provider Fraud.² Petitioner requests that rather than being excluded from Medicare under the mandatory exclusion provisions of section 1128(a)(1) of the Act and 42 C.F.R. § 1001.101, he should be excluded pursuant to the permissive exclusion provisions of the Act and 42 C.F.R. § 1001.601, for a period of three years or less, based on his exclusion from the Florida Medicaid Program. Petitioner further requests that if an exclusion is imposed, on any basis, that the exclusion be made retroactive to October 23, 1996, the date of his exclusion from the Florida Medicaid program.

² Petitioner did not object to the I.G.'s proposed findings of fact and conclusions of law (FFCL), except for I.G. proposed FFCL 8, which states, "The exclusion under section 1128(a)(1) is appropriate and reasonable." Petitioner contends that this finding is extraneous and not necessary to the determination of whether Petitioner should be excluded since the exclusion requested is mandatory under the law. I agree and, therefore, have not adopted the I.G.'s proposed FFCL 8.

Petitioner also cites his community service and assistance to the poor and elderly to maintain that his exclusion should be for a shorter period than the five years imposed by the I.G. He has submitted letters from health professionals attesting to services he provided.³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a psychiatrist practicing in Tampa, Florida. I.G. Ex. 4.
2. On October 17, 1996, a four count Information was filed against Petitioner in the Circuit Court for the Second Judicial Circuit in and for Leon County charging him with four counts of Medicaid Provider Fraud, a third degree felony. I.G. Ex. 5.
3. On October 23, 1996, Petitioner entered a plea of nolo contendere to four counts of felony Medicaid Provider Fraud, in violation of section 409.920(2)(a) of the Florida Statutes. I.G. Ex. 2.
4. On October 23, 1996, in an Order Withholding Adjudication of Guilt And Placing Defendant on Probation, the Circuit Court ordered and adjudged that based on Petitioner's plea of nolo contendere to four counts of Medicaid Provider Fraud, the adjudication of Petitioner's guilt and the imposition of his sentence be withheld; that Petitioner be placed on supervised probation for a period of four years; that he refrain from treating Medicaid patients during this period of probation; that he make restitution in the amount of \$4,934.20 to Medicaid; and that he pay other costs. I.G. Ex. 2.
5. On October 31, 1997, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for a period of five years pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1.
6. Petitioner's nolo contendere plea and the court's acceptance of that plea, constitute a "conviction" within the meaning of section 1128(i)(3) of the Act. FFCL 3 and 4.
7. Petitioner participated in a deferred adjudication program where judgment of conviction has been withheld. FFCL 4; I.G. Ex. 2.

³ In his request for a hearing Petitioner asserts that, because his criminal proceeding resulted in a deferred adjudication of guilt, he has not been convicted within the scope of the Act. He does not raise this argument in his subsequent brief but I will consider it in my decision.

8. Petitioner's participation in the deferred adjudication program constitutes a "conviction" within the meaning of section 1128(i)(4) of the Act. FFCL 7.

9. Petitioner was convicted of a criminal offense, Medicaid Provider Fraud, related to the delivery of an item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

10. 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.

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

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

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

DISCUSSION

The threshold question in every case under section 1128(a)(1) is whether the individual was convicted, as defined under the Act, of a criminal offense. The material facts of this case are not in dispute. Petitioner pled nolo contendere to the charge of Medicaid Provider Fraud. FFCL 3. Further, the Circuit Court Order dated October 23, 1996 states that adjudication of guilt and imposition of sentence were withheld pending successful completion by Petitioner of his probation. FFCL 4. Section 1128(i) establishes four alternative definitions of the term "convicted." It is necessary only to establish that an individual was "convicted" under one of the four definitions to establish that an individual was convicted of a criminal offense within the meaning of the Act. I find that Petitioner was convicted under two alternative definitions pursuant to section 1128(i)(3) and (4).

Under section 1128(i)(3), an individual is convicted of a criminal offense "when a plea of . . . nolo contendere by the individual has been accepted by a Federal, State or local court." It is well settled that a plea is accepted within the meaning of this section whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter. Robert W. Emfinger, R. Ph., DAB CR92 (1990). The undisputed facts here are that Petitioner was charged with the criminal offense of Medicaid Provider Fraud and

entered a plea of nolo contendere to those charges. Moreover, the undisputed facts clearly indicate that the court, by its Order Withholding Adjudication and Placing Defendant on Probation, consented to receive Petitioner's nolo contendere plea as an element of an arrangement to dispose of the criminal complaint against Petitioner. I.G. Ex. 2. Thus, I conclude that the court accepted Petitioner's nolo contendere plea to four counts of Medicaid Provider Fraud and, therefore, Petitioner was convicted within the meaning of section 1128(i)(3).

Furthermore, the court, having determined that Petitioner's plea was acceptable as a basis for disposing of the criminal charges, placed Petitioner on probation and ordered him to pay restitution and costs, withholding adjudication of guilt pending the successful completion of his probation. Departmental Appeals Board decisions which have dealt with such deferred adjudications have held that such procedures constitute convictions within the scope of section 1128(i)(4) of the Act. Benjamin P. Council, M.D., DAB CR391 (1995); Carlos E. Zamora, M.D., DAB CR22 (1989) (five year exclusion of physician who entered a plea of nolo contendere which was later withdrawn upheld). The petitioner in Council entered a guilty plea and was not adjudicated guilty or sentenced, but was instead placed on probation as part of a deferred sentencing option. Based on those facts, the administrative law judge (ALJ) held that the petitioner had entered into a deferred sentencing arrangement within the scope of section 1128(i)(4) of the Act. In the present case, Petitioner entered a plea of nolo contendere and was subject to a deferred adjudication program whereby he was placed on probation and adjudication was deferred, pending the successful completion of his probation requirements. I find that the disposition of Petitioner's criminal case pursuant to the court's Order constituted entry into a deferred adjudication program and thus, Petitioner is considered to be convicted within the meaning of section 1128(i)(4).

Next, it is required under section 1128(a)(1) of the Act that the crime at issue be related to the delivery of an item or service under Medicare or Medicaid. The record reflects that the conduct underlying Petitioner's conviction included billing for services rendered to patients when Petitioner physically was not present to provide the services. Petitioner was also convicted of directing his employees to file Medicaid claims for services under improper billing codes to obtain greater reimbursement than he was properly entitled. Thus, Petitioner was convicted of filing, or causing to be filed, fraudulent claims against Medicaid. The filing of fraudulent Medicare and Medicaid claims consistently has been held to constitute clear program-related misconduct. Alan J. Chernick, D.D.S., DAB CR434 (1996) (I.G.'s five year mandatory exclusion of dentist who was convicted in

state court of filing false claims upheld); see also Barbara Johnson, D.D.S., DAB CR78 (1990) (I.G.'s five year mandatory exclusion of dentist convicted of filing false claims upheld).

To determine if an offense is program-related, the ALJ must analyze the facts and circumstances underlying the conviction to determine whether a nexus or common sense connection links the offense for which a petitioner has been convicted and the delivery of an item or service under a covered program. Berton Siegel, D.O., DAB No. 1467 (1994). In Petitioner's case, a sufficient nexus links the facts underlying his crime with the delivery of health care items or services under Medicaid because the falsified claims leading to Petitioner's conviction resulted in his receipt of fraudulent Medicaid reimbursement. In Rosalyn 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 health care items or services under Medicaid. Additionally, the ALJ in Khalil held that a nexus may exist "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.* In the present case, the nexus between Petitioner's offenses and the delivery of health care items or services is firmly established by his conviction for the charge of "Medicaid Provider Fraud."

In his defense, Petitioner contends that he should not be subject to an exclusion under section 1128(a)(1) of the Act because he was not guilty in fact to the charges in the criminal Information. He also challenges the validity of his criminal conviction because he alleges that he was not advised in that proceeding that he could be excluded from participation in the Medicare and Medicaid programs. Petitioner, by these arguments, seeks to challenge the propriety of his criminal conviction. His claims that he was in fact not guilty of the offense for which he has been convicted and that he was not properly advised of the consequences of his plea amount to a collateral attack on his conviction. The Departmental Appeals Board has previously held such arguments to be ineffectual in the context of an exclusion appeal as the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter Edmondson, DAB No. 1330 (1992). In Douglas Schram, R.Ph., DAB CR215 (1992), *aff'd* DAB No. 1372 (1992), the petitioner argued that because he was not given adequate notice concerning the consequences of his plea, his right to due process had been violated. The Departmental Appeals Board rejected such argument, finding that a defendant does not have to be advised of all the possible consequences of his plea, including temporarily being barred from receiving government reimbursement for professional services.

Petitioner does not dispute that his exclusion from the Medicare program is a mandatory and automatic consequence of his having pled nolo contendere to the criminal charges of Medicaid Provider Fraud. Nevertheless, Petitioner requests that his exclusion from the Medicare program be based on the permissive exclusion provisions of the Act and 42 C.F.R. § 1001.601 and the period of exclusion, therefore, reduced or eliminated to three years or less. It is well established, however, that when a mandatory exclusion is appropriate, it is irrelevant that a petitioner's conduct might also satisfy the permissive exclusion provisions of section 1128(b). Id. Petitioner also claims that he provides a valuable service to elderly and indigent patients and has submitted letters from individuals attesting to these services and to Petitioner's good character. Under section 1128(c)(3)(B) of the Act, however, such arguments are irrelevant as Petitioner must be excluded for a minimum five year term. Neither the ALJ nor the I.G. is authorized to reduce the length of a mandatory five-year exclusion period. Jack W. Greene, DAB CR19, aff'd, DAB No. 1078 (1989), aff'd sub nom., Greene v. Sullivan, 781 F.Supp. 835, 838 (E.D. Tenn. 1990). Petitioner further requests that his exclusion be made retroactive to October 23, 1996, the date he was excluded from the state Medicaid program. The I.G. has the discretion to determine when to impose an exclusion. Lawrence Wynn, DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. As a matter of law, an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. An administrative law judge is without authority to change the effective date of any exclusion imposed and directed by the I.G. The regulations are clear that the effective date of an exclusion is not a reviewable issue in this administrative proceeding. 42 C.F.R. § 1001.2007.

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 the Medicaid program. The five year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge