

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Sheikh A. Qadeer, M.D.,	)	DATE: July 9, 1993
	)	
Petitioner,	)	Docket No. C-93-041
	)	Decision No. CR275
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated December 11, 1992, Sheikh A. Qadeer, 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 him for a period of five years from participation in the Medicare program and from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that the five-year exclusion was mandatory under 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 Medicaid.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition.

Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the case on the basis of 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 or Medicaid to be excluded from participation in such programs, for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

1. During the period relevant to this case, Petitioner was a licensed medical doctor (psychiatrist) and a Medicaid and Medicare provider, practicing in Chemung County, New York.
2. Petitioner was indicted by a Chemung County Grand Jury on the charges of Grand Larceny and Offering a False Instrument for Filing. I.G. Ex. 1.
3. The indictment alleged that Petitioner had filed with the State of New York claims for Medicaid reimbursement which intentionally overstated the duration of psychotherapy sessions he had provided to Medicaid patients, resulting in his being overpaid approximately \$7,000 by the State. I.G. Exs. 1 and 2.
4. On July 1, 1991, Petitioner, represented by counsel, entered a plea of guilty in Chemung County Court to the misdemeanor offenses of Attempted Grand Larceny and Offering a False Instrument for Filing. I.G. Ex. 2.
5. In the plea colloquy, Petitioner acknowledged that he ". . . tried to deprive the State of New York of money by making a false representation . . ." I.G. Ex. 2.
6. The court sentenced Petitioner to a conditional discharge, predicated upon the performance of community service and financial restitution in the amount of \$10,459.90. 50 percent of the restitution was for the federal government, 25 percent for the New York State Medicaid program, and 25 percent for Chemung County. I.G. Ex. 4.

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<sup>1</sup> Petitioner and the I.G. each submitted written argument supported by exhibit evidence. I admit all of the exhibits and cite them herein as P. Ex. (number) or I.G. Ex. (number).

7. Based upon this criminal conviction, the New York State Department of Social Services excluded Petitioner from participation in the Medicaid program. I.G. Ex. 3.

8. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

9. Petitioner's guilty plea, and the court's acceptance thereof, constitutes a "conviction" within the meaning of the mandatory exclusion provisions of the Act.

10. The offense underlying Petitioner's conviction -- intentionally billing Medicaid for services in excess of those actually provided -- constitutes criminal fraud related to the delivery of Medicaid services.

11. Petitioner's contention that he lacked the intent to defraud Medicaid is irrelevant.

#### PETITIONER'S ARGUMENT

Petitioner contends that his offense amounted to nothing more than a technical dispute over Medicaid billing codes and that he had no intention to defraud the State. He says that he entered a guilty plea only to lessen the emotional and physical stresses upon himself and his family. He insists that the punishments already imposed upon him -- which include the payment of restitution and the performance of community service -- are sufficiently severe.

Petitioner submitted statements from patients and colleagues, and also other members of the community, all of whom attested to the high level of his professional competence, his compassion, and his good citizenship.

As to legal argument, Petitioner asserts that his offenses were neither related to the delivery of health care, nor to patient abuse, and, thus, do not warrant mandatory exclusion pursuant to section 1128(a) of the Act. He contends further that his five-year suspension should be reduced because of the presence of various mitigating factors. He cites, as authority for this contention, the case of Melashenko v. Bowen, [1991 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 38,827 (E.D. Calif. June 19, 1990).

## DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the person to be excluded must have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner pled guilty and the New York court, after careful inquiry, accepted the plea. Section 1128(i)(3) of the Act expressly provides that when a person enters a plea of guilty to a criminal charge and the court accepts such plea, the individual will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act.

The statute further requires that the criminal offense in question must have been "program-related," i.e., related to the delivery of items or services under Medicaid or Medicare. It is well-established in decisions of the Departmental Appeals Board (DAB) that filing false Medicare or Medicaid claims relates to the delivery of items or services under such programs and clearly constitutes 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). I find that the offense underlying Petitioner's criminal conviction -- intentionally billing Medicaid for services in excess of those actually provided -- likewise constitutes criminal fraud related to the delivery of Medicaid services.

Petitioner asserts that he did not intend to defraud Medicaid. However, under section 1128(a) of the Act, proof that an appropriate criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is called for; the intent or state of mind of the individual committing the crime is not material. DeWayne Franzen, DAB 1165 (1990). Also, these administrative proceedings cannot be used to attack the substantive decision arrived at by the court. In sum, the law does not permit HHS to look behind the fact of conviction. 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 will not be considered. Peter J. Edmonson, DAB 1330 (1992).

Next, although it is not entirely clear, Petitioner may be suggesting that permissive exclusion, rather than mandatory exclusion is applicable in his case. This argument, however, is not supported by precedent. An appellate panel of the DAB has considered the

relationship between sections 1128(a) (mandatory exclusions) and 1128(b) (permissive exclusions). It concluded that where a criminal conviction satisfies the requirement of section 1128(a)(1) that such conviction relate to the delivery of an item or service under Medicare or Medicaid, then section 1128(a)(1) is controlling and the I.G. must impose the mandatory exclusion which the statute provides. The fact that the criminal conviction may appear also to fall within the broader criteria for permissive exclusion found in section 1128(b)(1) is irrelevant. Boris Lipovsky, M.D., DAB 1363 (1992).

Lastly, Petitioner's reliance upon Melashenko is misplaced in that the exclusion in that case was permissive, not mandatory, as in the present case. Specifically, the exclusion of Dr. Melashenko apparently was based on a competence-related charges and the subsequent recommendation of the California Peer Review Organization, and not a criminal conviction, as is the case here. In proceedings such as Dr. Melashenko's, the I.G. had to determine whether to impose an exclusion and, if so, for how long. The administrative law judges weighed the mitigating and aggravating factors and determined whether the period of exclusion imposed and directed by the I.G. was reasonable. There was no mandatory minimum dictated by Congress in such actions. In the case at hand, however, the statute does not allow the I.G. or the judge to impose less than the five-year minimum penalty, once the factual basis for the exclusion is proved.

#### CONCLUSION

Sections 1128(a)(1) 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 because of his conviction of program-related criminal offenses. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, at 12 - 14 (1989).

The I.G.'s five-year exclusion is, therefore, sustained.

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Joseph K. Riotto  
Administrative Law Judge