Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Alexander Scott Kirschner,	)	Date: September 10, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-357
	)	Decision No. CR1646
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Alexander Scott Kirschner, Petitioner, from participation in Medicare, Medicaid, and all other federally-funded health care programs for a minimum period of five years. I find that a basis exists for Petitioner's exclusion pursuant to section 1128(a)(1) of the Social Security Act (Act). Further, I find that an exclusion for a minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act.

I. Procedural History

By letter dated March 30, 2007, the I.G. notified Petitioner that he was being excluded for a period of five years from participating in the Medicare, Medicaid and all other federal health care programs. The I.G. informed Petitioner specifically that he was being excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the U.S. District Court, Southern District of Florida, Ft. Lauderdale, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items of services under any such program. Petitioner timely appealed the I.G.'s action.

This case was assigned to me for hearing and decision. I held a prehearing conference on May 2, 2007. During that conference, the parties agreed that this case could be decided on the parties' written submissions. P. Br. at 2. I therefore set a briefing schedule. The I.G. filed his brief (I.G. Brief) with attached exhibits 1 through 5 (I.G. Exs. 1-5). Petitioner filed his response (P. Brief) without any exhibits. The I.G. filed a reply brief (I.G. Reply). Petitioner did not object to the I.G. exhibits and I receive them into evidence.

II. Undisputed Facts

Petitioner stipulated to the following facts before the United States District Court, Southern District of Florida. I.G. Ex. 4. From May 2003 and continuing thorough August 2004, he was a licensed physical therapist who was engaged by Paul Feldman, another licensed physical therapist to prepare "canned" physical therapy treatment notes for individuals purportedly receiving physical therapy services through Northwood Physical Therapy , Inc. and Advanced Technologies. The "canned" physical therapy notes he prepared reflected subjective and objective findings regarding the purported physical therapy prior to the dates of the reflected physical therapy sessions. As a result, the canned notes did not reflect the actual subjective and objective findings of actual physical therapy sessions. Petitioner regularly prepared canned notes reflecting 18 sessions of physical therapy per patient. Petitioner was then instructed by Feldman to personalize the canned notes using basic patient identifying information provided to Petitioner by Feldman and others. After Petitioner prepared the canned notes, they were used by others in support of false claims submitted to the Medicare program for non-rendered and/or otherwise non-reimbursable physical therapy services. In an effort to conceal a portion of the payments Feldman received for his participation in the preparation of the canned notes, Feldman asked Petitioner to receive the payments in his name and then pay over the funds to Feldman in cash. On a number of occasions, Petitioner received checks made payable in his name which represented payments intended for Feldman. Petitioner would subsequently negotiate the checks and provide Feldman the payment due him in cash. He stipulated that he did each of these acts knowingly and intentionally and not as a result of mistake or accident. *Id.*

Petitioner pleaded guilty to one count of Misprision of Felony, to wit, the knowing and willful making and using of false, fictitious and fraudulent writings and documents in connection with the delivery of or payment for health care benefits, items or services, in violation of Title 18, United States Code, Section 1035; did conceal such felony by assisting in the preparation of the false, fictious and fraudulent writings, and by acting as a conduit for payments to another person who was creating the false, fictitious and fraudulent writings; and did not as soon as possible make known such felony to some judge or other person in civil or military authority under the United States, in violation of Titles 18, United States Code, Section 4. I.G. Ex. 3.

As part of the plea agreement, Petitioner agreed to the entry of an order of victim restitution to Medicare in the amount of $18,794. I.G. Ex. 5, at 2. On May 26, 2006, a judgment of conviction was entered against Petitioner, and he was sentenced to four months imprisonment and upon release, he was placed on supervised release for one year. I.G. Ex. 2, at 2-3.

III. Issues, findings of fact and conclusions of law

A. Issues

The scope of my review under section 1128(a)(1) is limited to two issues: (1) whether the I.G. has authority to exclude Petitioner on the ground that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act; and (2) whether the length of the exclusion imposed by the I.G. is unreasonable. There are no issues of material fact in dispute in this case. Petitioner solely contends that the I.G. does not have a basis for excluding Petitioner because he did not deliver any item or render any service under the Medicare or a state health care program. Thus, the only issue in dispute is whether Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act. If I so find, then his exclusion is mandatory under section 1128(a)(1) for a minimum period of five years. Act, section 1128(c)(3)(B). The I.G. imposed the statutory minimum five-year period of exclusion in this case. As the I.G. is required by law to impose the minimum statutory exclusion, there is no issue related to the reasonableness of the period of exclusion in this case.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding as a separate heading. I discuss each Finding in detail.

1. The I.G. has the authority to impose an exclusion because Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.

Section 1128(a)(1) provides:

> The Secretary [of Health and Human Services] shall exclude the following individuals . . . from participation in any Federal health care program (as defined in section 1128B(f)):

> (1) Conviction of program-related crimes. –Any individual . . . that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program.

Section 1128(i)(3) of the Act provides that an individual is "convicted" for purposes of section 1128(a) "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." Petitioner's guilty plea, and the acceptance of the guilty plea and the entry of a judgment based on that plea by the United States District Court for the Southern District of Florida, constitutes a conviction of a criminal offense under section 1128(i)(3) of the Act. I.G. Ex. 2. Accordingly, I conclude that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(a)(1).

I also find that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Petitioner's principal defense in this case is that his conviction of a criminal offense is not related to the delivery of an item or service under the Medicare program. Petitioner argues that he "did not deliver any item or render any service under the Medicare or a state health care program." P. Brief at 5-6. He claims that he performed more of a bookkeeping role in which he plugged in numbers and information he received from Feldman; he never submitted or signed any document used to defraud Medicare. Moreover, he claims he never received any payment directly from any federal agency.

The I.G. convincingly demonstrates that Petitioner's conviction is related to the delivery of an item or service under the Medicare program. The Departmental Appeals Board (Board or DAB) has held that a criminal offense is program-related for purposes of an exclusion under section 1128(a)(1) if there exists a "nexus" or "common sense connection" linking the offense for which the Petitioner has been convicted with the delivery of an item or service under a covered program. *Andrew Anello*, DAB No. 1803 (2001); *Berton Siegal, D.O.*, DAB No. 1467 (1994). The Board has also held that offenses other than the actual delivery of an item or service "are also 'related' because they concern acts that directly and necessarily follow under the health care programs from the delivery of the item or service." *Niranjana B. Parikh,* DAB No. 1334 (1992). Here, Petitioner prepared fictitious physical therapy treatment notes utilized in support of false claims submitted to the Medicare program for nonrendered and/or otherwise nonreimbursable physical therapy services. These fraudulent treatment notes are undisputedly linked to the delivery of an alleged item or service under Medicare. Moreover, I agree with the I.G. that the Plea Agreement, Information and Judgment unambiguously connect Petitioner to a conviction of an offense related to the delivery of a health care item or service under Medicare. *See* I.G. Exs. 5 (Plea Agreement), 3 (Information), 2 (Judgment). The Information to which Petitioner plead guilty charged Petitioner with "having knowledge of the actual commission of a felony cognizable by

court of the United States, to wit, the knowing and willful making and using of false, fictitious and fraudulent writings and documents **in connection with the delivery of or payment for health care benefits, items or services**." I.G. Ex 3 (emphasis added). Petitioner pleaded guilty to that Information and was adjudicated guilty and sentenced to four months in prison, supervised release of one year after release from prison, and was ordered to pay restitution to the Medicare program in the amount of $18,794. I.G. Ex. 2; I.G. Ex. 5, at 2.

Moreover, the DAB pointed out in *Anello,* DAB 1803, that section 1128(a)(1) has been applied to petitioners convicted of violating the federal prohibition against misprison of a felony. The DAB found that the petitioner's plea to a misprison of a felony constituted a conviction of a criminal offense related to the delivery of an item or service under Medicare. Finally, the fact that Petitioner was sentenced to pay restitution to the Medicare program is additional evidence that the criminal offense to which he pled guilty was related to the delivery of an item or service under Medicare. The restitution to Medicare illustrates that a detrimental fraud was perpetrated against the program. The payment of restitution to Medicare alone is support for finding that the conviction here was program related. *See Donald J. Purcell, II, M.D.*, DAB CR572, at 8 (1999).

The I.G.'s arguments in this case are sound and convincing. Based on my review of all of the evidence in this case, I conclude that Petitioner was convicted of a crime that was related to the delivery of an item or service under the Medicare program. I further find that the preponderance of the evidence establishes that Petitioner was properly excluded under section 1128(a)(1) of the Act.

2. Section 1128(c)(3)(B) of the Act requires the I.G. to exclude Petitioner for at least a minimum period of five years.

Section 1128(c)(3)(B) of the Act provides:

> . . . in the case of an exclusion under subsection [1128](a), the minimum period of exclusion shall be not less than five years . . . .

The Act clearly specifies a minimum of five years for an exclusion under section 1128(a). The I.G., the Secretary, and I have no discretion or authority to shorten the five-year minimum exclusion dictated by the Act. Thus, there is no issue of reasonableness as to the period of exclusion in this case.

IV. Conclusion

For the reasons set forth above, I sustain the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

/s/
Alfonso J. Montano
Administrative Law Judge