Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

| | | |
|---|---|---|
| In the Case of: | ) | |
| | ) | |
| Aroostook E.N.T. Clinic, P.A., | ) | Date: November 14, 2007 |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-07-481 |
| | ) | Decision No. CR1691 |
| The Inspector General. | ) | |
| | ) | |

## DECISION

This case is before me pursuant to the May 31, 2007 request for hearing filed by Aroostook E.N.T. Clinic, P.A., Petitioner.

By letter dated March 30, 2007, the Inspector General (I.G.) notified Petitioner that it was being excluded from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) for a period of five years. I.G. Exhibit (Ex.)1. The I.G. informed Petitioner that its exclusion was imposed under section 1128(a)(1) of the Act, due to its conviction of a criminal offense (as defined in section 1128(i) of the Act) related to the delivery of an item or service under the Medicaid program.

On July 6, 2007, I convened a telephone pre-hearing conference during which the parties agreed that an in-person hearing was not required and that the issues could be decided based on written memoranda and documentary evidence. Consequently, I issued an Order establishing briefing deadlines. Pursuant to that Order, on August 6, 2007, the I.G. filed a brief, accompanied by six proposed exhibits.[*] On September 14, 2007, Petitioner

[*] The I.G. and Petitioner failed to mark their exhibits as required by the Civil Remedies Division procedures, making it necessary to place the issuance of a decision in this case in abeyance until the parties complied with the procedural requirements.

submitted a brief in support of its contentions, with four exhibits. On October 2, 2007, the I.G. filed a reply brief. Neither party objected to the exhibits submitted. I admit into evidence I.G. exhibits (I.G. Exs.) 1 - 6 and Petitioner exhibits (P. Exs.) 1 - 4.

It is my decision to sustain the determination of the I.G. to exclude Petitioner from participating in the Medicare, Medicaid, and all federal health care programs for a period of five years. I base my decision on the documentary evidence, the applicable law and regulations, and the arguments of the parties. It is my finding that Petitioner was convicted of a criminal offense related to the delivery of an item or service under a State health care program.

## ISSUES

1. Whether the I.G. had a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act.

2. Whether the five-year exclusion imposed by the I.G. against Petitioner is unreasonable.

## APPLICABLE LAW AND REGULATIONS

Section 1128(a)(1) of the Act authorizes the Secretary of Health and Human Services (Secretary) to exclude from participation in any federal health care program (as defined in section 1128B(f) of the Act), any individual or entity convicted of a criminal offense relating to the delivery of a health care item or service.

An exclusion under section 1128(a)(1) of the Act must be for a minimum period of five years. Section 1128(c)(3)(B) of the Act.

Pursuant to 42 C.F.R. § 1001.2007, an individual or entity excluded under section 1128(a)(1) of the Act may file a request for a hearing before an administrative law judge.

## FINDINGS AND DISCUSSION

The findings of fact and conclusions of law noted below, in bold face, are followed by a discussion of each finding.

**1. Petitioner's conviction of a criminal offense related to the delivery of an item or service under the Medicaid program justifies its exclusion by the I.G. from participation in the Medicare, Medicaid, and all other federal health care programs.**

Petitioner is a corporation operating as Aroostook E.N.T. Clinic, P.A., in the State of Maine. Osama El-Sayed Abdalla El-Silimy was Petitioner's sole officer and director, and the only physician employed by Petitioner. Petitioner provided otolaryngology services, a specialty that diagnoses and treats disorders of the ears, nose, and throat (E.N.T.).

Petitioner was enrolled as a provider of medical services under a number of health care benefit programs, including the Maine Medicaid program. I.G. Ex. 2, at 2. Medicaid is a joint federal-state funded health insurance program intended to help low-income individuals by paying for medically indicated and necessary health care expenses.

In or about May 2001, the Office of the Inspector General for the United States Department of Health, the Federal Bureau of Investigation, and the United States Attorney's Office for the District of Maine initiated an investigation into Petitioner's and Dr. El-Silimy's billing and medical services practice. I.G. Ex. 3, at 2 - 3. The investigation focused on whether the services for which Petitioner had caused claim forms to be submitted and had received payment were medically indicated and necessary for the health of Petitioner's patients. When interviewed on or about March 12, 2002, Dr. El-Silimy stated that he always gave his patients the option of medication or surgery, and maintained that he did not add anything to the medical records after the fact. I.G. Ex. 3, at 3. Following that interview, federal investigators served Petitioner with a subpoena for the production of original patient treatment notes, including a patient known as Robin B, a Medicaid beneficiary. I.G. Ex. 3, at 3; I.G. Ex. 6. In response to the subpoena, Petitioner produced a version of the original treatment notes pertaining to Robin B that had been altered. The altered version, with the original date of January 7, 2000, contained the following two additions:

- "She just finished 4 weeks course of Augmentin, she said."
- "Continue with Augmentin until she is seen with the scan films."

I.G. Ex. 3, at 8.

At that time Robin B was not taking Augmentin, nor did she inform Dr. El-Silimy, that she had just finished a four-week course of Augmentin. *Id*. at 4. Dr. El-Silimy did not instruct Robin B to continue with Augmentin until seen with the scan films, and the Maine Medicaid records reflect that Augmentin had not been prescribed during the four-week period before January 7, 2000, or before her appointment with Petitioner on January 14, 2000. I.G. Ex. 3, at 6.

On January 31, 2000, Dr. El-Silimy performed endoscopic sinus surgery on Robin B without first determining whether she would respond to medication therapy. *Id*. at 5. According to the unaltered medical records, Robin B did not receive a four-week course of antibiotic prior to being treated surgically. *Id*. At a later date, Petitioner "doctored up" the medical charts to convey the impression that medication therapy had preceded surgery. *Id*.

On August 11, 2004, Petitioner was indicted, among other things, for making false statements relating to health care matters, in violation of 18 U.S.C. §1035(a)(2), and obstruction of a criminal investigation of health care fraud in violation of 18 U.S.C. § 1518(a). I.G. Ex. 2. Petitioner entered into a plea agreement whereby it pleaded guilty to both of the aforementioned felony counts. I.G. Ex. 5, at 1 (counts 3 and 65). Petitioner was sentenced on January 17, 2006, to probation for a five-year period and a fine of $100,000. *Id*. at 2-5.

The I.G. notified Petitioner on March 30, 2007, that it was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years based on the conviction of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program.

The threshold question to be decided is whether Petitioner was convicted of a criminal offense (as defined in section 1128(i) of the Act) related to the delivery of an item or service under the Medicaid program.

The Act provides that, for purposes of an exclusion under section1128(a)(1), an individual is considered "convicted" of a criminal offense --

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(i) of the Act.

Petitioner contends that the I.G. has failed to prove that its guilty plea to a violation of 18 U.S.C. §1035(a)(2) was a criminal offense "related to the delivery of an item or service" under a federal or State health care program. P. Brief at 6. Specifically, Petitioner argues that the determining factor as to whether a criminal offense is program-related is not the language in the indictment, but rather is "whether there is a nexus or common sense connection between the offense for which the Petitioner was convicted and the delivery of an item or service under a covered program." Petitioner derives this interpretation from the Board's holding in *Lyle Kai, R.Ph.*, DAB No. 1979 (2005). I do not disagree with the premise articulated here by Petitioner. However, the holding in *Kai* lends no support to Petitioner's argument that its conviction was not related to the delivery of an item or service under a federal or State health care program.

Perhaps Petitioner overlooks the Board's reasoning in *Kai.* The import of the Board's holding in that case is that the offense for which an individual or entity may be convicted (in *Kai*, Deceptive Business Practices) is not always clearly descriptive of criminal conduct that is related to the delivery of an item or service under a covered program. In those instances, it is necessary to examine "the basis for the underlying conviction." In *Kai*, although petitioner was charged with Deceptive Business Practices, the underlying conduct involved the sale of mislabeled pharmaceuticals that were subsequently billed to the Hawaii Medicaid program. Oftentimes, a petitioner will have entered into a plea

agreement with prosecutors, and pled guilty to an offense that is seemingly unrelated to the delivery of an item or service under a covered program. Therefore, it is by resorting to the conduct giving rise to the original criminal charges that a "common sense" connection may be established in exclusions under section 1128(a)(1) of the Act. That situation is exemplified in the case of *Anthony Halili Galvan*, CR1546 (2006). In that case, a felony complaint was filed against petitioner and 20 other co-defendants. Anthony Halili Galvan was named in four of a 40 count felony complaint. He was charged with engaging in a conspiracy to commit grand theft to cheat and defraud the [State of California] Medi-Cal dental program, and with the commission of health benefits fraud.

Pursuant to an agreement between the State and Defendant Galvan, petitioner entered a no contest plea as to one count of simple battery with respect to one dental patient. The remaining counts were dismissed. The court accepted petitioner's no contest plea and adjudged him guilty of the crime of battery. Although petitioner was convicted of simple battery only, it was concluded that a "common sense" connection existed between the conviction and the delivery of an item or service under a covered program. That finding is consistent with the Board's many rulings regarding this settled matter. One such example is the decision in *Scott D. Augustine*, DAB 2043 (2006), in which, the Board held, at 5, that:

> Section 1128(a)(1) requires merely that an offense be "related to" the delivery of an item or service under a covered program. It does not require that the offense result in a delivery and therefore does not require an actual delivery of an item or service. Based on the plain meaning of the word "related," the Board has repeatedly held that an offense is "related to" the delivery of an item or service under a covered program if there is a common sense connection or nexus between the offense and the delivery of an item or service under the program. *See, e.g., Berton Siegel*, *D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992).

Of course, in this case we are not faced with a situation that is similar to the one in the *Kai* or *Galvan* cases. Here, the connection between Petitioner's conviction and the delivery of an item or service under the Medicaid program is as plain as the nose on one's face. Petitioner in this case altered the medical charts of one of its patients and lied about it to federal investigators. Thus, it was charged with, and convicted of, obstructing a criminal investigation of health care fraud, and making false statements relating to a health care matter. I.G. Ex. 5. Thus, the actual conviction as well as the underlying basis for the

conviction are clearly related to the delivery of an item or service under the Medicaid program. Consequently, it is puzzling that Petitioner would suggest that I should look for a "common sense" connection between the offense for which the Petitioner was convicted and the delivery of an item or service under the Medicaid program.

Ultimately, Petitioner maintains that the I.G. has not shown that it altered Robin B's medical records "in order to justify a surgical procedure" and that it performed endoscopic surgery without following "established Guidelines." P. Br. at 7. In this regard, Petitioner posits that the I.G. merely relies on the language in the indictment. However, the I.G. need not make such a showing. The I.G.'s onus is to establish that Petitioner has been convicted of a criminal offense relating to the delivery of a health care item or service. In this case Petitioner was convicted under sections 1518(a) and 1035(a)(2) of Title 18.

Section1518(a) provides that:

> Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

Section 1035(a)(2) provides that:

> Whoever, in any matter involving a health care benefit program, knowingly and willfully—
>
> * * *
>
> > makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,
>
> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

It is therefore unequivocal that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid or a State health care program.

Petitioner also argues that the I.G. can take no solace from Petitioner's signature on the plea agreement. However, although unnecessary in this case, it is appropriate for the I.G. to rely on such a document to show a connection between the conviction and the delivery of an item or service under a covered program. The Board's decision in *Kai* would support such reliance.

Finally, Petitioner contends that the offense for which it was convicted was the product of panic associated with the tragic events of September 11, 2001. That argument is of no avail inasmuch as it constitutes an impermissible collateral attack on its guilty plea.

The exclusion provisions of the Act seek to preclude from federal health care programs untrustworthy individuals or entities that pose a risk to those programs. By having engaged in conduct that constitutes a felony under federal law regarding the delivery of an item or service under a Medicaid program, Petitioner placed itself in the category of individuals for whom the exclusion provisions were intended.

**2. Petitioners' exclusion for a period of five years is not unreasonable.**

An exclusion under section 1128(a)(1) of the Act must be for a minimum mandatory period of five years, as set forth in section 1128(c)(3)(B) of the Act:

> Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Aggravating factors that justify lengthening the exclusion period may be taken into account, but the five-year term will not be shortened. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. As a result of Petitioner's program-related conviction, the I.G. was required to exclude it, pursuant to section 1128(a)(1) of the Act, for at least five years.

## CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from Medicare, Medicaid, and all other federal health care programs, for a period of at least five years, because it was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

/s/
José A. Anglada
Administrative Law Judge