

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Jay Phillip Parker,	)	Date: October 8, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-373
	)	Decision No. CR1853
The Inspector General.	)	
_____	)	

**DECISION**

This matter is before me on the Inspector General’s (I.G.’s) Motion for Summary Affirmance of the I.G.’s determination to exclude the Petitioner herein, Jay Phillip Parker, from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.’s Motion and determination to exclude Petitioner are based on the terms of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the imposition of a five-year exclusion, and for that reason I grant the I.G.’s Motion for Summary Affirmance.

**I. Procedural Background**

Jay Phillip Parker, R.Ph., was first registered and licensed in the State of Kansas as a pharmacist in 1970. From 2003 through 2006, he made false or fraudulent claims to the Kansas Medicaid program in the amount of approximately \$75,000.

This activity became the subject of an inquiry by the Kansas State Board of Pharmacy and the Kansas Attorney General’s Medicaid Fraud Division, and, on November 17, 2006, resulted in Petitioner’s felony conviction. On that date, Petitioner appeared with counsel in the District Court for the Second Judicial District, Jefferson County, Kansas, and tendered a negotiated plea of guilty to a single count of Making a False Claim to the

Medicaid Program, in violation of KAN. STAT. ANN. 21-3846(a)(1), (6), and (7). Petitioner's plea was accepted; he was convicted on that plea; and on December 29, 2006, he was sentenced to a 12-month term of probation and required to pay restitution, costs, and fees in the total sum of \$75,213.

On January 31, 2008, more than 13 months after Petitioner's conviction, the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years. Section 1128(a)(1) mandates the exclusion, for a period of not less than five years, of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program."

Petitioner timely sought review of the I.G.'s action by his *pro se* letter of April 2, 2008, and on April 28, 2008, Petitioner's present counsel entered his appearance. I convened a telephonic prehearing conference on June 26, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss the procedures best suited for addressing the issues presented by the case. The parties agreed that the case likely could be decided on written submissions, and by Order of June 27, 2008, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case is closed.

The evidentiary record on which I decide the issues before me contains 14 exhibits. The I.G. proffered eight exhibits marked I.G. Exhibits 1-8 (I.G. Exs. 1-8). Petitioner proffered six exhibits marked Petitioner's Exhibits 1-6 (P. Exs. 1-6). In the absence of objection I have admitted I.G. Exs. 1-8 and P. Exs. 1-6 as designated.<sup>1</sup> CMS submitted a brief (CMS Br.), to which Petitioner responded (P. Br.) and CMS replied (CMS Reply). Petitioner decided not to submit a sur-reply.

## II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and

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<sup>1</sup> The Plea Agreement and Complaint/Information in this case, CMS Exs. 6 and 7, reflect Petitioner's name as Jay "Philip" Parker. Before me, Petitioner has been referred to as Jay "Phillip" Parker instead. However, Petitioner does not deny that he is the individual referred to in CMS's exhibits and I thus simply note the discrepancy.

2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Because his predicate conviction has been established, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is reasonable as a matter of law, since it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

### III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

In Kansas, the crime of Making a False Claim to the Medicaid Program is defined by a specific statute, KAN. STAT. ANN. 21-3846(a), which in relevant parts provides:

Making a false claim, statement, or representation to the medicaid program is, knowingly and with intent to defraud, engaging in a pattern of making, presenting, submitting, offering or causing to be made, presented, submitted, or offered:

(1) Any false or fraudulent claim for payment for any goods, service, item, facility, accommodation for which payment may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;

\* \* \* \*

(6) any claim for payment, for any goods, service, item, facility, or accommodation, which is not medically necessary in accordance with professionally recognized parameters or as otherwise required by law, for which payment may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable; or

(7) any wholly or partially false or fraudulent book, record, document, data or instrument, which is required to be kept or which is kept as documentation for any goods, service, item, facility or accommodation or of any cost or expense claimed for reimbursement for any goods, service, item, facility or accommodation for which payment is, has been, or can be sought, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable.

The crime of Making a False Claim to the Medicaid Program is classified by degree according to the value of the property, services, or funds illegally obtained. As classified by KAN. STAT. ANN. 21-3846(b), Petitioner's conviction was for a felony offense.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act; or "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act. 42 U.S.C. § 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

#### **IV. Findings and Conclusions**

I find and conclude as follows:

1. On his plea of guilty on November 17, 2006, in the District Court for the Second Judicial District, Jefferson County, Kansas, Petitioner Jay Phillip Parker was found guilty of the criminal offense of Making a False Claim to the Medicaid Program, in violation of KAN. STAT. ANN. 21-3846(a)(1), (6), and (7). I.G. Exs. 5, 6, 7, 8.
2. The accepted guilty plea and the finding of guilt described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

3. Petitioner's conviction of the criminal offense of Making a False Claim to the Medicaid Program, in violation of KAN. STAT. ANN. 21-3846(a)(1), (6), and (7), as noted in Findings 1 and 2 above, is related to the delivery of an item or service under a state health care program as a matter of law.
4. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act.
5. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).
6. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

## **V. Discussion**

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992). The I.G.'s proof of these two essential elements is not contested by Petitioner, and in any case they are fully established in the record before me.

The first essential element, the fact of Petitioner's conviction, is conclusively established by the District Court records, which include one of the investigators' Affidavit of Probable Cause (I.G. Ex. 5), the Plea Agreement by which Petitioner, his counsel, and the Attorney General negotiated Petitioner's guilty plea (I.G. Ex. 6), the charging document in the prosecution, the Complaint/Information (I.G. Ex. 7), and the Journal Entry of Judgment, by which the overall history and disposition of the prosecution was recorded (I.G. Ex. 8).

The second element is present as a matter of law. I have set out the relevant text of the Kansas statute above, and that statute's specific application to the Kansas Medicaid program supplies the requisite nexus and common-sense connection between crime and program. I have so held with reference to a similar federal statute in *Virginia Planas, D.C.*, DAB CR1831 (2008), and with reference to similar state statutes in *Tamara Brown*, DAB CR1799 (2008); *Stanley Junious Benn*, DAB CR1501 (2006); and *Mark D.*

*Perrault, M.D.*, DAB CR1471 (2006). I believe that this view has won at least implicit approval from the Departmental Appeals Board (Board) in *Tamara Brown*, DAB No. 2195, at 7.

Petitioner's sole defense is the one he has relied on from the outset of this appeal. Petitioner would avoid the mandatory minimum period of exclusion required by section 1128(a)(1) by requesting that the I.G.'s determination to proceed pursuant to the mandatory authority of section 1128(a)(1) "be set aside and that a permissive exclusion issued pursuant to section 1128(b)(4) of the Social Security Act be imposed in lieu of the previously imposed sanction." P. Br., at 1. That particular provision forms part of section 1128(b) of the Act, 42 U.S.C. § 1320a-7(b).

Now, section 1128(b) provides 15 distinct predicates for permissive, rather than mandatory, exclusions. Only three of those predicates are variants of criminal convictions. Of the remaining 12, several predicates allow the Secretary to exclude entities that do not cooperate with program requirements concerning inspection and record-keeping, or that engage in improper billing or other disapproved financial practices. Section 1128(b)(14) allows the Secretary to exclude individuals who persist in default of certain classes of scholarships and student loans. The predicate relied on by Petitioner here, section 1128(b)(4), permits the Secretary to exclude an individual or entity if its license to provide health care has been revoked or suspended. Petitioner has proffered uncontradicted evidence that his license has been subject to such proceedings before the Kansas State Board of Pharmacy. P. Exs. 1, 4, 5, 6. It is to be noted that although the revocation reflected in those proceedings was a sanction for the same misconduct that led to Petitioner's criminal conviction, the revocation proceedings did not assert the conviction itself as a basis for the revocation.

The Secretarial discretion implicit in the grant of permissive authority is sometimes seen as appropriate to situations in which individuals or entities may present less-serious threats to the integrity of the protected programs. Petitioner has made an impressive and sympathetic showing that his license has been restored and that he should not be regarded as a threat to those programs in the future. P. Exs. 4, 5, 6. Nothing in this Decision should be understood to trivialize or disregard his showing. But, once a conviction is found to be within the reach of any part of section 1128(a), as this one has been found to lie within the specific reach of section 1128(a)(1), the mandatory operation of that section bars Petitioner from asking that other more lenient, more discretionary, or more favorable exclusionary provisions should be applied instead.

Even in this situation, where the underlying misconduct itself can correctly be argued to have brought about consequences that fall within both section 1128(a) and one or more of the permissive exclusions sections 1128(b)(1)-(15), the well-settled, long-established rule

is clear: if section 1128(a) applies, then the mandatory exclusion and mandatory minimum period prescribed by section 1128(a) must be imposed, and neither the I.G. nor the Administrative Law Judge may choose to proceed under any other provision. The Board has enlisted the rigorous vocabulary of mathematics to explain the relationship between sections 1128(a) and 1128(b): “Sections 1128(a) and 1128(b)(11) describe sets of conduct that intersect but are not coextensive. When conduct falls within the intersection of the two provisions, section 1128(a)(1), as the mandatory provision, applies.” *Scott D. Augustine*, DAB No. 2043, at 14 (2006); see identical language in *James Randall Benham*, DAB No. 2042, at 14 (2006). To his credit, Petitioner candidly acknowledges the rule while asking that he be spared its application.

This rule enjoys a venerable pedigree in the decisions of this forum. *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000); *Lorna Fay Gardner*, DAB No. 1733 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992); *Jack W. Greene*, DAB No. 1078, *aff’d sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990). See also *Michael Travers*, DAB CR85 (1990). It has, as well, won explicit approval in the Article III federal judiciary:

An exclusion determination under [section 1128(a) of the Act] is a two-step process. First, the Secretary must determine whether the mandatory provision applies. Under [section 1128(a) of the Act] the Secretary *shall exclude* individuals who have been convicted of a program-related crime or who have been convicted of patient abuse. If the prerequisites of this section are met, the Secretary is directed by Congress to exclude that individual, and the issue of permissive exclusion becomes moot. It is only after the Secretary determines that the individual’s conviction was not for a “program-related crime” that the permissive exclusion statute becomes relevant.

*Travers v. Sullivan*, 801 F. Supp. 394, at 405 (E.D. Wash. 1992).

Here, the *Travers* court’s two-step process ends after the first step. I have found as a matter of law that Petitioner’s conviction is program-related. Further debate on the issue of permissive exclusion is moot and further discussion of the statute authorizing it is irrelevant. Petitioner’s misconduct may well lie within the intersection of the two provisions, sections 1128(a) and 1128(b) of the Act, but the mandatory provisions of section 1128(a) apply and control the result in this case.

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law.

*Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law. This Decision issues accordingly.

## **VI. Conclusion**

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Jay Phillip Parker from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby affirmed.

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/s/  
Richard J. Smith  
Administrative Law Judge