

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

In the case of:)	
Val Manocchio, M.D.,)	DATE: August 8, 1990
Petitioner,)	
- v -)	Docket No. C-228
The Inspector General.)	DECISION CR 93

DECISION

Petitioner waived his right to a hearing in this exclusion case and the parties jointly requested that I issue a decision and order on the basis of their stipulation of facts dated July 9, 1990.

On January 11, 1990 the Inspector General (I.G.) sent Petitioner a Notice that he was being excluded from participation in the Medicare and State health care programs.¹ The I.G. alleged that Petitioner had been convicted, within the meaning of section 1128(i) of the Social Security Act, in the United States District Court Southern District of Florida, of a criminal offense related to the delivery of an item or service under Medicare. Exclusions after such a conviction are required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act to be for a period of not less than five years. By letter dated March 8, 1990, Petitioner timely requested a hearing to contest this Notice. Petitioner contended that he should not be excluded based upon the mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B)

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

because: 1) Petitioner's misdemeanor conviction was not a "program related crime"; 2) the offense of which Petitioner was convicted occurred prior to the amendment and application of the mandatory period and would be in violation of the ex post facto clause of the United States Constitution; and 3) Petitioner was not properly convicted, as he was not informed that his guilty plea would also result in his exclusion from Medicare and Medicaid.

I held two telephone prehearing conferences in this case, one on May 24, 1990 and another on June 5, 1990. During the May 24, 1990 conference, Petitioner advised me that he had filed a law suit in federal court challenging his exclusion, based primarily on his allegation that the acts underlying the conviction occurred prior to the amendments to section 1128, which mandated a minimum period of exclusion under section 1128(c)(3)(B). Petitioner believes that this made the application to him of the amendments an unconstitutional ex post facto application of the statute. Petitioner requested a continuance until his court case was decided. The I.G. opposed this motion during the June 5, 1990 conference and made a motion for summary disposition. I denied Petitioner's request. In the absence of an order by a federal court to defer adjudication, I felt compelled by the Act to go forward with this case, and I set a briefing schedule for it.

On July 12, 1990, I received a stipulation of facts, entitled "Stipulation Of Administrative Judgment of Exclusion," dated July 9, 1990, in which the parties agreed that: 1) an administrative judgment of exclusion should be entered against Petitioner; and 2) the entry of this judgment meant that Petitioner had exhausted his administrative remedies and could proceed to litigate his federal court action.

ISSUES

1. Whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid, within the meaning of section 1128(a)(1) of the Social Security Act.
2. Whether application to Petitioner of the mandatory minimum period of exclusion provided for in section 1128(c)(3)(B) of the Act is unconstitutional under the ex post facto clause and the Double Jeopardy clause of the Fifth Amendment.

3. Whether I am without authority to adjudicate the constitutionality of a statute that I am charged with applying.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was convicted of a criminal offense related to the delivery of a health care item or service within the meaning of section 1128(a)(1) of the Act. Stipulation Page 1 (Stip., 1.).

2. As a result of his conviction, Petitioner was sentenced to a term of probation and was required to pay restitution of \$62.40. Stip., 1.

3. Petitioner was convicted after the effective date of the 1987 amendments to the Act, and under the terms of the Act the mandatory minimum period of exclusion provided for in section 1128(c)(3)(B) applies. Stip., 1.

4. The underlying offense which resulted in Petitioner's conviction occurred in 1984. Stip., 1.

5. I do not have the authority to declare a federal statute unconstitutional or to invalidate a regulation.

DISCUSSION

I have considered the constitutional issues raised in this case carefully and I conclude that I am without authority to adjudicate them. See Stip., 2. The scope of my review in these cases is stated in 42 C.F.R. 1001.128(a). This section limits an appeal in this type of case to the issues of (1) whether a petitioner was, in fact, convicted; (2) whether the conviction related to petitioner's participation in the delivery of medical care or services under the Medicare or Medicaid programs; and (3) whether the length of the exclusion is reasonable. These issues relate to the propriety of the imposition of the exclusion in a particular case and I have the authority to interpret section 1128 and the regulations promulgated thereunder. I do not have the authority to declare a federal statute unconstitutional or to invalidate a regulation. Petitioner must address these arguments in another forum, since I do not have the authority. See Section 205(b) of the Social Security Act; Jack W. Greene, DAB Civ. Rem. C-56 at 7, aff'd. DAB App. 1078 at 18 (1989); Eulalia Sentmanat, M.D., DAB Civ. Rem. C-88 at 7 (1989); Frank Waltz, M.D., DAB Civ. Rem. C-86 at 8 (1989).

Based on the parties' stipulations, there are no genuine issues of material fact which would require the submission of additional evidence. There is no need for an evidentiary hearing, and the parties have not requested oral argument. The issue of whether the I.G. had the authority to exclude Petitioner under Section 1128(a)(1) is a legal issue. I have concluded as a matter of law, and the parties have so stipulated, that Petitioner was properly excluded and that the length of his exclusion is mandated by law. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 10 (1990), and Rule 56 F.R.C.P.

CONCLUSION

Based on the law and the undisputed facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for the minimum mandatory period of five years.

/s/

Steven T. Kessel
Administrative Law Judge