

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Richard A. Fishman, D.O.,	)	DATE: September 19, 1990
	)	
Petitioner,	)	Docket No. C-217
	)	
- v. -	)	DECISION CR 100
	)	
The Inspector General.	)	

DECISION

On December 12, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for five years.<sup>1</sup> The I.G. told Petitioner that he was being excluded as a result of his conviction in a Florida court of a criminal offense related to the delivery of an item or service under Medicare. Petitioner was advised that exclusion from participation in Medicare and Medicaid of individuals or entities convicted of such an offense is mandated by section 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be not less than five years.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. Both parties moved for summary decision and entered into stipulations of fact and law. I have considered the parties' arguments, their fact submissions, and applicable law. I conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law.

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<sup>1</sup> "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issues in this case are:

1. Whether Petitioner was "convicted" of an offense within the meaning of section 1128(i) of the Social Security Act;
2. Whether Petitioner was convicted of a criminal offense "relating to the delivery of an item or service" within the meaning of section 1128(a) of the Social Security Act;
3. Whether I have the authority to decide if section 1128(a) of the Social Security Act is unconstitutional as applied in Petitioner's case; and if so,
4. Whether section 1128(c)(3)(B) of the Social Security Act is unconstitutional as applied to Petitioner's case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to these proceedings, Petitioner was a doctor of osteopathy. Stip. 1<sup>2</sup>
2. On November 15, 1988, Petitioner was charged with three counts of unlawfully devising a scheme and artifice to defraud and to obtain money from the Medicare program through its carrier, Blue Shield, by means of false and fraudulent pretenses, representations, and promises in violation of 18 U.S.C. sections 2 and 1003. Stip. 3.

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<sup>2</sup> The parties' exhibits and briefs will be cited as follows:

Stipulation of Fact	Stip. (number)
I.G.'s Exhibit	I.G. Ex. (number)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Exhibit	P. Ex. (number)
Petitioner's Br.	P. Br. (page)

3. On January 13, 1989, Petitioner pled guilty to, and was convicted of, the three counts described above. Stip. 5.
4. Petitioner was convicted of a criminal offense as defined by section 1128(i) of the Social Security Act.
5. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare within the meaning of section 1128(a)(1) of the Social Security Act.
6. On June 13, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act.
7. Petitioner's exclusion by the I.G. was for five years, the minimum period required by law for an exclusion imposed and directed pursuant to section 1128(a)(1) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).
8. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).
9. Petitioner was convicted after the effective date of the 1987 amendments to the Social Security Act, and under the terms of those amendments, the mandatory minimum period of exclusion provided for in section 1128(c)(3)(B) applies to his case.
10. I do not have the authority to declare a federal statute unconstitutional.

#### ANALYSIS

I. Petitioner was convicted of a criminal offense related to the delivery of an item of service within meaning of 1128(a)(1).

There are no disputed material facts in this case. The I.G. entered into "Stipulations of Fact and Law" which are part of the record in this case. Petitioner admitted that he was a doctor of osteopathy and that on January 13, 1989, he pled guilty to, and was convicted of, three counts of unlawfully devising a scheme and artifice to defraud the Medicare program. Petitioner also admitted that he was convicted of criminal offenses related to the delivery of an item or services under the Medicare

program. Accordingly, I conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service within the meaning of section 1128(a) of the Social Security Act.

II. The mandatory provisions of section 1128(c)(3)(B) of the Social Security Act apply to Petitioner's case.

Based on Petitioner's conviction, the I.G. excluded him from participating in Medicare and directed that he be excluded from participating in Medicaid, for five years. Petitioner admitted that section 1128(c)(3)(B) of the Social Security Act requires that persons convicted on or after August 18, 1987, of a criminal offense as defined in section 1128(a) of the Social Security Act be excluded from participation in Medicare and Medicaid for a period not less than five years. Thus, the only issue to be determined is whether the mandatory minimum exclusion provisions in 1128(c)(3)(B) are applicable to Petitioner's case.

Although he was convicted on January 13, 1989, the criminal acts for which Petitioner was convicted occurred on November 23, 1983, March 28, 1984, and April 9, 1984. (Stip. 4). Petitioner contends that Congress did not intend for the provisions of 42 U.S.C. 1320a-7 to apply to conduct which occurred prior to August 18, 1987, and thus the mandatory minimum exclusion provisions are inapplicable to his case. P. Br. 4.

On August 18, 1987, the Social Security Act was amended by the Medicare and Medicaid Patient and Program Protection Act of 1987. Public Law 100-93, 101 Stat. 680. Section 15(b) of this Act provides that the mandatory five-year exclusion period applies to exclusions based on convictions occurring after August 18, 1987.

There is no dispute that Petitioner was convicted after the effective date of these 1987 amendments. The I.G.'s authority to impose and direct exclusions against Petitioner arose from the conviction on January 13, 1989, and that is the controlling date specified by Congress in its 1987 amendment. Accordingly, I conclude that the minimum mandatory provisions of section 1128(c)(3)(B) of the Social Security Act were intended to apply to Petitioner's case, and thus the I.G. was mandated by law to exclude Petitioner for a period not less than five years.

III. I am without authority to adjudicate the constitutionality of a federal statute.

Petitioner argued that the application of the minimum mandatory provisions to his case would violate his constitutional rights to due process and equal protection of the law, as well as the constitutional prohibition of ex post facto laws contained in Article I of the United States Constitution.

I have considered the constitutional issues raised by Petitioner and I conclude that I am without authority to adjudicate them. 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) the conviction related to Petitioner's participation in the delivery of medical care or services under the Medicaid, Medicare or social services programs; and (3) whether the length of the suspension 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. Petitioner must address these arguments in another forum, since I do not have the authority to grant the relief he seeks. See section 205(b) of the Social Security Act; Jack W. Greene, DAB App. 1078 at 18 (1989).

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusion is mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

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Steven T. Kessel  
Administrative Law Judge