

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Raymond R. Veloso, M.D.,	)	DATE: April 4, 1991
Petitioner,	)	
- v. -	)	Docket No. C-260
The Inspector General.	)	Decision No. CR124

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner requested a hearing before an administrative law judge (ALJ) to contest the June 6, 1990 notice of determination (Notice) issued by the Inspector General (I.G.). The Notice informed Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for five years.<sup>1</sup>

By letter dated June 6, 1990, the I.G. advised Petitioner that he was being excluded from participation in the Medicare and State health care programs, alleging that Petitioner had been convicted, within the meaning of section 1128(i) of the Act, of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was further informed that exclusions from participation in Medicare and Medicaid of individuals convicted of such an offense are mandated by section 1128(a)(1) of the Act for a minimum period of five years. He was advised that his exclusion was for the minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to ALJ Charles E. Stratton for hearing and decision. After a prehearing telephone conference which

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<sup>1</sup>"State health care program" is defined by section 1128(h) of the Act to cover three types of federally financed programs, including Medicaid. I use the term "Medicaid" hereafter to represent all state health care programs from which Petitioner was excluded.

was conducted by Judge Stratton, the I.G. filed a motion for summary disposition. Petitioner filed an opposition. On March 8, 1991 the case was reassigned to me. On March 15, 1991 I conducted a prehearing telephone conference at which the parties agreed that the case was appropriate for summary disposition on the basis that there were no genuine issues of material fact which remained to be resolved.

Having reviewed all of the evidence and the arguments made, I conclude that the exclusion imposed by the I.G. in this case is mandatory under the law. Therefore, I enter summary disposition in favor of the I.G.

#### 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 Act.
2. Whether the mandatory provisions of section 1128(c)(3)(B) apply to the facts of this case.

#### FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. By Information dated April 21, 1989, the Assistant State Attorney for the State of Florida in the County of Palm Beach charged Petitioner with three criminal violations: 1) filing a false Medicaid claim; 2) receiving payment for a false Medicaid claim; and 3) grand theft in violation of Section 409.325(a) and (5)(b), section 409.325(4)(c) and (5)(b), and section 812.014 of the Florida statutes. I.G. Exhibit 1.<sup>2</sup>
2. On October 6, 1989, Petitioner pled guilty to count one of the Information. Count one charged that on or about the 1st day of December 1986 and continuing through the 30th day of November 1987, Petitioner "did knowingly and unlawfully file, attempt to file, or aid or abet in the filing of false claims to wit: claims made to the Florida Medicaid Program, a state or federally funded assistance program, seeking payment for physician services, rendered to one or more of the following

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<sup>2</sup>The parties' exhibits hereafter will be referred to as I.G. Ex. (number) for the Inspector General's exhibits and P. Ex. (letter) for Petitioner's exhibits.

persons and/or their dependents . . . said Physician services having not been rendered as represented in said claims, the aggregate value of said claims being more than two hundred (\$200.00) in a twelve (12) consecutive month period, in violation of Section 409.325(a) and (5)(b), Florida Statutes." I.G. Ex. 1.

3. Petitioner's plea of guilty was accepted by the court. I.G. Ex.2.; P's Exs. A-D.

4. By Order dated October 6, 1989, the Circuit Court of Palm Beach County, Florida, placed Petitioner on probation for a period of one year. Petitioner was required to pay restitution in the amount of \$492.00 to the State Medicaid Fraud Control Unit and to pay \$5,000.00 costs of investigations to the Medicaid Fraud Control Unit. I.G. Ex. 2.; P's Exs. A-B.

5. On June 6, 1990, the I.G. notified Petitioner of his exclusion for five years from the Medicare and Medicaid programs. I.G. Ex. 3.

6. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a) and 1128(i) of the Act (Act). Findings 1-4; Act, sections 1128(a) and 1128(i).

7. Petitioner was convicted of a criminal offense which was "related to the delivery of an item or service" under a State health care program, within the meaning of section 1128(a)(1) of the Act. Findings 1-4; Act, sections 1128(a)(1) and 1128(i).

8. Pursuant to section 1128(a)(1) of the Act, the Secretary is required to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Act, section 1128(c)(3)(B).

9. The minimum mandatory period for an exclusion pursuant to section 1128(a)(1) of the Act is five years. Act, section 1128(c)(3)(B).

10. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983); 42 U.S.C. 3521.

11. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1-8; Act, section 1128(a).

## ANALYSIS

1. 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.

The undisputed facts in this case show that on October 2, 1989, in the Circuit Court for Palm Beach County, Florida, Petitioner pled guilty to the criminal offense of Medicaid Fraud. His plea of guilty was accepted by the court and Petitioner was sentenced to one year probation; to pay \$492.00 restitution to the State Medicaid Fraud Control Unit; to pay \$5,000.00 for the cost of investigations to the Medicaid Fraud Control Unit; and to pay \$80.25 court costs. I.G.'s Ex. 2; P's Exs. A-D; and Petitioner's Amended Reply Brief.

Petitioner's plea was an Alford plea.<sup>3</sup> Although he argues that he never admitted guilt to Medicaid fraud, he does not contest the fact that he was "convicted" of Medicaid fraud within the meaning of section 1128(i). In any event, it is well settled that an Alford plea is a guilty plea. See North Carolina v. Alford, 400 U.S. 25 (1970). For the purposes of the Act, there is a conviction when a plea of guilty or nolo contendere is accepted by the court. 42 U.S.C. Section 13201-7(i)(3); Charles W. Wheeler, DAB App. 1123 (1990). Since Petitioner's plea was accepted by the court, I find that Petitioner was "convicted" of a criminal offense as that term is defined in section 1128(i) of the Act.

The evidence further establishes that Petitioner pled guilty to the statutory offense of "Medicaid Fraud". The count to which he pled guilty charged that he knowingly and unlawfully filed, attempted to file, aid or abet in the filing of false claims made to the Florida Medicaid Program, a state or federally funded assistance program, seeking payment for physician services which had not been rendered as represented in the claims. I.G. Exs. 1 & 2. The charge on its face shows a program-related offense. Moreover, that Medicaid was a victim of Petitioner's fraudulent conduct is shown by the sentence imposed by the court. The court required Petitioner to make restitution in the amount of \$492.00 and to pay \$5,000.00 costs of investigation to the Florida Medicaid program.

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<sup>3</sup>Under an Alford plea, a defendant does not admit guilt but concedes that the state has sufficient evidence for conviction. See North Carolina v. Alford, 400 U.S. 25, 35-38.

See Jack W. Greene, DAB App. 1078 (1989); Wheeler, supra; DeWayne Franzen, DAB App. 1165 (1990). Indeed, Petitioner has not argued that his conviction was not for a program-related offense.

I find, therefore, that Petitioner was convicted of an offense related to the delivery of an item or service under the Medicaid program.

Petitioner's sole argument against his exclusion from participation in the Medicare and Medicaid programs appears to be that he is not guilty of the charge to which he entered the Alford plea, and therefore he should not be subject to section 1128(a)(1) sanctions. He asserts that the nature of his plea (Alford) shows that he did not admit to any culpability and states that his plea was entered "under a misunderstanding that resulted from negotiations between his attorney and the State of Florida". He argues that he should be allowed to prove that he did not defraud the Medicaid program. (Petitioner's Amended Reply Brief).

As the I.G. has pointed out, section 1128(a)(1) requires Petitioner's exclusion based on the facts in his case, without a determination of his actual guilt. The I.G.'s authority to impose and direct exclusions pursuant to section 1128(a)(1) emanates from the fact of conviction for a program-related offense. It is not Petitioner's guilt that has to be determined, but rather the fact of his conviction. Charles W. Wheeler, DAB App. 1123 (1990). The ALJ is not to delve into the underlying facts to determine guilt. If Petitioner desires to challenge the sufficiency of the facts which were used to support the finding of guilt made by the trial court, or to otherwise challenge the validity of the guilty plea, the proper forum for such a challenge is in the trial court.<sup>4</sup> Arguments about the process leading to a petitioner's criminal conviction are irrelevant to an exclusion proceeding. See David S. Muransky, D.C., DAB App. 1227 at 6 (1991); Wheeler, supra; and Andy E. Bailey, DAB App. 1131 (1990).

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<sup>4</sup>Petitioner did, in fact, appeal certain aspects of the judgment of conviction to the Fourth District Court of Appeals. P. Exs. C and D. The specific issues raised on appeal are not set forth in the documents of record; however, they are not material to the resolution of the issues before me. What is clear is that Petitioner's conviction was not vacated by either court. P. Exs. C and D and P; Amended Reply Brief.

Since the undisputed facts before me show that Petitioner was convicted of a criminal offense, as that term is defined in section 1128(i) of the Act, and that his conviction was for an offense related to the delivery of an item or service under Medicaid, I find that the I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs under section 1128(a)(1) of the Act.

2. Based on Petitioner's conviction for a criminal offense related to the delivery of an item or service under the Medicaid program, the I.G. was required to exclude Petitioner from participation in the Medicare program and to direct his exclusion from the Medicaid program for a minimum period of five years.

The I.G. excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years. Under section 1128(c)(3)(B), a minimum period of exclusion of five years is mandatory for a conviction of an offense defined in section 1128(a)(1). Section 1128(c)(3)(B) gives the Secretary no discretion to reduce the period of exclusion below five years. See David S. Muransky, D.C., DAB App. 1227 at 6 (1991); Jack W. Greene, DAB App. 1078 (1989); Charles W. Wheeler, DAB App. 1123 at 6 (1990); Mark D. Bornstein, D.P.M., DAB Civ. Rem. C-218 (1990); and Orlando Ariz, DAB Civ. Rem. C-115 at 11-12 (1990).

Since Petitioner's criminal conviction fell under section 1128(a)(1), the I.G. was required to exclude his participation for a mandatory five year period.

#### CONCLUSION

Having considered all of the evidence and arguments presented in this case, I find that Petitioner was convicted of an offense which was related to the delivery of an item or service under a State health care plan and that his exclusion by the I.G. from participation in the

Medicare and Medicaid programs for a period of five years is required under the provisions of sections 1128(a)(1) and 1129(c)(3)(B) of the Act.

/s/

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Constance T. O'Bryant  
Administrative Law Judge