DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Hai Nhu Bui,	
Petitioner,	DATE: February 26, 1990
- v. -	Docket No. C-103
The Inspector General.	DECISION CR 70

DECISION AND ORDER

This case is governed by section 1128 of the Social Security Act (Act). Petitioner filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the February 14, 1989 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and Medicaid programs for five years.[1]

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum period of five years is mandated by federal law.

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[1] Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section 1128(h) and, for the sake of brevity, I refer only to it.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or the social services program.[2]

BACKGROUND

The I.G.'s Notice alleged that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the California Medicaid program and advised Petitioner that the law required a five-year minimum exclusion from participation in Medicare and Medicaid programs for individuals convicted of a program-related offense. Petitioner requested a hearing to contest the Inspector General's determination and the case was assigned to me for a hearing and decision.

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[2] The I.G.'s Notice allows an additional five days for receipt.

I conducted a prehearing conference in this case on May 23, 1989, and issued a prehearing Order on June 1, 1989, which established a schedule for filing motions and responses. The I.G. filed a motion for summary disposition and an objection to my June 1, 1989 Order. The I.G. objected to the issue of program-relatedness being an issue in this case. No response was filed by the Petitioner. On September 6, 1989, I issued an Order overruling the I.G.'s objection, denied the I.G.'s motion for summary disposition, and reopened the record to allow the parties to submit additional evidence. See Jack W. Greene, DAB App. 1078 at pp. 16, 17 (1989).[3] I heard oral argument on November 3, 1989, and the parties were granted leave to submit additional evidence or briefs on the issues.

ISSUES

1. Whether Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

2. Whether Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

3. Whether Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128 (a)(1) and 1128(c)(3)(B) of the Act.

4. Whether summary disposition is appropriate in this case.

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[3] As of February 23, 1990, the Departmental Appeals Board (DAB) adopted a new form for citing its ALJ and Appellate decisions. For example, the Appellate decision is cited as I have cited it here and the ALJ decision would be cited as follows: Jack W. Greene, DAB Civ. Rem. C-56 (1989).

FINDINGS OF FACT AND CONCLUSIONS OF LAW [4]

Having considered the entire record, the arguments and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:[5]

1. Petitioner was an employee of the Saigon Pharmacy in Garden Grove, California at all times relevant to this case. I.G. Ex. 10/12.

2. Medi-Cal is the appellation given to the Medicaid program in California and is a "State health care program" as defined in section 1128(h) of the Act. I.G. Br. 2.

3. Saigon Pharmacy was a participating provider of services under the Medicare and Medi-Cal programs at all times relevant to this case. I.G. Br. 2.

4. An undercover investigation was conducted by the Bureau of Medi-Cal Fraud of the California Department of Justice (Department) from 1983 through 1985, with respect to complaints that certain doctors in the Southeast Asian community were involved in a Medicaid fraudulent scheme (scheme) which entailed:

(1) billing Medi-Cal for services not performed;

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[4] Any part of this Decision and Order preceding the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is incorporated herein.

[5] The citations to the record in this Decision and Order are designated as follows:

Petitioner's Brief	P. Br. (page)
Petitioner's Exhibits	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Supplemental Brief	I.G. Supp. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)

(2) hiring individuals (drivers) to bring Medi-Cal cards and stickers to the doctors' offices for fraudulent use; and

(3) giving individuals prescriptions to be traded at pharmacies for goods or drugs other than those prescribed.

I.G. Ex. 10.

5. It is a violation of the Medi-Cal regulations to exchange prescriptions and Medi-Cal cards for non-medical goods or for drugs other than those prescribed. I.G. Ex. 10/14, 15.

6. As a result of the Department's investigation, felony warrants were obtained for Petitioner and four other individuals on February 9, 1984, charging them with filing false Medi-Cal claims, grand theft, and conspiracy. Two of these individuals were employees and two were the owners of Saigon Pharmacy. I.G. Ex. 10/24, 25.

7. On May 13, 1987, Petitioner and the four individuals were indicted on these charges. I.G. Ex. 1.

8. Petitioner and the four individuals were charged in the indictment with 32 counts of filing false Medi-Cal claims, 1 count of grand theft, and 1 count of conspiracy to cheat and defraud the State of California. I.G. Ex. 1.

9. Petitioner pled nolo contendere to one count of grand theft on August 1, 1988, and was sentenced to 30 days in jail, placed on probation for three years, ordered to pay a fine of $100.00, and held jointly and severally liable for restitution in the amount of $493.94, payable to the Health Care Deposit Fund of the Bureau of Medi-Cal Fraud and Patient Abuse. All other charges against Petitioner were dismissed. I.G. Ex. 2/1, 2; 3/1, 2, 4, 5; I.G. Supp. Br. 6.

10. The other individuals indicted with Petitioner pled guilty and were held jointly and severally liable with Petitioner for the restitution. I.G. Ex. 5.

11. The Report of Investigation contains specific references which demonstrate Petitioner's participation in the fraudulent Medicaid scheme:

a. Petitioner allowed an undercover employee for the Department to exchange prescriptions for fabric,

cigarettes, and money at Saigon Pharmacy. I.G. Ex. 10/11, 18;

b. One of the individuals investigated and involved in the scheme was Dung Vu. Dung Vu was a driver who ferried patients from their homes to doctors, and transported Medi-Cal proof of eligibility stickers (stickers) to doctors. Petitioner allowed Dung Vu to exchange prescriptions for fabric and other non-medical goods on several occasions. I.G. Ex. 10/70; and

c. Another individual investigated was Ms. Tran Lien Thi Tran. Ms. Tran was a driver involved in the scheme who delivered prescriptions and Medi-Cal stickers to Saigon pharmacy and received fabric and non-medical goods in return. Petitioner cut the fabric and gave it to Ms. Tran in exchange for the prescriptions. I.G. Ex. 10/98, 99.

12. The numerous references of Petitioner's participation in the scheme contained in the Report of Investigation, his indictment and nolo plea, and the State court's imposition of joint and several liability for the restitution with other participants in the scheme, leads to the irrefutable conclusion that the criminal offense to which he pled was related to the Medicaid fraudulent scheme.

13. The offense of grand theft to which Petitioner pled guilty was "related to the delivery of an item or service" under Medicaid within the meaning of section 1128(a)(1) of the Act.

14. On February 14, 1989, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 8.

15. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983); 42 U.S.C. 3521 et seq.

16. Summary disposition is appropriate in this case. See 56 F.R.C.P.

17. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(a) and 1128(i) of the Act.

18. Petitioner was convicted of a criminal offense "related to the delivery of an item or service under Medicaid" within the meaning of section 1128(a) of the Act.

19. A minimum mandatory exclusion of five years is required by section 1128(c)(3)(B) of the Act.

20. Neither the doctrine of double jeopardy nor the case of United States v. Halper, 109 S. Ct. 1892 (1989), are applicable to this case.

DISCUSSION

I. Petitioner Was "Convicted" Of A Criminal Offense As A Matter Of Federal Law.

The Secretary's authority, delegated to the I.G., to exclude an individual from Medicare and Medicaid programs is based upon the conviction of "a criminal offense related to the delivery of an item or service" as defined in sections 1128(a)(1) and 1128(i) of the Act. Without such a "conviction," there is no authority to exclude an individual.

Section 1128(i) of the Act provides that an individual or entity has been "convicted" of a criminal offense when:

> (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; . . .

In this case, the record contains evidence that Petitioner pled nolo contendere to one count of "grand theft," defined in the indictment as follows:

> "Count 33" That on or about and between May 18, 1982 and February 15, 1984, Dung Van Tran, Diep Ba Le, Le Pham, Hai Nhu Bui and Anh Thi Ho, did knowingly, willfully and unlawfully take the money and personal property of another, to wit: the State of California, exceeding four hundred dollars ($400) in violation of Penal Code section 487.1, a felony. I.G. Ex. 1/14, 15.

Petitioner does not dispute that he pled nolo contendere or that the court accepted his plea. Furthermore, the Minute Order from the California court recites Petitioner's plea of nolo contendere to the charge of grand theft, his sentence, and the monies he was ordered

to pay in fines and restitution. It is obvious from a review of this document that the court "accepted" Petitioner's plea. Thus, Petitioner's plea of nolo contendere, having been "accepted" by a State court, constitutes a "conviction" within the meaning of the sections 1128(a)(1) and 1128(i)(3) of the Act.

II. Petitioner's Conviction "Related To The Delivery Of An Item Or Service" Within The Meaning Of Section 1128(a)(1) Of The Act.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the evidence demonstrates a relationship between the conviction of grand theft and "the delivery of an item or service" under the Medicare or Medicaid programs.

Petitioner does not dispute that his criminal offense was program-related. Instead, he asserts that there is insufficient evidence in the record to determine whether or not his conviction was program-related. P. Br. 2.

The I.G. has submitted an investigative report made by the Department, as well as other documents in support of his motion for summary disposition. The I.G. contends that these documents, as a whole, support his contention that Petitioner's conviction was program-related. I.G. Supp. Br. 1.

As I held in Clarence H. Olson, DAB Civ. Rem. C-85 at 7 (1989), the issue of whether a conviction is program-related should not be decided in a vacuum, or with a strict hypertechnical interpretation of the term "related to." All relevant documents pertaining to the trial court proceeding must be considered. Id. This includes any evidence which explains or assists me in understanding the criminal charge brought against Petitioner, and the criminal offense to which he pled nolo contendere, and how it relates to the Medicare or Medicaid programs.

I have relied on the investigative report, criminal information, and other court documents as the best evidence of the nature of the offense of which Petitioner was convicted. See, Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 10 (1990). These documents, read in their totality, demonstrate that the criminal offense to which Petitioner pled was "related to the delivery of an item or service" under Medicaid.

Petitioner was an employee of Saigon Pharmacy, a provider of services under the Medicare and Medicaid programs. Petitioner's criminal offense of grand theft resulted from an undercover investigation by the Department into an extensive scheme to defraud the Medi-Cal program. As indicated by testimony contained in the investigative report and the overt acts recited in the criminal information, Petitioner, along with the owners and other employees of Saigon Pharmacy, participated in a scheme which involved exchanging prescriptions and Medi-Cal cards for items not listed on prescriptions, and not billable to the Medi-Cal program, and then billing the State of California for the prescribed medications. I.G. Ex. 10/11, 18, 70, 98, 99.

As evidenced by the Department's investigative report, Petitioner allowed an undercover employee for the Department, as well as other individuals, to exchange prescriptions for money, fabric, cigarettes, and other non-medical goods in violation of program regulations. These prescriptions were then paid for by the Medi-Cal program. This is the "grand theft" from the State of California to which Petitioner pled nolo contendere. I.G. Ex. 10/11, 14, 15, 18, 70, 98, 99.

The criminal offense to which Petitioner pled was not an isolated charge, nor is it a coincidence that Petitioner was indicted along with other individuals who were participants in the scheme. Moreover, these other defendants pled guilty and were held jointly and severally liable with Petitioner for payment of restitution to the Health Care Deposit Fund of the Bureau of Medi-Cal Fraud and Patient Abuse. I.G. Ex. 5; I.G. Supp. Br. 6.

The cumulative effect of the evidence contained in the I.G.'s exhibits is irrefutable. I conclude that the I.G. has demonstrated the necessary relationship between Petitioner's "conviction" and the "delivery of an item or service" under a Medicaid program. Accordingly, I find that Petitioner was convicted of a criminal offense related to the delivery of an item or service within the meaning of section 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion Is Required In This Case.

Section 1128(c)(3)(B) of the Act requires the I.G., as the Secretary's delegate, to impose an exclusion against individuals convicted of offenses described in section 1128(a)(1) of the Act for a minimum period of five years.

As I have concluded, the I.G. correctly determined that Petitioner was convicted of a criminal offense as defined by sections 1128(a)(1) and 1128(i) of the Act.

Congressional intent on this matter is clear:

> A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . . Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

Accordingly, I conclude that the I.G.'s exclusion of Petitioner for a period of five years was for the minimum period as required by section 1128(c)(3)(B) of the Act.

IV. The Doctrine of Double Jeopardy Does Not Bar This Action.

Petitioner asserts that the recent case of United States v. Halper, 109 S. Ct. 1892 (1989), is applicable to this case and that the I.G.'s exclusion of Petitioner is barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution. The I.G. argues that: (1) neither the doctrine of double jeopardy nor Halper is applicable to this case; and (2) I do not have authority to decide constitutional issues.

Although I do not have the authority to declare section 1128 of the Act unconstitutional, I do have the authority to interpret the statute and regulations promulgated thereunder. See Jack W. Greene, supra. Furthermore, I disagree with Petitioner's assertion that the I.G. is barred from excluding Petitioner by the doctrine of double jeopardy or the Halper case.

In Halper, the Supreme Court held that under some circumstances the imposition of civil penalties may violate the double jeopardy clause of the Fifth Amendment to the United States Constitution. The Court held that the imposition of a penalty under the False Claims Act, 31 U.S.C. 3729-3231, could constitute double jeopardy in the narrow circumstances where there existed a prior federal criminal conviction for the false claims for which the civil penalty was imposed and where there was not even a rough relationship between the amount of the penalty and the cost to the government resulting from the false claims.

Petitioner's case involves a state conviction whereas Halper involved a federal conviction. Double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. Chapman v. U.S. Dept. of Health & Human Services, 821 F.2d 523 (10th Cir. 1987); Abbate v. United States, 359 U.S. 187 (1959). Moreover, the major purpose of the exclusion law is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See, H.R. Rep. No. 97-158, 97th Cong., 1st Sess. Vol. III, 329, 344, (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62 (1981), 1981 U.S. Code Cong. & Admin. News 727-28; Preamble to the Regulations (48 Fed. Reg. 38827 to 38836, August 26, 1983).

V. Summary Disposition Is Appropriate In This Case.

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 that Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Wheeler and Todd, supra, and Rule 56 F.R.C.P.

CONCLUSION

Based on the law and undisputed material 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.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge