DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
James F. Allen, M.D.F.P.,	DATE: March 1, 1990
Petitioner,	
- v. -	Docket No. C-152
The Inspector General.	DECISION CR 71

DECISION

On June 7, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. told Petitioner that his exclusion resulted from his conviction in a Utah State Court of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was advised that exclusions, from participation in Medicare and Medicaid, of individuals or entities convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act for a period of five years. Petitioner was advised that his exclusion was for the minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. The I.G. moved for summary disposition of the case, and Petitioner opposed the motion. I heard oral argument of the motion on February 14, 1990.

I have considered the parties' arguments, the undisputed material facts, and the law. I conclude that the

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[1] "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.

exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issues in this case are whether:

1. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act; and

2. Petitioner's conviction was "vacated" within the meaning of 42 C.F.R. 1001.136(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On November 7, 1988, Petitioner was charged under Utah law with the criminal offense of filing false Medicaid claims. I.G. Ex. 1.[2]

2. On November 18, 1988, Petitioner entered a plea bargain agreement. I.G. Ex. 2.

3. Petitioner agreed to plead guilty to filing false claims. I.G. Ex. 2, 3.

4. As restitution, penalty, and the cost of investigating his case, Petitioner agreed to pay the sum of $8,195.46 to the Utah Bureau of Medicaid Fraud. I.G. Ex. 2.

5. Petitioner acknowledged that, if he failed to comply with each and every term of the plea agreement and the orders of the Third Circuit Court, Salt Lake County, State of Utah, the court would accept Petitioner's guilty plea and impose a sentence in his case. I.G. Ex. 2.

6. The parties to the plea agreement recommended that the court: (1) receive Petitioner's plea, and (2) hold the plea and imposition of sentence in abeyance pending Petitioner's successful completion of probation. I.G. Ex. 2.

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[2] The exhibits attached to the I.G.'s motion for summary disposition will be cited as: I.G. Ex. (number).

7. On November 18, 1988, Petitioner pleaded guilty to a misdemeanor offense of Medicaid fraud. I.G. Ex. 3.

8. The court: (1) agreed to accept the terms of the plea agreement, and (2) advised Petitioner that, on the recommendation of the prosecution, it would hold the plea in abeyance and stay execution of sentence, pending Petitioner's satisfaction of the terms of the agreement. I.G. Ex. 3.

10. The court placed Petitioner on unsupervised probation. I.G. Ex. 3.

11. Based on his compliance with the terms of the plea agreement, on January 17, 1989, Petitioner moved to withdraw his plea. I.G. Ex. 5.

12. On January 24, 1989, the court allowed Petitioner to withdraw his plea and dismissed the charges against Petitioner. I.G. Ex. 5.

13. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Findings 1-12; Social Security Act, section 1128(i)(3), (4).

14. Petitioner's conviction was not "vacated" within the meaning of 42 C.F.R. 1001.136. See Findings 11-12.

15. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. Findings 1-12; Social Security Act, section 1128(a)(1).

16. 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 Social Security Act. 48 Fed. Reg. 21662, May 13, 1983.

17. On June 7, 1989, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act. I.G. Ex. 6.

18. There are no disputed issues of material fact in this case, and summary disposition is appropriate. Findings 1-12.

19. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required by section 1128(a)(1) of the Social Security Act. I.G. Ex. 6; Social Security Act, section 1128(c)(3)(B).

20. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Finding 15; Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. Petitioner was charged under Utah law with the crime of filing false Medicaid claims. Petitioner and the prosecutor entered into an agreement which provided that Petitioner would plead guilty to a single misdemeanor charge of filing false Medicaid claims, and pay restitution, costs, and a penalty to the Utah Bureau of Medicaid Fraud. The agreement further recited that the parties would recommend that the court receive Petitioner's plea, but hold it in abeyance pending Petitioner's satisfying the terms of the agreement.

Petitioner pleaded guilty to a misdemeanor offense of Medicaid fraud. The court placed Petitioner on a brief period of unsupervised probation. Subsequently, based on his compliance with the terms of his plea agreement, Petitioner moved to withdraw his plea. The court granted Petitioner's request, and his plea was withdrawn.[3]

The parties agree that, if I conclude that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act (the Act), that conviction related to the delivery of an item or

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[3] At oral argument, counsel for Petitioner made an offer of proof as to additional facts. He asserted that he could produce testimony that the parties to the plea agreement intended that the agreement and Petitioner's subsequent plea would not constitute a "conviction" within the meaning of section 1128(i) of the Social Security Act. I make no findings or conclusions concerning Petitioner's offer of proof. However, for purposes of resolving the motion for summary disposition, I accept as true Petitioner's representations of the parties' intent. For reasons stated infra this decision, the parties' intent is not relevant.

service under the Utah Medicaid program. However, the parties dispute: (1) whether Petitioner was "convicted" of a criminal offense within the meaning of the law, and (2) assuming that Petitioner was convicted of a criminal offense, whether the conviction was subsequently "vacated" within the meaning of 42 C.F.R. 1001.136.

The issues contested by the parties are legal issues involving questions of interpretation and application of law to the undisputed material facts. Therefore, summary disposition is an appropriate mechanism for deciding this case. John W. Foderick, M.D., DAB Civ. Rem. C-113 (1989), aff'd DAB App. 1125 at 10 (1990).

1. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act.

Petitioner asserts that he was not "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Therefore, according to Petitioner, there exists no authority for the I.G. to impose and direct an exclusion against him.

Section 1128(a)(1) of the Act requires the Secretary (or his delegate, the I.G.) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid of:

> any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid]. (Emphasis added).

The term "convicted" is defined at section 1128(i) of the Social Security Act. The law provides that an individual or entity is considered to have been "convicted" of a criminal offense:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

The I.G. does not contend that Petitioner's guilty plea is a conviction within the meaning of section 1128(i)(1) or (2). However, the I.G. and Petitioner dispute whether Petitioner was convicted within the meaning of section 1128(i)(3) or (4). More specifically, they dispute the issues of whether: (1) the Court "accepted" Petitioner's guilty plea within the meaning of section 1128(i)(3), and (2) Petitioner's plea constitutes an "other arrangement or program where judgment of conviction has been withheld" within the meaning of section 1128(i)(4).

a. Section 1128(i)(3).

Petitioner acknowledges that the determination of what is a conviction is a matter of federal law. But, he asserts that any such determination must be based upon an accurate interpretation of the impact of a given disposition under state procedures. According to Petitioner, the Court did not "accept" Petitioner's plea of guilty within the meaning of Utah law and relevant state procedures. Therefore, the plea was not accepted within the meaning of section 1128(i)(3).

It is apparent that, notwithstanding his acknowledgment, Petitioner contends that the exclusion law must be defined in terms of state usage of terminology contained in the federal statute. Taken to its logical end, Petitioner's argument means that every term in section 1128(i) is susceptible to as many definitions of that term as may exist under the laws of the various states.

I disagree with Petitioner's analysis. Section 1128 is a federal statute. It defines what constitutes a conviction independently from the definitions or interpretations applied by the states. It is not relevant that an action might not constitute a conviction within the meaning of state law, so long as the action meets the federal definition of conviction. See Carlos E. Zamora, M.D., DAB Civ. Rem. C-74 (1989), aff'd DAB App. 1104 (1989).

Petitioner cites the decision in Doe v. Bowen, Case No. 87-1068-WD, 5-6, n. 5 (D. Mass. July 30, 1987), to support his analysis. The Doe case consisted of a federal court challenge to an exclusion imposed by the I.G. pursuant to section 1128. Plaintiff in Doe argued that he had not been convicted of a criminal offense under Massachusetts law, and therefore had not been convicted within the meaning of section 1128(i). The court concluded that the case was not ripe for judicial review because plaintiff had not exhausted his administrative remedies. However, the court criticized the I.G.'s determination to apply the definition of "conviction" without regard to "distinctions among the protean variety of dispositions of criminal matters in the courts of the Commonwealth." Id. at 5-6.

This critical statement was made in a footnote which was dictum to the court's decision. It is, therefore, not a binding precedent. Furthermore, the facts of the Doe case are distinguishable from the present case, in that the plaintiff in Doe did not make a guilty plea to any offense in state court. I disagree with the Doe decision to the extent that it is construed as stating that the terminology contained in section 1128(i) must be defined and applied in terms of state practice.

The term "accept" is not specifically defined in section 1128(i)(3) or elsewhere in section 1128. In the absence of a specific statutory definition, the term should be given its common and ordinary meaning. "Accept" is defined in Webster's Third New International Dictionary 1969 Edition as:

> 2a: to receive with consent (something given or offered) . . . .

A guilty plea is "accepted" within the meaning of section 1128(i)(3) whenever a party admits his guilt to a criminal offense and a court disposes of the case based on that party's plea.

This interpretation is not only consistent with the common and ordinary meaning of the term "accept" but with Congressional intent, as expressed through legislative history. Congress intended that its definition of conviction sweep in the situation where a party has been adjudicated guilty of an offense, and the situation where a party admits guilt in order to dispose of a complaint. In Congress' view, a party's admission of guilt in order

to dispose of a criminal complaint is sufficient to establish a conviction, regardless of how that admission is treated under the various states' criminal statutes and procedures. The Congressional committee which drafted the 1986 version of section 1128 stated:

> The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.
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> These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S. Code Cong. & Admin. News 3607, 3665; see Zamora, supra, at 5-6.

The Utah court accepted Petitioner's guilty plea within the meaning of section 1128(i)(3). Petitioner offered to

admit his guilt to a criminal offense in return for: (1) a term of probation; (2) payment by Petitioner of restitution, costs, and a penalty; and (3) the opportunity to apply to the court to have the criminal complaint dismissed upon satisfactory completion of the aforesaid conditions.

I do not accept Petitioner's contention that the Utah court's determination to hold Petitioner's plea "in abeyance" meant that the court did not accept Petitioner's plea. Petitioner admitted his guilt in order to dispose of the complaint, and the court received Petitioner's plea. That transaction amounts to acceptance of a plea within the meaning of federal law, irrespective of the court's characterization of its actions.

Petitioner argues that the language of the plea agreement establishes that the court did not accept a guilty plea. Specifically, he refers to page two of the agreement at paragraph (3), which states:

> Defendant acknowledges that if he fails to live up to each and every term of this agreement and the orders of the Court, the Court will accept the Defendant's plea of guilty and proceed to impose sentence.

I.G. Ex. 2.

However, a different representation from that contained in the written plea agreement was made to the court by the prosecuting attorney at the time that Petitioner pleaded guilty. In presenting the agreement, the prosecuting attorney stated:

> And what we're proposing asking the Court to consider is to take . . . [Petitioner's] plea <u>and accept that</u> but rather than proceed to impose sentence, place sentencing and taking the sentencing under abeyance and on the condition that . . . [Petitioner] complete the terms of probation that the Court may set. Then at that point the Court -- we would ask the Court to entertain a motion to dismiss the action. (Emphasis added).

I.G. Ex. 3 at 3. This contradictory language underscores that the issue here is what Petitioner admitted in court, not what arrangement Petitioner negotiated with the

withdraw the plea, does not alter the fact that the party has been convicted of an offense.

Petitioner references the Supreme Court's decision in Kercheval v. United States, 274 U.S. 220 (1926), in support of his argument that his withdrawn guilty plea is a nullity and should not be the basis of an exclusion. However, Kercheval does not support Petitioner's argument. The Supreme Court in Kercheval held that a withdrawn guilty plea may not be used as evidence against an accused where he has substituted that plea with a plea of not guilty in a subsequent criminal proceeding. Unlike Petitioner's case, Kercheval: (1) involved a criminal proceeding; (2) the court permitted the defendant to withdraw his guilty plea and proceed to trial with a substituted plea of not guilty; and (3) the prosecutor proposed to use the withdrawn guilty plea as evidence of guilt at the trial. Petitioner withdrew his guilty plea in order to have it removed from his record. He did not withdraw it for the purpose of substituting a plea of not guilty so that he could establish his innocence at a trial.

Petitioner's withdrawal of his guilty plea is distinguishable from the situation where a party's conviction is reversed and vacated on appeal, or where a party is permitted to withdraw a plea so that he may have a trial on the merits. In the latter situation, the withdrawal of the plea effectively acts as a judicial determination that no adjudication of guilt is of record, and that the party has not admitted his guilt. In Petitioner's case, the withdrawal of the plea only signifies that Petitioner has complied with court-imposed punishment.[4]

b. Section 1128(i)(4).

Petitioner contends that his plea arrangement does not constitute a "deferred adjudication or other arrangement or program where judgment of conviction has been

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[4] Petitioner contends that, under Utah law, it is technically possible for the prosecutor to bring him to trial now that his plea has been withdrawn. However, the circumstances under which Petitioner's plea was withdrawn do not suggest that to be a realistic possibility, any more than they suggest that the prosecutor or the Court now find that Petitioner was innocent of the criminal charges filed against him.

withheld" within the meaning of section 1128(i)(4) of the Act. Central to Petitioner's argument is his contention that informal or "bargained" plea arrangements, such as the one entered into by Petitioner, do not fall within the purview of section 1128(i)(4). According to Petitioner, this section was intended by Congress to encompass only formal first offender, deferred adjudication, or other arrangements or programs authorized by state statute.

I disagree with this argument. The term "other arrangement or program" is broad enough to encompass any disposition of a criminal complaint, including a "bargained" plea arrangement, which results in a court withholding a judgment of conviction. There is nothing in section 1128(i)(4) which suggests that Congress meant the law to encompass only arrangements or programs authorized by state statute. The Court's agreement to hold Petitioner's plea in abeyance pending Petitioner's satisfying the terms of the plea agreement is an "other arrangement or program where judgment of conviction has been withheld" within the plain meaning of section 1128(i)(4).

This interpretation of the law is supported by examination of the legislative evolutionary process which resulted in enactment of the current version of section 1128(i)(4). Prior to December 1987, section (i)(4) provided that a party was convicted of a criminal offense when that party entered "into participation in a first offender or other program where judgment of conviction has been withheld." Congress revised this section in December 1987 by substituting the phrase "deferred adjudication, or other arrangement or program" for the phrase "or other program." P.L. 100-203, 4118(e)(5)(C) [as added by P.L. 100-360, 411(k)(10)(D)], December 22, 1987. The 1987 revision communicates Congressional intent to ensure that its definition of "conviction" include both formal and informal arrangements where judgment of conviction has been withheld.

It is also apparent from the legislative history cited above that Congress did not intend section 1128(i)(4) to distinguish between those arrangements and programs which are codified in state laws, and those which are negotiated as a matter of custom or common law between a court and criminal defendants. The distinction advocated by Petitioner is inconsistent with Congress' objectives.

Petitioner asserts that his interpretation of section 1128(i)(4) is consistent with decisions by the Departmental Appeals Board or its administrative law judges which have applied that section to the facts of specific cases. This contention is not supported by the decisions which Petitioner cites. Indeed, two of these decisions, Hanks, supra, and Akagi, supra, involve guilty pleas in Utah courts under arrangements which are essentially identical to that entered into by Petitioner.[5]

2. Petitioner's conviction was not "vacated" within the meaning of 42 C.F.R. 1001.136(a).

Petitioner asserts that, even assuming he was convicted of a criminal offense within the meaning of section 1128(i), his conviction was subsequently vacated by the Court. He contends that his conviction was, therefore, "vacated" within the meaning of 42 C.F.R. 1001.136(a), and the I.G. may therefore not premise an exclusion on it.

This regulation provides that:

> The . . . [I.G.] will reinstate a suspended party whose conviction has been reversed or vacated.

This regulation is part of a regulatory framework adopted by the Secretary to implement the exclusion law. The exclusion law has subsequently been amended and revised. However, the regulations continue to be effective to the extent that they are consistent with the statute. Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 5 (1990).

Petitioner was permitted to withdraw his plea only after he had completed a term of probation and paid restitution, costs, and a penalty. As I have held supra, Congress did not intend to except from its definition of

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[5] One apparent difference between the facts of this case and the facts of Hanks and Akagi is that in those two cases the petitioners did not ask to withdraw their pleas after they had satisfied the conditions imposed by the court. However, for the reasons I have stated supra, that is not a meaningful distinction.

conviction those situations where parties plead guilty to offenses, and subsequently have their pleas withdrawn upon satisfaction of court-imposed conditions. Congress intended the "vacated" exception to apply in those circumstances where a conviction is reversed and vacated on appeal, and perhaps where a party withdraws his plea in order to be tried on the merits.

The Secretary did not intend to exempt parties from the reach of the exclusion law in a manner inconsistent with Congress' stated intent. By withdrawing his guilty plea, Petitioner did not vacate his conviction within the meaning of 42 C.F.R. 1001.136(a).

3. The exclusion imposed and directed against Petitioner was mandated by law.

As is noted above, the parties do not disagree that, assuming Petitioner was convicted of a criminal offense within the meaning of section 1128(i), he was convicted of a criminal offense related to the delivery of an item or service under a Medicaid program. The exhibits establish that Petitioner was convicted of filing false Medicaid claims. This offense relates to the delivery of an item or service under Medicaid. Jack W. Greene, DAB App. 1078 (1989).

Petitioner's conviction falls within the provisions of section 1128(a)(1) of the Act. This section mandates exclusion of parties convicted of criminal offenses related to the delivery of an item or service under the Medicare or Medicaid programs. Section 1128(c)(3)(B) of the Act provides that, in the case of parties against whom mandatory exclusions are imposed, the minimum length of such exclusions shall be for five years. The I.G. imposed and directed a five-year exclusion against Petitioner, which was for the minimum mandatory period. Therefore, the exclusion imposed against Petitioner was mandated by law.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare, and to direct that Petitioner be excluded from participation in Medicaid, for five years, was mandated by law. Therefore, I am entering a decision in this case

sustaining the five year exclusion imposed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge