Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Betsy Chua, M.D. and Betsy Chua, M.D.,S.C.,	DATE: April 23, 1990
Petitioners,	Docket No. C-139
- v. -	DECISION CR 76
The Inspector General.	

DECISION AND ORDER

In this case, governed by section 1128 of the Social Security Act (Act), Petitioners timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the May 15, 1989 notice of determination (Notice) issued by the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS). The Notice informed Petitioners that they were excluded from participating in the Medicare and Medicaid programs for five years.[1]

Based on the entire record before me, I conclude that there are no material facts at issue, that Petitioners are subject to the federal mandatory minimum exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that it is required that Petitioners be excluded for a period of five years.

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioners are excluded. I use the term "Medicaid" to represent all three of these programs which are defined in section 1128(h) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the 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. Prior to August 18, 1987, the law did not prescribe a minimum period of exclusion. By amendments enacted on August 18, 1987, section 1128(c)(3)(B) requires 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 issue an exclusion notice to an individual or entity whenever the I.G. has "conclusive information" that such individual or entity has been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs; the exclusion begins 20 days from the date on the notice.[2]

BACKGROUND [3]

I held a telephone prehearing conference on August 29, 1989, at which time the parties stated that there was no

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[2] The I.G.'s notice letter adds five days to the 15 days prescribed in section 1001.123, to allow for receipt by mail.

[3] The citations in this Decision and Order are as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br.(page)
I.G.'s Exhibits	I.G. Ex.(number)/(page)
Findings of Fact and Conclusions of Law	FFCL (number)

need for an evidentiary hearing because the facts were not disputed. The parties agreed to submit this case on the basis of documentary evidence and briefs. I issued a Prehearing Order and schedule for filing briefs and motions which set forth the issues raised by the parties. Both parties submitted briefs, and I heard oral argument by telephone on March 14, 1989.

ADMISSIONS

Petitioners admit that: (1) they were "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and (2) the offense was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

ISSUES

The remaining issues are:

1. Whether Petitioners' conviction of a program-related criminal offense triggers the mandatory minimum five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

2. Whether the 1987 amendments to section 1128 of the Act mandating a minimum five year exclusion for program-related convictions apply to this case.

3. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [4]

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

1. Petitioner Betsy Chua, M.D., was a licensed medical doctor in the State of Illinois and was the president of Petitioner Betsy Chua, M.D., S.C. I.G. Ex. 2/5.

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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.

2. Petitioner Betsy Chua, M.D., S.C., is an Illinois Corporation. I.G. Ex. 2/5.

3. In 1986 the Medicaid Fraud Unit of the Illinois State Police conducted an investigation which revealed that Petitioners were involved in a kickback-conspiracy scheme to defraud the Medicaid program. I.G. Ex. 2/4-5.

4. Petitioners were indicted by the Grand Jury serving in the Circuit Court of Cook County, Illinois, for committing the offense of "conspiracy" during the period from January 1985 to August 1986 by conspiring with other co-conspirators to commit the offense of "kickbacks." Petitioners were also indicted for committing the offense of "kickbacks" during the period from August 1985 to August 1986 by unlawfully receiving remuneration in an amount of more than $1,000, but less than $5,000, in exchange for referring laboratory work ordered by them for Medicaid recipients to a Medicaid provider laboratory. I.G. Ex. 1.

5. On June 30, 1988 Petitioners entered a plea of guilty to the offense of "kickbacks" and the Circuit Court of Cook County in the State of Illinois entered a judgment convicting Petitioners of that offense. I.G. Ex. 6.

6. The Cook County Circuit Court sentenced Petitioner Betsy Chua to a conditional discharge for a period of one year. The Cook County Circuit Court sentenced Petitioner Betsy Chua, M.D. to probation for a period of one year and ordered Betsy Chua, M.D., S.C., to pay restitution in the amount of $3,000. I.G. Ex. 5.

7. Petitioners were "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

8. Petitioners were 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.

9. By letter dated May 15, 1989, the I.G. notified Petitioners that, effective twenty days from the date of the Notice, they would be excluded from participation as providers in the Medicare and Medicaid program for a period of five years.

10. Petitioners admit that they were "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

11. Petitioners admit that they were 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.

12. The I.G. properly excluded Petitioners from participation in the Medicare and Medicaid programs for a period of five years as required by the minimum mandatory exclusion provisions of section 1128(c)(3)(B) of the Act.

13. The I.G. is not barred by the ex post facto and due process clauses of the United States Constitution from applying the 1987 Amendments to section 1128 of the Act mandating a minimum five year exclusion to this case.

14. I do not have the discretion or authority to reduce the five year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

15. Since there are no material facts in dispute, there is no need for an evidentiary hearing in this case.

16. Since the material facts are undisputed in this case, the classification of Petitioners' conviction as a criminal offense subject to the authority of 1128(a)(1) is a legal issue.

17. The I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

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

Petitioners admit that they were "convicted," of a criminal offense which was "related to the delivery of an item or service" under the Medicaid program.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act clearly require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) 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.

Since Petitioners were "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioners for a minimum of five years and an ALJ has no discretion to reduce the mandatory minimum five year period of exclusion. See Jack W. Greene v. Louis Sullivan, No. Civ.-3-89-758 (E.D. Tenn., Feb. 22, 1990).

II. The 1987 Amendments to Section 1128 of the Act Mandating A Minimum Five-Year Exclusion For Program-Related Convictions Apply To This Case.

The record demonstrates that the conduct for which Petitioners were "convicted" occurred between 1985 and 1986, and that the final disposition of the proceedings resulting in the criminal conviction did not occur until June 1988. On August 18, 1987, during the pendency of Petitioners' criminal proceedings, Section 1128(a) of the Act was amended by the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, 101 Stat. 680. While the pre-August 1987 version of section 1128 provided for an exclusion for a conviction of a program-related criminal offense, there was no mandatory minimum exclusion. Congress provided for the first time on August 18, 1987 that the exclusion must be for a mandatory minimum period of five years for program-related criminal offenses.

Petitioners argue that the ex post facto and due process clauses of the United States Constitution bar application of the five year mandatory minimum exclusion to this case.[5]

Petitioners contend first that application of the mandatory minimum period of exclusion to this case would violate the ex post facto clause of the United States

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[5] During oral argument, Petitioners abandoned their contention that the I.G. has engaged in selective prosecution of section 1128 exclusion cases.

Constitution, which prohibits Congress from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[6] The foundation of Petitioners' argument is that the conduct giving rise to their conviction took place prior to the effective date of the August 18, 1987 amendments. Petitioners contend that application of the 1987 amendments to this case "imposes additional punishment," because after the enactment of the 1987 amendments, the I.G. no longer had the authority to impose an exclusion of less than five years, thereby depriving Petitioners of any possibility of being excluded for a shorter time than the mandatory minimum five year period.

Petitioners argue that since their conduct which formed the basis of their conviction occurred prior to the effective date of the August 18, 1987 amendments, application of the 1987 amendments to this case would have an improper retroactive effect because they lacked fair notice of the full extent of the legal consequences of their conduct at the time they engaged in it. Since the purpose of the ex post facto clause is to "assure that legislative acts give fair warning of their effect," Petitioners conclude that the ex post facto clause forbids application of the 1987 amendments to this case. P. Br. 4.

Petitioners also contend that application of the 1987 amendments to this case would violate their rights to due process guaranteed by the Fifth Amendment of the United States Constitution. Petitioners argue that the due process clause prohibits a statute which interferes with antecedent rights from being applied retroactively except where the legislative will is expressed so plainly that there is no doubt that the legislature intended the statute to be applied retroactively. According to Petitioners, there is no explicit statement of Congressional intent to retroactively apply the 1987 amendments to misconduct which occurred prior to the effective date of the statute. Petitioners contend that in the absence of such explicit Congressional intent, the due process clause bars the application of the 1987 amendments to this case.

During oral argument, Petitioners stated that if their ex post facto and due process claims prevail, they would like to revive their request for a hearing to determine

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[6] Article 1, Section 10 of the United States Constitution.

the appropriate length of the exclusion based on the facts of this case. It is the belief of Petitioners that there are sufficient "mitigating factors" in this case to justify the imposition of an exclusion that is shorter than the mandatory minimum five year period and they desire the opportunity to have these factors considered.

The I.G. argues first that I do not have authority to decide constitutional issues. The I.G. also argues that even if I do have authority to decide constitutional issues, there is no violation of the ex post facto clause of the Constitution because the exclusion sanction is not a penal law imposing a "punishment" contemplated by the Constitution.

The I.G. also argues that even if I determine that the five year mandatory minimum exclusion is penal, Petitioners' ex post facto claim would still be without merit. The I.G. contends that application of the 1987 amendments to this case would not have retroactive effect because the legislative history and the text of the Act make it clear that Congress intended the mandatory minimum exclusion provision to apply prospectively to all convictions occurring on or after the date of enactment of the amendments on August 18, 1987, regardless of whether the misconduct giving rise to the conviction occurred before or after August 18, 1987. Since Petitioners in this case were convicted of a program-related crime after the effective date of the 1987 amendments, the I.G. contends that there is no basis for asserting that the amendments have been retroactively applied to them.

The I.G. also uses this reasoning to attack Petitioners' contention that the due process clause of the Constitution bars application of the 1987 amendments to this case. The I.G. argues that Congressional intent regarding the application of the mandatory exclusion period is clear. According to the I.G., the text of the amendments and their legislative history clearly indicate that the only factual predicate to the imposition of the five year mandatory minimum exclusion is the conviction of a program-related crime after August 18, 1987. Since Petitioners' conviction occurred after the enactment of the amendments, the I.G. contends that it is clear that Congress would have intended the mandatory exclusion to apply to this case.

The I.G. additionally argues that even if I determine that Congressional intent regarding the applicability of the mandatory exclusion to this case is ambiguous, Petitioners' objections on due process grounds would

still fail. The I.G. points out that even under the law in effect prior to August 18, 1987, Petitioners' conduct would have justified the imposition of an exclusion. The I.G. argues that given the strong national interest in protecting the integrity of the Medicaid and Medicare programs and the fact that the 1987 amendments do not prohibit conduct which had previously been lawful, application of the 1987 amendments to this case would not be "harsh and oppressive" or result in "manifest injustice." I.G. Rep. Br. 6-7.

I have carefully considered the contentions of the parties and the relevant law, and I will address the jurisdictional question regarding the scope of my review raised by the I.G. first. Guidance concerning the scope of review by an ALJ in hearing federal exclusion cases is found in section 1001.128(a) of the Regulations. That section provides that an ALJ has the authority to hear and decide issues of whether: (1) a petitioner was in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) the length of the suspension (exclusion) is reasonable. There is no language in section 1001.128 of the Regulations or in other federal regulations, which states that an ALJ has the authority to consider collateral challenges to the validity of the underlying federal statutory provisions that the issues were designed to address. However, the jurisdiction conferred upon an ALJ by section 1001.128 of the Regulations does permit inquiry into the propriety of the imposition of an exclusion in particular cases. In order to consider the three issues set forth in section 1001.128 of the Regulations, an ALJ must therefore interpret, construe, and apply the underlying statutory provisions to individual cases. As stated by the Departmental Appeals Board in Jack W. Greene, DAB App. 1078 at 17 (1989):

> The ALJ must consider the meaning of the pertinent statutory provision as well as related provisions, relevant legislative history, the effective date of the statute, case law interpretations, and implementing regulations and policy issuances. It would literally be impossible to apply the issue identified by [42 C.F.R. 1001.128] in a legally correct manner without considering these factors, as appropriate.

Thus, although I do not have the authority to declare the 1987 amendments unconstitutional, I do have the authority

to interpret and apply the amendments. See Hai Nhu Bui, DAB Civ. Rem. C-103 (1990), citing Jack W. Greene, supra.

In this case, Petitioners raise the issue of whether the 1987 amendments to section 1128 of the Act mandating a minimum five year exclusion apply to them under the particular facts of this case. I am empowered to decide how Congress intended the 1987 amendments to apply. In addition, where there is room to decide how to apply the statute, I have a duty to apply it in a manner that is constitutional and valid. See generally, Dickerson, The Interpretation and Application of Statutes, Ch. 3 (Little, Brown and Co. 1975).[7]

I disagree with Petitioners' assertion that the constitutional prohibition against ex post facto laws bars the I.G. from imposing the mandatory minimum exclusion in this case.

Petitioners' objections to application of the mandatory exclusion provision to this case on ex post facto grounds are necessarily premised on the assertion that Congress intended the imposition of the five year mandatory minimum exclusion to be a punishment. The mandatory exclusion provision of the 1987 amendments is not a penal law, imposing a punishment. As the title of the 1987 amendments, the Medicare and Medicaid Patient and Program Protection Act of 1987, suggests, the purpose of the exclusion, and the amendments as a whole, is not to punish anyone. Instead, the major purpose of the exclusion sanction is to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See Orlando Ariz and Ariz Pharmacy Inc., DAB Civ. Rem. C-115 (1990). See also H. R. Rep. No. 158, 97th Cong., 1st Sess. Vol. III, 329, 344 (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62, reprinted in 1981 U.S. Code Cong. & Admin. News 727-28; Preamble to the Regulations at 48 Fed. Reg. 38827 to 38836 (August 26, 1983). Thus, the exclusion provision of the 1987 amendments is a civil law that imposes a protective or remedial sanction, and it is not a punishment within the meaning of that term in the United States Constitution. Therefore, this civil remedy does not trigger the protections afforded by the Constitution which are applicable to criminal laws.

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[7] See also Scott v. Bowen, 845 F.2d 856 (9th Cir. 1988) (an ALJ also has authority to decide constitutional questions involving evidence, procedure, and due process).

I also disagree with Petitioners' assertion that the due process clause bars the I.G. from imposing the five year mandatory minimum exclusion in this case.

In making their due process claim, Petitioners rely heavily on the decision of the Court of Appeals in Griffon v. United States Department of Health and Human Services, 802 F.2d 146 (5th Cir. 1986). On March 15, 1982, Griffon was convicted of submitting false claims to the Louisiana Medicaid program in 1979. The I.G. subsequently notified Griffon that he intended to impose a $44,000 fine under the Civil Monetary Penalties Law (CMPL) which had been passed by Congress on August 13, 1981. Griffon challenged the retroactive application of the CMPL to actions committed by him before the effective date of the statute. On appeal from an adverse ALJ decision, the Fifth Circuit decided that the CMPL cannot be applied retroactively, holding that due process considerations embodied in the first rule of statutory construction mandate that, in the absence of clear Congressional intent, every statute which changes established rights must be given prospective application. Petitioners argue that the circumstances in this case are similar to the circumstances present in Griffon. Here, the conduct in question occurred prior to the effective date of the relevant amendments to the already existing federal exclusion statute and the criminal convictions resulting from the conduct occurred after the date of the amendments. Petitioners argue that, in this case, as in Griffon, there is no clear Congressional intent to apply the amendments to the statute to actions which occurred prior to the date of enactment.

I disagree with Petitioners' assertion that Griffon is controlling or that the facts on Griffon are close to the facts of this case. In Griffon, there was "deafening congressional silence regarding retrospective application" of the CMPL. Id. at 238. In this case, both the language of the statute and its legislative history clearly show that Congress intended the 1987 amendments to apply to this case.

The 1987 amendments were enacted by Public Law 100-93, and section 15(b) of Public Law 100-93 specifically states:

> Mandatory minimum exclusions apply prospectively. Section 1128(c)(3)(B) of the Social Security Act (subsec (c)(3)(B) of this section) (as amended by this Act [Pub. L. 100-93, section 2]) which requires an exclusion of not less than 5 years in the

> case of certain exclusions, shall not apply to exclusions based on convictions occurring before the date of the enactment of this Act [Aug. 18, 1987].

Regarding this provision, the legislative history states: "The provision establishing mandatory five year minimum exclusion periods for conviction of certain crimes would apply to convictions occurring on or after the date of enactment." S. Rep. No. 109, 100th Cong., 1st Sess. 27, reprinted in 1987 U.S. Code Cong & Admin. News 682, 708.

It is clear from both the language of the statute itself and its legislative history that Congress intended the mandatory minimum exclusion provisions to apply prospectively from the date of the statute's enactment to all convictions occurring on or after August 18, 1987. Obviously, if a conviction occurred on August 18, 1987 or shortly thereafter, the misconduct giving rise to the conviction would necessarily have occurred prior to August 18, 1987. Accordingly, in enacting this provision, Congress must have been aware that there would be many convictions that would be entered after the effective date of the amendments and that these convictions would be based on acts that were committed prior to that date. Thus, by logical inference, Congress intended the 1987 amendments to apply even in those cases where the misconduct occurred prior to August 18, 1987, as long as the conviction resulting from the misconduct occurred on or after August 18, 1987. This logical inference is inescapable, and the only way it could be overcome would be by specific language in the text of the statute itself or in its legislative history indicating Congressional intent not to apply the mandatory exclusion to convictions based on misconduct occurring prior to August 18, 1987.

In this case, Petitioners pleaded guilty to, and were convicted of, a program-related criminal offense on June 30, 1988, nearly a year after the enactment of the amendments to the Act. Accordingly, I conclude that it is evident, both from the language of the 1987 amendments and from the legislative history, that Congress intended to make the mandatory minimum exclusion applicable to all convictions occurring on or after August 18, 1987, and that Petitioners' due process arguments are misplaced. Since Petitioners in this case were convicted of a program-related offense after August 18, 1987, the I.G. had no choice but to apply the 1987 amendments and exclude Petitioners from participation in the Medicare and Medicaid programs for at least five years.

III. There Is No Need For An Evidentiary Hearing In This Case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Surabhan Ratanasen, M.D., DAB App. 1138 at 8 (1990). Petitioners have stipulated to the material facts of this case. They admit that they were "convicted" of a criminal offense within the meaning of section 1128(i) of the Act and that it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

I have concluded that, based on the undisputed material facts in the record of this case, the I.G. properly excluded Petitioners from the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act and that the length of their exclusion is controlled by section 1128(c)(3)(B), which mandates a minimum period of exclusion for five years.

At oral argument on the motion for summary disposition, Petitioners requested a hearing so that I would have the opportunity to consider mitigating circumstances which, in their view, would compel a reduction in the five year exclusion imposed upon them. Since I do not have the authority to reduce the five year minimum exclusion mandated by section 1128(c)(3)(B) of the Act, the facts which Petitioners seek to establish in an evidentiary hearing would not materially affect the outcome of this case. See, Orlando Ariz and Ariz Pharmacy, Inc., DAB Civ. Rem. C-115 (1990). There are no genuine issues of material fact which would require the submission of additional evidence, and, therefore, 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, Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990) 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 pursuant to section 1128(a)(1) of the Act, and

that the minimum period of exclusion for five years is mandated by federal law.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge