Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Leon Brown, M.D.,	DATE: June 13, 1990
Petitioner,	
- v. -	Docket No. C-180
The Inspector General.	DECISION CR 83

DECISION

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 October 5, 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 required by federal law.

---

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

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 Inspector General (I.G.) notified Petitioner on October 5, 1989 that he was being excluded from participation in the Medicare program, and any State health care programs for a period of five years. The I.G.'s Notice alleged that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid and advised Petitioner that the law required a five-year minimum exclusion from participation in the Medicare and Medicaid programs for individuals convicted of a program-related offense. Petitioner requested a hearing to contest the I.G.'s

---

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

determination and the case was assigned to me for a hearing and decision.

I conducted a prehearing conference in this case on March 8, 1990, and issued a prehearing Order on March 16, 1990, which established a schedule for filing motions and responses. The I.G. filed a motion for summary disposition, brief and exhibits in support thereof. Petitioner filed a response and brief in opposition to the I.G.'s motion.

ISSUES

The issues are:

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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [3]

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:[4]

1. Petitioner is a medical doctor licensed in the State of Maryland. I.G. Ex. C and D.

2. On October 25, 1983, Petitioner signed a Provider Ownership and Control Disclosure Form and a Group Application to participate in the State of Maryland's Medicaid program as the "Safford Health Clinic" (Clinic). I.G. Ex. C and D.

3. The application and disclosure signed by Petitioner listed him as the physician who would be providing medical services at the Clinic and listed Larry Solomon as a physician assistant. I.G. Ex. C. and D.

4. On October 27, 1988, a criminal information charging Petitioner with Medicaid fraud was filed in the Circuit Court for Baltimore City, Maryland. I.G. Ex. F.

5. The criminal information alleged that Petitioner had engaged in Medicaid fraud by knowingly allowing a physician's assistant to provide primary medical care of recipient patients at the Clinic without direct supervision of a licensed physician. I.G. Ex. F.

---

[3] 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.

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

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply	I.G. Rep. (page)
I.G.'s Exhibits	I.G. Ex. (letter)/(page)

6. Subsequently, Petitioner entered into a plea agreement and his case was submitted to the state court upon an agreed statement of facts. I.G. Ex. E and G.

7. The statement recited that Petitioner was the medical director of the Clinic and was the supervising physician for Solomon. I.G. Ex. E.

8. The statement also recited that the State's witnesses would testify that:

> a. Solomon conducted physical and gynecological examinations, diagnosed illnesses, provided physical therapy, and prescribed medication for treatment on prescription pads signed in advance by Petitioner; and
>
> b. Petitioner did not routinely provide medical treatment to the Clinic's patients, review patient's files, and was unavailable for immediate direction as to diagnosis and treatment of patients.

I.G. Ex. E.

9. On October 5, 1989, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. A.

10. 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.

11. Summary disposition is appropriate in this case. See 56 F.R.C.P.; Wheeler and Todd, DAB App. 1123 (1990).

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

13. 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.

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

DISCUSSION

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

The I.G.'s authority to exclude an individual from the 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. Section 1128(i) of the Act contains four definitions of "conviction", only one of which must be met in order for me to find that Petitioner was "convicted" within the meaning of section 1128(a)(1) of the Act.

Section 1128(i) provides that an individual is considered to have been convicted of a criminal offense, for purposes of section 1128(a):

> (2) when there has been a finding of guilt against the individual ... by a Federal, State, or local court; or
>
> (4) when the individual ... has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

The record contains evidence that Petitioner was charged with Medicaid fraud in a criminal information filed on October 27, 1988, in the Circuit Court for Baltimore City, Maryland. Petitioner entered into a plea agreement and an agreed statement of facts on the charge. In the plea agreement, Petitioner agreed to have his case submitted to the court upon the statement of facts, and agreed, if found guilty, that he would receive a suspended one-year sentence and be placed on supervised probation for three years.

Subsequently, Petitioner appeared in court on the Medicaid fraud charge and affirmed his desire to have the judge decide his case based upon the plea agreement and the agreed statement of facts.

The state court judge, after reviewing the plea agreement and statement, addressed Petitioner as follows:

> Dr. Brown, the report, the offense report, the statement of facts as stipulated to by your attorney, is sufficient to find you guilty of the charge. Do you understand that, sir?

After Petitioner answered in the affirmative, the judge stated that he had "decided to stay any finding of guilt," against Petitioner and, "accordingly, entry of judgment has been stayed." Petitioner was then placed on probation for a period of three years and assessed restitution in the amount of $10,050.

After a review of the transcript of the state court proceedings, plea agreement, and agreed statement of facts, I conclude that there was a finding of guilt by the state court against Petitioner on the charge of Medicaid fraud and that he was "convicted" within the meaning of 1128(i)(2) of the Act. This is not an unreasonable conclusion in light of the fact that the state court specifically stated that the facts were sufficient to find Petitioner guilty, and would not have had the authority to impose probation or any other type of sanction against Petitioner without such a finding of guilt. Furthermore, Petitioner's plea agreement states that, if found guilty, he would receive a three-year probation.

Although it is only necessary that I find that Petitioner be convicted as defined by one of the subsections of 1128(i), I also conclude that Petitioner was convicted as defined by section 1128(i)(4) of the Act. Petitioner's state court arrangement was one where judgment of conviction was withheld and he received probation. These facts constitute a "conviction"; it is the type of arrangement contemplated by Congress in enacting this subsection.

Accordingly, I find that Petitioner was "convicted" as defined in sections 1128(i)(2) and 1128(i)(4) 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 Medicaid fraud and "the delivery of an item or service" under the Medicare or Medicaid programs.

Although Petitioner originally disputed the fact that his conviction was program-related, he did not argue this issue in his brief. Petitioner was the owner and medical director of a clinic that he had enrolled as a provider in the State of Maryland's Medicaid program. Along with other violations, Petitioner's fraud consisted of knowingly allowing a physician's assistant to provide medical care to Medicaid recipients without supervision or direction, and allowing the assistant to issue prescriptions for medicine. The Medicaid program was then charged for these medical services as if they had been rendered by Petitioner.

There is no question that Petitioner's criminal offense "related to the delivery of an item or service" under the Medicaid program. The conduct for which Petitioner was convicted falls within the literal language of section 1128(a)(1). Moreover, Petitioner's fraud was, in essence, a false billing to the Medicaid program which misrepresented what had been delivered, and was therefore "related to the delivery of an item or service" under the Medicaid program. See Jack W. Greene, DAB App. 1078 (1989).

Accordingly, I find that 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) of the Act.

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

Section 1128(c)(3)(B) of the Act provides that "in the case of an exclusion under subsection (a) of this section, the minimum period of exclusion shall be not less than five years, . . ." and Congressional intent on this matter is clearly reflected in the legislative history:

> 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.

The I.G., as the Secretary's delegate, is therefore required 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. 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. 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 that the undisputed documentary evidence in the record supports findings and conclusions that, as a matter of law, 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 Rule 56 F.R.C.P.; Wheeler and Todd, DAB App. 1123 (1990).

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