Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: June 21, 1990
Michael Travers, M.D.,	)	
	)	
Petitioner,	)	Docket No. C-170
	)	
- v. -	)	DECISION CR 85
	)	
The Inspector General.	)	
	)	

DECISION

By letter dated June 20, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare and any State health care program for five years.[1] Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. Petitioner was further advised that his exclusion was mandated by section 1128(a)(1) of the Social Security Act.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. The I.G. moved for summary disposition. Petitioner opposed the motion, and moved to dismiss the exclusion (which I have treated as a cross motion for summary disposition), or in the alternative, to be given an evidentiary hearing. I conducted oral argument of the motions by telephone on April 19, 1990.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

I have considered the applicable law, the parties' arguments, and the undisputed material facts. I conclude that the exclusion imposed and directed against Petitioner by the I.G. was mandated by section 1128(a)(1) of the Social Security Act. Therefore, I enter summary disposition in favor of the I.G. and affirm the exclusion. Petitioner's motions are denied.

ISSUES

The issues in this case are whether:

1. the delegation of authority by the Secretary of Health and Human Services (the Secretary) to the I.G. to determine and impose or direct exclusions pursuant to section 1128 is unlawful;

2. the Secretary is required to adopt regulations implementing the 1987 revisions to section 1128(a) before the I.G. may make exclusion determinations pursuant to the law;

3. there are disputed issues of material fact which would preclude summary disposition in this case;

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

5. within the meaning of section 1128(a)(1) of the Social Security Act, Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.[2]

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[2] On August 9, 1989, the I.G. granted Petitioner a limited waiver from the exclusions which applies to reimbursement for Medicare and Medicaid items or services furnished, ordered, or prescribed by Petitioner in the State of Utah. Neither party has raised any issue concerning this waiver, or its application, and my Decision in this case does not consider the waiver or its application. I note that the Secretary's decision whether to waive an exclusion is not reviewable. Social Security Act, section 1128(c)(3)(B).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 16, 1988, Petitioner was charged in a criminal information in Utah state court with the offense of filing false Medicaid claims. I.G. Ex. 1; 8A at 3.[3] [4]

2. Petitioner was charged with using the wrong billing code number in claiming reimbursement for Medicaid claims, resulting in misrepresentation of the type, quality or quantity of the services rendered by Petitioner. I.G. Ex. 1.

3. Petitioner entered a plea agreement with the prosecutor in which he agreed to enter a plea of "no contest" to the criminal charge against him. I.G. Ex. 2.

4. Petitioner agreed to pay to the Utah Bureau of Medicaid Fraud, within 60 days, the sum of $8,464. This consisted of restitution in the amount of $6,464, costs of investigation in the amount of $1,000, and a civil penalty in the amount of $1,000. I.G. Ex. 2.

5. The plea agreement provided that the Utah court might take Petitioner's no contest plea under advisement, as part of a first offender program, and hold the matter in abeyance for a period of 60 days. I.G. Ex. 2.

6. The plea agreement further provided that if Petitioner failed to make the agreed payment to the Utah Bureau of Medicaid Fraud, the court should accept his no contest plea and proceed to schedule the matter for imposition of sentence. I.G. Ex. 2.

7. On December 16, 1988, the Utah court approved the plea agreement as a disposition of Petitioner's case, and accepted Petitioner's no contest plea. I.G. Ex. 3; P. Ex. 8-A at 6-7, 10.

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[3] The parties' exhibits will be cited as follows:

I.G.'s Exhibit I.G. Ex. (number)

Petitioner's ExhibitP. Ex. (number)

[4] I.G. Ex. 1, 2, and 3 consist of unsigned and undated copies of court records. However, there is no dispute between the parties as to the authenticity of these records, or as to their dates as represented by the I.G.

8. On January 9, 1989, Petitioner filed a petition with the Utah court, asserting that he had complied with the terms of his plea, and requesting that he be permitted to withdraw his plea and that the criminal charges against him be dismissed with prejudice. I.G. Ex. 5.

9. On January 9, 1989, the prosecuting attorney filed with the Utah court a notice of compliance stating that Petitioner had complied with the terms of his plea. I.G. Ex. 6.

10. On January 9, 1989, the Utah court entered an Order permitting Petitioner to withdraw his plea and dismissing with prejudice the criminal charges against Petitioner. I.G. Ex. 7.

11. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Findings 1 - 9; Social Security Act, section 1128(i).

12. 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)(1) of the Social Security Act. Findings 1 - 11; Social Security Act, section 1128(a)(1).

13. Pursuant to section 1128(a)(1) of the Social Security Act, the Secretary is required to exclude Petitioner from participating in Medicare and Medicaid. Social Security Act, section 1128(a)(1).

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

15. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Red. Reg. 21662 (May 13, 1983).

16. On June 20, 1989, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid. I.G. Ex. 8.

17. Petitioner was notified that he was being excluded from participation for five years, the minimum period mandated by law. I.G. Ex. 8.

18. I do not have authority to decide whether the Secretary lawfully delegated authority to the I.G. to impose exclusions.

19. The Secretary was not required to adopt implementing regulations prior to imposing exclusions pursuant to section 1128(a)(1) of the Social Security Act.

20. There do not exist disputed issues of material fact in this case; therefore summary disposition is appropriate.

21. The exclusion imposed against Petitioner by the I.G. was mandated by law. Findings 12 - 17.

ANALYSIS

1. I do not have authority to decide whether the Secretary lawfully delegated authority to the I.G. to impose exclusions. Petitioner argues that the Secretary did not lawfully delegate to the I.G. the authority to impose and direct exclusions pursuant to section 1128 of the Social Security Act. This is so, according to Petitioner, because the authority to impose and direct exclusions is a "program operating responsibility" which is prohibited from transfer to the I.G. by 42 U.S.C. 3526(a).

The identical argument concerning the lawfulness of the delegation of exclusion authority was made by the petitioner in Jack W. Greene, DAB Civ. Rem. C-56 (1989), aff'd DAB App. 1078 (1989), aff'd sub nom Greene v. Sullivan, Civil No. 3-89-758 (E.D. Tenn. February 8, 1990).[5] In Greene I held that I lacked authority to hear and decide this argument, because the Secretary's decision to delegate exclusion authority to the I.G. is a policy determination which I am without authority to review.

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[5] One of the attorneys who represented the petitioner in Greene also represents Petitioner in this case.

This holding was affirmed on appeal by the Departmental Appeals Board (the Board). DAB App. 1078 at 18 - 19.

I premised this holding on my conclusion that my authority to hear and decide issues raised by the parties to exclusion cases is limited to those issues which I am authorized by law and regulations to hear and decide. Neither section 1128 of the Social Security Act, nor section 205(b) of the Act (incorporated by reference in section 1128) provide for administrative review of regulations or policy determinations in exclusion cases. Regulations contained in 42 C.F.R. Parts 498 and 1001 do not provide for such review.

Petitioner offers nothing to augment that which was argued by the petitioner in Greene. I incorporate the analysis of that decision, again concluding that I do not have authority to hear and decide Petitioner's contentions concerning the Secretary's delegation of exclusion authority to the I.G.

2. The Secretary is not required to adopt regulations implementing the 1987 revisions to section 1128(a) before the I.G. may make exclusion determinations pursuant to the law. Petitioner contends that the I.G.'s exclusion determination is defective because the Secretary has not yet adopted regulations implementing the 1987 revisions to section 1128(a). Petitioner asserts that section 1128(a) is ambiguous, and that without regulations explaining and implementing the law, the law cannot be meaningfully applied in individual cases. This identical argument was also raised by the petitioner in Greene, and it was expressly found to be without merit, both by the Board and in federal district court.

There is no legal requirement that the Secretary adopt regulations to construe or implement a law, so long as the Secretary carries out his statutory duty pursuant to "ascertainable standards" and provides a statement showing his reasoning in applying the standards. Patchoque Nursing Center v. Bowen, 797 F.2d 1137, 1143 (2d Cir. 1986), cert. denied, 479 U.S. 1030 (1987). The Secretary is not required to adopt regulations applying section 1128(a), because the law is unambiguous and the standards for application of that section are plainly set forth in the law. Greene, supra.

Petitioner pleaded no contest to a charge of filing false Medicaid claims. The I.G. excluded Petitioner pursuant

to section 1128(a)(1), which mandates exclusion of parties convicted of criminal offenses related to the delivery of an item or service under Medicare or Medicaid. As I hold, infra, this section plainly applies to the offense of which Petitioner was convicted. That application is evident from the language of the statute. It is also evident both from legislative history and from comparison of the current law with its predecessor.

Petitioner argues that section 1128(a) is ambiguous because the conduct on which criminal charges was premised could arguably have been a basis for exclusion under one of the other subsections of section 1128. Petitioner asserts that without implementing regulations, it is not possible to rationally choose which part of section 1128 applies in individual cases.

I disagree. As I explain infra, section 1128(a)(1) is part of a comprehensive statute which both mandates and permits the Secretary to impose exclusions based on specified categories of conviction or conduct. The statute is not ambiguous when read in context.

Petitioner also argues that the Secretary's enforcement of section 1128(a) in the absence of implementing regulations violates section 552(a)(1)(D) of the Administrative Procedure Act, 5 U.S.C. 552(a)(1)(D). This section requires an agency to publish:

> (S)ubstantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; . . . .

I disagree with Petitioner's contention. Where an agency operates directly pursuant to the language of a statute in satisfaction of the standards expressed in Patchogue, there is no publication requirement imposed by the Administrative Procedure Act.[6]

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[6] There is a separate requirement in the Administrative Procedure Act that administrative law judge decisions contain written findings of fact and conclusions of law. 5 U.S.C. 556. That requirement is satisfied in this case by this Decision.

3. There are no disputed issues of material fact which would preclude summary disposition. This case is before me on the I.G.'s motion for summary disposition. Petitioner objects to summary disposition being entered against him, arguing that the reasonableness of the exclusion cannot be decided without an evidentiary hearing.

Petitioner asserts that he "never consented to the imposition of a judgment upon him" (Petitioner's Brief at 21). Therefore, according to Petitioner, he should not be estopped by his criminal conviction from presenting evidence to show that he was not actually guilty of the offense of which he was charged and to which he pleaded. Petitioner has submitted his affidavit to show: (1) that he never intentionally committed a criminal offense, and (2) his understanding of the legal significance of his plea to the criminal charges. P. Ex. 1.

I have assumed for purposes of deciding the I.G.'s motion for summary disposition that the facts alleged by Petitioner in his affidavit are true.[7] However, the facts alleged by Petitioner are not material to the issues in this case.[8]

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[7] Petitioner asserts at paragraph five of his affidavit that he "never entered into any plea agreement which provided for judgment of conviction to be withheld." P. Ex. 1. It is unclear to me what Petitioner means by this assertion. Paragraph 4 of Petitioner's plea agreement specifically states that "the Court may take [Petitioner's] . . . plea of no contest under advisement, as part of a first offender program, and hold the matter in abeyance for a period of 60 days." Perhaps Petitioner is seeking by his declaration to distinguish between a judgment of conviction and a no contest plea. In any event, this assertion is not material to the issues in the case, because a no contest plea is a basis for a conviction of a criminal offense within the meaning of section 1128(i)(3).

7 Had Petitioner been excluded for more than the minimum mandatory five years, evidence as to the conduct which resulted in his conviction might be relevant to the issue of the reasonableness of the length of the exclusion. However, Petitioner was excluded for the minimum mandatory period.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the only issues to be resolved are issues involving application of the law to the undisputed material facts. John W. Foderick, M.D., DAB App. 1125 (1990); see Federal Rules of Civil Procedure, Rule 56; Collins v. American Optometric Ass'n., 693 F.2d 636 (7th Cir. 1982).

This case involves no disputed issues of material fact. Section 1128(a)(1) mandates exclusion when a party is convicted of a criminal offense relating to the delivery of an item or service under Medicare. The triggering event is the conviction of an offense and not the commission of the conduct upon which the criminal charges are based. The term "conviction" is defined by section 1128(i). If a disposition of a criminal offense meets the statutory definition of a conviction, then it is a "conviction" within the meaning of section 1128(i) regardless of a party's personal belief as to whether he is guilty of a crime. And, if the offense of which a party is convicted is related to the delivery of an item or service under Medicare or Medicaid, then it falls within the mandatory exclusion provisions of section 1128(a)(1). It is therefore not relevant, in deciding whether the I.G. had authority to impose an exclusion pursuant to section 1128(a)(1), that a party may assert that he is not guilty of the offense of which he was convicted. See Foderick, supra; Andy E. Bailey, C.T., DAB App. 1131 (1990).

The facts material to this case consist of the specific criminal charges against Petitioner, the offense to which Petitioner pleaded, and the disposition of that plea. The I.G. has offered as exhibits the official records which describe the criminal charges against Petitioner and the disposition of those charges. I.G. Ex. 1-7, 8A. These exhibits contain the facts necessary to resolve the issues of material fact. Petitioner has not disputed the authenticity, accuracy, or completeness of any of these documents. Nor has Petitioner offered any exhibits of his own which would dispute the facts contained in these exhibits. I conclude that there exist no disputed issues of material fact in this case and that summary disposition is therefore appropriate.

4. Petitioner was convicted of a criminal offense. Petitioner asserts that he was not "convicted" of any offense within the meaning of section 1128. Specifically, Petitioner contends that no plea to the criminal charges against him was "accepted" by the Utah

court. I disagree with Petitioner's contention. I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3). I also conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Social Security Act.

Section 1128(i) 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;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
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> (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.

Petitioner offered a plea of "no contest" to a criminal charge. Findings 3, 7. The Utah court received this plea as a disposition of Petitioner's criminal case. Finding 7.

Petitioner argues that his plea was not "accepted" within the meaning of section 1128(i)(3), because the Utah court held imposition of judgment in abeyance pending Petitioner's satisfaction of the terms of a plea agreement, and dismissed the charges after Petitioner satisfied the terms of his plea agreement. Although I accept as true the facts as argued by Petitioner, I conclude that the Utah court "accepted" Petitioner's no contest plea.

Petitioner's no contest plea was "accepted" within the meaning of section 1128(i)(3), because the Utah court agreed to dispose of the criminal charges against Petitioner based on its receipt of his plea. Petitioner

offered a no contest plea to a criminal offense in return for payment by Petitioner of restitution, costs, and a penalty; and for the opportunity to apply to the Court to have the criminal complaint dismissed upon satisfactory completion of the aforesaid conditions. The Court received this offer with consent. The fact that the Utah court held entry of the plea in abeyance and subsequently dismissed the criminal charges against Petitioner based on his satisfaction of the terms of the plea agreement does not derogate from my conclusion that the plea was accepted within the meaning of the exclusion law.

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 no contest plea is "accepted" within the meaning of section 1128(i)(3) whenever a party offers a no contest plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal complaint against that party. James F. Allen, M.D.F.P., DAB Civ. Rem. C-152 (1990).

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 not only the situation where a party has been adjudicated guilty of an offense, but where a party admits guilt or pleads nolo contendere (no contest) in order to dispose of a complaint. Furthermore, Congress concluded that disposition of a criminal charge based on a guilty plea or a plea of no contest would be a conviction even under those circumstances where a court decided to hold in abeyance entry of a judgment against a party pending the party's satisfaction of the terms of a plea agreement. 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; Carlos E. Zamora, M.D., DAB App. 1104 (1989), at 5-6.

The committee also stated that:

> With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

Id.; Zamora, supra, at 6.

The Court's disposition of Petitioner's plea under the terms of the plea agreement also constitutes a "first offender" program within the meaning of section 1128(i)(4). The plea agreement specifically recited that Petitioner's plea was part of a first offender program. I.G. Ex. 2 at Paragraph 5. Moreover, my interpretation of the law and my application of the law to the facts of the case is consistent with Congress' intent as expressed in legislative history. The arrangement entered into by Petitioner falls squarely within the kinds of arrangements which the committee responsible for drafting the law sought to include within the ambit of section (i)(4). H.R. No. 727, supra.

5. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner argues that the I.G. lacked authority to exclude him pursuant to section 1128(a)(1) because the offense of which Petitioner was convicted does not relate to the delivery of an item or service under Medicare or Medicaid. Petitioner contends that "financial" offenses, including those that relate to Medicare or Medicaid, were not intended by Congress to be included within the reach of section 1128(a)(1). Petitioner also contends that a conviction of an offense does not fall within section 1128(a)(1) absent proof that he intentionally engaged in conduct prohibited by law. According to Petitioner, the offense of which he was convicted was an offense embodying a "strict liability" violation standard. Petitioner asserts that the record does not establish the intent required to bring his conviction within the ambit of section 1128(a)(1).

I find that these arguments are not supported by the law. Section 1128(a)(1) was intended, among other things, to reach convictions of criminal offenses which made Medicare or Medicaid programs the intended victims of theft and fraud. Petitioner's conviction for filing false Medicaid reimbursement claims is among the types of offenses that are covered by section 1128(a)(1). I do not find that Petitioner was convicted of an offense based on strict liability, as opposed to an offense which required proof of intent to commit an unlawful act. However, even if that were the case, Petitioner would still stand convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner contends that the exclusion law, in requiring that the offense be related to the delivery of an item or

service, requires that the offense relate specifically to an aspect of the delivery. According to Petitioner, the items or services delivered by a health care provider are separate and distinct from the programs' reimbursement for those services and items. He argues that the offense of which he was convicted does not fall within section 1128(a)(1), because that offense relates to the reimbursement claim he made for an item or service and not to the actual delivery of the item or service.

Petitioner's argument is inconsistent with both the language and the structure of the exclusion law. His analysis of section 1128(a)(1) is narrower than the meaning conveyed by the term "related to the delivery of an item or service." It also ignores the companion section, section 1128(a)(2), which mandates exclusion of parties convicted of criminal offenses relating to neglect or abuse of patients in connection with the delivery of a health care item or service. If Petitioner's interpretation of section 1128(a)(1) were accepted, then there would be no meaningful difference between sections 1128(a)(1) and 1128(a)(2), because Petitioner would limit the reach of section 1128(a)(1) to convictions of offenses related to misfeasance or malfeasance in the delivery of items or services covered by Medicare or Medicaid.

The petitioner in the Greene case also argued that section 1128(a)(1) applied only to convictions for misfeasance or malfeasance in the delivery of items or services, as opposed to the commission of theft or fraud against Medicare or Medicaid programs. The Board expressly rejected this argument, holding that:

> [The] . . . offense is directly related to the delivery of the item or service since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB App. 1078 at 7. The Board based its holding on the plain meaning of the law, and also on the law's legislative history, as well as on comparison of language in the current version of the law with language contained in previous versions. Id. In so holding, the Board found that the current legislation constituted a broadening of the scope of the mandatory exclusion provisions of the law and not a narrowing of that scope, as was contended by the petitioner. DAB App. 1078 at 11.

This case falls squarely within the holding of Greene. The criminal offense of which Petitioner was convicted consisted of filing a false claim for Medicaid reimbursement. Here, as in Greene, Petitioner's submission of a Medicaid reimbursement claim was the step necessary to bring his service within the purview of the Utah Medicaid program.

The Board has recently held that a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the intended victim of the crime is Medicare or a Medicaid program. Napoleon S. Maminta, DAB App. 1135 (1990). The criminal offense in Maminta consisted of the unlawful conversion of a Medicare reimbursement check, and the victim of the crime was the Medicare program. In the present case, the Utah Medicaid program was the victim of Petitioner's crime because the offense of which Petitioner was convicted consisted of filing a false claim against Medicaid.

Petitioner argues that where a conviction or underlying conduct may be a basis for an exclusion under both permissive and mandatory exclusion subparts of section 1128, the law compels the Secretary to consider the case pursuant to the permissive exclusion subparts. He argues that the offense of which he was convicted falls within the ambit of subparts of the exclusion law which provide for permissive, as opposed to mandatory, exclusion of parties. Petitioner asserts that the Secretary might have such authority in this case, pursuant to sections 1128(b)(1), (b)(6), and (b)(7).[9] Therefore, according to

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[9] Section 1128(b)(1) permits the Secretary to exclude parties who are convicted of criminal offenses in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by a federal, state, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Section 1128(b)(6) permits the Secretary to exclude parties for, among other things, submission of Medicare or Medicaid requests for payment for items or services which substantially exceed the party's usual and customary charge for such items or services. Section 1128(b)(7) permits the Secretary to exclude parties who are found to have engaged in conduct which violates either sections 1128A (false claims) or 1128B (payment or

Petitioner, his conviction should have, at most, provided the Secretary with discretionary authority to impose an exclusion.

Petitioner's analysis of the law, if accepted, would emasculate the mandatory exclusion provisions of section 1128(a). It would also require the conclusion that Congress' most recent revision of the law was intended, through the addition of permissive exclusion subparts, to weaken the mandatory exclusion provisions of section 1128(a). This analysis is unsupported by the text, history, or evolution of the exclusion law.

The plain meaning of section 1128(a)(1) is that parties who are convicted of "financial" crimes against Medicare or Medicaid must be excluded from participation, even if the convictions or the conduct which underlies the convictions might arguably give the Secretary permissive authority to exclude under some other subpart of section 1128. That meaning is evident when section 1128(a) is read in context with the other parts of section 1128. It is also evident when the evolution of the exclusion law is considered.

The exclusion law is the latest version of a series of Congressional enactments which have progressively strengthened remedies against parties who are convicted of crimes related to or directed against government-financed health care programs. However, the core of the law has remained unchanged since enactment of the earliest version. That core has always been the requirement that parties who are convicted of criminal offenses against Medicare or Medicaid be excluded from participation in these programs.

In 1977, Congress passed a law requiring the Secretary to suspend physicians or practitioners convicted of criminal offenses related to their involvement in Medicare or Medicaid. 91 Stat. 1175, 1192-1193 (1977) (codified as section 1862(e)(1) of the Social Security Act). By its terms and history, this mandatory exclusion law was directed against physicians or practitioners who were convicted of fraud against Medicare or Medicaid. In the legislative history to the law, Congress specifically stated its intent to mandate exclusion of those who were convicted of acts of fraud against these programs. H.R. Rep. No. 95-393-Part II, 95th Cong., 1st Sess. 44 (1977).

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receipt of kickbacks) of the Social Security Act.

The law was revised in 1980 to assure that exclusions would also be imposed against health care professionals, other than physicians, who committed program-related crimes. 94 Stat. 2599, 2619 (1980) (codified as section 1128(a) of the Social Security Act). The 1980 revision maintained the mandatory exclusion features of the 1977 enactment, but broadened the scope of its coverage.

The current law was adopted by Congress in August 1987. Congress again broadened the reach of the law by adding sections which: (1) required exclusion of parties who were convicted of offenses involving patient neglect or abuse (section 1128(a)(2)); and (2) permitted exclusion of parties under a range of circumstances (section 1128(b)).

Thus, Congress has over time both broadened and strengthened the provisions of the exclusion law. At no time has Congress ever intimated by its revisions that the mandatory exclusion provisions of section 1128(a) were to be weakened, as is contended by Petitioner.

The petitioner in Greene made the same arguments with respect to sections 1128(b)(1) and (b)(7) as are made by Petitioner. The Board found these arguments to be without merit:

> While it is not inconceivable that one of these provisions could have been applied in the absence of section 1128(a), which provides that the Secretary "shall" exclude individuals where applicable, these provisions focus on different circumstances from those raised here, such as where the individual has not been convicted of an offense or where the conviction does not relate to the Medicare program or a State health care program . . . Congress clearly viewed the exclusion provisions, including sections 1128(a)(1) and 1128(b)(1), as a comprehensive and inter-related set of provisions. The application of the provisions here gives full weight and effect to each of the provisions, and clearly does not nullify the effect of section 1128(b)(1) as the Petitioner argued.

DAB App. 1078 at 9-10 (emphasis in original).

The Board also found the arguments as to section 1128(b)(7) to be without merit:

> (S)ection 1128(b)(7) does not require the Secretary to undertake independent investigations of possible further violations when section 1128(a)(1) on its face applies and Petitioner may be excluded based upon his actual conviction under State law.

DAB App. 1078 at 10 (emphasis in original).

The petitioner in Greene did not argue that his conduct should have been considered by the Secretary under the permissive exclusion authority contained in section 1128(b)(6). However, there is no more reason to require the Secretary to evaluate Petitioner's conduct under this section than there is to require such evaluation pursuant to sections 1128(b)(1) or (b)(7).

Petitioner has made no showing, and I do not find, that the offense of which he was convicted embodied a strict liability standard. The statute under which Petitioner was convicted does not, on its face, embody or suggest a strict liability standard.[10] The Utah court refrained from making a ruling as to the standard of liability embodied in the statute to which Petitioner entered his no contest plea. I.G. Ex. 8A at 11-12. Petitioner offered no authority to support his contention. However, even were I to accept for purposes of this decision that Petitioner was convicted of a an offense embodying a strict liability standard, that finding would not be material to the issue of whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1).

At oral argument, counsel for Petitioner conceded that the offense to which Petitioner pleaded no contest is a criminal offense under Utah State law. Conviction pursuant to the State law therefore is conviction of a criminal offense within the meaning of Utah law,

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[10] The statute, UCA 26-20-7(2)(b), makes it a misdemeanor offense for a person to "knowingly" file a claim for medical benefit which misrepresents the type, quality, or quantity of times or services rendered. On its face, this law suggests that proof of or admission of intent to perform an act which is unlawful is a necessary element for conviction.

regardless whether the State law embodies a strict liability standard.

In enacting section 1128(a)(1), Congress made no distinction as to the standard of liability required to satisfy the conviction of a "criminal offense" test. Congress decided that any conviction of a criminal offense, including any conviction of a criminal offense under a state law, would fall within section 1128(a)(1) so long as it related to the delivery of an item or service under Medicare or Medicaid.

Furthermore, there is no language in section 1128(i) which suggests that the definition of "conviction" should apply only to those cases where the underlying criminal law embodies an element of intent. I conclude that, had Congress intended to distinguish between convictions of offenses which embody an element of intent and those which are based on a strict liability standard, it would have done so, either in section 1128(a)(1) or in section 1128(i). Therefore, I find no merit in Petitioner's argument that he was not convicted of an offense within the meaning of section 1128(a)(1) because he was allegedly convicted of a statute embodying a strict liability standard.

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 and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge