Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Guido Escalante, Sr., M.D.,	DATE: July 27, 1990
Petitioner,	Docket No. C-175
- v. -	DECISION CR 89
The Inspector General.	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the October 24, 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 Petitioner that he was excluded from participating in the Medicare and Medicaid programs for five years.[1]

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

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[1] 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 in section 1128(h) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security 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 (1989). 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 whenever the I.G. has conclusive information that such individual 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

The I.G. based this exclusion on Petitioner's conviction, as defined in section 1128(i) of the Act, of a criminal offense "related to the delivery of an item or service" under the Medicare and Medicaid programs. The I.G. stated that such exclusions are mandated by section 1128(a)(1) of the Act.

On November 6, 1989, Petitioner requested an administrative hearing to contest the I.G's determination and the case was assigned to me for a hearing and decision. On January 4, 1990, I held a prehearing conference and established a schedule for filing prehearing motions and briefs. Thereafter, the I.G. timely filed his motion for summary disposition on all

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

issues. Petitioner timely submitted a brief which opposed the I.G.'s motion for summary disposition.

ISSUES

The issues in this case are:

1. Whether Petitioner was "convicted" of a criminal offense within the meaning of section 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 was subject to the minimum mandatory five-year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

4. Whether mitigating factors can be considered in determining the period of exclusion.

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. At all times relevant to this case, Petitioner was a licensed doctor, maintaining a medical practice in Norfolk, Virginia. I.G. Ex. E/1.

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[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 Exhibits	I.G. Ex. (letter)/(page)

2. Petitioner was a provider in the Medicare, Medicaid and CHAMPUS (Civilian Health and Medical Program of the Uniformed Services) programs. He held a Drug Enforcement Administration (DEA) Controlled Substance Registration Certificate, which entitled him to a DEA registration number and to receive and prescribe narcotic and non-narcotic controlled substances. I.G. Ex. E/2, 3.

3. On January 27, 1989, Petitioner entered into a plea agreement with the U.S. Attorney's Office for the Eastern District of Virginia (U.S. Attorney) wherein he agreed to plead guilty to five misdemeanors charged in a criminal information (information) filed by the U.S. Attorney. The information was attached to the plea agreement and incorporated by reference. I.G. Ex. D.

4. Count 1 of the information charged Petitioner with conspiracy to distribute and dispense controlled substances. Petitioner was charged with conspiring to (1) knowingly distribute and dispense controlled substances; (2) knowingly refusing and failing to make, keep and furnish records, reports, notifications, orders, statements, and information; and (3) stealing, purloining, knowingly converting, and, without authority, disposing of monies belonging to departments and agencies of the United States. I.G. Ex. E/3.

5. Count 2 of the information charged Petitioner with failure to make and keep records and counts 3, 4 and 5 of the information charged Petitioner with theft of United States government property. I.G. Ex. E/16, 17, 18.

6. As part of the conspiracy, Petitioner allowed his son, Guido R. Escalante, Jr., to examine, diagnose and treat patients at Petitioner's medical practice, even though his son was not a licensed doctor. Also, Petitioner signed prescription blanks which were pre-printed with his name and DEA registration number. His son used these prescription blanks to dispense controlled substances without the exercise of proper medical examinations, diagnoses, and judgment by a licensed doctor. I.G. Ex. E/4.

7. Petitioner's son was not licensed to practice medicine by any state in the United States and he did not have a DEA Controlled Substance Registration Certificate to prescribe narcotic or non-narcotic controlled substances. I.G. Ex. E./1, 2.

8. Petitioner received reimbursement from the CHAMPUS, Medicare, and Medicaid programs based upon his

claims that he had performed medical services, when, in fact, the services were performed by his son, an individual unlicensed to practice medicine, anywhere in the United States. I.G. Ex. D/3, 4.

9. The plea agreement was conditioned upon the Court's acceptance of Petitioner's guilty pleas as found in the plea agreement and in the information. I.G. Ex. D/6.

10. On April 11, 1989, a Judgment of Conviction was entered against Petitioner in the the United States District Court for the Eastern District of Virginia (Court), citing that Petitioner had entered a plea of guilty as to the criminal information and that Petitioner was guilty of the criminal offenses recited in the criminal information. I.G. Ex. B/1.

11. The imposition of sentence with respect to all counts of the information was suspended and Petitioner was placed on supervised probation for three years. I.G. Ex. B/1.

12. Petitioner was also ordered to make restitution to the CHAMPUS, Medicare, and Medicaid programs for claims for medical services provided by Petitioner's son. I.G. Ex. D/3, 4.

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

14. The offenses of conspiracy, failure to keep records, and theft to which Petitioner pled guilty were "related to the delivery of an item or service" under Medicaid, within the meaning of section 1128(a)(1) of the Act.

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

16. On October 24, 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 Act. I.G. Ex. A.

17. The exclusion imposed against the Petitioner by the I.G. is for five years, the minimum period

required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

18. The I.G. is entitled to summary disposition in this case.

19. The I.G. acted properly in excluding and directing the exclusion of Petitioner from participation in the Medicare and Medicaid programs for the minimum period of five years.

DISCUSSION

I. Petitioner Was "Convicted" of a Criminal Offense as a Matter of Federal Law.

The Secretary's authority, delegated to the I.G., to exclude an individual from 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 provides that an individual or entity has been "convicted" of a criminal offense when:

> (1) 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; . . .
>
> (3) a plea of guilty or nolo contendere by the individual or entity has been acccepted by a Federal, State, or local court; . . .

In this case, I relied on the evidence contained in the following three documents, together with all other Court documents, to decide the issue of whether Petitioner was convicted of a criminal offense as a matter of federal law: (1) Petitioner's plea agreement dated January 27, 1989; (2) the information which is incorporated by reference in the plea agreement; and (3) the Court's Judgment of Conviction, entered against Petitioner on April 11, 1989.

The evidence in the documents demonstrates that Petitioner entered into a plea agreement with the U.S. Attorney and agreed to plead guilty to the charges contained in the information, to wit: (1) one count of

conspiracy; (2) one count of failure to make and keep records; and (3) three counts of theft of U.S. property.

Paragraph five of the plea agreement states: "The defendant admits that he is in fact guilty of the offenses to which he has agreed to plead guilty in paragraph two of this agreement. The defendant admits that the facts in the counts of the attached information to which he is pleading guilty are accurate." I.G. Ex. D/3.

Further, the plea agreement was conditioned upon the court's acceptance of Petitioner's guilty pleas as found in the plea agreement and in the information. The Court's Judgment of Conviction stated that Petitioner had entered pleas of guilty as to the information and that Petitioner was guilty of the counts therein. The Court imposed a three-year sentence. The Court thereafter suspended Petitioner's sentence and placed him on probation.

Thus, it is obvious from a review of the evidence, that Petitioner's plea of guilty was "accepted" by the Court. This plea, together with the Judgment of Conviction entered against Petitioner by the Court, constitute a "conviction" within the meaning of sections 1128(a)(1), 1128(i)(1), and 1128(i)(3) of the Act.

II. Petitioner's Conviction "Related to the Delivery of an Item or Service" Within the Meaning of Section 1128(a)(1) of the Act.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the evidence demonstrates a relationship between the judgment of conviction and "the delivery of an item or service" under the Medicare or Medicaid programs as provided in Section 1128(a)(1) of the Act.

Petitioner argues that he should not be excluded from participation in the Medicare and Medicaid programs because the criminal offenses to which he pled guilty were not program related, giving rise to a mandatory exclusion under section 1128(a)(1) of the Act. Instead, Petitioner contends that his conviction fits within the provisions of section 1128(b)(1) of the Act, as a conviction relating to fraud, and that, accordingly, the exclusion is permissive and not mandatory. P. Br. 3.

The I.G. argues that Petitioner was convicted of program-related fraud because Petitioner submitted invoices to

Medicare and Medicaid seeking payment for medical services which he had not rendered, and that Petitioner filed Medicare and Medicaid claims for services performed by an unlicensed doctor, his son. P. Br. 3, 4.

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

Petitioner pled guilty to conspiracy and was charged with conspiring to (1) knowingly distribute and dispense controlled substances; (2) knowingly refusing and failing to make, keep, and furnish records; and (3) stealing, purloining, knowingly converting, and without authority, disposing of monies belonging to U.S. departments and agencies. I.G. Ex. E/3. As part of the conspiracy, Petitioner allowed his son to examine, diagnose, and treat patients at Petitioner's medical practice, even though his son was not a licensed doctor. Also, Petitioner signed prescription blanks which were pre-printed with his name and DEA registration number. His son used these prescription blanks to dispense controlled substances, even though he was an unlicensed doctor. I.G. Ex. E/4.

The evidence reveals that Petitioner submitted Medicare and Medicaid claims for services performed by his son, who was not a licensed doctor and thereby not authorized to seek such payments. Further, Petitioner fraudulently submitted these claims and accepted payments from CHAMPUS, Medicare, and Medicaid for services that he himself did not provide.

In the case of Jack W. Greene, DAB App. 1078 (1989), the Department Appeals Board (DAB) held that "the false Medicaid billing and the delivery of drugs to a Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term." Petitioner's conviction for submitting fraudulent claims to CHAMPUS, Medicare, and Medicaid seeking payments for services which he did not render is "inextricably intertwined" with the Medicare and Medicaid program, and, therefore, "related." Thus, Petitioner was convicted of criminal offenses "related to the delivery of an item or service" under the Medicare and Medicaid programs within the meaning of section 1128(a)(1) of the Act.

The conspiracy charges, together with the other charges to which Petitioner pled guilty in both the plea agreement and information, establish that Petitioner's actions were "program related."

I find and conclude that Petitioner's offenses were "related to the delivery of an item or service" under the Medicare and Medicaid programs within the meaning of section 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion is Required in This Case.

Petitioner contends that the permissive exclusion provisions of section 1128(b) should apply to this case, rather than the minimum mandatory provisions of section 1128(a)(1) of the Act. P. Br. 3, 4, 5. The I.G. argues that a mandatory exclusion is warranted within the provisions of 1128(a)(1) of the Act and that five years is the required minimum length of exclusion. I.G. Br. 6, 7.

Section 1128(c)(3)(B) of the Act requires 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:

> 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 Petitioner was "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 to exclude Petitioner for a minimum of five

years.[5] See, Jack W. Greene v. Louis Sullivan, No. Civ. 3-89-758 (E.D. Tenn., Feb. 22, 1990).

IV. Mitigating Factors Cannot Be Considered In This Case.

Petitioner argues that if an exclusion is ordered, there are mitigating circumstances which compel a reduction in the proposed five years, regardless of the minimum mandatory provisions. Petitioner asserts that (1) the charges to which he pled guilty were all misdemeanors; (2) the imposition of incarceration was suspended with respect to all counts; (3) restitution to the appropriate programs has been made; and (4) Petitioner's violations did not have a significant adverse physical, mental or financial impact on individuals. P. Br. 6.

In this proceeding, the law does not permit me to consider mitigating circumstances, and thus I am unable to reduce Petitioner's period of exclusion based on the mitigating circumstances presented. There is no equitable relief from the minimum mandatory provisions of section 1128(a)(1) and 1128(c)(3)(B) of the Act.

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[5] Since I have found and concluded that the mandatory exclusion provisions of section 1128(a)(1) apply in this case, I need not address the issue of whether I am authorized to make a de novo determination to reclassify Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that 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