Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Divisn

In the Case of:	
Albert Lerner, Ph. D.,	DATE: August 8, 1990
Petitioner,	
- v. -	Docket No. C-182
The Inspector General.	DECISION CR 91

DECISION

By letter dated October 24, 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 a hearing and decision. The I.G. moved for summary disposition. Petitioner opposed the motion. In opposing the motion, Petitioner raised an issue not addressed by the I.G. in his motion -- whether the California Medicaid Program (Medi-Cal) was a "State health care program" within the meaning of section 1128 of the Social Security Act -- and I afforded both parties the opportunity to file briefs as to this new issue. Neither party requested oral argument.

I have considered the applicable law, the parties' arguments, and the undisputed material facts. I conclude that the exclusion imposed and directed against

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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.

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.

ISSUES

The issues in this case are whether:

1. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid; and

2. I am required to withhold a decision in this case pending the Secretary's decision on a request for waiver of the exclusions imposed and directed against Petitioner.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Medi-Cal is a "State health care program" within the meaning of section 1128(a) of the Social Security Act and provides eligible recipients with Medicaid health care coverage. See, Lynch v. Rank, 747 F.2d 528, 530 (9th Cir. 1984); I.G. Ex. 15.[2]

2. On December 3, 1986, Petitioner was charged in a felony complaint in a California state court with criminal offenses, including intentionally filing false Medi-Cal claims. I.G. Ex. 2.

3. On October 31, 1988, Petitioner pleaded guilty to Count 13 of the complaint. I.G. Ex. 4.

4. Count 13 specifically charged Petitioner with the crime of willfully, feloniously, and with intent to defraud, presenting a false or fraudulent Medi-Cal claim for furnishing services. I.G. Ex. 2.

5. 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 - 4; Social Security Act, section 1128(a)(1).

6. Pursuant to section 1128(a)(1) of the Social Security Act, the Secretary is required to exclude Petitioner from

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

participating in Medicare and Medicaid. Social Security Act, section 1128(a)(1).

7. 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).

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

9. On October 24, 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. 11.

10. Petitioner was notified that he was being excluded from participation for five years, the minimum period mandated by law. I.G. Ex. 11.

11. The exclusion imposed against Petitioner by the I.G. was mandated by law. Findings 1 - 10; Social Security Act, section 1128(a)(1).

12. I am not required to withhold a decision in this case pending the Secretary's decision on a request to waive the exclusion imposed and directed against Petitioner. Social Security Act, section 1128(c)(3)(B).

ANALYSIS

1. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. Many of the material facts of this case are not in dispute. The I.G. offered exhibits to show that Petitioner was charged with criminal offenses, including filing false claims with Medi-Cal, and that Petitioner pleaded guilty to one count of the criminal complaint. Petitioner did not deny that this was the case. Petitioner does not disagree that these undisputed facts prove that he was convicted of a criminal offense related to the delivery of an item or service under the Medi-Cal program. Indeed, these facts establish that Petitioner was convicted of fraud directed against Medi-Cal and such an offense is plainly related to the delivery of an item or service under that program. See 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); Napoleon S. Maminta, DAB App. 1035 (1990).

Petitioner argues, however, that notwithstanding these undisputed facts, the I.G. has not established that Petitioner was convicted of a criminal offense related to the delivery of an item or service under a "State health care" (Medicaid) program, within the meaning of section 1128(a)(1) of the Social Security Act. Petitioner bases his argument on two contentions.

First, Petitioner asserts that the I.G. has not offered undisputed proof that Medi-Cal is a Medicaid program within the meaning of section 1128. Specifically, Petitioner asserts that the I.G. has not established that Medi-Cal is a "State plan approved under Title XIX" as required by section 1128(h)(1). Therefore, according to Petitioner, the issue of Medi-Cal's status is an issue of fact which must be tried in an evidentiary hearing.

Second, Petitioner argues that even if Medi-Cal was at one time authorized to operate as a federally-approved Medicaid program, the undisputed facts do not establish that Medi-Cal was, at the time of the commission of Petitioner's criminal offense, in compliance with applicable federal law and regulations. Petitioner asserts that proof of such compliance is a necessary prerequisite to finding that Medi-Cal was, at the relevant point in time, an approved State plan within the meaning of section 1128(a)(1). Petitioner also offers exhibits which he contends show that Medi-Cal has not complied with federal law and regulations. Therefore, according to Petitioner, there is a disputed issue of fact concerning whether Medi-Cal is an approved State plan, and an evidentiary hearing is necessary as to that issue.

The I.G. argues that I should take judicial notice that Medi-Cal is an approved State plan. He argues alternatively that documents which he has offered as I.G. Ex. 15 establish that to be the case. The I.G. also argues that proof of ongoing compliance with federal law and regulations is not necessary to show that a State plan is a "State health care program" within the meaning of section 1128(a)(1).

The term "State health care program" is defined by section 1128(h) of the Social Security Act to include any State plan approved under Title XIX. If Medi-Cal is a State plan approved under Title XIX, it is a "State health care program" as defined by law.

I take judicial notice of the fact that Medi-Cal is California's State plan approved under Title XIX. Therefore, it is a "State health care program" within the meaning of section 1128(a)(1). I discern no legitimate reason to conduct an evidentiary hearing as to the issue of whether Medi-Cal is in fact a Medicaid program. I conclude further that the law does not require proof that Medi-Cal complied with applicable federal law and regulations as a necessary prerequisite to concluding that Medi-Cal is a Medicaid program.

There are no regulations governing the circumstances under which judicial notice may be taken in administrative hearings concerning exclusions imposed under section 1128. However, regulations provide at 42 C.F.R. 498.60(b)(1) that the administrative law judge who conducts an exclusion hearing shall inquire fully into all of the matters at issue and receive into evidence the testimony of witnesses and any documents that are relevant and material. This regulation effectively mandates that hearings in exclusion cases comport with accepted requisites of due process. Furthermore, the Administrative Procedure Act, 5 U.S.C. 556, implicitly requires that administrative hearings comport with due process requirements.

I conclude that I may take judicial notice of facts in issue in those circumstances where to do so would efficiently resolve controverted issues, and where the parties' rights to due process are not transgressed. I consider it relevant, in deciding under what circumstances I may take judicial notice, to consider analogous situations where courts are permitted to do so.

The Federal Rules of Evidence provide, at Rule 201(b), that:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The judicial notice rule is a mechanism by which courts may draw factual conclusions without requiring parties to prove that which is obvious. It is not a rule which may be lightly applied. I would not take judicial notice of any fact under circumstances where there exists reasonable doubt as to whether that fact is established.

I conclude that, in this case, Medi-Cal's status as a State plan approved under Title XIX is an obvious fact of which I can take notice. The I.G. has offered two sources which establish Medi-Cal to be California's Medicaid plan, and these sources' accuracy cannot reasonably be questioned.

The United States Court of Appeals for the Ninth Circuit specifically found that Medi-Cal is a State plan approved under Title XIX. Lynch v. Rank, 747 F.2d 528, 530 (9th Cir. 1984). Lynch establishes that Medi-Cal's status as an approved State plan is a fact generally known within the jurisdiction of the Ninth Circuit. Furthermore, there exists no reasonable basis to challenge the accuracy of the Court of Appeals' finding.

The I.G. has also offered documents that establish that Medi-Cal is California's State plan approved under Title XIX. These are compiled as I.G. Ex. 15.[3] The exhibit includes Departmental documents which plainly describe Medi-Cal as an approved State plan. I am aware of nothing which would call into question the accuracy of the source offered by the I.G.

I do not agree with Petitioner's contention that the I.G. must prove that Medi-Cal is in continuing compliance with all relevant laws and regulations in order to satisfy the definition of the term "State health care program." The I.G. meets his burden by showing that Medi-Cal is a State plan approved under Title XIX. The term "approved" does not suggest a continuing approval process contingent upon ongoing compliance by a State plan with applicable federal laws and regulations. Rather, the term plainly refers to the act of approving a plan by the Secretary or by his delegate. Once a plan is "approved" by the Secretary, it meets the definition contained in sections 1128(h) and incorporated in section 1128(a).

This conclusion is directed by the plain language of section 1128(h). However, I also conclude that any other interpretation of the meaning of that section would be inconsistent with Congress' purpose in enacting the

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[3] The documents in Exhibit 15 establish Medi-Cal to be California's State plan as of December 1989. They do not, on their face, relate back to the month in which Petitioner committed the offense of which he was convicted, September 1983. However, there is no serious contention that Medi-Cal's status as of December 1989 as a State plan was materially different from its status in September 1983.

exclusion law. The purpose of the exclusion law is to protect federally-funded health care programs and the programs' beneficiaries and recipients from untrustworthy providers of services. Petitioner in effect argues that Congress did not intend to protect programs or recipients from untrustworthy providers in those circumstances where State programs defrauded by those providers were not technically complying with every detail of federal regulations. I find this analysis to be inimical to Congressional intent, for three reasons.

First, there is nothing in either the letter of the law or in its history to suggest that Congress qualified its application as averred by Petitioner. As I note above, the meaning of the term "approved" is plain and unambiguous. Had Congress intended to qualify that meaning, it would have said so.

Second, the law's remedial objectives would be frustrated if recipients of a State plan were denied protection from an untrustworthy provider because the plan had not complied with some legal requirement. Finally, the exclusion law is written to enable the Secretary to protect all State plans and Medicare from an untrustworthy provider, based on that provider's conviction of a criminal offense related to the delivery of an item or service under any approved State plan or Medicare. The law's premise is that an offense committed against any plan evidences untrustworthiness with respect to all plans. It would be an absurd result to deny that protection to all plans and Medicare based on the failure of a State plan victimized by fraud to comply with some federal law or regulation.

2. I am not required to withhold my decision in this case pending the Secretary's decision on a request to waive the exclusion imposed and directed against Petitioner. Petitioner asserts that a request for a waiver of the exclusion has been made on his behalf by the State of California.[4] Petitioner contends that the Secretary must decide whether a waiver should be granted before I decide the I.G.'s motion for summary disposition. In effect, Petitioner argues that I must

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[4] According to Petitioner, the waiver request was made by two members of the California State Assembly. I make no finding as to whether this constitutes a request for a waiver by "the State agency administering or supervising the administration" of a program, as specified by section 1128(d)(3)(B) of the Social Security Act.

stay this case, pending the Secretary's decision on the waiver request.

The exclusion law expressly provides that a request for a waiver shall be nonreviewable. Social Security Act, section 1128(c)(3)(B). I conclude that, inasmuch as I do not have authority to review the Secretary's waiver decisions, I am not required to withhold my disposition in a case pending the Secretary's decision as to whether to grant or deny a waiver. It would be illogical to read the law as requiring me to withhold a decision in a case pending the Secretary's final action on a waiver request, given that I have no authority to review the Secretary's decision. Moreover, the Secretary's decision as to a waiver has nothing to do with the issues addressed to me in this case. Presumably, the Secretary could decide to grant a waiver even if I affirm the I.G.'s exclusion determination.

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