Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Robert W. Emfinger, R. Ph.	DATE: August 8, 1990
Petitioner,	
- v. -	Docket No. C-207
The Inspector General.	DECISION CR 92

DECISION

In this case, governed by section 1128 of the Social Security Act, Petitioner timely filed a request for a hearing before an administrative law judge (ALJ) to contest the November 24, 1989 notice of determination (Notice) issued by the Inspector General (the I.G.). The Notice informed Petitioner that he was being excluded from participating in the Medicare and Medicaid programs for five years.[1] Neither party contends that there are questions of material fact which would require a hearing. 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 Social Security Act, and that Petitioner's exclusion for a minimum period of five years is mandated by federal law.

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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, 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.

ISSUE:

The issue in this case is whether Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a pharmacist licensed in Texas. P. Br. 2.[2]

2. On April 10, 1989, the 86th Judicial District Court of Kaufman County, Texas (court), accepted Petitioner's plea of guilty to the charge of tampering with a governmental record; specifically, Petitioner was charged with submitting fraudulent Medicaid claims for reimbursement. I.G. Ex. 1; P. Ex. B.

3. In accepting the plea, the court found that the evidence substantiated Petitioner's guilt of tampering with a governmental record. I.G. Ex. 1.

4. The Court deferred an adjudication of guilt at that time, pursuant to Art. 42.12, Sec. 3d of the Texas Code of Criminal Procedure. I.G. Ex. 1.

5. Petitioner was placed on probation and the court ordered him to pay court costs and to make restitution in the amount of $803.00. I.G. Ex. 1.

6. On October 2, 1989, the court dismissed the action against Petitioner based on Petitioner's motion. P. Ex. A.

7. On November 8, 1989, the Texas State Board of Pharmacy ordered that Petitioner's pharmacist's license be suspended for two years on the condition that he pay a fine of $250.00 and that he abide by federal and state laws. P. Ex. B.

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[2] The parties' exhibits and briefs will be cited as follows:

Petitioner's Exhibit	P. Ex. (letter)
I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)

8. Pursuant to section 1128(b)(1) of the Social Security Act, the Secretary of the Department of Health and Human Services (Secretary) had authority to impose and direct exclusions against Petitioner from participation in the Medicare and Medicaid programs. Social Security Act, section 1128(b)(1).

9. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662, May 13, 1983.

10. On November 24, 1989, the I.G. advised Petitioner that he was being excluded from participating in the Medicare program and was directing that Petitioner be excluded from participating in State health care programs for five years.

11. The exclusions were based on the I.G.'s determination that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

12. Petitioner's plea of guilty in Court constitutes a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(3) of the Social Security Act, notwithstanding the provisions of Article 42.12 of the Texas Code of Criminal Procedure, or the terms of the October 2, 1989 Order dismissing the aforementioned charges against Petitioner.

13. The actions taken by the I.G., excluding Petitioner from participating in the Medicare program and directing his exclusion from participating in State health care programs, were mandated by section 1128 of the Social Security Act.

ANALYSIS

I. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act.

There are no disputed material facts in this case. Petitioner acknowledges that a plea of guilty was entered against him, charging him with tampering with a governmental record. P. Br. 1. Petitioner does not deny that the offense to which he pled guilty was an offense related to the delivery of an item or service under the Medicaid program, nor does he dispute that if his plea is

a "conviction" of an offense within the meaning of 42 U.S.C. 1320a-7(a)(1) and 7(i), then his exclusions were mandated by law.

Section 1128(a)(1) of the Social Security Act requires the Secretary (or his delegate, the I.G.) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid of:

> any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid]. (Emphasis added).

The term "convicted" is defined at section 1128(i) of the Social Security Act. The law 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. (Emphasis added).

The Texas Code of Criminal Procedure states, at Art. 42.12, Sec. 7, that after a defendant convicted in a criminal proceeding has satisfactorily completed a term of probation the sentencing court shall "amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant." This section further states that, with exceptions, the court may, in discharging the defendant, "set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such

defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense."

Petitioner pled guilty to the offense of fraudulently submitting claims for reimbursement of prescription drugs to the Texas Department of Human Services. In accepting his plea, the Texas court found that sufficient evidence existed to convict Petitioner for the offense of tampering with a governmental record. Thus, Petitioner's plea fell within the statutory definition of a "conviction." It is irrelevant that under Texas law Petitioner was permitted to subsequently withdraw his plea after satisfactorily completing a period of probation. See Carlos Z. Zamora, M.D, DAB Civ. Rem. C-74 (1989), aff'd DAB App. 1104 (1989).

Petitioner denies that his plea was a "conviction" under the law of Texas and makes several arguments to support his contention. He claims that his plea of April 10, 1989 was dismissed against him by the court on October 2, 1989 pursuant to the terms of Art. 42.12, Sec. 3d and 7 of the Texas Code of Criminal Procedure. He bases his principal argument on this fact, alleging that after his plea of guilty was entered, he received a deferred adjudication for the charge of tampering with a governmental record. He contends that once he fulfilled probation, paid court costs, and made restitution of $803.95, the court dismissed the cause of action against him. Petitioner claims that the court's October 2, 1989 Order dismissed any action against him which could constitute a "conviction."

The I.G. argues that Petitioner incorrectly asserts that because his judgment was deferred and the charges of tampering with a governmental record were dismissed pursuant to Texas law, there is no conviction under federal law and thus no conviction for purposes of this exclusion action. I.G. Br. 4.

Pursuant to Texas' law, Petitioner was permitted to plead guilty to the charge of tampering with a governmental record as alleged in the criminal information. The court found that the evidence against Petitioner, substantiated his guilt as charged in the information and as confessed by him in his plea of guilty. However, the court deferred further proceedings without an adjudication of

guilt as provided in Art. 42.1, Sec. 3d of the Texas Code of Criminal Procedure. I.G. Ex. 1. The court then placed Petitioner on probation for a period of one year with the stipulation that it could alter or modify the conditions of his probation. Petitioner, thereafter, having made restitution, paid the penalty and court costs, and applied on his own motion to the court for a dismissal of the charges against him.

The Texas court accepted Petitioner's guilty plea within the meaning of section 1128(i)(3). Petitioner offered to admit his guilt to a criminal offense in return for: (1) a term of probation; (2) payment by Petitioner of restitution, costs, and a penalty; and (3) the opportunity to apply to the court to have the criminal information dismissed upon satisfactory completion of the aforesaid conditions.

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 guilty plea is "accepted" within the meaning of section 1128(i)(3) whenever a party admits his guilt to a criminal offense and a court disposes of the case based on that party's plea. See James F. Allen, M.D.F.P., DAB Civ. Rem. C-152 (1990).

This interpretation is consistent not only with the common and ordinary meaning of the term "accept," but also with Congressional intent, as expressed through legislative history. Congress intended that its definition of conviction sweep in the situation where a party has been adjudicated guilty of an offense, and the situation where a party admits guilt in order to dispose of a complaint. In Congress' view, a party's admission of guilt in order to dispose of a criminal complaint is sufficient to establish a conviction, regardless of how that admission is treated under the various states' criminal statues and procedures. 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 or probation, such as community service or a given number of months or 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. Rep. No. 727, 99th Cong., 2d Sess. 1986 reprinted in 1986 U.S. Cong. Code & Admin. News, 3607, 3664-65; see Zamora, supra, at 5-6.

I disagree with Petitioner's contention that the Texas court's determination to defer adjudication until a later date meant that the court did not accept Petitioner's plea. Petitioner admitted his guilt in order to dispose of the criminal information, and the court received Petitioner's plea. That transaction amounts to acceptance of a plea within the meaning of federal law, irrespective of the court's characterization of its actions.

Finally, Petitioner argued that the plain meaning of 42 U.S.C. 1320-7(a)(i) states that a punishment could be asserted for certain actions, and according to

Petitioner, said punishment puts him in jeopardy of his federal and state constitutional rights. I am not persuaded by this argument, and I conclude that the Texas deferred adjudication statute and the federal exclusion law do not conflict. The Petitioner's double jeopardy/due process argument is necessarily premised on the assertion that the exclusion is an additional punishment. An exclusion is not a punishment, but a consequence of certain court actions defined by the federal statute as "convicted." The Petitioner has not been subjected to double jeopardy, nor has he been denied due process, by application of the federal definition of "convicted."

It is evident from the face of the federal statute, as well as from the legislative history cited above, that Congress' intent in enacting the exclusion legislation was remedial and not punitive. A principal objective of the law was to protect the financial integrity of federally-funded health care programs from those who have proven themselves to be untrustworthy. That excluded individuals might be financially disadvantaged by their exclusions is an incidental effect. Because the intent of Congress was not to "punish," the exclusion remedy cannot be viewed as constituting an additional punishment beyond that contemplated by Texas law.

I find and conclude that Petitioner was "convicted" within the meaning of sections 1128(a)(1) and (i)(3) of the Social Security Act because he pled guilty to the charge of tampering with a governmental document and the court "accepted" his plea. I also find that Petitioner was convicted of a program-related offense.

II. A Minimum Mandatory Five--Year Exclusion Was Required In this Case.

Section 1128(a)(1) of the Social Security Act clearly requires the I.G. to exclude individuals and entities from the Medicare program, and direct their exclusion from the Medicaid program, 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 Social Security 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. and Admin. News 682, 686.

Since the 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 Social Security Act, the I.G. was required to exclude the Petitioner for a minimum of five years.

CONCLUSION

Based on the law and the undisputed material facts, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge