Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
David S. Muransky, D.C.,	DATE: September 5, 1990
Petitioner,	
- v. -	Docket No. C-229
	DECISION CR 95
The Inspector General.	

DECISION

On January 19, 1990, the Inspector General (I.G.) notified Petitioner that he would be excluded from participation in the Medicare program and federally-financed State health care programs, as defined in section 1128(h) of the Social Security Act, for a period of five years.[1] The I.G. told Petitioner that his exclusion resulted from his conviction in a Florida federal court of a criminal offense related to the delivery of an item or service under Medicare. Petitioner was advised that exclusions from participation in Medicare and Medicaid of individuals or entities convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act for a period of five years. Petitioner was advised that his exclusion was for the minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. Both parties filed motions for summary disposition of this case. Neither party contends that there are questions of material fact which would require an evidentiary hearing. Based on the undisputed facts and the law, I conclude that the exclusion imposed and directed by the I.G. in

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

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

2. Whether the mandatory minimum period of exclusion amounts to an unlawful retroactive application of 1128(c)(3)(B) to the facts of this case.

3. Whether I am without authority to adjudicate the constitutionality of a statute that I am charged with applying.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a chiropractor practicing in Florida. Stip. 1.[2]

2. On September 27, 1985, the carrier for the Medicare Part B Insurance program in the State of Florida, Blue Cross and Blue Shield of Florida, Inc., notified Petitioner that payments on all assigned Medicare claims submitted by him would be suspended immediately. Stip. 1.

3. On November 15, 1988, Petitioner was charged in a criminal information in the United States District Court for the Southern District of Florida with four counts of unlawfully devising a scheme and artifice to defraud and to obtain money from the Medicare program through its carrier, Blue Shield, by means of false and fraudulent pretenses, representations and promises. Stip. 1.

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

Stipulation	Stip. (page)
I.G.'s Exhibit	I.G. Ex. (letter)
Petitioner's Reply Brief	P. Reply Br. (page)
Petitioner's Brief	P. Br. (page)

4. The violations of which Petitioner was charged in the criminal information occurred in 1984 and 1985 and involved the submission of claims for spinal manipulations which were allegedly performed by Petitioner. Stip. 2.

5. Petitioner did not perform said spinal manipulations. Stip. 2.

6. On March 31, 1989, the federal court entered a judgment showing that Petitioner pled guilty to all four counts of the criminal information and that the court found him guilty on all four counts. I.G. Ex. B.

7. On March 22, 1989, the federal court sentenced Petitioner to three years' probation, a fine of $4,000.00, restitution of $245.76, and a $50.00 special assessment fee. Stip. 2.

8. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Social Security Act. Findings 1 - 8; Social Security Act, section 1128(a)(1).

9. 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).

10. 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).

11. 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).

12. On June 26, 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 Medicare. Stip. 2.

13. Petitioner was notified that he was being excluded from participation for five years, the minimum period mandated by law. Stip. 2.

14. The exclusion imposed against Petitioner by the I.G. was mandated by law. Findings 1-14; Social Security Act, section 1128(a)(1).

15. Petitioner was convicted after the effective date of the 1987 amendments to the Social Security Act, and under the terms of the Social Security Act, the mandatory minimum period of exclusion provided for in section 1128(c)(3)(B) applies.

16. I do not have the authority to declare a federal statute unconstitutional or to invalidate a regulation.

ANALYSIS

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

There are no disputed material facts in this case. The I.G. and Petitioner have signed "Stipulations of Fact and Law" (stipulation) which is now part of the record. Petitioner admits in the stipulation that on March 22, 1989 he was convicted on his plea of guilty to criminal offenses related to the delivery of an item or service under Medicare. Further, Petitioner admits that his plea is a "conviction" of an offense within the meaning of 42 U.S.C. 1320a-7(a)(1) and 7(i) and that said exclusion was mandated by law.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act clearly require 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 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. & Admin. News 682, 686.

Since Petitioner was "convicted" of a criminal offense which involved the submission of claims to Medicare for spinal manipulations that were not performed and said offense was "related to the delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) and (i) of the Social Security Act, the I.G. was required by section 1128(c)(3)(B) of the Social Security Act to exclude Petitioner for a minimum of five years. I have no discretion to reduce the mandatory minimum five year period of exclusion. See Jack W. Greene v. Louis Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

II. The mandatory minimum period of exclusion does not amount to an unlawful retroactive application of 1128(c)(3)(B) to the facts of this case.

The record demonstrates that the conduct for which Petitioner was "convicted" occurred in 1984 and 1985, and that the final disposition of the proceedings resulting in the criminal conviction did not occur until March 31, 1989. On August 18, 1987, during the pendency of Petitioner's criminal proceedings, Section 1128(a) of the Social Security Act was amended by the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, 101 Stat. 680. While the pre-August 1987 version of section 1128 provided for an exclusion for a conviction of a program-related criminal offense, there was no mandatory minimum exclusion. Congress provided for the first time on August 18, 1987 that the exclusion must be for a mandatory minimum period of five years for program-related criminal offenses.

Petitioner argues that the I.G.'s exclusion determination amounts to an unlawful retroactive application of 1128(a)(1) of the Social Security Act to the facts of his case. P. Reply Br. 3; P. Br. 3. Petitioner premises this argument on his assertion that the conduct on which his license suspension was based "relates back" to September 1984, and that the exclusion law was amended by Congress to include a five-year minimum mandatory period of exclusion. Petitioner also contends that, if the law is applied retroactively to his case, it "is arbitrary and capricious and a denial of his Fifth Amendment Constitutional rights." P. Br. 5.

It is unnecessary for me to decide whether the exclusion law may be applied retroactively in particular cases, because it is evident that it was not retroactively applied in this case. On March 31, 1989, the federal court found Petitioner guilty of the charges filed against him, more than a year and a half after Congress amended 1128. The I.G.'s authority to impose and direct exclusions against Petitioner arises from his conviction for a criminal offense in federal court. Therefore, the act which gave the I.G. grounds to exclude Petitioner occurred after the date that Congress enacted statutory revisions.

III. I am without authority to adjudicate the constitutionality of a statute that I am charged with applying.

I have considered the constitutional issues raised in this case carefully and I conclude that I am without authority to adjudicate them. The scope of my review in these cases is stated in 42 C.F.R. 1001.128(a). This section limits an appeal in this type of case to the issues of (1) whether a petitioner was, in fact, convicted; (2) whether the conviction related to a petitioner's participation in the delivery of medical care or services under the Medicare or Medicaid programs; and (3) whether the length of the exclusion is reasonable. These issues relate to the propriety of the imposition of the exclusion in a particular case and I have the authority to interpret section 1128 and the regulations promulgated thereunder. I do not have the authority to declare a federal statute unconstitutional or to invalidate a regulation. Petitioner must address these arguments in another forum, since I do not have the authority. See Section 205(b) of the Social Security Act; Jack W. Greene, DAB Civ. Rem. C-56 at 7, aff'd, DAB App. 1078 at 18 (1989); Eulalia Sentmanat, M.D., DAB Civ. Rem. C-88 at 7 (1989); Frank Waltz, M.D., DAB Civ. Rem. C-86 at 8 (1989).

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