Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Francis Shaenboen, R.Ph.,	)	Date: September 12, 1990
	)	
Petitioner,	)	
	)	Docket No. C-221
- v. -	)	DECISION CR 97
	)	
The Inspector General.	)	
	)	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the February 26, 1990 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner 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 required by federal law.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (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

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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-financed programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

"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) requires 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 give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or the social services program.[2]

BACKGROUND

The I.G.'s Notice alleged that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, and advised Petitioner that the law required a five-year minimum exclusion from participation in Medicare and Medicaid programs for individuals convicted of a program-related offense. Petitioner requested a hearing to contest the I.G.'s determination and the case was assigned to me for a hearing and decision.

I conducted a prehearing conference in this case on April 19, 1990 and issued a prehearing Order on May 2, 1990, which established a schedule for filing motions and responses. The I.G. filed a motion for summary disposition and a memorandum in support thereof on May 23, 1990. The Petitioner filed a response on July 12, 1990. I heard oral argument in this case on July 25, 1990.

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[2] The I.G.'s Notice letter allows an additional five days for receipt.

ADMISSIONS

Petitioner admits that he was "convicted" within the meaning of section 1128(i) of the Act.

ISSUE

The issues in this case are:

1. 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.

2. Whether the I.G. is required to exclude Petitioner under the provisions of section 1128(a)(1) of the Act.

3. Whether the 1987 amendments to section 1128 of the Act, mandating a minimum five year exclusion for program-related convictions, apply to this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3] [4]

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:

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[3] The citation to the record in this Decision and Order is noted as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)

[4] 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 hereby incorporated.

1. Petitioner is a pharmacist and at the time of the events underlying his conviction was president of Racey Pharmacy, Inc., Garden City, Michigan. I.G. Ex. 1,2, I.G. Ex. 2,4.

2. On July 30, 1987, a 43 count criminal complaint was filed against Petitioner and Racey Pharmacy, Inc. in the 21st District Court for the County of Wayne, charging them with defrauding the Michigan Department of Social Services, Medical Assistance Program for the medically indigent (Medicaid) and Blue Cross/Blue Shield of Michigan, by submitting bills for prescription drugs which had not been prescribed or dispensed, and which Petitioner knew to be false. I.G. Ex. 1.

3. On November 21, 1988, in the Recorder's Court for the City of Detroit, Petitioner pled nolo contendere to Counts 1 and 30 of the complaint; Count 1 involved attempted violation of the Medicaid False Claim Act, and Count 30 involved attempted violation of the Health Care False Claim Act. I.G. Ex. 2, I.G. Ex. 3.

4. Petitioner's plea was accepted by the court. I.G. Ex. 2, 14.

5. Petitioner, individually and on behalf of Racey Pharmacy, Inc., was sentenced to six months probation, and was required to pay investigative costs and restitution to Medicaid in the amount of $18,001.75 and to Blue Cross in the amount of $16,317.50. I.G. Ex. 4.

6. On or about March 18, 1990, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 6.

7. The Secretary of the Department of Health and Human Services (DHHS) has 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); 42 U.S.C. 3521 et seq.

8. Since the material facts are undisputed in this case, the classification of Petitioner's conviction of a criminal offense as subject to the authority of 1128(a) is a legal issue.

9. Summary disposition is appropriate in this case. 56 F.R.C.P.

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

11. 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.

12. Petitioner's conviction occurred after the enactment of the 1987 amendments instituting the mandatory exclusion provision of section 1128(c)(3)(B), for section 1128(a)(1) exclusions.

13. The I.G. is not barred by the ex post facto clause of the United States Constitution from imposing an exclusion with a minimum mandatory term of five years.

14. A minimum mandatory exclusion of five years is required in this case by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

I. 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.

I have relied on the plea agreement and other Court documents as the best evidence of the nature of the offense for 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's "conviction" was for attempting to submit bills to Medicaid and to Blue Cross for prescription drugs which had not been dispensed or prescribed. FFCL 2.

Convictions for criminal offenses involving false or fraudulent claims, such as the offense here, are clearly "related to the delivery of items or services" within the

ambit of section 1128(a)(1) because such claims "directly and necessarily follow ... from the delivery of the item or service." Dewayne Franzen, DAB App. 1165 (1990); Jack W. Greene, DAB App. 1078 (1989). In Greene, the Departmental 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." In the instant case, the Court realized how inextricably intertwined Petitioner's conviction was with the program by ordering Petitioner to pay $18,001.75 in restitution to the program. FFCL 5.

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.

II. The I.G. is Required To Exclude Petitioner Under The Provisions Of Section 1128(a)(1) Of The Act.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs when 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. See Greene supra.

Petitioner entered a plea of nolo contendere to a criminal offense which I have found and concluded to be "related to" the Medicaid program. That plea was accepted by the Recorder's Court for the City of Detroit on November 21, 1988. FFCL 3,4. Since it is undisputed that Petitioner was "convicted" within the meaning of section 1128(i)(3) of the Act and the criminal offense was "related to the delivery of an item or service" under Medicare, I conclude that Petitioner is an individual subject to the provisions of section 1128(a)(1) and the I.G. was required to exclude him from the Medicare and Medicaid programs.

III. The 1987 Amendments to Section 1128 of the Act Mandating A Minimum Five-Year Exclusion For Program-Related Convictions Apply To This Case.

Petitioner does not contest that he was convicted within the meaning of section 1128(a)(1). Rather, Petitioner contends that the mandatory five year exclusion provisions of section 1128(c)(3)(B) cannot be applied, because the activity underlying his conviction took place prior to the

enactment of the mandatory exclusion provisions and such action constitutes an unconstitutional ex post facto law as applied to him. Although I do not have the authority to declare the 1987 amendments unconstitutional, I do have the authority to interpret and apply the federal statute and regulations. See Betsy Chua, M.D., DAB Civ. Rem. C-139 (1990) and Hai Nhu Bui, DAB Civ. Rem. C-103 (1990), citing Jack W. Greene, supra.

The prohibition against ex post facto laws applies to criminal or penal laws which impose punishment that is applied retroactively. In Betsy Chua M.D., supra, as in the instant case, the petitioner objected to application of the mandatory exclusion on ex post facto grounds, premised on the assertion that Congress intended the imposition of the five year mandatory minimum exclusion to be a punishment. The purpose of the exclusion law and the amendments thereto, however, is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See Chua, supra at 10, citing Orlando Ariz and Ariz Pharmacy Inc., DAB Civ. Rem. C-115 (1990). See also H.R. Rep. No. 158, 97th Cong., 1st Sess. Vol. III, 329, 344 (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-462, reprinted in 1981 U.S. Code Cong. & Admin. News 727-728; Preamble to the Regulations at 48 Fed. Reg. 38827 to 38836 (August 26, 1983). Exclusion in this instance is a civil, not a penal, remedy, and is not subject to ex post facto considerations. As I held in Chua, even if the amendment were penal, however, Congress intended the mandatory minimum exclusion provision to apply prospectively from the date of the statute's enactment to all convictions occurring on or after the effective date of the 1987 amendment.

Petitioner acknowledges that he is cognizant of my earlier determination. However, he has asked me to review the entire Act, not just the provision contained in 42 U.S.C. 1320a-7A, to determine whether the five year exclusion is a civil or a penal provision.

Petitioner asserts that, when passing the 1987 amendments, Congress also passed amendments relative to criminal sanctions as contained in 42 U.S.C. 1320a-7B. Petitioner argues that there are analogies between the two, and that a comparison of the sanctions contained in the two sections would establish that the purpose of the exclusion law is punishment, and that imposition of such a punishment on the basis of activity occurring prior to the enactment of the statute is an unconstitutional ex post facto application of the law to him. P. Br. 1,2,3,4,5,6. I do not agree.

minimum mandatory provision of the Act. However, while the amendments now mandate a five year exclusion in these cases, the prior statute certainly provided for a period of exclusion for these infractions.

As I have found that this is not a penal statute retroactively applied to Petitioner, the issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded that, as a matter of law, Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 10 (1990), and Rule 56 F.R.C.P.

CONCLUSION

Based on the law and undisputed facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for the minimum mandatory period of five years under the provisions of section 1128(a)(1) and 1128(c)(3)(B) of the Act.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge