Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Marie Chappell,	DATE: November 14, 1990
Petitioner,	
- v. -	Docket No. C-225
The Inspector General.	Decision No. CR109

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 February 27, 1990 notice of determination (Notice) issued by the Inspector General (I.G.). The Notice informed Petitioner that she 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 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 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

By letter dated February 27, 1990, the I.G. notified Petitioner that she would be excluded from participation in the Medicare and Medicaid programs for a period of five years. The I.G. based the exclusion on Petitioner's conviction (within the meaning of section 1128(i) of the Act) of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. stated that such exclusions are mandated by section 1128(a)(1).

On March 13, 1990, Petitioner requested a hearing to contest the I.G.'s determination, and the case was assigned to me for a hearing and decision. On May 15, 1990, I held a prehearing conference. I issued a prehearing Order on May 23, 1990 which established a

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

schedule for moving for summary disposition of the case. Both parties moved for summary disposition. Neither party requested oral argument.

Based on the undisputed facts and the law, I conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issues in this case are whether:

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

2. 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. Petitioner was subject to the minimum mandatory five-year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioner, at all times relevant to this case, was an owner and managerial agent of DAC Community Service (DAC), an enrolled provider of ambulance transportation in the state of Pennsylvania. I.G. Ex. D.[4]

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[3] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

[4] The parties' exhibits and memoranda will be cited as follows:

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

2. From May 1, 1987 through June 1, 1989, the Medicaid Fraud Control Section of the Office of Attorney General for the State of Pennsylvania conducted an investigation which revealed that Petitioner allegedly submitted fraudulent invoices to the Department of Public Welfare's (DPW) Office of Medical Assistance. I.G. Ex. D/3.

3. An undated document entitled "Amended Information" (information) which appears to amend a criminal information (not contained in the record in this case) was filed in the Court of Common Pleas of Berks County, Pennsylvania, charging Petitioner with 123 counts of Medicaid fraud which involved submitting claims for unnecessary ambulance transportation. I.G. Ex. E.

4. Petitioner entered into a plea agreement, wherein she agreed to be placed in the Accelerated Rehabilitative Disposition (ARD) program on the following conditions: (1) Petitioner's participation in ARD would be for two years; (2) Petitioner would pay the costs incurred by Berks County in administering her participation in the ARD program; and (3) Petitioner would pay restitution in the amount of $6,908.00 to the Commonwealth of Pennsylvania. I.G. Ex. F.

5. On June 28, 1989, Petitioner signed a Waiver which states that, in return for the opportunity to earn a discharge and avoid a record of conviction if she participated in the ARD program, Petitioner waives her right to a speedy trial and waives the statute of limitations. I.G. Ex. G.

6. On June 28, 1989, the court issued an Order which placed Petitioner on two years' probation under the ARD program and ordered payment of court costs and restitution. I.G. Ex. H.

7. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

8. The offense of submitting fraudulent claims for unnecessary ambulance transportation was "related to the delivery of an item or service" under Medicaid, within the meaning of section 1128(a)(1) of the Act.

9. 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).

10. By Notice dated February 27, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act. I.G. Ex. B.

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

12. 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, within the meaning of section 1128(i).

The evidence in the record indicates that Petitioner was charged with 123 counts of Medicaid fraud. P. Br. 2; I.G. Ex. E. Petitioner was an owner and managerial agent of DAC, an enrolled provider of ambulance transportation. I.G. Ex. D. An investigation conducted by the Office of the Attorney General for the State of Pennsylvania revealed that Petitioner was involved in a Medicaid fraud scheme. I.G. Ex. D. The information accused Petitioner of submitting fraudulent invoices to DPW's Office of Medical Assistance for reimbursement of ambulance transportation services that were not provided to "medical recipients." I.G. Ex. E. Additionally, Petitioner allegedly attempted to provide ambulance transportation to medical recipients when ambulance transportation was not medically necessary and in which the "destination was noncompensable under the Medical Assistance Program." I.G. Ex. E.

Petitioner argues that she should not be excluded from participation in the Medicare and Medicaid programs because she has not been convicted of any criminal offense, thus making her exclusion improper under section 1128(a)(1) of the Act. P. Br. 1. Petitioner asserts that "she was not tried, did not waive her right to a trial, nor was she adjudicated guilty in any fashion." P. Br. 2. Additionally, Petitioner argues that she never offered a plea of guilty to any charge against her. P. Br. 7. Petitioner further claims that because of her participation in the ARD program, a judgment of

conviction was not entered against her within the meaning of section 1128(i)(4) of the Act. P. Br. 9.

The I.G. contends that under section 1128(i)(3) of the Act, Petitioner admitted her guilt, her guilty plea was "accepted" by the court, and she was entered into Pennsylvania's ARD program. The I.G. also argues that Pennsylvania's ARD program fits squarely within the definition of "conviction" as defined in section 1128(i)(4) of the Act and that Congress intended to include all deferred adjudication programs within the Act's definition of conviction. I.G. Br. 4; I.G. R. Br. 1.

I disagree with Petitioner's contentions. I conclude that Petitioner was "convicted" of a criminal offense, within the meaning of sections 1128(i)(3) and 1128(i)(4) of the Act.

The Secretary's authority 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:

> (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;
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> (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.

Petitioner entered into a plea agreement whereby she agreed to participate in the ARD program. I.G. Ex. F. Petitioner signed a Waiver (I.G. Ex. G) which states in part:

> . . . the Defendant . . . having been afforded the privilege of participating in the Accelerated Rehabilitative Disposition in order to afford an opportunity to win a complete discharge of the above captioned charge and to avoid a record of conviction, does hereby waive the right to a speedy trial; . . . I plead guilty to the summary offense(s) set forth in the information, and in the event it is found necessary to try me of the within charge, I hereby waive the right to claim double jeopardy . . . (Emphasis added.)

Additionally, the court's Order, dated June 28, 1989, acknowledges that Petitioner agreed to participate in the ARD program. I.G. Ex. H. The Order states:

> In the event you fail to comply with the conditions of your program, you will be subject to removal from the ARD Program, and upon removal therefrom, you will be tried on the charge(s) filed against you in the above captioned action. . . .

Thus, pursuant to Pennsylvania's law, Petitioner was permitted to plead guilty to the summary offenses in the information filed against her. I.G. Ex. G. However, the information does not specifically address summary offenses, but rather the information recites the 123 counts with which Petitioner was charged. I.G. Ex. E. Thus, the court found that the evidence against Petitioner substantiated her guilt as charged in the information and as stated in Petitioner's plea agreement. The court deferred further proceedings without an adjudication of guilt on the condition that Petitioner agree to participate in the ARD program for two years, make restitution, and pay court costs. I.G. Ex. H. Thus, upon fulfilling the aforementioned conditions, Petitioner could apply to the court for a dismissal of the charges against her. However, the fact that Petitioner's guilty plea was dismissed based on her satisfactory completion of a probation period in the ARD program is of no consequence to the determination that the entry and acceptance of her plea constituted a "conviction" within the meaning of sections 1128(a)(1) and 1128(i).

Petitioner cites the decision in Doe v. Bowen, 682 F. Supp. 637 (D. Mass. 1987) as being similar to the present case. The Doe case consisted of a federal court challenge to an exclusion imposed by the I.G. pursuant to section 1128. Plaintiff in Doe argued that he had not been convicted of a criminal offense under Massachusetts law, and therefore had not been convicted within the meaning of section 1128(i). The court concluded that the case was not ripe for judicial review because plaintiff had not exhausted his administrative remedies. However, the court criticized the I.G.'s determination to apply the definition of "conviction" without regard to "distinctions among the protean variety of dispositions of criminal matters in the courts of the Commonwealth." Id. at 5-6. This critical statement was made in a footnote which was dictum. It is, therefore, not a binding precedent. Furthermore, the facts of the Doe case are distinguishable from the present case, in that the plaintiff in Doe did not make a guilty plea to any offense in state court.

The term "accepted" in section 1128(i)(3) is defined by Webster's Third New International Dictionary, 1976 Unabridged Edition, as the past tense of "to receive consent." 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 Guido R. Escalante, Sr., M.D., DAB Civ. Rem. C-175 (1990); Orlando Ariz and Ariz Pharmacy, Inc., DAB Civ. Rem. C-115 (1990). In the instant case, the court "accepted" Petitioner's plea agreement and Waiver as statements of her guilt to the charges of Medicaid fraud, pursuant to section 1128(i)(3). Thus, under section 1128(i)(3), Petitioner's plea constitutes a conviction for purposes of this federal law exclusion.

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 include 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 statutes 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 on probation, such as community service or a given number of months of 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. Code Cong. & Admin. News, 3607, 3664-65; see Carlos E. Zamora, M.D., DAB App. 1104 at 5-6 (1989); see James F. Allen, M.D.F.P., DAB Civ. Rem. C-152 (1990).

The court's disposition of Petitioner's plea under the terms of the plea agreement and Waiver constitutes a "deferred adjudication," within the meaning of section 1128(i)(4), even though an adjudication of guilt was withheld by the court. The Waiver recited that

Petitioner's participation in ARD could result in her winning a complete discharge of the charges filed against her and the opportunity to avoid a record of conviction. My interpretation of the law and my application of the law to the facts of the case is consistent with Congress' intent as expressed in legislative history. The arrangement entered into by Petitioner falls squarely within the types of arrangements which the committee responsible for drafting the law sought to include within the ambit of section 1128(i)(4). H.R. No. 727, supra.

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.

The I.G. contends that Petitioner was "convicted" of a criminal offense related to the delivery of an item or service under Medicaid. I.G. Br. 3. Petitioner challenges the finding that she was "convicted" of a criminal offense but does not challenge the finding that the conviction was program related.

Petitioner was charged with 123 counts of Medicaid fraud. P. Br. 2.; I.G. Ex. E. Additionally, Petitioner was alleged to have provided ambulance transportation through DAC to medical recipients when ambulance transportation was not medically necessary and in which the ambulance trip was noncompensable under the Medical Assistance Program. I.G. Ex. D/1; I.G. Ex. E.

Section 1128(a)(1) requires exclusion from participation in the Medicare and State health care programs of those parties who commit offenses, including fraud or financial misconduct, in connection with the delivery of or billing for items or services rendered pursuant to these programs. The phrase in 1128(a)(1), "related to the delivery of an item or service," conveys legislative intent to include within the reach of the statute all "financial" offenses which affect the Medicare and Medicaid programs. Petitioner's offenses--which amount to theft or conversion of Medicaid funds--are covered by this language.

Based on the evidence in the record, the Medicaid fraud charges filed against Petitioner 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.

Section 1128(a)(1) 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:

> 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 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 and an ALJ has no discretion to reduce the minimum mandatory five-year period of exclusion. See Jack W. Greene, DAB App. 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990).

CONCLUSION

Based on the law and the 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