Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Stanley H. Guberman, D.C.,	DATE: November 20, 1990
Petitioner,	
- v. -	Docket No. C-240
The Inspector General.	Decision No. CR111

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 April 12, 1990 notice of determination (Notice) issued by the Inspector General (I.G.). The Notice informed Petitioner that he 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 Social Security 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 (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

The I.G. based this exclusion on Petitioner's conviction, as defined in section 1128(i) of the Act, of a criminal offense "related to the delivery of an item or service" under the Medicare and Medicaid programs. Such exclusions are mandated by section 1128(a)(1) of the Act.

On April 23, 1990, Petitioner requested an administrative hearing to contest the I.G's determination and the case was assigned to me for a hearing and decision. On June 6, 1990, I held a prehearing conference and established a schedule for filing prehearing motions and briefs. Thereafter, the I.G. filed a motion for summary disposition on all issues; Petitioner submitted an opposing brief to which the I.G. replied.

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

ISSUES

The issues in this case are:

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

2. 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.

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

4. Whether the effective date of Petitioner's exclusion should be a date other than the date set out in the I.G.'s Notice.

5. Whether the I.G. is barred from excluding Petitioner because the exclusion violates the prohibition of double jeopardy, the ex post facto clause of the United States Constitution, and the requirements of due process.

6. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

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:[4]

1. At all times relevant to this case, Petitioner was a licensed chiropractor certified as a Medicare provider, maintaining a practice in the State of Florida. I.G. Ex. 2.

2. By letter dated September 27, 1985, Blue Cross and Blue Shield of Florida suspended payments to Petitioner for assigned Medicare claims. I.G. Ex. 10.

3. On March 1, 1989, Petitioner entered into a plea agreement with the Office of the United States Attorney for the Southern District of Florida (U.S. Attorney) wherein he agreed to plead guilty to five misdemeanors charged in a criminal information (information) filed by the U.S. Attorney. I.G. Exs. 2 and 3.

4. The five counts of the information charged Petitioner with submitting five false claims under the Medicare program to the Department of Health and Human Services for services that were not eligible for payment in that the services were not provided or did not meet the requirements for payment. I.G. Ex. 2.

5. On March 13, 1989, the United States District Court for the Southern District of Florida (Court), on Petitioner's plea of guilty entered a Judgment of Conviction finding Petitioner guilty of the criminal offenses recited in the information. I.G. Ex. 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 citations to the record in this Decision are designated as follows:

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

6. The Court suspended imposition of sentence with respect to all counts of the information; placed Petitioner on supervised probation for three years; imposed a $3,000 fine; and ordered Petitioner to perform 600 hours of community service. I.G. Ex. 4.

7. The Court also ordered Petitioner to make restitution to the Medicare program in the total amount of $169.92. I.G. Ex. 4.

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

9. The offenses of submitting false claims under the Medicare program were "related to the delivery of an item or service" under Medicare, within the meaning of section 1128(a)(1) of the Act.

10. 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.

11. The five year exclusion is the minimum period required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

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.

13. Neither the ALJ nor the I.G. have the authority to reduce the mandatory minimum period of exclusion.

14. The ALJ does not have the authority to change the effective date of the exclusion imposed by the I.G. in this case.

15. The exclusion of Petitioner is not barred by double jeopardy or the ex post facto and due process clauses of the United States Constitution.

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

DISCUSSION

I. Petitioner Was "Convicted" of a Criminal Offense as a Matter of Federal Law.

The I.G. must exclude an individual from the Medicare and Medicaid programs if he or she is convicted 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 when:

> (1) 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; or
>
> (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local Court.

In this case, I relied on the evidence contained in the following three documents to decide the issue of whether Petitioner was "convicted" of a criminal offense as a matter of federal law: (1) Petitioner's plea agreement signed by Petitioner March 1, 1989; (2) the information; and (3) the Court's Judgment of Conviction entered against Petitioner on March 13, 1989.

These documents prove that Petitioner entered into a plea agreement with the U.S. Attorney and pled guilty to the charges contained in the information, to submitting false claims under the Medicare program as charged in the information.

The Court's Judgment of Conviction states that Petitioner entered pleas of guilty as to the five counts in the information and that Petitioner was guilty of the counts therein. The Court suspended sentencing Petitioner and placed him on probation.

The Judgment of Conviction shows that Petitioner's plea of guilty was "accepted" by the Court within the meaning of section 1128 (i) of the Act. This plea, together with the Judgment of Conviction entered against Petitioner by the Court, constitute a "conviction" within the meaning of sections 1128(a)(1), 1128(i)(1), and 1128(i)(3) of the Act.

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.

I have relied on the plea agreement, information, and Judgment of Conviction as the best evidence of the nature of the offense of 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.

The evidence shows that Petitioner submitted false claims to the Medicare program. In the case of Jack W. Greene, DAB App. 1078 (1989), the Departmental Appeals Board (DAB) held that "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." Petitioner's conviction for submitting false claims to Medicare is "inextricably intertwined" with the Medicare program, and, therefore, "related." Thus, Petitioner was convicted of criminal offenses "related to the delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) of the Act.

I find that Petitioner's offenses were "related to the delivery of an item or service" under the Medicare program, within the meaning of section 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion is Required in This Case.

Petitioner contends that the period of 13 months between his conviction of March 13, 1989 and his exclusion by the I.G. (effective 20 days from the April 12, 1990 Notice) constitutes an unreasonable delay which violates section 1128(c) of the Act. Sections 1128(c) and 1128(f)(1) of the Act and section 1001.123 of the Regulations require reasonable notice and an opportunity for a hearing. Petitioner argues that such a delay requires the period

of his exclusion to be reduced or the effective date adjusted. P. Br. 1.

Petitioner was convicted on March 13, 1989. I.G. Ex. 4. The date that the I.G. learned of the conviction of Petitioner does not appear in the record. However, three months after the date of the conviction, on June 13, 1989, the I.G. sent a letter to Petitioner advising him of the I.G.'s intent to exclude him and his chiropractic clinic from participation in federal and state health care programs pursuant to section 1128(a)(1) of the Act. Although the letter solicited a reply from Petitioner within 30 days, the I.G. received no response. I.G. Rep. Br. 1 and 2.

On January 5, 1990, the I.G. again sent the same letter of intent to Petitioner, at a different address, to which Petitioner responded on February 6, 1990. I.G. Exs. 6 and 7. Subsequently, the I.G. excluded Petitioner. I.G. Ex. 8.

The I.G. contends that at least six months of the 13 months period is attributable to Petitioner. The I.G. alleges in his Reply Brief that for six months the I.G. waited for a response from Petitioner to the June 13, 1989 letter because the I.G. desired to have Petitioner's input prior to exclusion. Petitioner was afforded the opportunity by telephone to submit any information in response to the I.G.'s Reply Brief, but did not do so.

The I.G. offered no evidence to show that Petitioner received the June 13, 1989 letter. The fact that a second letter of intent was sent by the I.G. in January 1990 (to a different address) leads to the conclusion that the I.G. could not show that Petitioner had received the first letter and had failed to respond. Therefore, I find that the evidence does not support this contention by the I.G.

Section 1128(c)(3)(B) 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:

> 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 Medicare program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required to exclude Petitioner for the mandatory minimum of five years. See, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). In Samuel W. Chang, M.D, DAB 1198 at 9 (1990), the Departmental Appeals Board found that, in a mandatory five year minimum exclusion case, the ALJ cannot decrease the time, nor can he decide when the exclusion is to begin. Therefore, I am without authority to reduce Petitioner's period of exclusion or to adjust the effective date of the exclusion.

IV. The Effective Date of Petitioner's Mandatory Minimum Exclusion Cannot be Changed.

Petitioner contends that on September 27, 1985, he was formally suspended from the Medicare program. Petitioner argues that this suspension effectively excluded him from participation in the Medicare program since that time. Petitioner argues that the effective date of the I.G.'s exclusion extends the exclusion beyond the mandatory five year period. For this reason, Petitioner asserts his mandatory exclusion by the I.G. should become effective either as of September 27, 1985, the date of his suspension, or as of March 13, 1989, the date of his conviction. P. Br. 1.

The I.G. contends that in 1985 only payments to Petitioner for assigned Medicare claims were suspended pending the outcome of an investigation. The I.G. further contends that Petitioner was not excluded at that time because he could have continued to submit Medicare assigned claims which would have been processed but on which payments would have been withheld. Medicare beneficiaries could have continued to submit unassigned claims. The I.G. argues that had Petitioner not been convicted, he would have ultimately been reimbursed for covered services properly rendered. I.G. Br. 5 and 6.

The letter of suspension advised Petitioner that his future assigned Medicare claims would be processed but that payments would be withheld pursuant to 42 C.F.R. 405.371(b). Petitioner's argument is premised on his incorrect assumption that his suspension of payments in 1985 is the same as the present exclusion. As a matter of law, a suspension of payment under 42 C.F.R.

405.371(b) is not the equivalent of an exclusion under section 1128 of the Act.

An exclusion under section 1128 of the Act bars:

(1) a provider;

(2) any entity in which the provider serves as an employee, operator, or in any other capacity; and

(3) suppliers wholly owned by the provider

from claiming or obtaining reimbursement for items and services furnished to Medicare beneficiaries and Medicaid recipients. State and local licensing and certification authorities as well as the public are notified of the exclusion. In addition, an excluded provider can be subject to further penalties if he submits or causes claims to be submitted after the effective date of the exclusion. An exclusion seeks, among other goals, to protect beneficiaries, maintain program integrity, and foster public confidence in the programs.

The purpose of a suspension of payments under 42 C.F.R. 405.371(b) is to withhold payments to a provider and protect the program against financial loss when there is minimal likelihood of recovery of overpayments or of amounts paid for fraudulent claims. The primary purpose of a suspension of payment is preserving the financial integrity of the program. Thus, the effect of a suspension of payments is more limited than the effect of an exclusion.

The I.G. argues that despite the suspension, the Petitioner could have continued "business as usual." The Petitioner argues that the practical effect of a suspension of payments on a provider whose practice

depends to a large degree on Medicare or Medicaid reimbursement is to force the provider to discontinue such a practice.[5]

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[5] Petitioner was suspended under the Regulations for possible fraud or misrepresentation. In such cases the intermediary or carrier of the program is not required to first notify the provider of the intent to suspend payments. The provider is not permitted to submit a statement or pertinent evidence on his behalf to prevent the suspension. Providers have argued that such procedures violate their due process because they do not afford them some kind of notice or hearing. This issue has not been reached by a court but has been discussed in actions requesting temporary injunction relief against the suspension of payments.

In Plaza Health Laboratories, Inc. v. Perales, et al., 702 F.Supp. 86 (1989), the plaintiff's payments were suspended by the New York Medicaid program for program misconduct occurring in New Jersey. In seeking a temporary injunction against such a suspension, the plaintiff argued, inter alia, that such a suspension was a denial of due process because the plaintiff had a substantial interest in the Medicaid payments that were being suspended. The plaintiff submitted evidence that 25% of its business was Medicaid business; that it employed 20 persons prior to the suspension and had been forced to lay off 10 of them in the wake of the suspension; and that plaintiff could not remain in business without Medicaid payments as a source of income. Further, the plaintiff directed the court to decisions that had found a property interest in program reimbursements that triggered due process considerations. The court in Plaza rejected those findings as having been made without analysis and proceeded to conclude that a health-care provider's "interest" does not rise to the level of a constitutionally protected property interest. Id. at 90 (emphasis in original). Contra, Patchogue v. Bowen, 797 F.2d 1137, 1144-45 (2d Cir. 1986) where the court stated that "health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs, and thus are entitled to some form of hearing before being deprived of that interest"; and Case v. Weinberger, 523 F.2d 602, 606 (2d Cir. 1975) where the court said that "it is clear that [plaintiff] has a property interest in her expectations of continued participation in the Medicaid program". In both these cases the court did not reach the due process issue in denying the temporary injunction.

Suspension of payments to Petitioner in 1985 may involve due process considerations.[6] However, this is a matter of program administration which is not within my authority to address. The issue that is of concern here is whether the suspension of payments to Petitioner and the present exclusion are, as a matter of law, equivalent. The issue is not whether the practical result of the suspension and the exclusion is the same, as argued by Petitioner.

I conclude that the suspension of payments to Petitioner in 1985 under regulations directing such in instances of possible fraud or misrepresentation is not equivalent to the exclusion imposed by the I.G. in this case. However impractical, Petitioner could have continued his practice of seeing and accepting assignment for Medicare patients. Ultimately, Petitioner would have been paid for legitimate and valid claims. Consequently, I conclude that suspension of payments to Petitioner under 42 C.F.R. 405.371(b) is not equivalent, as a matter of law, to an exclusion under section 1128 of the Act. Accordingly, the suspension of payments does not lengthen Petitioner's exclusion. Petitioner's suspension of payments in 1985 was a process separate and different from the present exclusion.

As indicated earlier in this decision, an ALJ in a mandatory minimum exclusion case cannot decide when the exclusion is to begin. Chang, supra. Therefore, Petitioner's mandatory period of exclusion cannot become

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In S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988), the court indicated that a provider's desire to continue the relationship [with the programs] did not rise to the level of a legitimate entitlement, and, therefore, there is no constitutionally protected property interest in future Medicaid payments. See ADL, Inc. v. Perales, [1988-2 Transfer Binder] Medicare & Medicaid Guide (CCH) Para. 37,237 (S.D.N.Y. Aug. 2, 1988); and Hillside Medical Laboratory, Inc. v. Perales, [1989-1 Transfer Binder] Medicare & Medicaid Guide (CCH) Para. 37,459 (S.D.N.Y. Sept. 20, 1988)(the court found there is a property interest in reimbursement for services already rendered).

[6] Although this is not the forum to discuss the due process issues presented by a suspension of payments, I recognize Petitioner's concerns and the practical effect of the suspension on him.

effective on any date other than the date established by the I.G.'s Notice.

V. The I.G. is not Precluded From Excluding Petitioner in This Case.

Petitioner contends that the I.G. is barred from excluding him because of the prohibition against double jeopardy. Petitioner cites the recent Supreme Court case of United States v. Halper, 109 S. Ct. 1892 (1989), in support of his argument. P. Br. 2.

The I.G. contends that this case is distinguishable from Halper in that here the I.G. is not seeking a monetary recovery and the economic impact on Petitioner is not the primary intent of the exclusion. I.G. Rep. Br. 6.

In Halper, the Supreme Court held that, under some circumstances, the imposition of civil penalties could constitute double jeopardy in the narrow circumstances where there existed a prior criminal conviction for the false claims for which the civil penalty was imposed and where there was not even a rough relationship between the amount of the penalty and the cost to the government resulting from the false claims.

This case is distinguishable from Halper. First, the I.G. is seeking to impose an exclusion, not additional monetary sanctions. Second, unlike the factual situation in Halper where the government was attempting to impose a civil penalty which the Supreme Court found to be a punishment, the purpose of the exclusion is to protect the Medicare and Medicaid programs, not to be any sort of punishment. Dewayne Franzen, DAB App. 1165 at 10 (1990). Moreover, the Board found in Franzen that the exclusion process is a collateral consequence of the underlying criminal conviction, similar to the ones whereby a professional license is revoked based upon a criminal conviction. Id. at 11 and 12. The Board found that such situations did not constitute double jeopardy. Further, exclusions by the I.G. in similar circumstances to the ones in this case have received judicial approval. In Greene v. Sullivan, 731 F.Supp. 838, 840 (E.D. Tenn. 1990) the court noted that the goals of the I.G.'s exclusion "are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc."

Petitioner also contends that the ex post facto and due process clauses of the United States Constitution bar application of the five year mandatory minimum exclusion to this case.

Petitioner contends that application of the mandatory minimum period of exclusion to this case would violate the ex post facto clause of the United States Constitution, which prohibits Congress from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[7] The foundation of the argument of Petitioner is that the conduct giving rise to his conviction took place during the period 1982 through 1984, prior to the effective date of the August 18, 1987 amendments. Petitioner further argues that it was the delay in bringing his case to trial that caused his conviction to have occurred in 1989, after the effective date of the 1987 amendments. But for this delay in convicting him, Petitioner would not have been subject to the mandatory exclusion period of five years required under the 1987 amendments. P. Br. 2.

Petitioner then argues that application of the 1987 amendments to this case "imposes additional punishment." After the enactment of the 1987 amendments, the I.G. no longer had the authority to impose an exclusion of less than five years, thereby depriving Petitioner of any possibility of being excluded for a shorter time than the mandatory minimum five years. Petitioner supports this contention by submitting that other providers whose offenses occurred on or about the same time as that of the Petitioner, but who were convicted prior to the effective date of the 1987 amendments, were given different periods of exclusion. In the alternative, Petitioner argues that the I.G. is imposing the exclusion sanction in an inconsistent fashion. P. Br. 2 and attachments.

The I. G. contends that the ex post facto clause applies only to criminal statutes. The I.G. argues that using the two-step approach set forth by the Supreme Court in United States v. One Assortment of 89 firearms, 465 U.S. 354, 362-63 (1984), (1) the statute was not designated criminal by Congress, and (2) the statutory scheme is not so punitive in purpose or effect as to negate the Congressional intent. The primary purpose and effect of the exclusion sanction is to protect the integrity of and foster public confidence in the Medicare and Medicaid programs. The I.G. further argues that for the same reasons as in the discussion of double jeopardy, neither the purpose nor primary effect of the five-year exclusion

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[7] Article 1, Section 10 of the United States Constitution.

is punitive, and the ex post facto clause is not implicated in this case. I.G. Rep. Br. 10.

Petitioner also contends that application of the 1987 amendments to this case would violate his rights to due process guaranteed by the Fifth Amendment of the United States Constitution. P. Br. 2.

The implied basis of Petitioner's argument must be that application of the 1987 amendments to this case would have an improper retroactive effect. Since the purpose of the ex post facto clause is to "assure that legislative acts give fair warning of their effect," Petitioner concludes that the due process clause requires notice of the legislation's effect. Retroactive applicability would deny notice to Petitioner and therefore due process, forbidding application of the 1987 amendments to his case. P. Br. 2

The Regulations at 45 C.F.R. 1001.128(a) provide some guidance concerning the scope of review by an ALJ in hearing federal exclusion cases. That section provides that an ALJ has the authority to hear and decide issues of whether: (1) a Petitioner was in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) the length of the suspension (exclusion) is reasonable. There is no language in section 1001.128 of the Regulations, or in other federal regulations, which states that an ALJ has the authority to consider collateral challenges to the validity of the underlying federal statutory provisions that the issues were designed to address. However, the jurisdiction conferred upon an ALJ by section 1001.128 of the Regulations does permit inquiry into the propriety of the imposition of an exclusion in particular cases. In order to consider the three issues set forth in section 1001.128 of the Regulations, an ALJ must therefore interpret, construe, and apply the underlying statutory provisions to individual cases. As stated by the Departmental Appeals Board in Jack W. Greene, DAB App. 1078 at 17 (1989):

> The ALJ must consider the meaning of the pertinent statutory provision as well as regulations and policy issuances. It would literally be impossible to apply the issue identified by [42 C.F.R. 1001.128] in a legally correct manner without considering these factors, as appropriate.

Thus, although I do not have the authority to declare the 1987 amendments unconstitutional, I do have the authority to interpret and apply the amendments. See Hai Nhu Bui, DAB Civ. Rem. C-103 (1990), citing Jack W. Greene, supra.

Petitioner raises the issue of whether the 1987 amendments to section 1128 of the Act mandating a minimum five year exclusion apply to him. I am empowered to decide how Congress intended the 1987 amendments to apply. In addition, where there is room to decide how to apply the statute, I have a duty to apply it in a manner that is constitutional and valid. See generally, Dickerson, The Interpretation and Application of Statutes, Ch. 3 (Little, Brown and Co. 1975).[8]

I disagree with Petitioners' assertion that the constitutional prohibition against ex post facto laws bars the I.G. from imposing the mandatory minimum exclusion in this case.

Petitioners' objections to application of the mandatory exclusion provision to this case on ex post facto grounds are necessarily premised on the assertion that Congress intended the imposition of the five year mandatory minimum exclusion to be a punishment. For the reasons discussed above on double jeopardy, I conclude that the exclusion provision of the 1987 amendments is a civil law that imposes a protective or remedial sanction, and it is not a punishment within the meaning of that term in the United States Constitution. Therefore, this civil remedy does not trigger the protections afforded by the Constitution to defendants in criminal cases.

I also disagree with Petitioner's assertion that the due process clause bars the I.G. from imposing the five year mandatory minimum exclusion in this case.

The 1987 amendments were enacted by Public Law 100-93. Section 15(b) of Public Law 100-93 specifically states:

> Mandatory minimum exclusions apply prospectively. Section 1128(c)(3)(B) of the Social Security Act (subsec (c)(3)(B) of this section) (as amended by this Act [Pub. L. 100-93, section 2]) which requires an exclusion of not less than 5 years in the case of certain

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[8] See also Scott v. Bowen, 845 F.2d 856 (9th Cir. 1988) (an ALJ also has authority to decide constitutional questions involving evidence, procedure, and due process).

> exclusions, shall not apply to exclusions based on convictions occurring before the date of the enactment of this Act [August 18, 1987].

Regarding this provision, the legislative history states: "The provision establishing mandatory five year minimum exclusion periods for conviction of certain crimes would apply to convictions occurring on or after the date of enactment." S. Rep. No. 109, 100th Cong., 1st Sess. 27, reprinted in 1987 U.S. Code Cong & Admin. News 682, 708.

It is clear from both the language of the statute itself and its legislative history that Congress intended the mandatory minimum exclusion provisions to apply prospectively from the date of the statute's enactment to all convictions occurring on or after August 18, 1987. See, Betsy Chua, M.D., et al, DAB Civ. Rem. C-139 (1990), aff'd, DAB App. 1204 (1990). Obviously, if a conviction occurred on August 18, 1987 or shortly thereafter, the misconduct giving rise to the conviction would necessarily have occurred prior to August 18, 1987. Accordingly, in enacting this provision, Congress must have been aware that there would be many convictions that would be entered after the effective date of the amendments and that these convictions would be based on acts that were committed prior to that date. Thus, by logical inference, Congress intended the 1987 amendments to apply even in those cases where the misconduct occurred prior to August 18, 1987, as long as the conviction resulting from the misconduct occurred on or after August 18, 1987. This logical inference is inescapable, and the only way it could be overcome would be by specific language in the text of the statute itself or in its legislative history indicating Congressional intent not to apply the mandatory exclusion to convictions based on misconduct occurring prior to August 18, 1987.

In this case, Petitioner's guilty plea and subsequent conviction were entered nearly a year and a half after the enactment of the amendments to the Act. Accordingly, I conclude there is no retroactive application here, and that the due process arguments of Petitioner are therefore misplaced. Since Petitioner in this case was convicted of a program-related offense after August 18, 1987, the I.G. had no choice but to apply the 1987 amendments and exclude Petitioner from participation in the Medicare and Medicaid programs for at least five years. Greene, supra, at 840

VI. Summary Disposition Is Appropriate In This Case.

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 as a matter of law that 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 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.

/s/

Charles E. Stratton
Administrative Law Judge