Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Baron L. Curtis,	)	DATE: March 21, 1991
	)	
Petitioner,	)	
	)	Docket No. C-306
- v. -	)	
	)	Decision No. CR122
The Inspector General.	)	
	)	

DECISION

In this case, governed by section 1128 of the Social Security Act, Petitioner requested a hearing before an administrative law judge (ALJ) to contest the December 27, 1989 notice of determination (Notice) issued by the Inspector General (I.G.).

By letter dated December 27, 1989, the Inspector General (I.G.) advised Petitioner that he was being excluded from participation in the Medicare and State health care programs based on the fact that he had been convicted, within the meaning of section 1128(i) of the Social Security Act, of a criminal offense related to the delivery of an item or service under Medicaid. [1] Petitioner was further informed that exclusions from participation in Medicare and Medicaid of individuals convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act for a minimum period of five years. He was advised that his exclusion was for the minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to ALJ Charles E. Stratton for hearing and decision. After a prehearing telephone conference which

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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.

was conducted by Judge Stratton, the I.G. filed a motion for summary judgment. Petitioner filed an opposition. On November 2, 1990, the parties agreed that the matter was appropriate for summary disposition on the basis of their stipulation of facts. The case was subsequently reassigned to me for decision.

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 provisions of section 1128(c)(3)(B) apply to the facts of this case.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. Petitioner, a pharmacist, has been the sole owner of Metrocare Center Pharmacy, 6323 Georgia Avenue N.W., Washington, D.C., since June 1986. Stipulations 1 and 2.[2]

2. By information dated April 5, 1988, the Corporation Counsel for the District of Columbia charged Petitioner with 142 counts of violation of D.C. Code section 3-702(b((3) (1985 Supp.). Stip. 3.

3. The April 5, 1988 Information charged that Petitioner had committed "Medicaid Provider Fraud" on 142 specified dates at the MetroCare Center Pharmacy, 6323 Georgia Avenue, N.W., Washington, D.C., as indicated in the 142 counts of violation of D.C. Code section 3-702(b)(3) (1985 Supp.) in that he did, in dispensing medication, "with intent to defraud, by means of a false claim, false statement, and a failure to disclose information, obtain payment from the District of Columbia as a District of Columbia Medicaid provider, for an item and service that he knew and had reason to know was not provided as claimed." Stip 4.

4. Petitioner pled guilty to 15 of the 142 counts in the April 5, 1988 Information. All 15 counts charged Medicaid fraud. Stip. 5.

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[2]The parties stipulated to the principal facts, cited hereafter as Stip. (number).

5. Petitioner's plea of guilty was accepted by the court.

6. By Judgment and Probation Order dated June 19, 1989, the Superior Court of the District of Columbia sentenced Petitioner to 60 days incarceration and $50.00 fine, sentences to run concurrently on each of the 15 counts of Medicaid fraud to which Petitioner had pled guilty. The court suspended imposition of sentence and placed Petitioner on probation for 15 months, supervised, and ordered Petitioner to make restitution of $3,500.00 to the District of Columbia Office of Health Care Financing. The court assessed Petitioner costs of $150.00 and ordered Petitioner to complete 100 hours of community service. Stip. 6.

7. On July 26, 1990, the I.G. notified Petitioner of his exclusion for five years from the Medicare and Medicaid programs. Stip. 9.

8. The District of Columbia, as a District of Columbia Medicaid provider, is a federally financed State health care program as defined by section 1128(h) of the Social Security Act. 42 C.F.R. 1001.123(a)(5) and 42 C.F.R. 1001.30.

9. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a) and 1128(i) of the Act. Findings 1-8; Social Security Act, sections 1128(a)(1) and 1128(i).

10. Petitioner was convicted of a criminal offense which was "related to the delivery of an item or service" under a State health care program, within the meaning of section 1128(a)(1) of the Act. Findings 1-9; Social Security Act, sections 1128(a)(1) and 1128(i).

11. Pursuant to section 1128(a)(1) of the Social Security Act, the Secretary is required to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Social Security Act, section 1128(a)(1).

12. The minimum mandatory period of exclusion for exclusions pursuant to section 1128(a) of the Social Security Act is five years. Social Security Act, section 1128(c)(3)(B).

13. 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); 42 U.S.C. 3521.

14. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1-13; Social Security Act, section 1128(a).

ANALYSIS

The agreed upon facts show that Petitioner was charged in an Information filed in the Superior Court for the District of Columbia with 142 counts of making false claims to the D.C. Medicaid program and obtaining reimbursement based thereon. The Information charged that Petitioner, a pharmacist, had filled prescriptions with generic drugs but billed Medicaid for brand name drugs and/or that he had billed for services he had not provided at all. After plea negotiations with the prosecutor, Petitioner pled guilty to 15 counts of the Information and the remaining counts were nolle prossed. Petitioner's guilty plea was accepted by the court. As a result of his conviction, the I.G. notified Petitioner that he would be excluded from participation in the Medicare and Medicaid programs and that his exclusion was mandatory for a minimum period of five years under section 1128(a)(1) of the Social Security Act.

Having reviewed all of the evidence and the arguments made, I conclude that the exclusion imposed by the I.G. in this case is mandatory under the law. Therefore, I enter summary disposition in favor of the I.G.

1. 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.

Petitioner contends that he should not be subject to exclusion under section 1128(a)(1). Although he concedes that his conviction after his plea of guilty in the Superior Court of the District of Columbia constitutes a "conviction" for the purposes of section 1128(a) of the Social Security Act, he argues that his plea of guilty was "not supported by a sufficient factual determination as to the specific counts of his conviction" to show that his conviction was for a program-related offense. (Petitioner's Brief page 5)[3]. He contends that the circumstances surrounding his plea of guilty should be considered in determining whether he was convicted of a

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[3]Petitioner's Brief will hereafter be referred to as P. Br. p. (number).

program-related violation. Petitioner points to the fact that his conviction was not the result of a trial on the merits. He states that his plea agreement with the Corporation Counsel for the District of Columbia allowed him to enter a guilty plea to any 15 counts of the 142 in the Information and asserts that since the government allowed him to choose the specific counts for his pleas, the government was not making a factual determination as to the merits of any particular count. He claims that he pled guilty simply because he had no desire to contest the indictment in a trial on the merits. He maintains he was not admitting guilt as to any of the counts and asserts that his plea for all practical purposes was a nolo contendere plea. (P's Br. pp. 5-6).

Petitioner's argument that there is not a sufficient factual basis in the record to support a finding that his conviction was for a program-related crime under section 1128(a)(1) is without merit. The I.G. argues that under the facts and the law, Petitioner's conviction is clearly for a program-related offense. I agree. The undisputed facts show that the Petitioner's plea of guilty to 15 counts in the Information was accepted by the court. Further, each count to which he pled guilty charged that Petitioner violated the District of Columbia Medicaid Provider Fraud Prevention statute in that he intentionally defrauded, by making false claims for Medicaid reimbursement, the District of Columbia Medicaid program. (Stip. 5). Underlying the Information were charges that Petitioner submitted claims and received reimbursement for medications which were not provided as claimed (i.e., he filled prescriptions with a generic drug and billed for a brand name drug) or which were not provided at all. As the I.G. has noted, the charges on their face show a program-related violation.

Moreover, that Petitioner was allowed to select which 15 counts of the 142 he would plead guilty to is of no significance. Each and every one of the 142 counts charged that he submitted a false claim for Medicaid reimbursement (Inspector General Exhibit E and Stip.4)[4]. Therefore, it did not matter which 15 of the counts he chose.

Further, it does not matter that Petitioner was not convicted after a trial on the merits. By his pleas of guilty, he admitted that he intentionally defrauded the

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[4]The Inspector General was the only party to offer hearing exhibits. The exhibits hereafter will be referred to as Ex. (number).

District of Columbia Medicaid program, since such intent was an element of the offenses to which he pled guilty.[5] His pleas were accepted by the court which found him guilty of the 15 counts to which he pled. Ex.D. These 15 counts charged program-related offenses.

Whether Petitioner intended to admit to the factual predicate which would establish guilt is not material to the determination as to whether he was convicted of a criminal offense which is related to the delivery of an item or service under Medicaid within the meaning of section 1128(i). It is not the Petitioner's guilt that has to be determined, but rather the fact of his conviction. Charles W. Wheeler, DAB App. 1123 (1990). The ALJ is not to delve into the underlying facts to determine guilt. If Petitioner desires to challenge the sufficiency of the facts which support the finding of guilty, he is in the wrong forum. That challenge must be raised in the trial court - - in this case the Superior Court of the District of Columbia. See Wheeler at 1123; Andy E. Bailey DAB App. 1131 (1990).

Petitioner's contention that I should consider the circumstances he alleged to have surrounded his plea -- that he entered into a plea agreement simply because he did not want to challenge the 142 counts at trial; that he was allowed to choose which of the 15 counts he pled to so that his guilt on any one count was not established by the prosecutor; and that he was promised by the D.C. prosecutor that his medical license and his Medicaid privileges would not be restricted -- must be rejected.

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[5]It appears from the judgment of conviction, the presentence report, and the stipulation of record, that the plea of guilty was a straight plea, i.e. not an Alford plea (with denial of guilt) nor a nolo contendere plea (without admission of guilt). However, the type of plea is immaterial. Even if his plea were considered a nolo contendere plea, as he asserts it should, his conviction for the offenses charged in the 15 counts would be established. "It is well settled that a plea of nolo contendere constitutes an admission of every essential element of the offense [that is] . . . pleaded in the charge." Myers v. Secretary of Health and Human Services, 898 F.2d 840 at 845 (6th Cir. 1990), quoting from U.S. v. Frederickson, 444 U.S. 934, quoting Lott v. U.S., 367 U.S. 421, 426 (1961). In any event, Petitioner concedes that a plea of nolo contendere is within the definition of a "conviction" under section 1128(i) (P's Br. p.6). See Carlos E. Zamora, M.D., DAB App. 1104 at pp. 4-7 (1989); Charles W. Wheeler, DAB App. 1123 (1989).

The underlying facts about the plea agreement are not material to this proceeding. They do not go to the fact of the conviction, but rather the correctness of the charges brought by the D C. Corporation Counsel, which is not relevant to the issues before me.

The allegations in this case are very similar to those made by the petitioners in Wheeler. In that case, the petitioners, in challenging their exclusion from participation in the Medicare and Medicaid programs, had entered "Alford" pleas to a program-related offense. They alleged that they pled guilty, not because they were guilty, but because they wanted to avoid the strain of a trial. In that case, the Board concluded that the underlying facts of the plea agreement were not relevant to the issues before the ALJ in the exclusion proceeding. It concluded that the important fact was that the pleas were accepted by the trial court, "which is all that section 1128(i) requires." DAB App. 1123 at 9.

Based on the Board's ruling in Wheeler, I conclude that the proper forum for any challenge to the validity of Petitioner's plea of guilty, and the acceptance by the trial court, is in that court, not in this administrative proceeding.

Petitioner argues that his conviction was for acts related to financial misconduct or billing errors and does not fall within the scope of the provision of the mandatory exclusion law. The I.G. relies on the decision in the case of Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). Petitioner argues that the Greene decision is inconsistent with the clear language of the statute. He urges that Greene not be followed in his case.

The argument made by Petitioner here (described in the preceding paragraph) also was made by the petitioner in the Greene case. The petitioner in that case was a pharmacist who, like Petitioner, was convicted of falsely billing Medicaid for brand name drugs for prescriptions he filled with generic drugs. In specifically rejecting Greene's argument that his violation was a "financial" or "billing" violation which was not covered by section 1128(a)(1), the Board held:

> [The] . . . offense is directly related to the delivery of the item or service since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the 'item' within the purview of the program.

DAB App. 1078 at 7. In reaching their decision in Greene, the Board reviewed the legislative history of sections 1128(a) and 1128(b). DAB App. 1078.

DeWayne Franzen, DAB App. 1165 (1990) (decided after Greene), is another case where a pharmacist was convicted of dispensing to Medicaid patients generic drugs in lieu of brand name drugs billed to Medicaid. The Board noted its holding in Greene and reiterated two ways that the conviction was 'related' to Medicaid (at p. 7):

> First, program recipients failed to receive drugs consistent with prescription labels . . . Second, the program was billed for the higher priced brand named drugs rather than the generic drugs actually dispensed . . . As such, Petitioner's action resulted in an overpayment by the Medicaid program. The program is authorized to pay only for drugs within the limitations of state and federal laws.

Since Petitioner's actions resulted both in the receipt by Medicaid patients of drugs not consistent with that shown on their prescription labels, and excess expenses paid by the Medicaid program of at least $3500.00, it harmed the Medicaid program and was "related to the delivery of an item or service" under Medicaid.

As indicated, the Board's decision in Greene was affirmed by the U. S. District Court. The criminal violations for which Petitioner was convicted are essentially the same as those in Greene and Franzen. Petitioner cites no authority for his position nor does he set forth any cogent argument which persuades me that the holding in Greene is inconsistent with the language of the statute.

Thus, I find that section 1128(a)(1) was intended to reach convictions of criminal violations for "financial" offenses which harm the Medicare and Medicaid programs. Petitioner's conviction for filing false claims for Medicaid reimbursement is a conviction within the meaning of section 1128(a)(1).

I find also that Petitioner's offense was "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.

2. Based on Petitioner's conviction for a criminal offense related to the delivery of an item or service under the Medicaid program, the I.G. was required to exclude Petitioner from participation in the Medicare program and to direct his exclusion from the Medicaid program for a minimum of five years.

Having determined that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, I will now discuss the reasonableness of the exclusion. The I.G. applied section 1128(c)(3)(B), which provides for a mandatory exclusion for a minimum period of five years. Petitioner asserts that his conviction "was for acts related to financial misconduct" and does not fall within the scope of the mandatory exclusion law at section 1128(a)(1), but rather within the permissive exclusion provisions of section 1128(b). I have already found that the conviction falls under section 1128(a)(1) in this case.

Petitioner would not prevail even if I were to conclude that his conviction might also trigger an exclusion under 1128(b)(1) or 1128(b)(6). The I.G. has no discretion to choose under which section to proceed. Where a conviction falls under section 1128(a)(1), the I.G. is required to impose a mandatory minimum exclusion. The statute gives the Secretary no option to choose between 1128(a) and 1128(b). Therefore, the ALJ need not first consider whether the offense falls under 1128(b). Samuel W. Chang, M.D., DAB App. 1198 at 8 (1990); Charles W. Wheeler, DAB App. 1123 at 6 (1990); Leon Brown, M.D., DAB App. 1208 at 4 (1990).

Since Petitioner's criminal violation fell under 1128(a)(1), the I.G. was required to exclude his participation for a mandatory five year period.

Finally, Petitioner argues that he should not be excluded from participation in the Medicaid program because the prosecutor in the Office of the D.C. Corporation Counsel promised him, as a part of his plea agreement, that there would be no referral to any government agency and that his Medicaid privileges would not be restricted. He asserts he would not have entered the guilty plea had he known that it would lead to his exclusion from participating in the Medicaid program.[6] He argues that,

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[6] The record before me does not clearly support Petitioner's claim that such a promise was made. However, even if a promise had been made, the evidence

(continued...)

under the circumstances of the plea agreement, his exclusion would not be consistent with the intention of section 1128(a)(1). However, this is not the proper forum for Petitioner to challenge the voluntariness of his guilty plea.

The allegations stated above are essentially the same as those made by the petitioner in Wheeler. In that case, petitioners claimed they pled guilty (entered an "Alford" plea) in large part because they were assured by the state prosecutor that they would not be excluded from participating in the Medicaid and Medicare programs if they did so. They sought an evidentiary hearing to establish the underlying conduct surrounding their pleas. In upholding the ALJ's ruling that no hearing was required in the case, the Board stated:

> The proffered testimony that a misrepresentation was made to the Petitioners about the effect of their pleas on participation in Medicare and Medicaid would not necessarily establish that their pleas were not properly accepted by the State court . . . In any event, the proper forum for any challenge to the validity of their pleas, and their acceptance by the State court, is in State court and not in this administrative proceeding.

DAB App. 1123 at 9. The Board has held in other cases that arguments about the process leading to a Petitioner's criminal conviction are completely irrelevant to an exclusion proceeding. See David S. Muransky, DAB App. 1227 at 5 (1991), citing the decision of the Board in Andy E. Bailey, DAB App. 1131 at 3 (1990).

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[6](...continued)
does not show that the I.G., or any person acting on behalf of the Secretary, was a party to Petitioner's agreement. It would not appear that an Assistant D.C. Corporation Counsel, who did not represent the federal government, would have had the authority to make a decision on Medicare and Medicaid sanctions that would bind the I.G., who, by law, was required to exclude Petitioner. Under these circumstances, I question whether Petitioner, who was represented by counsel, could reasonably have relied on any representation by a non-federal prosecutor that he would be excluded in a civil action under federal statutes.

Since there is no dispute that the Petitioner was convicted of the 15 counts charging Medicaid fraud, I hold that Petitioner's exclusion was mandated based on the facts in his case and that section 1128(c)(3)(B) gives the Secretary no discretion to reduce the period of exclusion below five years.

CONCLUSION

Having considered all of the evidence and arguments presented in this case, I find that the Petitioner was convicted of an offense which was related to the delivery of an item or service under a State health care plan and that his exclusion by the I.G. from participation in the Medicare and Medicaid programs for a period of five years is required under the provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act and is therefore reasonable.

/s/

Constance T. O'Bryant
Administrative Law Judge