Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Mamdouh El-Attrache, M.D.,	DATE: April 10, 1991
Petitioner,	
- v. -	Docket No. C-254
The Inspector General.	Decision No. CR126

DECISION

Petitioner timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the April 19, 1990 notice of determination (Notice) issued by the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS). The Notice informed Petitioner that he was excluded from participation in the Medicare program and three federally-financed state health care programs for a period of five years, pursuant to section 1128 of the Social Security Act (Act).[1]

I have considered the parties' arguments, the documentary evidence submitted, and the applicable federal law and regulations. I conclude that there are no disputed questions of material fact that would require an in-person evidentiary hearing. I further conclude that the exclusion imposed and directed by the I.G. in this case is mandated by federal law. Therefore, I enter summary disposition in favor of the I.G.

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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.

BACKGROUND

The I.G.'s Notice alleged that Petitioner had been convicted in the Court of Common Pleas of Westmoreland County, Pennsylvania of a criminal offense related to the delivery of an item or service under the Pennsylvania Medical Assistance Program. Petitioner was further advised that section 1128 of the Act required a minimum five-year exclusion for individuals convicted of a program-related offense. The I.G. informed Petitioner that he was excluded for the mandatory minimum five-year period required by federal law.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. In his request for a hearing, Petitioner alleged that he had received ineffective assistance of counsel during the criminal proceedings and, therefore, his guilty plea was "involuntary." Petitioner stated that he would be attacking his plea in a collateral state court proceeding. He requested that I stay his exclusion pending resolution of the issue of his "involuntary" plea agreement. During the prehearing conference on July 26, 1990, I informed Petitioner that I would not stay his exclusion pending his state appeal. I noted that if he were successful in overturning his conviction, he would be reinstated. I granted Petitioner the opportunity to amend his request for a hearing and to add issues. Petitioner filed an amended statement of contested issues and findings. The I.G. moved for summary disposition of the case and submitted documentary evidence in support of the motion. Petitioner opposed the motion. The parties briefed the issues and neither party requested oral argument.

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., 1990 Supp.). Section 1128(a)(1) of the Act provides for the mandatory 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.

ADMISSIONS

During the prehearing conferences on July 26, 1990 and October 17, 1990, Petitioner admitted that: (1) he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and (2) the offense was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

ISSUES

The remaining issues in this case are:

1. Whether the five-year minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act must apply in this case;

2. Whether the delegation of authority to the I.G. by the Secretary to impose exclusions was lawful;

3. Whether the principle of double jeopardy bars the I.G. from excluding Petitioner;

4. Whether, in the absence of new or additional regulations, the I.G. has jurisdiction to impose Petitioner's exclusion;

5. Whether this exclusion violates the due process clause of the United States Constitution; and

6. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

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:

1. On January 23, 1989, the Attorney General for the Commonwealth of Pennsylvania filed an information in the Court of Common Pleas of the County of Westmoreland (State Court) charging Petitioner with 58 felony counts of Medicaid fraud. I.G. Ex. E.[3]

2. On January 23, 1989, Petitioner pled guilty to 10 counts in the information. I.G. Ex. B.

3. Petitioner, by his guilty plea, admitted to conspiring with individuals who were not licensed physicians and having these unlicensed individuals examine and write prescriptions for Medicaid patients. Petitioner then submitted reimbursement invoices to Medicaid, misrepresenting that these services had been performed by a licensed physician. I.G. Ex. E.

4. By his guilty plea, Petitioner also admitted to having received monthly kickbacks from a clinical laboratory in exchange for his referral of patients to the laboratory. I.G. Ex. E.

5. On May 23, 1989, at Petitioner's sentence hearing, the State Court placed Petitioner on probation for three years; ordered restitution of $36,000 to the Pennsylvania

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[2] 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.

[3] The citations to the record and to Board cases in this Decision are designated as follows:

I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibits	I.G. Ex. (letter)
I.G.'s Reply Brief	I.G. Rep. Br. (page)
Petitioner's Brief	P. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./ date)
Departmental Appeals Board Appellate decisions	DAB App. (decision no./date)

Department of Public Welfare and $3,000 to the Office of the Pennsylvania Attorney General to cover the costs of his investigation; and imposed $8,000 in fines. I.G. Ex. F.

6. Petitioner admitted that he was convicted of a program-related criminal offense within the meaning of section 1128 of the Act.

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

8. 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.

9. The I.G. properly excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

10. The Secretary of the Department of Health and Human Services (the Secretary) properly delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

11. The I.G. has authority to impose and direct Petitioner's exclusion even in the absence of new regulations.

12. The principles espoused in United States v. Halper, 490 U.S. 435 (1989), concerning double jeopardy, do not bar the I.G. from imposing and directing exclusions against Petitioner from participation in the Medicare and Medicaid programs.

13. This exclusion does not violate the due process clause of the United States Constitution.

14. Since the material facts are undisputed in this case, the only remaining issues are legal issues.

15. There are no material facts in dispute in this case, there is no need for an in-person evidentiary hearing, and the I.G. is entitled to summary disposition as a matter of law. See Charles W. Wheeler and Joan Todd, DAB App. 1123 (1989); Fed. R. Civ. P. 56.

DISCUSSION

I. A minimum mandatory five-year exclusion is required in this case.

Petitioner admits, and I conclude, that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 1-7. Petitioner also admits, and I conclude, that he 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. FFCL 1-8.

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 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. Congressional intent on this matter is clear:

> A minimum five-year exclusion is appropriate, given the seriousness of the offense 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 (1987), 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 sections 1128(a)(1) and 1128(i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum period of five years and an ALJ has no discretion to reduce the mandatory minimum five-year period of exclusion. See Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990); Charles W. Wheeler, DAB Civ. Rem. C-61 (1989), aff'd, Charles W. Wheeler and Joan K. Todd, DAB. App. 1123 (1990). See also Greene v. Sullivan, 731 F. Supp. 838, 840 (E.D. Tenn. 1990).

II. It is well settled that the delegation of authority to the I.G. by the Secretary to impose exclusions was lawful and that the I.G.'s participation in the exclusion process does not violate the Act.

Petitioner contends that the delegation of authority from the Secretary to the I.G. was unlawful because the delegated duty to impose exclusions is a "program operating responsibility" which is prohibited from transfer to the I.G. by 42 U.S.C. 3526(a). P. Br. 2, 4.

This issue was settled by the United States District Court for the Eastern District of Tennessee in Greene, 731 F. Supp. at 837. The district court upheld the lawfulness of the Secretary's delegation of exclusion authority to the I.G., finding "nothing inappropriate in the Secretary's delegation of the exclusion sanction authority to this office" and that Greene's argument to the contrary ". . . is totally without merit." Id. I similarly found this argument to be without merit in Mark M. Akaqi, R.Ph., DAB Civ. Rem. C-91 (1989); Arthur B. Stone, D.P.M., DAB Civ. Rem. C-52 (1989); and Charles W. Wheeler, DAB Civ. Rem. C-61 (1989). Accordingly, I find Petitioner's argument here to be without merit.[4]

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[4] The I.G. argued in his brief that I lack jurisdiction to decide this question, relying on Jack W. Greene, DAB App. 1123 (1989), in which the Departmental Appeals Board (DAB) upheld the ALJ's finding that he lacked authority to consider the lawfulness of the delegation. I do not need to resolve this jurisdictional question because the delegation issue is well settled. I note, however, that the issue of my jurisdiction to decide collateral issues is not so clearly established. For example, the DAB upheld my decision in Wheeler where I held as I do here on this issue. They also upheld my reasoning in Wheeler for declaring that it was not necessary for the Secretary to promulgate new exclusion regulations, a collateral issue. Moreover, the DAB in Greene went on to explain how the ALJ should decide the delegation issue if he did have the authority to decide it. Furthermore, on appeal, the District Court in Greene did not address the issue of the ALJ's authority. Finally, and more recently, the DAB held in Betsy Chua, M.D. et. al., DAB App. 1204 (1990), that while the ALJ does not have authority to declare statutes or regulations unconstitutional, the ALJ does have the authority to interpret and apply them. They also held in Chua, by implication, that I had the authority to make conclusions on constitutional questions because they upheld my due process and ex post facto conclusions.

Moreover, Congress, in amending and strengthening the exclusion law, has itself approved the involvement of the I.G. in the exclusion process, since it is the I.G. who has performed this responsibility from the law's inception. In fact, the legislative history of the 1987 amendments to the law expressly approves the Secretary's delegation of the exclusion authority to the I.G.:

> Under current practice, the Secretary has delegated all existing suspension, exclusion, and civil monetary penalty authorities to the Department's Inspector General. The Committee believes that this delegation of authority by the Secretary is entirely consistent with the statutory mandate of the HHS Inspector General (42 U.S.C. section 3521 et seq.) and has resulted in the efficient administration of these authorities. The Committee expects the Secretary both to continue this existing practice and to delegate all new statutory exclusion authorities created by this bill to the Department's Inspector General.

S. Rep. No. 109, 100th Cong., 1st Sess. 14, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 695.[5]

III. It is well settled that the I.G. is not precluded from excluding Petitioner in this case by reason of the double jeopardy clause of the Constitution.

Petitioner contends that his exclusion from the Medicare and Medicaid programs for the mandatory five-year period is a second punishment for a single offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution, citing United States v. Halper, 490 U.S. 435 (1989). P. Br. 10-11; I.G. Ex. D. The I.G. claims that Petitioner's exclusion does not

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[5] Petitioner has requested a stay in this case until DHHS acts on his request for materials such as executive orders, memoranda, directives, releases, program operating manuals and the like under the Freedom of Information Act, relating to the delegation of authority issue. P. Ex. 1. Since I have found and concluded that the issue of the I.G.'s delegation has clearly been decided in favor of the I.G. and that the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) apply in this case, I need not stay this action.

violate the double jeopardy clause of the Constitution. I.G. Br. 10.

In Halper, the Supreme Court held that under some circumstances, the imposition of civil penalties under the False Claims Act, 31 U.S.C. 3729-3731, could constitute double jeopardy in the narrow circumstances where there existed a prior federal 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. The Court noted that the rule is one for "the rare case."

Petitioner's case involves a state conviction, whereas Halper involved a federal conviction. Double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. Chapman v. U.S. Dept. of Health & Human Services, 821 F.2d 523 (10th Cir. 1987); Abbate v. United States, 359 U.S. 187 (1959). Moreover, the primary goals of the exclusion law are not to punish, but are remedial, such as protecting program beneficiaries, protecting program integrity, and by fostering public confidence. See Greene, 731 F. Supp. at 840; H.R. Rep. No. 158, 97th Cong., 1st Sess. Vol. III, 329, 344 (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62 (1981), 1981 U.S. Code Cong. & Admin. News 727-28; Preamble to the Regulations (48 Fed. Reg. 38827 to 38836, August 26, 1983). Accordingly, the I.G. is not barred from excluding Petitioner by the principles of double jeopardy.

IV. It is well settled that the I.G. has the authority to impose and direct Petitioner's exclusion in the absence of new or additional regulations.

Petitioner argues that his exclusion from the Medicare and Medicaid programs is void because additional rulemaking was required under both the Administrative Procedure Act and the Medicare and Medicaid Patient and Protection Act of 1987, before the exclusion could be imposed and implemented. I.G. Ex. D. The I.G. argues that no additional rulemaking was required before Petitioner's exclusion could be imposed. I.G. Br. 11. I agree with the I.G.

The DAB in the cases of Wheeler, DAB App. 1123 and Greene, DAB App. 1078, cases brought under section 1128(a)(1), held that a mandatory exclusion may be applied on the basis of the statute alone and on the basis of the existing regulations that preceded these

1987 revisions. The DAB stated that the Secretary could rely on existing regulations as long as they were compatible with the revised statute, and provided for the timing and notice of the exclusion in a manner fully consistent with the revised statutory provisions. The DAB stated that as long as the agency proceeds in accordance with "ascertainable standards" and "provides a statement showing its reasoning in applying the standards," formal rulemaking was not required. Moreover, the DAB held that Congress clearly authorized the Secretary to apply the revised provisions prior to promulgating new regulations when it authorized exclusions based on convictions occurring on or after the enactment of the revisions.

The DAB's interpretation was upheld in Greene, 731 F. Supp. at 837, where the Court held:

> The 1987 amendments simply imposed a five-year minimum period of exclusion . . . These provisions are self executing and do not require the formation of additional regulations prior to their application. Adequate notice and hearing regulations were already in place when Congress enacted the 1987 Amendments.

V. Petitioner's due process arguments have no merit.

Petitioner claims that the federal law which provides that the same branch of government investigate and determine exclusions and consider appeals of those decisions is a violation of his rights and deprives him of a liberty interest without due process of law. I.G. Ex. D. The I.G. argues that this issue is not one that the ALJ can decide. I.G. Br. 10-11. See footnote 4.

I have considered the constitutional issues raised in this case by Petitioner and conclude that they are without merit for the same reasons expressed by the District Court in Greene, 731 F. Supp. at 840. There, the District Court considered Greene's due process arguments and found that they lacked merit, concluding that there was not the "slightest bias in the administrative proceedings." See also, Chua, DAB App. 1204 (1990).

VI. It is well settled that summary disposition is appropriate in exclusion cases and that there is no need for an evidentiary hearing in this case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Leon Brown, DAB App. 1208 (1990); Surabhan Ratanasen, M.D., DAB App. 1138 at 8 (1990). Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act and that it was "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. In addition, there is documentary evidence in the record that supports a finding that Petitioner was "convicted" of a program-related crime.

Petitioner contends that he has an unconditional statutory right to an in-person hearing relating to this exclusion. He argues that under the Administrative Procedure Act at 5 U.S.C. 556(d), he is entitled to present his case and conduct such hearing "as may be required for a full and true disclosure of the facts." P. Br. 6. While Petitioner is quite correct that there must be a full disclosure of all relevant facts in all exclusion cases, there are no genuine issues of material fact which would require the submission of additional evidence in this case. Therefore, there is no need for an in-person evidentiary hearing.

I have concluded that, based on the undisputed material facts contained in the record of this case, the I.G. properly excluded Petitioner from the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act and that the length of the exclusion is controlled by section 1128(c)(3)(B), which mandates a minimum period of exclusion for five years.

Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Wheeler, DAB App. 1123; Fed. R. Civ. P. 56.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I find that Petitioner was convicted of a program-related criminal offense, find that summary disposition is appropriate, conclude that the I.G. properly excluded Petitioner from participating in the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act, and conclude that the minimum period of exclusion for five years is required by section (c)(3)(B) of the Act

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge