Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Russell E. Baisley and Patricia Mary Baisley,	DATE: April 26, 1991
Petitioners,	
- v. -	Docket No. C-276
The Inspector General.	Decision No. CR128

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioners timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the June 1, 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 Petitioners that they were excluded from participating in the Medicare and Medicaid programs for five years.[1] The I.G. alleged that Petitioners were "convicted", as defined in section 1128(i) of the Act, of a criminal offense "related to the delivery of an item or service" under the Medicaid program.

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioners are subject to the mandatory exclusion provisions of section 1128(a)(1) of the Act, and that Petitioners' exclusion for a minimum period of five years is mandated by section 1128(c)(3)(B) of the Act.

---

[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

1. 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 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).

2. 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

On July 31, 1990, Petitioners requested an administrative hearing before an ALJ to contest the I.G's determination to exclude and the case was assigned to me for a hearing and decision. On September 19, 1990, I held a prehearing conference. I issued a prehearing Order on September 24, 1990 which established a schedule for the parties to submit briefs and documentary evidence in support of motions for summary disposition in this case. The I.G. filed a motion for summary disposition and Petitioners submitted an opposing brief to which the I.G. replied. Petitioners requested oral argument in their response brief, but withdrew their request on March 25, 1991, prior to oral argument being heard.

---

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

ADMISSIONS

During the telephone prehearing conference on September 19, 1990, Petitioners admitted that they had been "convicted", as defined by section 1128(i) of the Act, of a criminal offense "related to the delivery of an item or service" under Medicaid, within the meaning of section 1128(a)(1) of the Act. Later, Petitioners retracted their admission that they were "convicted", as defined by section 1128(i) of the Act.

ISSUES

The issues in this case are:

1. Whether Petitioners were "convicted" of a criminal offense within the meaning of section 1128(i) of the Act;

2. Whether the criminal 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; and

3. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioners, at all times relevant to this case, were "high managerial agents" of C.R. Baisley Transportation Company, Inc. (C.R.), Main-Transit Taxi Service, Inc. (Main), McCourt Transportation Company, Inc. (McCourt), and Suburban Wheelchair of W.N.Y., Inc. (Suburban)(Defendant Corporations), enrolled Medicaid providers of ambulance transportation in the State of New York (State). I.G. Ex. 3.[4]

---

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

[4] References to the record and to Board cases in this decision will be cited as follows:

I.G.'s Exhibits I.G. Ex. (letter/page)

(continued...)

2. On April 23, 1986, Petitioners were accused by Indictment 86-0453-A of Grand Larceny in the Second Degree, in violation of Section 155.35 of the Penal Law, and, by Indictment 86-0453-G, of Offering a False Instrument for Filing in the First Degree, in violation of Section 175.35 of the Penal Law. I.G. Ex. 3.

3. Indictment 86-0453-A alleged that Petitioners, as "high managerial agents" of each of the Defendant Corporations, acting within the scope of their employment and on behalf of the Defendant Corporations, and each aiding and abetting the other, submitted and caused to be submitted to the Erie County Department of Social Services (Social Services) various invoices which falsely represented that fares for certain multiple ride Medicaid clients had been billed in accordance with the guidelines set forth by Erie County (County). I.G. Ex. 3.

4. Indictment 86-0453-A further alleged that by the false representations, Petitioners intentionally caused the State and the County to pay the Defendant Corporations approximately $274,382.00 to which they were not entitled. I.G. Ex. 3.

5. Indictment 86-0453-G alleged that Petitioners, as "high managerial agents" of C.R. and Suburban, acting within the scope of their employment and on behalf of C.R. and Suburban, and each aiding and abetting the other, submitted and caused to be submitted to Social Services invoices which Petitioners knew falsely represented that Suburban was entitled to bill a full fare for the transportation of a Medicaid recipient in accordance with the agreed guidelines promulgated by the County in that Petitioners well knew the transportation of this Medicaid recipient, along with other Medicaid recipients in the same vehicle, was considered a "multiple fare" and not a full fare. I.G. Ex. 3.

---

[4](...continued)

I.G.'s Brief	I.G. Br. (page)
Petitioners' Brief	P. Br. (page)
I.G.'s Reply Brief	I.G. R. Br. (page)
Findings of Fact and Conclusions of Law	FCCL (number)
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./date)
Departmental Appeals Board Appellate decisions	DAB App. (decision no./ date)

6. Indictment 86-0453-G further alleged that Petitioners knowingly and intentionally submitted vouchers so that the County would pay one half fare and two full fares as if the Medicaid recipients had been transported in three separate vehicles when Petitioners knew they had been transported in the same vehicle. I.G. Ex. 3.

7. Indictment 86-0453-G additionally alleged that Petitioners intended to defraud the State and the County into paying Suburban a sum of money to which it was not entitled. I.G. Ex. 3.

8. On June 6, 1988, The Erie County Supreme Court in Buffalo, New York (Court), on Petitioners' March 28, 1988 pleas of guilty, entered Certificates of Conviction-Imprisonment finding Petitioner Russell Baisley guilty of Grand Larceny in the Second Degree, in violation of section 155.35 of the Penal Law, and finding Petitioner Patricia Baisley guilty of Attempt to Offer a False Instrument for Filing, in violation of section 110-175.30 of the Penal Law. I.G. Ex. 2.

9. The Court sentenced Petitioner Russell Baisley to pay $250,000 restitution and to five years probation in Florida, and Petitioner Patricia Baisley to an unconditional discharge and payment of a $60.00 surcharge. I.G. Ex. 2.

10. The Certificates of Conviction entered by the Court are judgments of conviction within the meaning of section 1128(i)(1) of the Act.

11. Petitioners' Alford pleas are equivalent to nolo contendere pleas and constitute a plea of guilty, within the meaning of section 1128(i)(3) of the Act.

12. Petitioners were "convicted" of a criminal offense, within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

13. Petitioners' criminal offenses of submitting fraudulent claims for ambulance transportation were "related to the delivery of an item or service" under Medicaid, within the meaning of section 1128(a)(1) of the Act. P. Br. 3.

14. The Secretary of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

15. The I.G. was required by section 1128(a)(1) and 1128(c)(3)(B) to exclude Petitioners for a mandatory period of no less than five years and an ALJ has no statutory authority to alter this mandatory minimum exclusion period.

16. By Notice dated June 1, 1990, the I.G. excluded Petitioners from participating in Medicare and directed that they be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act, effective 20 days from the date of the Notice. I.G. Ex. 1.

17. The exclusion imposed and directed against Petitioners is for the mandatory minimum of five years.

18. There being no disputed issues of material fact in this case, there is no need for an in-person evidentiary hearing and the I.G. is entitled to summary disposition.

DISCUSSION

I. Petitioners' Were "Convicted" of a Criminal Offense, as Defined by Section 1128(i) of the Act.

The evidence establishes that Petitioners were each charged in an indictment with one count of Grand Larceny in the Second Degree and one count of Offering a False Instrument for Filing in the First Degree in New York State. FFCL 1-7. Petitioners were managerial agents of C.R., Main, McCourt, and Suburban, enrolled Medicaid providers of ambulance transportation. FFCL 1-7. The indictment accused Petitioners of submitting and causing to be submitted to Social Services various invoices which falsely represented that fares for certain multiple-ride Medicaid clients had been billed in accordance with the guidelines set forth by the County. I.G. Ex. 3. The indictment further accused Petitioners of submitting and causing to be submitted invoices which falsely represented that Petitioners were entitled to bill a full fare for the transportation of Medicaid recipients when Petitioners knew this was not the case. FFCL 1-7. The indictment alleges that this was knowingly and intentionally done by Petitioners. FFCL 1-7.

The Court's Certificate of Conviction-Imprisonment shows that Petitioner Russell Baisley pleaded guilty to Grand Larceny in the Second Degree and that Petitioner Russell Baisley's plea was accepted by the Court. Judgment on the plea was entered by the Court and Petitioner Russell Baisley was ordered to pay restitution and serve five years probation. FFCL 7-9.

The Court's Certificate of Conviction-Imprisonment shows that Petitioner Patricia Baisley pleaded guilty to Attempt to Offer a False Instrument for Filing and that Petitioner Patricia Baisley's plea was accepted by the Court. Judgment on the plea was entered by the Court and Petitioner Patricia Baisley was given an unconditional discharge and ordered to pay a surcharge. FFCL 7-9

Petitioners contend that their convictions were not upon a verdict after trial or upon a plea of guilty or nolo contendere. P. Br. 5. Petitioners argue that New York does not allow a plea of nolo contendere; that under its common law system, New York has formulated a system for accepting pleas where an individual does not contest the proceedings against him and still maintains his innocence. P. Br. 6. Petitioners also contend that they are innocent of the charges against them and have maintained their innocence throughout the proceedings. P. Br. 5. Petitioners further argue that their convictions were not for federal crimes, and Petitioners are, therefore, not estopped from denying the essential elements of the criminal offense before the ALJ. P. Br. 5 and 6.

I disagree with Petitioners' contentions. I conclude that Petitioners were "convicted" of a criminal offense, within the meaning of sections 1128(i)(1) and 1128(i)(3) of the Act.

The I.G.'s authority to exclude an individual from the Medicare and Medicaid programs is based upon "conviction" for 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; or
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court.

Petitioners implied argument is that their Alford pleas are not the same as nolo contendere pleas and, therefore, do not fall within the meaning of section 1128(i)(3) of the statute. Petitioners also argue that their entering of the Alford pleas demonstrate their lack of culpability. Petitioner Patricia Baisley further argues that she is additionally not culpable in that she was convicted of an "attempted", not a completed, offense.

An Alford plea is equivalent to a nolo contendere plea and entry of an Alford plea and acceptance of such a plea by a state court amounts to a conviction within the meaning of sections 1128(i)(1) and 1128(i)(3) of the Act. Under an Alford plea, an individual enters a plea of guilty, although maintaining his innocence. North Carolina v. Alford, 400 U.S. 25 (1970). Under a nolo contendere plea, an individual enters a plea of guilty, although not expressly admitting his guilt.[5] Id. at 35. In its practical results, an Alford plea and a nolo contendere plea are equivalent.[6] In both instances, the individual waives his right to a trial, authorizes the court for purposes of the case to treat him as if he were guilty, and consents to the court's imposition of sentence.[7] Id. at 35-37. An Alford plea is therefore a guilty plea within the meaning of section 1128(i). Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990); See Alford at 35-38.

No contentions have been made by Petitioners and there is nothing in the record that would lead to the conclusion that Petitioners' pleas were not entered knowingly,

---

[5] Courts have defined the plea of nolo contendere in a variety of different ways. On the one hand, they have described it as a plea of guilty. United States v. Food & Grocery Bureau, 43 F. Supp. 974, 979 (S.D. Cal. 1942), aff'd, 139 F.2d 973(9th Cir. 1943). On the other hand, the courts have seen it as a query directed to the court to determine the defendant's guilt. State v. Hopkins, 27 Del. 306, 88 A. 473 (1913).

[6] "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence." Alford at 37.

[7] "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Alford at 37.

voluntarily and understandingly. Even if they had made such an argument, this would not be the proper forum to set aside the Alford plea. See Ronald Allen Cormier, DAB Civ. Rem. C-206 (1990). Petitioners' guilty pleas were accepted by a state court, which is all that is required by section 1128(i). Wheeler and Todd, supra at 9; See Gordon Lee Hanks; DAB Civ. Rem. C-112 at 9-10 (1989). 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. Marie Chappell, DAB Civ. Rem. C-225 at 8 (1990). 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). Acceptance by a state court is evidenced here by the Court's entry of Certificates of Convictions-Imprisonment against Petitioners which imposed sentence and disposed of the cases against Petitioners.

Petitioners also argue that they are innocent of the charges against them and that their entering of Alford pleas demonstrate their lack of culpability. Petitioner Patricia Baisley additionally argues that she is not guilty in that she pled to an "attempted", not a completed, offense.

Culpability is not a prerequisite to a section 1128(a)(1) offense. The clear meaning of the statute's requirement that there be a conviction is evident from its language:

> (1) CONVICTION OF PROGRAM-RELATED CRIMES.-Any individual or entity that has been convicted of a criminal offense related to the delivery to the delivery of an item or service under Title XVIII or under any State health care program.

[Emphasis added]. Section 1128(a)(1) of the Act.

There is nothing in the statutory language requiring that culpability be established. Furthermore, it is a settled principle that a petitioner cannot challenge the I.G.'s authority to exclude him by denying that he is guilty of that for which he has been convicted. Christino Enriquez, M.D., DAB Civ. Rem. C-277 (1991) See Andy E. Bailey, C.T., DAB App. 1131 (1990); John W. Foderick, M.D., DAB App. 1125 (1990); Daniel B. Salyer, R.Ph., DAB Civ. Rem. C-224 (1990); Roosevelt A. Striggles, DAB Civ. Rem. C-301 (1991). The I.G.'s authority to exclude a party under section 1128(a)(1) arises by virtue of that party's conviction of a criminal offense, as described in the Act. A party's actual guilt or innocence is not a relevant factor to be considered in deciding whether the

I.G. has authority to impose or direct an exclusion pursuant to section 1128(a)(1).[8]

Petitioners' convictions are established as a matter of law, within the meaning of the Act. Thus, the facts which Petitioners would like to establish through testimony in an in-person evidentiary hearing, such as Petitioners' lack of culpability regarding the criminal offenses for which they were convicted, would not materially affect the outcome of this case. There being no disputed material facts in this case, summary disposition is appropriate without an in-person evidentiary hearing.

II. Petitioners' Convictions are "Related to the Delivery of an Item or Service" Under Medicaid, Within the Meaning of Section 1128(a)(1) of the Act.

Sections 1128(a)(1) requires the I.G. to exclude from participation any individual who is convicted of a criminal offense "related to the delivery of an item or service" under Medicaid (emphasis added). Petitioners do not challenge a finding that their convictions were for program-related offenses.

I also independently find that crimes involving financial misconduct in the submission of Medicaid claims are "related to" the "delivery of an item or service." Black's Law Dictionary, Fifth Edition (West Pub. Co. 1979) defines "related" as: ". . . standing in relation; connected; allied; akin." The offense for which Petitioners were convicted were "connected to" the delivery of an item or service under Medicaid. This case should not be decided in a vacuum, or with a strict, hypertechnical interpretation of the term "related to" in section 1128(a)(1) of the Act. There is a simple, common sense connection, supported by the record, between the actions associated with Petitioners' convictions and the Medicaid program. Thus, the criminal offenses for which Petitioners were convicted are "related to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act.

---

[8] A party who continues to deny his or her guilt after a conviction is not without recourse. That party may appeal the conviction in a court which has jurisdiction over the matter. If the conviction is overturned on appeal, then the I.G. may reinstate the excluded party. See 42 C.F.R. 1001.136(a).

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

Petitioners' contend that the five year mandatory exclusion required by sections 1128(a)(1) does not apply in this case because (if found to be convicted for purposes of the federal statute) Petitioners' conduct fell within subparagraph (b) of the statute. P. Br. 9. Petitioners argue that the I.G. misconstrued the nature of the exclusion. P. Br. 9. Therefore, the I.G. was not required to exclude Petitioners for a minimum of five years. P. Br. 9.

As I said in Charles W. Wheeler, DAB Civ. Rem. C-61 (1989), aff'd, DAB App. 1123 (1990), 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 sections 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 Petitioners were "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 Petitioners for a minimum of five years and an ALJ has no discretion to reduce the minimum mandatory five-year period of exclusion. See Wheeler, DAB App. 1123 at 9; Jack W. Greene, DAB App. 1078 (1989), aff'd, 731 F. Supp. 835 and 838 (E.D. Tenn 1990).

In Wheeler and Greene, supra, the Departmental Appeals Board concluded that, absent the section 1128(a) mandatory requirements, it is possible for an offense to fall within the scope of section 1128(b) provisions. Here, Petitioners' criminal offenses met the statutory requirements of section 1128(a)(1). In cases such as this, the I.G. has no discretionary authority to choose between the sanctions under section 1128(a) and section 1128(b), but must apply the minimum mandatory five year

exclusion provisions applicable to a section 1128(a)(1) offense.

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, I conclude that the I.G. properly excluded Petitioners 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 section 1128(c)(3)(B) of the Act, and that summary disposition in favor of the I.G. is appropriate.

/s/

Charles E. Stratton
Administrative Law Judge