Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Mark E. Silver, D.P.M.,	DATE: July 2, 1991
Petitioner,	Docket No. C-336
- v. -	Decision No. CR139
The Inspector General.	

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 December 20, 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 participating in the Medicare and Medicaid programs for five years.[1] The I.G. alleged that Petitioner was "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, within the meaning of section 1128(a)(1) of the Act.

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

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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

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 (1990). 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 January 7, 1991, Petitioner requested an administrative hearing before an ALJ to contest the I.G's determination to exclude him and the case was assigned to me for a hearing and decision. On February 13, 1991, I held a prehearing conference. I issued a prehearing Order on February 15, 1991 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 Petitioner submitted an opposing brief. Neither party requested oral argument.

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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.

ADMISSIONS

During the telephone prehearing conference on February 13, 1991, Petitioner admitted that he had been "convicted", as defined by section 1128(i) of the Act. In his hearing request, Petitioner admits that he pleaded guilty to a Medicaid related offense.

ISSUES

The issue in this case is whether the five-year minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. At all times relevant to this case, Petitioner was a podiatrist. I.G. Ex. 1.[4]

2. On March 28, 1989, Petitioner pleaded guilty in a New York State court (Court) to grand larceny in the third degree, a class E felony under New York law. I.G. Ex. 1.

3. In his guilty plea, Petitioner admitted that he had improperly billed the New York Medicaid program in that he had submitted claims for reimbursement indicating that he had made orthotics for Medicaid patients from casts and imprints when in fact he made them from tracings and impressions. I.G. Ex. 1.

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

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

4. As an element of his plea, Petitioner agreed to pay restitution in the amount of $75,000.00. I.G. Ex. 1.

5. Petitioner's plea was accepted by the Court, within the meaning of section 1128(i) of the Act. I.G. Ex. 1.

6. Petitioner was convicted 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. FFCL 2 and 3.

7. The Secretary of DHHS 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.

8. On December 20, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128 of the Act.

9. Because there are no disputed issues of material fact in this case, there is no need for an in-person evidentiary hearing and summary disposition is appropriate. FFCL 1-3, 5, and 6.

10. Petitioner may not collaterally challenge his State conviction in this proceeding. Act, section 1128(a)(1).

11. The I.G.'s authority to impose and direct exclusions pursuant to section 1128 of the Act is independent of any authority to impose exclusions vested in the New York Medicaid program by State law or regulations. Act, section 1128.

12. While I am sympathetic to Petitioner's concerns about the twenty-one month delay between the date of his conviction and the date of this exclusion, I do not have authority to change the effective date of the exclusion. Act, section 1128.

13. This exclusion imposed and directed against Petitioner by the I.G. for five years is the minimum period required by section 1128(a)(1) and section 1128(c)(3)(B) of the Act.

14. This exclusion imposed and directed against Petitioner by the I.G. is required by section 1128 and may not be reduced. FFCL 7 and 13.

DISCUSSION

The material facts are not in dispute. In March 1989, Petitioner pleaded guilty in New York to a state felony charge. At the time of his plea, Petitioner admitted that he had billed the Medicaid program for orthotics that were not made from a cast or imprint, but rather from tracings and impressions of the patient's feet. In pleading guilty, Petitioner admitted that he had filed improper claims for a Medicaid item or service. Petitioner's plea was accepted by the Court and constitutes a conviction as defined by section 1128(i) of the Act. In his hearing request, Petitioner asked for a six months credit towards his exclusion; he asked that the mandatory five year exclusion begin at the time his license was suspended, or, in the alternative, that I should make the effective date of his exclusion retroactive to the date of his conviction.

I. Petitioner Was Convicted of a Criminal Offense Related to the Delivery of an Item or Service Under Medicaid Within the Meaning of Section 1128(a)(1) and Section 1128(i) of the Act.

Section 1128(a)(1) of the Act requires the I.G. (as delegate of the Secretary) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid, of:

> any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Petitioner admitted at the prehearing conference that he was convicted. Additionally, Petitioner's guilty plea was accepted by the Court, which is all that is required by section 1128(i) of the Act. Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990); See Gordon Lee Hanks, DAB Civ. Rem. C-112 at 9-10 (1989). The term "accepted" in section 1128(i)(3) is defined by Webster's Third New International Dictionary, 1976 Unabridged Edition, as the past tense of "to receive consent." A guilty plea is "accepted" within the meaning of section 1128(i)(3) whenever a party admits his guilt to a criminal offense and a court disposes of the case based on that party's plea. Russell E. Baisley and Patricia Mary Baisley, DAB Civ. Rem. C-276 (1991). See Marie Chappell, DAB Civ. Rem. C-225 (1990). In the instant case, the Court "accepted" Petitioner's plea agreement as statement of his guilt to the charges, pursuant to section 1128(i)(3). Thus, under

section 1128(i)(3), Petitioner's plea constitutes a conviction for purposes of this federal law exclusion.

Petitioner admitted in his hearing request that he pled guilty to a Medicaid related offense. 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." Wheeler and Todd, supra.

Black's Law dictionary, Fifth Edition (West Pub. Co. 1979) defines "related" as: ". . . standing in relation; connected; allied; akin." The offense for which Petitioner was convicted was "connected to" the delivery of an item or service under Medicaid. There is a simple, common sense connection, supported by the record, between the actions associated with Petitioners' conviction and the Medicaid program. Thus, the criminal offense for which Petitioner was convicted is "related to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act.

II. Petitioner May Not Collaterally Challenge his State Conviction in this Proceeding.

In his hearing request, Petitioner indicated that his plea was made under duress and threat of imprisonment, that his conduct was the result of being misled by the lab he used, and that recent New York case law has held that the conduct for which he was convicted is no longer considered an offense in all cases. The I.G. argues that Petitioner may not now collaterally attack his State court conviction. I.G. Br. 7-9.

Petitioner pled guilty and was convicted of submitting reimbursement claim forms to Medicaid indicating that he had made orthotics for Medicaid patients from casts and imprints when in fact he had made them from tracings and impressions. Petitioner attached to his hearing request an article, the gist of which is that he, and other similarly situated providers, would appear to have been prosecuted as a result of an ambiguous Medicaid reimbursement code and policy. Petitioner asserts that the written guidance and the Medicaid officials were ambiguous as to whether or not the reimbursement code in question required that orthotics billed under the code be made from casts or imprints, not tracings or impressions.

Although Petitioner has not articulated his argument, he appears to be asserting that the conduct for which he was convicted is no longer considered illegal in all

instances. He apparently contends that his conviction is for conduct which was or should no longer be considered illegal under the New York Medicaid program. Therefore, Petitioner seems to argue that his conviction is not a valid conviction and the I.G. is without authority to exclude him.

Even assuming that all of Petitioner's assertions of fact are true, they are not relevant to the issue of whether the I.G. was required to impose and direct an exclusion against Petitioner. 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. The underlying conduct behind the conviction, except for the limited purpose of establishing the "related to" requirement of the statute, is not relevant in considering whether the I.G. had authority to impose and direct a mandatory exclusion pursuant to section 1128(a)(1). The conviction, and not the underlying conduct, is the triggering event which requires the I.G. to impose and direct an exclusion. It is not relevant to the issue of the I.G.'s authority that the criminal conviction may have been defective or that the conduct which resulted in the conviction may no longer be unlawful. See Andy E. Bailey, C.T., DAB Civ. Rem. C-110 (1989), aff'd DAB App. 1131 (1990); John W. Foderick, M.D., DAB App. 1125 (1990). A party who believes his conviction was defective 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. would 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.

Petitioner argues that the minimum mandatory exclusion of five years is not applicable to him or should be adjusted because of the delay from the date of his conviction to the date of this exclusion. He further argues that this twenty-one months delay places him in a position of double jeopardy. He also argues, in effect, that equity requires that the five year exclusion be reduced by six months to give him credit for the time his license was suspended or, in the alternative, that the effective date of this exclusion be moved back twenty-one months to the date of his conviction.

Petitioner's arguments are misplaced. The Supreme Court has held that, under some circumstances, the imposition

of civil penalties could constitute double jeopardy where:

> . . . [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435 (1989). However, the primary goal of the exclusion here is not punishment, but remedial. The remedial purpose of the Act is to protect the trust funds of the Medicare and Medicaid programs and the beneficiaries and recipients of those funds. The Board has found that double jeopardy does not apply in situations like the instant case. Dewayne Franzen, DAB App. 1165 (1990). See Greene v. Sullivan, 731 F.Supp. 835 and 838 (E.D. Tenn. 1990).

While I am sympathetic to Petitioner's concerns about the fairness of the long delay between the time he was convicted and the time of this exclusion, I am without authority to reduce Petitioner's period of exclusion or to adjust the effective date of the exclusion. See Samuel W. Chang, M.D., DAB App. 1198 (1990) 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) and 1128(i) of the Act. The I.G. was required to exclude Petitioner for a minimum of five years and an ALJ has no discretion to reduce the minimum mandatory five-year period of exclusion or to decide when an exclusion is to begin. Chang, supra. See Wheeler and Todd, DAB App. 1123 at 9; Jack W. Greene, DAB App. 1078 (1989), aff'd, 731 F. Supp. 835 and 838 (E.D. Tenn 1990).

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act, that the minimum period of exclusion for five years is required 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