Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Ricardo Santos,	
Petitioner,	DATE: November 13, 1991
- v. -	Docket No. C-376 Decision No. CR165
The Inspector General.	

DECISION

On March 5, 1991, the Inspector General notified Petitioner, Ricardo Santos, that he would be excluded from participating in the Medicare and State health care programs for a period of five years.[1] The I.G. advised him that the exclusion was mandated based on his conviction of a criminal offense "relating to the delivery of a health care item or service" within the meaning of section 1128(a)(1) of the Social Security Act (Act) and that section 1128(c)(3)(B) of the Act provides that such exclusions be for a period of not less than five years.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. By my prehearing order of May 14, 1991, the I.G. was given until August 8, 1991 to file a motion for summary disposition and supporting brief. Petitioner was given until September 9, 1991 to file a brief in response. The I.G. was given until September 24, 1991, to file a reply brief and request for oral argument. On September 6, 1991, I granted Petitioner's request for an extension of time to file his brief. He was given until September 30,

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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 health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

1991 and the I.G. was given until October 14, 1991 to file his reply.

I have considered the arguments, the evidence and the applicable law. I conclude that there is no dispute as to any material fact, the parties do not seek oral argument and that summary disposition is therefore appropriate.[2] I also conclude that the five year exclusion imposed and directed by the I.G. against Petitioner is mandated by law, under section 1128(a)(1) of the Act, and that the exclusion imposed is the minimum mandatory period required by section 1128(c)(3)(B) of the Act.

ISSUES

The issues in this case are whether Petitioner:

1. was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act; and

2. was properly excluded from the Medicare and Medicaid programs for a five year period pursuant to section 1128(c)(3)(B) of the Act.

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[2] In his brief at 12, Petitioner seeks a summary disposition in his favor, or in the alternative, that a "formal hearing be set" for the receipt of additional evidence. Since there is no dispute as to any material fact regarding Petitioner's conviction and the reasonableness of the exclusion is not at issue, there is no need for an in-person hearing. In exclusion cases, an in-person hearing is usually held where there are outstanding issues of Petitioner's trustworthiness as they relate to the reasonableness of the exclusion. The minimum mandatory exclusion in this case obviates the need for a hearing on such issues. The only issues herein are legal. Thus, summary disposition is an appropriate means to decide this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner in 1984 or 1986 began working as a medical assistant at the Coast Urgent Medical Clinic in Huntington Park, California. I.G. Ex. 6, 7; I.G. Br. 4-5; P. Br. 2.[3]

2. Petitioner's employer and supervisor at the Coast Urgent Medical Clinic was Dr. Suresh Gandotra. Dr. Gandotra was also the owner of the Coast Urgent Medical Clinic. P. Br. 2; P. Ex. C; I.G. Ex. 6, 7; I.G. Br. 4.

3. Petitioner was never a licensed physician or surgeon in the State of California. I.G. Ex. 6-7.

4. At no time was Petitioner licensed to provide medical care and treatment, in any capacity, to patients in the United States. I.G. Ex. 6-8; I.G. Br. 5.

5. Petitioner is a licensed physician in Mexico. I.G. Ex. 8.

6. As a medical assistant, Petitioner, under the direction of Dr. Gandotra, was involved in the treatment and care of patients of the Clinic. Dr. Gandotra instructed Petitioner to sign Dr. Gandotra's name on medical prescriptions and to furnish prescription medication to patients. Upon inquiry by Petitioner regarding the legality of his actions on behalf on the Clinic, Dr. Gandotra on several instances led him to believe his actions were lawful. I.G. Ex. 16; P. Ex. B, C.

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[3] The parties' exhibits and briefs will be cited as follows:

I.G.'s Exhibit Ex. (number)	I.G.
Petitioner's Exhibit (number)	P. Ex.
I.G.'s Brief (page)	I.G. Br.
Petitioner's Brief (page)	P. Br.
I.G.'s Reply Brief (page)	I.G. R. Br.
My Findings and Conclusions (number)	FFCL

7. Medi-Cal, the California Medicaid program, is a State health care program as defined by section 1128(h) of the Act.

8. On or about March 4, 1988, Petitioner provided medical care and treatment to two patients of the Clinic who were undercover agents from the Bureau of Medi-Cal Fraud posing as Medi-Cal recipients. In the course of providing treatment to these agents, Petitioner forged the name of Dr. Gandotra on prescriptions given for their medical care. P. Br. 3; I.G. Ex. 6-7; I.G. Ex. 9-11.

9. The prescriptions and the Medi-Cal claims prepared by the Clinic for the treatment of the undercover agents were seized as evidence before the claims could be processed. I.G. Ex. 12.

10. On March 19, 1989, a criminal information was filed in the Superior Court of the Southeast Judicial District, County of Los Angeles, State of California, charging Petitioner, inter alia, with two counts of forging prescriptions in connection with the unlawful medical care and treatment he provided to undercover agents posing as Medi-Cal recipients. Dr. Gandotra was charged in the same criminal information with various felony and misdemeanor counts of prescription forgery, unlawful practice of medicine, unlawfully furnishing a dangerous drug, and unlawfully prescribing and furnishing controlled substances. I.G. Ex. 16 - 17; 19.

11. On August 9, 1989, Petitioner entered a plea of nolo contendere to two misdemeanor counts of prescription forgery. On March 22, 1990, a jury returned a guilty verdict on all counts charged against Dr. Gandotra. P. Ex. B; P. Br. 3; I.G. Ex. 16, 19.

12. Petitioner was sentenced on September 7, 1991 to two years' probation, a $1,500 fine, and a payment of $1.00 to the victims/restitution fund. Dr. Gandotra was sentenced on May 30, 1990 to incarceration in a State prison, for 16 months, and a fine of $347,800. I.G. Br. 8; I.G. Ex. 18, 20.

13. 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 Social Security Act. 48 Fed. Reg. 21622 (May 13, 1983).

14. On March 5, 1991, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 4.

15. 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. Findings 5 - 9.

16. There are no disputed issues of material fact in this case, and summary disposition is appropriate.

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

18. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Sections 1128(a)(1) and (c)(3)(B) of the Act.

RATIONALE

1. 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.

Petitioner, Ricardo Santos, was hired by Dr. Suresh Gandotra to work as a medical assistant at Dr. Gandotra's medical clinic, Coast Urgent Clinic. Petitioner is a licensed physician in Mexico but is not licensed in the United States. Dr. Gandotra instructed Petitioner to sign Dr. Gandotra's name on prescriptions that Petitioner provided to patients under his care at the Clinic. Petitioner was misled by Dr. Gandotra as to the legality of his practicing medicine without a license and signing Dr. Gandotra's name on prescriptions. FFCL 1 - 5.

On March 4, 1988, two undercover agents from the Bureau of Medi-Cal Fraud entered the clinic posing as Medi-Cal patients. Petitioner proceeded to provide medical treatment to them, including the provision of prescriptions for each of the "patients", and, in doing so, forged Dr. Gandotra's signature on the prescriptions. The Clinic prepared forms to bill Medi-Cal for such treatment, but before forms or the prescriptions could be processed, they were seized as evidence for use in the subsequent criminal proceeding. FFCL 6 - 7.

On August 9, 1989, Petitioner entered a plea of nolo contendere to two misdemeanor counts of prescription forgery and was sentenced to two years' probation, a $1,500 fine, and payment of $1.00 to the

victims/restitution fund.[4] In contrast, Dr. Gandotra, Petitioner's supervisor and owner of the Clinic, was found guilty of all counts of the criminal information in a jury trial and sentenced to 16 months in a State prison and fined $347,800. FFCL 9 - 10.

Petitioner's principal contention is that his offense does not relate to the delivery of a health care item or service because the California statute under which Petitioner was convicted does not, on its face, state that the offense is related to any State health care program. Petitioner further contends that 42 C.F.R. Sec. 1002.1 et seq. is applicable in making a determination as to whether a criminal offense is related to the delivery of a health care item or service. Additionally, Petitioner argues that the I.G. must show that his criminal conviction involved "fraud" in order to support a mandatory exclusion. Lastly, Petitioner avers that the I.G. should have imposed a permissive exclusion under section 1128(b), instead of the minimum mandatory exclusion under section 1128(a)(1). P. Br. at 6, 8, 10.

The I.G. contends that the regulations cited by Petitioner are irrelevant to the instant case because they only apply to a State Medicaid agency's ability to exclude a provider that defrauds or abuses that State's Medicaid program. The I.G. argues that these regulations have nothing to do with this case, which is an exclusion of Petitioner by the I.G. for conviction of a program-related crime, not an action taken by a State agency under its own authority to police its Medicaid program. The I.G. states the applicable regulations as 42 C.F.R. Sec. 1001.123.[5] Also, the I.G. argues that it has no

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[4] Section 1128(i) of the Act defines a conviction for purposes of sections 1128(a) and 1128(b) of the Act. It reads, in relevant part "Conviction Defined. - For purposes of subsections (a) and (b), an individual or entity is considered to have been "convicted" of a criminal offense - . . . (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." Since Petitioner does not address this point in his brief, he apparently concedes that his "nolo contendere" plea and resultant conviction comes within the purview of section 1128(i) of the Act.

[5] The I.G.'s citation to 42 C.F.R. 1001.123 is incorrect. The correct citation is 42 C.F.R. 1001.122. Section 1001.122 refers to the notice given to the affected party while section 1001.122 refers to the basis

discretion in selecting an exclusion if Petitioner's criminal conviction falls within section 1128(a). The I.G. has no option to seek a permissive exclusion in cases where the conviction arguably can come within the purview of sections 1128(a) or 1128(b). I.G. R. Br. 2 - 3; 5.

Petitioner's position is that the I.G. lacks authority under section 1128(a)(1) to exclude him. Petitioner supports his assertion by arguing that the State statute forming the basis for his criminal conviction did not specifically state that his offense is related to any health care program. Petitioner's position on this issue has no foundation in the law. Contrary to Petitioner's position, the I.G. is not limited to the "four corners" of the State statute in determining whether the conviction meets the elements of section 1128(a)(1). In H. Gene Blankenship, DAB CR42 (1989) at 11 (Docket No. C-67), the administrative law judge stated that the determination of whether a conviction is related to the delivery of an item or service under the Medicare program "must be a common sense determination based on all the relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court." To determine whether the conviction falls within section 1128(a)(1), the I.G. is not confined by the specific language of the State statue, criminal conviction, or judgment. A substantially broader test can be applied.

While the Act does not specifically define the term "criminal offense related to the delivery of an item or service", a criminal offense related to the delivery of an item or service has been held to fall within the reach of section 1128(a)(1) where:

> [T]he 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.

Jack W. Greene, DAB 1078 (1989) at 7; aff'd sub nom. Greene v. Sullivan, 731 F. Supp 835 and 838 (1990). Under the rationale of Greene, a criminal offense is an offense which is related to the delivery of an item or service under Medicare or Medicaid where the delivery of

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for the I.G.'s action.

a Medicare or Medicaid item or service is an element in the chain of events giving rise to the offense.

The facts of this case are that Petitioner was convicted of forging a doctor's name on prescriptions that were given to undercover agents from the Bureau of Medi-Cal Fraud posing as Medi-Cal (Medicaid) recipients. The cost of the medical treatment, including the prescriptions, provided to the agents would have been billed to the Medi-Cal (Medicaid) program had the Medi-Cal agents not seized the billing for evidentiary purposes. The chain of events giving rise to Petitioner's offense was the visit to the Clinic of agents whom he thought were Medi-Cal-eligible patients. The chain continued with Petitioner's forging a doctor's name on prescriptions that would ultimately be billed to Medicaid via the Medi-Cal program. Under Greene, the offense is related to the delivery of an item or service because the delivery of a Medicaid item or service, here a prescription, is an element in the chain of events giving rise to Petitioner's conviction for forgery. Additionally under Greene, the prescription is brought within the purview of the program by the submission of a bill or claim for Medicaid reimbursement.

Moreover, using the Blankenship common sense test yields the same result as Greene mandates. Specifically, while the language of Petitioner's conviction does not directly mention Medicaid, all of the relevant facts surrounding the conviction can be determined. In this case, it is undisputed that Petitioner thought the undercover agents were Medi-Cal recipients. Petitioner provided services to the agents believing that the Clinic would be reimbursed by the Medicaid program, through Medi-Cal. In writing the prescriptions, Petitioner would have caused the program to be billed for prescriptions written by a licensed physician, even though Petitioner was not a licensed physician. Where a non-physician's services are billed to Medicaid as having been performed by a physician, there is no question that Petitioner's criminal offense relates to the delivery of an item or service under Medicare. See Leon Brown, M.D., DAB CR83 (1990) (Docket No. C-180); aff'd DAB 1208 (1990). Applying the applicable precedents to the uncontested facts of this case supports the conclusion that Petitioner's conviction is program-related.

Petitioner also contends that the I.G. must prove that he knowingly and willfully engaged in conduct which constituted an abuse or fraud of the program in order to exclude him under section 1128(a)(1) of the Act. Petitioner states in his brief that the I.G. has not

sustained his burden of proving fraud. Petitioner argues that he had authorization from Dr. Gandotra to write prescriptions. In support of his arguments, Petitioner cites a letter from the prosecuting attorney, Pet. Ex. B. The letter states that, in the opinion of the prosecutor, Petitioner did not have the requisite criminal mind to garner a felony conviction, only a misdemeanor, and that Petitioner was instructed by Dr. Gandotra to forge medical prescriptions.

Petitioner's argument that the I.G. must prove Petitioner engaged in conduct which constituted an abuse or fraud of the program is not supported by the statute or case precedent. The DAB has specifically held that a conviction of Medicaid fraud is not required to sustain an exclusion under section 1128(a).

The sole test is whether the conviction involves delivery of an item or service "related to" the Medicare or Medicaid programs. See, DeWayne Franzen, DAB 1165 (1990). As the appellate panel stated in Franzen at 8:

> Section 1128(a)(1) does not require that the individual must intend to commit a criminal offense, or indeed fraud, for an exclusion to be proper. It merely requires, as here applicable, that the individual's acts cause the individual to be convicted of an offense and that the offense be related to the delivery of an item or service under the Medicaid program.

In furtherance of his position that "fraud" is required under section 1128(a), Petitioner cites Willie B. Sherman, Jr., DAB CR105 (1990) (Docket No. C-235). As the I.G. correctly points out at I.G. R. Br. 3 - 4, Petitioner misreads this case and improperly interprets language in the case referring to permissive exclusions under section 1128(b) as applicable to section 1128(a) of the Act. Section 1128(b) of the Act was enacted by Congress in 1987 to cover criminal convictions that were not related to the Medicare or Medicaid programs and, therefore, prior to enactment of section 1128(b), outside of the I.G.'s authority to impose exclusions. It is correct that section 1128(b)(1) criminal convictions must relate, inter alia, to "fraud." However, as the I.G. notes at I.G. R. Br. 5, it is well settled law that where both sections 1128(a) and 1128(b) can provide a basis for an exclusion, the I.G. has no discretion to choose which section to proceed under and must impose a minimum mandatory exclusion under section 1128(a).

As stated by the appellate panel in Samuel W. Chang, M.D., DAB 1198 (1990) at 8:

> The permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid or other covered programs. While it is not inconceivable that one of the provisions of section 1128(b) could have been applied in the absence of section 1128(a), which provides that the Secretary "shall" exclude individuals where applicable, the permissive exclusion provisions of subsection (b) focus on different circumstances from those raised here, such as where an individual's conviction does not relate to the Medicare or Medicaid programs.

See, Charles W. Wheeler, DAB 1123 (1990); Leon Brown, M.D., DAB 1208 (1990); Jack W. Greene, supra.

Petitioner erroneously relies on 42 C.F.R. 1002.1 et seq. to further support his position that "fraud" or "abuse" must be shown to exclude him from the Medicaid program. This section refers to actions taken by Medicaid agencies, not the I.G., to protect the integrity of the program. The applicable section pertaining to actions by the I.G. based on program-related criminal convictions is 42 C.F.R. 1001.122. This section states:

> (a) The OIG will suspend from participation in Medicare any party specified in paragraph (b) of this section who is convicted on or after October 25, 1987, of a criminal offense related to --
>
> (1) Participation in the delivery of medical care or services under the Medicare or Medicaid, or the social services program; . . .
>
> Paragraph (b) states:
>
> (b) The suspension from participation in Medicare for conviction of a program-related crime, specified in paragraph (a) of this section, will apply to -- . . .
>
> (3) Individuals who are employees, administrators, or operators of providers; . . .

A careful reading of this section of the regulations fails to support Petitioner's position that the regulations require a showing of "fraud" in a program-related criminal conviction under section 1128(a) of the Act. The operative language is the "delivery of medical care or services under Medicare or Medicaid". If the criminal conviction involves such care or services, it is program-related and provides the I.G. with authority to exclude.

Petitioner has presented as an exhibit a letter from the prosecuting attorney in his criminal case. P Ex. B. This letter states that Petitioner did not possess the requisite intent to be charged with a felony. The letter also states that Petitioner has cooperated with authorities. The letter lends credence to Petitioner's contention that he had permission from Dr. Gandotra to sign prescriptions. There is no doubt that Petitioner may have been misled by Dr. Gandotra into believing he could practice medicine under the auspices of Dr. Gandotra and even sign his name on prescriptions. I am willing to concede that Petitioner believed his actions were lawful. A simple comparison of the sentences imposed on Petitioner and Dr. Gandotra strongly supports the conclusion that Petitioner was not the principal in the cited criminal offenses. However, these facts are not material to whether Petitioner committed a program-related crime, the sole issue before me in determining whether the I.G. has authority to exclude him. Moreover, absence the existence of a permissive exclusion, the circumstances surrounding his criminal conduct can not be considered when Petitioner's exclusion is the minimum five year exclusion imposed by operation of law.

2. The exclusion imposed and directed against Petitioner is mandated by law.

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 relating to the delivery of a health care item or service. Congressional intent is clear from the express language of section 1128(c)(3)(B):

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . .

The I.G. must apply the minimum mandatory exclusion of five years once a section 1128(a) violation is established. Unlike cases brought under section 1128(b) of the Act, where I have the authority to consider the reasonableness of the exclusions and the trustworthiness of petitioners, I have no discretion here and must affirm the exclusion. Absence the exercise of discretion, section 1128(a) violations unfortunately may result in exclusions of a length seemingly disproportionate to the severity of the crimes upon which the exclusions are based.

CONCLUSION

Based on the law and the undisputed material facts of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act and accordingly grant summary disposition in favor of the I.G. Petitioner's motion for summary disposition is denied.

/s/

Edward D. Steinman
Administrative Law Judge