Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Danny E. Harris, R. Ph.,	)	DATE: December 2, 1991
	)	
Petitioner,	)	
	)	Docket No. C-392
- v. -	)	Decision No. CR166
	)	
The Inspector General.	)	
	)	

DECISION

In a letter dated May 17, 1991 (Notice), the Inspector General (I.G.) told Petitioner that he was being excluded from participation in Medicare and State health care programs for a period of five years.[1] The Notice stated that Petitioner was being excluded as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid. The Notice advised Petitioner that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(1) of the Social Security Act (Act) for a period of not less than five years. The I.G. informed Petitioner that he was being excluded for the minimum mandatory period of five years.

Petitioner timely requested a hearing and the case was assigned to me for hearing and decision.

On August 19, 1991, the I.G. moved for summary disposition. Petitioner filed his opposition to the motion on September 19, 1991. The I.G. filed a reply on October 4, 1991. I have considered the arguments made by the parties in their submissions. I have also considered

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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" in this decision to include all State health care programs from which Petitioner was excluded.

the undisputed material facts of the case and applicable law. I conclude that there are no facts in dispute that would require an in-person evidentiary hearing. Taking as true all the facts alleged by Petitioner, I nevertheless conclude that the five-year exclusion imposed and directed by the I.G. against Petitioner is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUE

The issue in this case is whether 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 OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a pharmacist in the State of Tennessee.

2. Petitioner and Robert L. Parr are co-owners of the Parr Prescription Center. I.G. Br. at 1; P. Br. at 1.[2]

3. On April 7, 1987, Petitioner and Robert L. Parr, d/b/a Parr Prescription Center, were indicted by the grand jury for Montgomery County, Tennessee, on 14 felony counts of Medicaid fraud. I.G. Ex. 1; I.G. Br. at 1; P. Br. at 1.

4. The indictment bears case number 24183. I.G. Ex. 1.

5. Count One of the indictment charged that on or about November 14, 1985, Petitioner and Parr filled a prescription for Thorazine 25 with a generic substitute, dispensed that substitute to Medicaid recipient Kate Godwin (actually a special agent of the Tennessee Bureau of Investigation), and then billed the Tennessee Medicaid program for the more expensive brand-name drug, thus defrauding the State of the difference in value between the two drugs. I.G. Ex. 1; I.G. Br. at 1-2; P. Br. at 1.

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[2] The I.G.'s exhibits and brief are cited as I.G. Ex. (number) and I.G. Br. at (page). Petitioner's brief is cited as P. Br. at (page). For purposes of creating a record in this case, I have admitted all of the I.G.'s and Petitioner's exhibits into evidence. I cite to my findings of fact and conclusions of law as FFCL (number).

6. Count Two of the indictment charged that on or about April 30, 1986, Petitioner and Parr filled a prescription for the drug Theo Dur 200 with a generic substitute, dispensed that substitute to Medicaid recipient Alexis D. Wilson (actually a special agent of the Tennessee Bureau of Investigation), and then billed the Tennessee Medicaid program for the more expensive brand-name drug, thus defrauding the State of the difference in value between the two drugs. I.G. Ex. 1; I.G. Br. at 1-2; P. Br. at 1.

7. In a proposed settlement agreement, dated February 13, 1990, the State agreed to reduce the charges of Medicaid fraud in counts one and two of the indictment to charges of mislabeling drugs and to recommend a suspended sentence of 11 months and 29 days on each of those counts. I.G. Ex. 2; I.G. Br. at 2; P. Br. at 1.

8. On March 9, 1990, Petitioner pled guilty to two counts of mislabeling drugs in violation of T.C.A. section 53-10-105.[3] I.G. Exs. 3, 4; I.G. Br. at 2; P. Br. at 1.

9. Based on Petitioner's guilty pleas, the Criminal Court of Montgomery County, Tennessee, entered separate judgments of conviction against Petitioner as to counts one and two. I.G. Exs. 3, 4.

10. Petitioner was sentenced to 11 months and 29 days' probation and 100 hours of community service as to count one and to 11 months and 29 days' probation as to count two. I.G. Exs. 3, 4.

11. The judgments of conviction entered against Petitioner bear the same case number as the indictment (i.e. 24183). I.G. Exs. 3, 4.

12. The judgments of conviction indicate that Petitioner committed the acts of mislabeling on November 14, 1985 and April 10, 1986, dates which correspond to the conduct described in counts one and two of the indictment. I.G. Exs. 1, 3, 4.

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[3] Petitioner asserts that the statutory section number referenced in the judgments is incorrect. According to Petitioner, he pled guilty to T.C.A. section 53-1-109. P. Br. at 1. Petitioner concedes however, that he pled guilty to the conduct described in the judgments, i.e. mislabeling drugs. Id. For this reason, I conclude that, even if the section number is incorrectly cited in the judgments, this fact is irrelevant for purposes of my decision.

13. Petitioner admits that the acts of mislabeling to which he pled guilty consisted of placing the brand name on the prescription bottle while dispensing the generic. P. Br. at 7.

14. Petitioner does not deny that the drugs he pled guilty to mislabeling were dispensed to special agents of the Tennessee Bureau of Investigation who were posing as Tennessee Medicaid recipients. See P. Br. at 7.

15. Claims for reimbursement for the mislabeled drugs were submitted by Parr Prescription Center to the Tennessee Medicaid program. I.G. Br. at 2; P. Br. at 1.

16. For purposes of this decision, I assume, without so finding, that the following facts are true:

> a. To lower the cost of prescription drugs to its citizens, the State of Tennessee has authorized pharmacists to substitute less costly generic drugs for higher priced brand-name drugs.
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> b. Under Tennessee law, if a physician signs a prescription form on the line indicating "substitution allowed," a pharmacist may dispense any lower priced drug having the same generic name as the brand-name drug prescribed.
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> c. The prescriptions for the drugs Petitioner pled guilty to mislabeling were signed by the physicians on the line indicating "substitution allowed."
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> d. There is no evidence that Petitioner individually misbilled, authorized the misbilling, or had knowledge of misbilling the Medicaid program.
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> e. The offense to which Petitioner pled guilty does not require any criminal intent by Petitioner.
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> f. The offense to which Petitioner pled guilty is of a nature that does not necessarily relate to the Medicaid program.
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> g. Another individual, Robert L. Parr, was jointly indicted with Petitioner in the state court proceeding.
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> h. The I.G. has not excluded Robert L. Parr from the Medicare and Medicaid programs and no action to exclude Robert L. Parr is pending.

P. Br. at 2-3.

17. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Tennessee Medicaid program. FFCL 1-16.

18. The Secretary of the Department of Health and Human Services (Secretary) has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128(a)(1) of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

19. On June 6, 1991, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act. I.G. Ex. 5.

20. Even if all the facts asserted by Petitioner are taken as true, the I.G. is entitled to summary disposition as a matter of law.

21. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

22. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. FFCL 1-17; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

The undisputed facts in this case are sufficient to support the I.G.'s authority to impose and direct a five-year exclusion against Petitioner. Even assuming the truth of the additional facts averred by Petitioner, the I.G. is entitled to summary disposition as a matter of law.

Petitioner is a pharmacist and co-owner of the Parr Prescription Center. FFCL 1, 2. Petitioner admits that he pled guilty to mislabeling drugs and that the court entered judgments of conviction against him.[4] FFCL 8,

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[4] Petitioner apparently does not dispute that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Section 1128(i) defines several alternatives which satisfy the requirement of a conviction. Section 1128(i)(1) provides that an individual is "convicted" when a court has entered a judgment of conviction against that individual. Section

(continued...)

9. In pleading guilty, Petitioner admitted that he had dispensed prescriptions labeled as brand-name drugs but which actually contained generic substitutes. FFCL 13. Petitioner does not dispute that the drugs so mislabeled were dispensed to special agents of the Tennessee Bureau of Investigation, posing as Medicaid recipients. FFCL 14. Nor does Petitioner dispute that, as to those prescriptions, Parr Prescription Center submitted claims for reimbursement to the Tennessee Medicaid program which falsely represented that brand-name drugs had been dispensed. FFCL 15.

Petitioner asserts, however, that he has never admitted that he had personal knowledge of, or responsibility for, submitting the fraudulent claims. Further, according to Petitioner, there has never been a judicial finding that he had such knowledge or responsibility. Because he was jointly indicted with his partner, Robert L. Parr, Petitioner contends that Parr and not Petitioner may be responsible for all conduct charged in the indictment except that to which Petitioner pled guilty. Petitioner further argues that the misdemeanor to which he pled guilty does not require criminal intent and that the gravamen of the offense does not necessarily relate to the Medicaid program. For these reasons, Petitioner argues that I cannot conclude that Petitioner engaged in Medicaid fraud or caused an overpayment by the Medicaid program. Accordingly, Petitioner contends, there is insufficient evidence to show that his conviction was program-related.

Petitioner's argument appears to be that section 1128(a)(1) only applies to convictions for the crime of Medicaid fraud or to conduct which evidences a specific intent to defraud the Medicaid program. Neither argument is well-founded. Section 1128(a)(1) is not limited to convictions for Medicare or Medicaid fraud. Nor does it require criminal intent. An appellate panel of the Departmental Appeals Board (Board) addressed both arguments in Dewayne Franzen, DAB App. 1165 (1990).

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[4] (...continued)
1128(i)(3) provides that an individual is also "convicted" when a guilty plea by that individual has been accepted by a court. Thus, Petitioner was "convicted" under the definition of either section 1128(i)(1) or section 1128(i)(3).

The Board in Franzen makes clear that criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1):

> 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 . . . 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.

Id. at 7. See also, Michael Travers, M.D., DAB CR85 (1989) (Docket No. C-170), aff'd, DAB App. 1237 (1991). As noted above, Petitioner does not dispute that he was convicted. Thus, the remaining question under Franzen is whether the offense of which Petitioner was convicted related to the delivery of an item or service under Medicaid.

As to this point, the Franzen decision demonstrates that in determining whether or not a conviction is program-related, the ALJ may appropriately look beyond the four corners of the trial court's judgment:

> [T]he ALJ, the finder of fact, can look beyond the findings of the state court to determine if a conviction was related to Medicaid. Therefore, the ALJ's characterization of an offense is not limited to the state court's or the violated statute's precise terms for purposes of determining whether a conviction related to Medicaid.

Id. at 6. See also H. Gene Blankenship, DAB CR42 (1989) (Docket No. C-67). Thus, the fact that Petitioner pled guilty to mislabeling drugs, rather than to Medicaid fraud, is not determinative as to whether his conviction was program-related. Instead, I am authorized to inquire into the circumstances surrounding Petitioner's guilty plea to determine whether it was program-related. In this case, the circumstances surrounding Petitioner's conviction convince me that it was "related to the delivery of an item or service" under Medicaid.

The Act does not define the phrase "criminal offense related to the delivery of an item or service." However, Franzen suggests that a conviction is program-related if the conduct affected the amount paid by the Medicaid program for identifiable items or services or if it affected specific items or services delivered to Medicaid recipients. In finding that Franzen had been convicted

of a program-related crime, the Board made the following analysis:

> It is undisputed that Petitioner dispensed generic drugs in lieu of the brand name drugs listed on the prescription labels. It is also undisputed that the individuals who received the generic drugs rather than the brand name drugs were Medicaid recipients. The Medicaid program was thus affected in two ways. First, program recipients failed to receive drugs consistent with prescription labels . . . . Second, the program was billed for the higher-priced brand name drugs rather than the generic drugs actually dispensed . . . . As such, Petitioner's action resulted in an overpayment by the Medicaid program.

Franzen, DAB App. 1165 at 7.

The undisputed facts of this case establish that Petitioner's crime affected identifiable Medicaid items or services. In the present case, as in Franzen, Petitioner pled guilty to misdemeanor charges of placing brand name prescription labels on bottles in which generic drugs were dispensed.[5] The Board's analysis in Franzen suggests that Petitioner's conduct in dispensing those mislabeled drugs to apparent Medicaid recipients is itself sufficient to establish that Petitioner's conviction was related to the delivery of an item or service under Medicaid. As was the case in Franzen, here the Tennessee Medicaid recipients (here undercover agents) did not receive drugs that were consistent with prescription labels.[6] Petitioner's conviction was thus program-related.

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[5] Unlike the present case, in Franzen there had been a finding that the petitioner himself had submitted bills to Medicaid and had received overpayments.

[6] Petitioner argues that recipients did receive drugs which were consistent with prescription labels because the physicians who signed the prescriptions had indicated that generic substitution was permitted. P. Br. at 7. This argument misses the point. By authorizing generic substitution, the physicians did not authorize dispensing generic drugs labeled as brand names. Thus, recipients were affected, because the drug in the bottle they received was not the drug named on the label.

Petitioner argues, however, that his conviction cannot be program-related under Franzen unless it affected services to recipients and caused an overpayment by the Medicaid program. See P. Br. at 7. According to Petitioner, there has been no showing that he personally was responsible for overbilling Medicaid. Therefore, he argues, his conviction is not program-related under Franzen. I find no requirement in Franzen that, to be program-related, a conviction must both affect services to recipients and result in an overpayment by Medicaid for those services.

Moreover, even if such a requirement were present, it would be satisfied by Petitioner's conviction. In Franzen, the Board observed, "Petitioner's action resulted in an overpayment by the Medicaid program" (emphasis added). In the present case, the ultimate result of Petitioner's mislabeling was that the Tennessee Medicaid program was overcharged for the drugs so mislabeled. This is true whether or not Petitioner himself submitted or caused to be submitted the claims.

The test suggested by Franzen focuses on whether a petitioner's conduct has an identifiable impact on specific reimbursement claims for items or services or on the items or services themselves. Another approach to determining whether a conviction is program-related can be found in Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 & 838 (E.D. Tenn. 1990). In Greene, the Board held that a criminal offense falls 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.

See also Ricardo Santos, DAB CR165 (1991) at 7 (Docket No. C-376). Under the rationale of Greene, a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the delivery of a Medicare or Medicaid item or service is an element in the chain of events giving rise to the offense.

I applied this analysis in Larry W. Dabbs, R.Ph. and Gary L. Schwendimann, R.Ph., DAB CR151 (1991) at 6 (Docket Nos. C-370 and C-371). As did Petitioner this case, the petitioners in Dabbs and Schwendimann pled guilty to mislabeling drugs which were dispensed to Medicaid recipients. The petitioners were not convicted of fraud against Medicaid; however, their crimes were an element

of a chain of events resulting in a Medicaid reimbursement claim. I concluded that, applying the rationale of Greene to the facts, the petitioners' crimes were related to the delivery of Medicaid items or services.

There is no question that the offense of which Petitioner was convicted was program-related under the test set out in Greene and Dabbs and Schwendimann. Undercover special agents of the Tennessee Bureau of Investigation, posing as Medicaid recipients, presented prescriptions for brand-name drugs at the Parr Prescription Center. Petitioner admits that he dispensed generic drugs in bottles labeled to indicate that the corresponding brand-name drugs were being dispensed. Petitioner admits that someone at Parr Prescription Center submitted claims to the Tennessee Medicaid program which falsely represented that brand-name drugs had been dispensed. Petitioner's actions in mislabeling the drugs were an indispensable link in the chain of events leading to the false claims. But for Petitioner's dispensing of the mislabeled drugs to persons who appeared to be Medicaid recipients, there would have been no item or service for which a bill could be submitted to the Medicaid program.

Petitioner has asked that I draw a conclusion of law that the I.G. is entitled to exclude Petitioner, if at all, under the permissive exclusion provisions of section 1128(b)(3) of the Act. That section permits the I.G. to exclude individuals or entities that have been convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. It is well settled, however, that where an individual's conduct arguably falls within both the mandatory provisions of section 1128(a)(1) and the permissive provisions of one or more subsections of section 1128(b), the I.G. is required to exclude the individual for the minimum mandatory period prescribed by sections 1128(a)(1) and 1128(c)(3)(B). See Greene. Because I have concluded that Petitioner was convicted of a program-related crime, I cannot conclude that Petitioner's exclusion should be governed by section 1128(b)(3).

CONCLUSION

Based on the law and on the facts viewed in the light most favorable to Petitioner, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare, and to direct his exclusion from Medicaid, for five years was mandated by law. Therefore, I am denying Petitioner's request for an in-person evidentiary hearing and I am granting the I.G.'s motion for summary disposition.

/s/

Steven T. Kessel
Administrative Law Judge