Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In The Case of:	
Paul S. Barrentine, R.Ph.,	DATE: January 28, 1992
Petitioner,	
- v. -	Docket No. C-420 Decision No. CR174
The Inspector General.	

DECISION

On May 24, 1991, the Inspector General (I.G.) advised Paul S. Barrentine, Petitioner, that he was being excluded from participation in the Medicare and State health care programs for five years, as a result of his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.[1] Exclusions after such a conviction are made mandatory by section 1128(a)(1) of the Social Security Act (Act). Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion shall not be less than five years.

On May 24, 1991, the I.G. also advised Cedar Creek Pharmacy, Inc., that it was being excluded from participation in the Medicare and State health care programs for five years pursuant to section 1128(b)(8) of the Act. Section 1128(b)(8) of the Act authorizes the I.G. to exclude entities from Medicare and State health care programs where an individual who has been convicted of an offense described under section 1128(a), 1128(b)(1), (2) or (3) of the Act has a direct or indirect ownership or control interest of five percent or

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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.

more in the entity, or who is an officer, director, agent, or managing employee of such entity. The I.G. stated that Cedar Creek Pharmacy, Inc., is being excluded under section 1128(b)(8) of the Act because Petitioner was convicted of one of the criminal offenses listed in section 1128(b)(8), and he has a relationship with Cedar Creek Pharmacy, Inc., as described in section 1128(b)(8).

Separate administrative hearing dockets were initially created to hear these two cases individually. However, in the interest of judicial economy, I consolidated them for the purpose of conducting a prehearing conference on August 28, 1991. During that conference, the parties in both cases agreed to proceed by summary disposition on the issue of whether the I.G. has the authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act. The parties agreed to proceed in this manner because the outcome of this issue could be dispositive of the issue of whether the I.G. has the authority to exclude Cedar Creek Pharmacy, Inc., pursuant to section 1128(b)(8) of the Act.

Based on the record before me, I conclude that summary disposition is appropriate on the issue of whether the I.G. has the authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act, that Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum of five years is mandated by federal law. This is the decision of the administrative law judge in Civil Remedies Docket No. C-420 and is appealable to the Appellate Division of the Departmental Appeals Board. Accordingly, the cases are no longer consolidated. Cedar Creek Pharmacy, Inc., Petitioner, v. The Inspector General, Civil Remedies Docket No. C-421, will proceed to hearing.

ISSUE

The issue in this case is whether, given the undisputed material facts, the I.G.'s determination to exclude Petitioner from participation in the Medicare program and to direct that he be excluded from participation in State health care programs for five years is mandated by law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a registered pharmacist in the State of Texas. I.G. Ex. 4/1.[2]

2. On January 4, 1988, the 173rd District Court of Henderson County, Texas, issued an indictment charging Petitioner with intentionally defrauding the Texas Medicaid program by submitting false pharmacy service billing information in order to receive reimbursement for services he did not perform. I.G. Ex. 2.

3. On September 17, 1990, Petitioner pled guilty to the charge contained in the indictment, and the Texas court issued an order stating that it "accepted" Petitioner's guilty plea. I.G. Ex. 5/1.

4. In accepting Petitioner's guilty plea, the Texas court found that the evidence substantiated that Petitioner was guilty of the offense of Securing Execution of a Document by Deception, a crime under Texas law. I.G. Ex. 5/1.

5. The Texas court also ordered that all further proceedings would be deferred without an entry of a Judgment of Guilt against Petitioner, pursuant to Article 42.12, Section 3d of the Texas Code of Criminal Procedure. I.G. Ex. 5/1.

6. The Texas court ordered that Petitioner be placed on probation for a period of two years with certain conditions, including that Petitioner pay court costs, a fine, and that he surrender his pharmacy license for 60 days. I.G. Ex. 5/2.

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[2] The I.G. attached five exhibits to his motion for summary disposition which he identified as Exhibits "1" through "5". By letter dated September 30, 1991, the I.G. submitted an Affidavit of William H. Hughes which I will identify as I.G. Exhibit 6. Petitioner did not contest the authenticity or relevancy of these exhibits, nor has he denied the relevant material facts contained in the exhibits. I have admitted these six exhibits into evidence. Petitioner attached one exhibit to his cross-motion for summary disposition, which he identified as Petitioner's Exhibit 1. The I.G. did not object to the authenticity or relevancy of this exhibit, and I have admitted it into evidence. I refer to the I.G.'s exhibits as "I.G. Ex. (number)/(page)" and to the Petitioner's exhibit as "P. Ex. (number)/(page)".

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 Secretary of the United States Department 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 Act. 48 Fed. Reg. 21662 (May 13, 1983).

10. On May 24, 1991, the I.G. notified Petitioner of his determination to exclude him for five years pursuant to section 1128(a)(1).

11. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, as required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

12. The I.G.'s application of the minimum mandatory exclusion provisions to this case is contemplated by the language of the statute, and the absence of implementing regulations does not prevent the I.G. from imposing the mandatory minimum exclusion against Petitioner.

13. There are no disputed material fact in this case, and the I.G. is entitled to summary disposition.

ANALYSIS

I. The mandatory exclusion provisions of the Act apply to this case.

Section 1128(a)(1) of the Act mandates an exclusion 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].

The Act further requires, at section 1128(c)(3)(B), that in the case of an exclusion imposed and directed pursuant to section 1128(a)(1), the minimum term of such exclusion shall be five years. The I.G. asserts that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act, and therefore he must be excluded for at least five years pursuant to section 1128(c)(3)(B). I.G. Brief at pages 12-14.

The authority to impose and direct an exclusion under section 1128(a)(1) is based on the fulfillment of the following statutory criteria: (1) an individual or entity must be "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act, and (2) the conviction must be "related to the delivery of an item or service" under the Medicare or Medicaid programs.

A. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

There are no disputed material facts in this case. The undisputed facts establish that, on January 4, 1988, the 173rd District Court of Henderson County, Texas, issued an indictment charging that Petitioner intentionally defrauded the Texas Department of Human Services by submitting false pharmacy service billing information to Bluff Creek Systems, the claims processing service for the Texas Medicaid Program. The indictment alleged that the information provided by Petitioner indicated that a medication was dispensed to a Texas Medicaid recipient when in fact that medication had not been dispensed to the Medicaid recipient. I.G. Ex. 2.

On September 17, 1990, Petitioner pled guilty to the charge contained in the indictment, and on that same day the court issued an Order stating that it "accepted" Petitioner's guilty plea. In accepting Petitioner's guilty plea, the Texas court stated that it "is of the opinion that the evidence substantiates that [Petitioner] is guilty of the offense of Securing Execution of a Document by Deception, Class A Misdemeanor." I.G. Ex. 5/1. The court also ordered that all further proceedings would be deferred without the entry of a Judgment of Guilt against Petitioner as provided in Article 42.12, Section 3d of the Texas Code of Criminal Procedure. The court then placed Petitioner on probation for a period of two years. The court also ordered several conditions of probation, including that Petitioner pay court costs, a fine, and that he surrender his pharmacy license for 60 days. I.G. Ex. 5/1-2.

In his July 23, 1991 letter requesting a hearing on the I.G.'s exclusion determination, Petitioner stated that he "objects to and questions the determination that he was

in fact convicted as defined in [section 1128(i) of the Act]".[3]

The undisputed material facts of this case and the law establish that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i)(3) of the Act. This section [section 1128(i)(3) of the Act] defines the term "convicted" of a criminal offense to include those circumstances in which:

> a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; . . .

In Robert W. Emfinger, R. Ph., DAB CR92 (1990), I applied this definition of "convicted" to facts which are close to the facts of this case. The petitioner in Emfinger, like the Petitioner in this case, pled guilty to a criminal offense. In addition, Emfinger also involved a Texas State court which issued an Order finding that the evidence against the petitioner substantiated his guilt as alleged in the charging document and as confessed by him in his plea of guilty. The Texas State court in Emfinger likewise deferred further proceedings against the petitioner without an adjudication of guilt pursuant to Article 42.12, section 3d of the Texas Code of Criminal Procedure. In Emfinger, I concluded that, under these facts, the Texas court "accepted" petitioner's guilty plea within the meaning of section 1128(i)(3) of the Act, and therefore, Petitioner was "convicted" according to the statutory definition of that word.

In reaching this conclusion, I rejected the argument that the Texas court's determination to defer adjudication until a later date meant that the court did not "accept" Petitioner's guilty plea. I also held that it is irrelevant that, under Texas law, Petitioner was permitted to subsequently withdraw his plea after satisfactorily completing a period of probation.

As I stated in Emfinger, the term "accept" is not specifically defined in section 1128(i)(3) or elsewhere

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[3] I note that although Petitioner contended in his hearing request that the court proceedings in his underlying criminal case do not support a finding that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, he did not make any arguments to support this contention in the brief he submitted in support of his cross-motion for summary disposition.

in section 1128. In the absence of a specific statutory definition, the term should be given its common and ordinary meaning. "Accept" is defined in Webster's Third New International Dictionary 1969 Edition as:

> 2a: to receive with consent (something given or offered) . . .

In this case, Petitioner offered to admit his guilt to a criminal offense in return for: (1) a term of probation with certain conditions, and (2) the court's deferral of the proceedings without the entry of a Judgment of Guilt. Petitioner offered an admission of guilt in order to dispose of the criminal indictment against him, and the court disposed of the case based on its receipt of Petitioner's guilty plea. That transaction amounts to "acceptance" of a plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore "convicted" of a criminal offense within the meaning of that provision. See James F. Allen, M.D.F.P, DAB CR71 (1990).

B. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the criminal offense which formed the basis for the conviction 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 his July 23, 1991 hearing request, Petitioner asserted that the facts of this case do not support the conclusion that he was convicted of a criminal offense "related to the delivery of an item or service" under Medicaid.[4] I disagree.

Petitioner was convicted of Securing Execution of a Document by Deception, a class A misdemeanor under Texas law. I.G. Ex. 5. While the name of the offense, on its face, does not suggest that it is related to the delivery of an item or service under the Medicaid program, this

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[4] Although Petitioner challenged the determination that his criminal offense was related to the delivery of an item or service under the Medicaid program in his hearing request, he did not brief this issue in his supporting memorandum submitted with his cross-motion for summary disposition.

relationship can be found from a reading of the indictment which describes the nature of the offense to which Petitioner pled guilty and which formed the basis of his conviction.

According to the indictment, Petitioner was charged with intentionally submitting false pharmacy service billing information in order to receive reimbursement to which he was not entitled from the Texas Medicaid Program for dispensing a medication to a Medicaid recipient that in fact had never been dispensed. I.G. Ex. 2.

The Act does not define the term "criminal offense related to the delivery of an item or service". However, case law has consistently held that convictions for criminal offenses involving fraudulent Medicaid claims fall within the reach of section 1128(a)(1) of the Act. In the case of Jack W. Greene, DAB 1078 (1989), an appellate panel of the Departmental Appeals Board (DAB) held that:

> [S]ubmission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of an item or service, to bring the 'item' within the purview of the program.

DAB 1078 (1989) at 7.

The DAB in Greene therefore concluded that "false Medicaid billing and the delivery of the drugs to the Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term." Id. The Greene decision was subsequently affirmed by the United States District Court. Greene v. Sullivan, 731 F.Supp. 835, 838 (E.D. Tenn. 1990).

Applying this holding in Greene to the facts of this case, Petitioner's conviction for submitting false billing information to the Texas Medicaid program for pharmacy services he did not perform as claimed is "inextricably intertwined" to the delivery of those services under the Medicaid program. Thus, 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.

The DAB has also held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Napoleon S. Maminta, M.D., DAB 1135 (1990). The petitioner in the

Maminta case was convicted of converting to his own use a Medicare reimbursement check that was intended to be paid to another health care provider.

Although the facts of the present case are not on all fours with the facts of Maminta, the rationale used by the DAB in deciding that case applies here. The indictment in this case charges that Petitioner defrauded the Texas Medicaid Program knowingly and with the intent to "harm another". The intent of Petitioner's fraud was to deceive the Texas Medicaid Program into paying for services which were not performed as claimed. The victim of Petitioner's crime was the Texas Medicaid Program.

Accordingly, I conclude that Petitioner's crime is 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. This result fits squarely within both the Greene and Maminta cases.

C. A five year exclusion is required in this case.

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 section of 1128(a)(1) and (i)(3) of the Act, section 1128(c)(3)(B) requires that he be excluded for a minimum of five years. The administrative law judge has no discretion to reduce the mandatory minimum five year period of exclusion.

II. The mandatory exclusion applies to this case on the basis of the statute alone.

Petitioner argues that the offense which formed the basis of his conviction, filing false claims, is the type of financial misconduct which falls into the ambit of section 1128(b)(1) of the Act. Section 1128(b)(1) permits the Secretary in his discretion to exclude persons who have been convicted of a criminal offense "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or service, or "with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency."

Petitioner states that there are no specific laws or regulations which give any guidance to the I.G. "in the exercise of his discretion in making his determination of whether a conviction is to be covered by section 1128(a)(1) or section 1128(b)(1) of the Act." Petitioner

argues that since there are no rules or regulations guiding the I.G.'s decision making process "on this critical issue affecting a property right" and since the basis for the decision is not set out in the Notice of exclusion, the I.G.'s decision to exclude him is "arbitrary and capricious" and "violates fundamental due process". Petitioner Brief at page 4.

Petitioner's argument is premised on the assertion that the I.G. has discretion to classify financial offenses such as fraud and theft directed at the Medicaid program as falling under either the mandatory exclusion authority of section 1128(a)(1) or the permissive exclusion authority of section 1128(b)(1). This assertion is based on a misreading of the statute. The plain meaning of the language of section 1128(a)(1) is to require exclusion from participation in the Medicaid programs of those providers who commit offenses, including fraud or financial misconduct, in connection with the delivery of an item or service rendered pursuant to the Medicaid program. The phrase in section 1128(a)(1) "related to the delivery of an item or service" conveys legislative intent to sweep within section 1128(a)(1) all "financial" offenses directed against the Medicaid program.

Section 1128(a)(1) encompasses the same kinds of "financial" offenses which are described in 1128(b)(1), but is limited to those offenses which are directed against, or committed in connection with, the rendering of services pursuant to the Medicare or Medicaid programs. The legislative scheme apparent from reading 1128(a)(1) and 1128(b)(1) in conjunction with each other is to mandate exclusions of those who commit financial crimes directed against Medicare and Medicaid, and to permit exclusions of those who commit financial crimes in connection with the delivery of a health care item or service pursuant to programs, other than Medicare or Medicaid, which are financed by federal, State, or local government agencies. As the fraud committed by Petitioner was directed against Medicaid, his exclusion is mandated by section 1128(a)(1). See Greene, 731 F.Supp. at 838.

There is no question that if 1128(b)(1) is read in isolation, its language would literally encompass the offense for which Petitioner was convicted. However, when this section is read in context with section 1128(a)(1), it becomes clear that Petitioner's exclusion may not be governed by the permissive exclusion provisions. This is so because the law specifically requires a minimum five-year term for exclusions of

parties who commit offenses described in section 1128(a)(1).

The petitioner in Greene, like Petitioner in this case, also argued that he lacked adequate notice of the effect of section 1128(a)(1) because the Secretary has not published regulations implementing the minimum mandatory provisions of the Act. The DAB addressed this argument as a subsidiary issue to the question of whether the mandatory exclusion was required by statute in cases involving convictions for filing false Medicaid claims. The DAB found that section 1128(a)(1) on its face covers convictions involving false billings under Medicaid. In addition, the DAB stated that the I.G.'s application of the mandatory provisions of the Act to false billings under Medicaid was not only encompassed by the language of the statute, but that it is consistent with the meaning and effect of parallel exclusion provisions, and is supported by the legislative history of the Act. Moreover, the DAB pointed out that the Act does not contain any provision requiring that exclusions be "tolled" until the Secretary promulgates regulations. See Jack W. Greene, DAB 1078 (1989) at 13-15.

The DAB therefore concluded that the standards for applying the mandatory provisions of section 1128(a)(1) of the Act were "ascertainable" based on the statute alone, and the Secretary is not required to promulgate regulations before he imposes a mandatory minimum exclusion against health care providers. The DAB also held that the exclusion notice was sufficient to provide Petitioner with notice of the basis for his exclusion because it fully and accurately portrayed the applicable statutory standard. DAB 1078 (1989) at 14. A federal district court reviewed the DAB's decision in Greene and agreed that the mandatory minimum provisions of the Act "are self-executing and do not require the formation of additional regulations prior to their application". 731 F.Supp. at 837.

I find to be without merit Petitioner's argument that the absence of implementing regulations prevents the I.G. from imposing the mandatory minimum exclusion provisions against him. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. Under these circumstances, sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the imposition of an exclusion for a minimum of five years. Regulations which give guidance to the I.G. regarding "the exercise of his discretion" in deciding whether a conviction comes within the scope of the mandatory or permissive exclusion provisions are not

necessary because the I.G. is required to exclude health care providers under the mandatory provisions in cases where there are convictions for program-related offenses. The exclusion Notice provided Petitioner on May 24, 1991 accurately stated the statutory provision that applies to this case, and Petitioner therefore had sufficient notice of the basis of his exclusion.

III. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions and the record establishes that the I.G. excluded Petitioner.

The Secretary 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.) Petitioner does not dispute that the Secretary delegated his authority to impose exclusions under section 1128 of the Act to the I.G. Nor does Petitioner argue that the Secretary's delegation of this authority to the I.G. is unlawful.[5] Instead, Petitioner asserts that the exclusion Notice is "null and void" because the record does not establish that James F. Patton, the signatory of the Notice, has the authority to act in the capacity of the I.G.

The exclusion Notice in this case was signed by James F. Patton in his capacity as "Director, Health Care Administrative Sanctions, Office of Investigations." Petitioner contends that there is no legal authority for "the Inspector General to delegate his decision making authority to the director of Health Care Administrative Sanctions" and that the record does not adequately establish Mr. Patton's authority to exclude health care providers. Petitioner Brief at 5.

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[5] I note that had Petitioner argued that the Secretary's delegation of his exclusion duties to the I.G. was unlawful, I would be without authority to decide this issue. This issue was also raised by the petitioner in Greene, and the DAB held that the scope of review by the administrative law judge in exclusion cases relates to the propriety of the imposition of an exclusion in particular cases, and does not encompass "collateral challenges to the validity of [the Secretary's] regulatory procedures based on statutory provisions that are wholly outside the realm of the exclusion authorities." DAB 1078 (1989) at 18. In any event, I also note that a federal court in Greene held that the Secretary appropriately delegated to the I.G. his authority to impose exclusions. 731 F.Supp. at 837.

Petitioner's argument is premised on the assumption that Mr. Patton, rather than the I.G., imposed the exclusion in this case. I disagree with this premise.

It is undisputed that the I.G. is a party to this proceeding. The case caption itself makes this clear. The I.G. is represented by legal counsel, Lorin R. George, of the Office of the General Counsel. Mr. George asserts that the I.G. excluded Petitioner. Petitioner has not brought forward any probative evidence showing that this assertion is a misstatement of fact. Absent a showing by Petitioner that the I.G. did not exclude him, I have no basis to find that the I.G. did not authorize Petitioner's exclusion in this case.

The fact that the exclusion Notice was signed by Mr. Patton does not mean that Mr. Patton made the determination to exclude Petitioner. Instead, I find that Mr. Patton, acting in his capacity as the Director of Health Care Administrative Sanctions in the Office of Investigations, merely notified Petitioner of the I.G.'s determination to exclude him. It is clear from the letterhead of the exclusion Notice that this document was issued by the "Office of the Inspector General" in the "Department of Health and Human Services." It is reasonable to infer from this document that Mr. Patton issued this letter at the direction of the I.G. for the purpose of informing Petitioner that the I.G. has excluded him. I do not conclude from the fact that Mr. Patton is the signatory of the Notice letter that Mr. Patton, rather than the I.G., excluded Petitioner.

In view of the foregoing, I find that the I.G. excluded Petitioner in this case and that the record adequately establishes this fact.

CONCLUSION

Based on the undisputed material facts and the law, 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 entering a decision in this case sustaining the five-year exclusion imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge