Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
John Strausbaugh, R.Ph.,	DATE: March 27, 1992
Petitioner,	
- v. -	Docket No. C-92-022 Decision No. CR186
The Inspector General.	

DECISION

By letter dated September 16, 1991 (Notice), the Inspector General (I.G.) notified John Strausbaugh, R. Ph. (Petitioner), that he was excluded from participation in the Medicare program, and any State health care program, as defined in section 1128(h) of the Social Security Act (Act).[1] The I.G.'s Notice informed Petitioner that his exclusion resulted from a State conviction of a criminal offense related to the delivery of an item or service under Medicare. The I.G. told Petitioner that he was being excluded for a period of five years, the mandatory minimum under sections 1128(c)(3)(B) and 1128(a)(1) of the Act.

In a letter dated November 8, 1991, Petitioner requested a hearing before an Administrative Law Judge (ALJ) and the case was assigned to me for hearing and decision. On December 18, 1991, I held a prehearing conference at which Petitioner contended that he had not been aware of the ramifications of his plea of nolo contendere in State court. Petitioner also contended that his age, the extreme embarrassment he suffered due to the exclusion, and his record of community service were all factors that should be considered favorable to him. I established a

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[1] "State health care program" is defined by section 1128(h) of the 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.

schedule for the parties to brief the issues on cross motions for summary disposition.

The parties timely filed their motions and briefs along with supporting exhibits. I have admitted all of the parties' exhibits into evidence.[2] I have considered the evidence, the parties' written briefs and supporting exhibits, and the applicable laws and regulations. There are no disputed issues of material fact in this case which would preclude the entry of summary disposition. I conclude that sections 1128(a)(1) and 1128(c)(3)(B) required the I.G. to exclude Petitioner for five years. I therefore sustain the exclusion.[3]

ISSUES

1. 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.

2. Whether Petitioner must be excluded for five years.

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[2]The parties' submissions will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
Petitioner's Second Brief	P. Sec. Br. (page)
Departmental Appeals Board	
- ALJ decisions	DAB CR (docket no./year)
- Appellate decisions	DAB (no./year)

[3]In light of the federal regulations at 57 Fed. Reg. 3298 et seq., published on January 29, 1992, I permitted the parties to submit additional briefs addressing the impact of the new regulations on this case. Petitioner took this opportunity to submit an additional brief (Pet. Sec. Br.). The I.G. stated that the new regulations should not impact upon my determination in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant, Petitioner was a licensed pharmacist in the State of Michigan.

2. Petitioner was indicted in State court in Michigan for four separate criminal counts. These were: conspiracy to defraud Medicaid; conspiracy to unlawfully deliver controlled substances, common plan or scheme to deliver unlawfully controlled substances; and common plan or scheme to defraud Medicaid, specifically, causing claims to be made for unnecessary drugs. I.G. Ex. 2.

3. Petitioner pled nolo contendere to the charge of a common plan or scheme to defraud Medicaid. Petitioner also pled guilty to the charge of a common plan or scheme to unlawfully deliver controlled substances. Petitioner's nolo contendere plea and his guilty plea were accepted by a Michigan State court and judgment of sentence was entered on August 6, 1990.[4] I.G. Ex. 1.

4. Petitioner was sentenced to pay a fine of $1,000 and court costs of $1,000. I.G. Ex. 1.

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

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

7. Petitioner's conviction is "related to" the Medicare program within the meaning of section 1128(a)(1) of the Act.

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[4]Petitioner correctly notes that the judgment of sentence of the Michigan State Court, I.G. Ex. 1, contains a mistake. The document refers to counts five and six as the counts for which judgment was entered. However, Count Six of the indictment states that Sidney Brickman was charged with a common plan or scheme to unlawfully deliver controlled substances, whereas Count Four states that John Strausbaugh was charged as common plan or scheme to unlawfully deliver controlled substances. Petitioner concedes this mistake by the Court is harmless error for the purposes of these proceedings, because he is not contesting the fact that he was convicted of a common plan or scheme to unlawfully deliver controlled substances.

8. On September 16, 1990, the I.G. excluded Petitioner from participating in Medicare and directed he be excluded from Medicaid, pursuant to section 1128 of the Act.

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

10. The exclusion imposed and directed against Petitioner is for five years, the minimum period required under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

11. Neither the I.G. nor the ALJ has the discretion or authority to reduce the five year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

I. Petitioner Was "Convicted" Of A Criminal Offense As A Matter Of Federal Law.

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].

On August 6, 1990, Petitioner pled guilty to the offense of common plan or scheme to deliver unlawfully controlled substances. On that same date, Petitioner also pled nolo contendere to the offense of common plan or scheme to defraud Medicaid, specifically, causing claims to be made for medically unnecessary drugs. Count five of Petitioner's indictment specifically states that Petitioner was charged with causing Medicaid claims to be submitted for medically unnecessary drugs, and the judgment of sentence indicates that Petitioner's plea of nolo contendere was accepted as to Count five. Based on this conviction, the I.G. excluded Petitioner under section 1128(a)(1) of the Act.

Petitioner admits that he was "convicted" of a criminal offense and that his plea of nolo contendere to the charge of Medicaid fraud is a conviction for the purposes of section 1128(i) of the Act. P. Sec. Br. 7. Charles Wheeler and Joan Todd, DAB 1123 (1990).

II. 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.

Petitioner admits his conviction is related to the delivery of a health care item or service within the meaning of section 1128(a)(1). P.Br. 7. Moreover, a Board Appellate panel has held that a conviction of a criminal offense meets the statutory requirements of section 1128(a)(1) of the Act where the unlawful conduct can be shown to affect an identifiable Medicare or Medicaid item or service or to affect reimbursement of such an item or service. DeWayne Franzen, DAB 1165(1990). Such is the case here, where Petitioner pled guilty to an indictment that charged him with causing Medicaid claims to be submitted for medically unnecessary drugs.

III. A Five Year Exclusion Is Required In This Case.

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 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(i) and 1128(a)(1) of the Act.

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 1128(a)(1) and (i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum of five years. Neither the I.G. nor the ALJ has discretion to reduce the mandatory minimum five year period of exclusion. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

Petitioner contends that the imposition of the minimum mandatory five-year exclusion in this case constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Although I do not have the authority to rule on the constitutionality of sections 1128(a)(1) and 1128(c)(3)(B), I do have the authority to interpret and apply the federal statute and regulations. See Francis Shaenboen DAB CR97 (1990). The Eighth Amendment prohibition against cruel and unusual punishment applies to only to criminal punishments and not to civil sanctions. See Stamp v. Commissioner of Internal Revenue, 579 F.Supp. 168 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Popow v. City of Margate, 478 F.Supp. 1237 (1979); Ingraham v. Wright, 430 U.S. 651 (1977). The Supreme Court in United States v. Halper, 109 S.Ct. 1892 (1989) stated

> only in rare cases will a civil sanction imposed after a criminal sanction violate the double jeopardy clause, and even in those rare cases, only where the sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

As Petitioner correctly states, under Halper, whether a civil sanction constitutes punishment depends in large part upon the goal served by the sanctions--if the civil sanction can be said to serve a remedial purpose, its imposition does not violate the double jeopardy clause. Halper at 1902.

Exclusions are remedial sanctions that serve a remedial purpose and as such do not constitute a second punishment. Halper. The Inspector General's goals are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc. See Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990), affirming Jack W. Greene, DAB 1078 (1989).

As I stated in Dewayne Franzen, DAB CR58 (1990):

> The primary purpose of an exclusionary sanction is remedial, not punitive. When the OIG imposes an exclusion under section 1128 of the Act, it is simply carrying out Congress' intent to protect the Medicare and Medicaid programs from individuals or entities who have already been tried and convicted of a criminal offense.

Thus, relevant case law and DAB precedent hold that the imposition of an exclusion is not a punishment, but a remedial action. As a remedial action, an exclusion cannot be a cruel and unusual punishment. Therefore, Petitioner's argument that exclusions are subject to Eighth Amendment prohibitions is without merit.

Petitioner argues that his advanced age and poor health, coupled with his desire to teach, are factors which should lessen the penalty in this case. Petitioner also argues that his involvement in the activities which ultimately led to his conviction was minimal and peripheral, compared with the culpability of his co-conspirators. Petitioner indicates that he has no desire to actively practice pharmacy, only to teach others.

First, Petitioner is not prohibited from engaging in private practice or from teaching; he is only excluded from the Medicare and Medicaid programs. Second, I cannot reduce a mandatory five year exclusion. Section 1128(c)(3)(B) provides that the minimum term for any exclusion imposed under section 1128(a)(1) is five years. The Act and the regulations require me to uphold the provisions of the Act as authored by Congress. Because the I.G. correctly determined that Petitioner was convicted within the meaning of sections 1128(i) and 1128(a)(1) of the Act, Petitioner's exclusion for a period of five years is required as a matter of law.

IV. Summary Disposition Is Appropriate In This Case.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. Charles W. Wheeler and Joan K. Todd, supra.

CONCLUSION

Based on the undisputed material facts, the evidence and the law, I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid programs for five years was mandated by law. Therefore, I enter summary disposition in favor of the I.G.

/s/

Charles E. Stratton
Administrative Law Judge