

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

_____)	
In the Case of:)	
)	DATE: March 14, 1990
Samuel W. Chang, M.D.,)	
)	
Petitioner,)	Docket No. C-125
)	
- v. -)	DECISION CR 74
)	
The Inspector General.)	
_____)	

DECISION AND ORDER

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 May 18, 1989 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

Based on the entire record before me, I conclude that there are no material facts at issue, that Petitioner is subject to the federal minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that it is appropriate for Petitioner to be excluded for a period of five years.

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

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 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)² provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

Section 1128(b) of the Act provides for the permissive exclusion of individuals and entities for certain types of convictions, infractions, or undesirable activities, with no minimum period of exclusion.

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). 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

² The I.G.'s notice letter adds five days to the 15 days prescribed in section 1001.123, to allow for receipt by mail.

BACKGROUND³

I held a telephone prehearing conference on July 18, 1989, at which time the parties stated that there was no need for an evidentiary hearing because the facts were not disputed. The parties agreed to submit this case on the basis of documentary evidence and briefs. On August 1, 1989, I issued a prehearing Order and Schedule for filing briefs and motions which set forth the issues raised by the parties. Both parties submitted briefs, and I heard oral argument by telephone on November 14, 1989.

Petitioner admits that he was "convicted" on October 28, 1987, of a criminal offense within the meaning of section 1128(i) of the Act. P. Br. 1.

ISSUES

The remaining issues are:

1. Whether Petitioner's 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.
2. Whether Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.
3. Whether the principles of double jeopardy, laches, equitable estoppel, or fairness bar the I.G. from excluding Petitioner.
4. Whether the period of this federal exclusion should be reduced or adjusted on the grounds that the I.G. failed to issue the Notice to Petitioner in a timely manner as required by the Act and Regulations.

³ The citations in this Ruling are as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br. (page)
Petitioner's Exhibits	P.Ex. (number)/(page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)
Findings of Fact and Conclusions of Law	FFCL (number)

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴

1. Petitioner was a licensed medical doctor who had practiced medicine in Poolesville, Maryland since 1979.
2. The Maryland Medicaid Fraud Control Unit discovered a billing pattern by Petitioner that caused them to initiate an investigation in late 1986. I.G. Ex. M/1.
3. Petitioner was charged by the State of Maryland with Medicaid fraud for billing for services that were not performed as claimed. I.G. Ex. N.
4. On October 28, 1987, Petitioner pleaded guilty to one count of Medicaid fraud. I.G. Ex. B/2.
5. Petitioner agreed to pay restitution of \$35,540.95, and was given five years probation. I.G. B/2.
6. Petitioner was "convicted" within the meaning of section 1128 (i) of the Act.
7. On November 5, 1987, the State of Maryland suspended Petitioner from participation in the State Medicaid program, retroactive to October 28, 1987; the State's suspension was based on Dr. Chang's October 28, 1987 conviction of one count of Medicaid fraud. I.G. Ex. E.
8. On November 12, 1987, the I.G. was notified by the State of Maryland of Petitioner's conviction. I.G. Ex. F.
9. On January 7, 1988, Petitioner was notified by the I.G. that the I.G. was proposing to exclude him for at least five years under the minimum mandatory provisions of section 1128 of the Act from Medicare and Medicaid because of his October 28, 1987 conviction. The I.G. allowed him the opportunity to submit mitigating circumstances before the I.G. made a final determination on the length of the exclusion. I. G. Ex. I, G.
10. By letter of February 4, 1988, Petitioner requested that the I.G. withdraw the proposed exclusion. I. G. Ex. H.

⁴ Any part of this Decision and Order preceding the Findings of Fact and Conclusions of law which is obviously a finding of fact or conclusion of law is incorporated herein.

11. By letter dated May 18, 1989, the I.G. informed Petitioner that he had been excluded for five years under the minimum mandatory provisions of section 1128 (a)(1) of the Act and that such federal exclusion from both Medicare and Medicaid would begin twenty days from the date of the Notice.

12. By letter dated June 5, 1989, Petitioner requested a hearing before an ALJ.

13. Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. P. Br. 4.

14. 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. I.G. Ex. A through G.

15. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years as required by the minimum mandatory exclusion provisions of section 1128(c)(3)(B) of the Act.

16. Since the material facts are undisputed in this case, the classification of Petitioners' conviction of a criminal offense as subject to the authority of 1128(a)(1) is a legal issue.

17. The I.G. is entitled to summary disposition in this proceeding.

18. The I.G. is not barred by principles of double jeopardy, due process, or laches from excluding Petitioner in this case.

19. The I.G.'s Notice in this case was not timely and, thus, was not reasonable within the meaning of the Act and Regulations.

20. The five year exclusion from Medicare and Medicaid programs which is required by federal law in this case is hereby effective beginning November 22, 1988, which is one year and twenty days from November 12, 1987, the date that the I.G. received notice of Petitioner's conviction (instead of May 18, 1989, the date of the I.G.'s Notice).

21. All Medicare reimbursements, if any, received by Petitioner from November 22, 1988 to May 18, 1989 must be refunded to the Medicare carrier because Petitioner was effectively excluded during that period.

DISCUSSION

I. Petitioner's Conviction "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128(a)(1) of The Act.

Petitioner argues that even though he was "convicted," he should not be excluded because the criminal offense to which he pleaded guilty was not "related to the delivery of an item or service" under section 1128(a)(1) of the Act. Instead, Petitioner contends that his conviction fits within the provisions of section 1128(b)(1) of the Act, as a conviction relating to fraud, and that, accordingly, the exclusion is permissive and not mandatory.

Petitioner was convicted of Medicaid fraud. FFCL 4,6,13. Section 1128(a)(1) of the Act provides for a federal exclusion when a conviction is "related to the delivery of an item or service" under Medicare or Medicaid. The evidence in the record clearly demonstrates that Petitioner's criminal activity did cause financial harm to the Medicaid program and was, thus, "related to the delivery of an item or service." The Maryland criminal court ordered Petitioner to pay restitution to the Medicaid program and ordered him to serve five years of unsupervised probation. I.G. Ex. E. In the case of Jack W. Greene, DAB App. 1078 (1989), the Departmental Appeals Board (DAB) held that "the false Medicaid billing and the delivery of drugs to a Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term." Petitioner's conviction is also "inextricably intertwined" with the Medicaid program and, therefore, "related." Accordingly, 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.

II. A Minimum Mandatory Five Year Exclusion Is Required In This Case.

Section 1128(a)(1) of the Act clearly requires 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 "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act. Congressional intent on this matter is clear:

A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . . Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

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 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.⁵ See Jack W. Greene v. Louis Sullivan, No. Civ.-3-89-758 (E.D. Tenn., Feb. 22, 1990).

III. The I.G. Is Not Precluded From Excluding Petitioner In This Case.

Petitioner contends that the I.G. is barred from excluding him because of the doctrine of double jeopardy. P. Br. 12. Petitioner cites the recent Supreme Court case of United States v. Halper, 109 S. Ct. 1892 (1989), in support of his argument. P. Br. 12-13.

⁵ Since I have found and concluded that the mandatory exclusion provisions of section 1128(a)(1) apply in this case, I need not address the issue of whether I should make a de novo determination to reclassify the Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

In Halper, the Supreme Court held that under some circumstances, the imposition of civil penalties under the False Claims Act, 31 U.S.C. 3729-3231, could constitute double jeopardy in the narrow circumstances where there existed a prior federal criminal conviction for the false claims for which the civil penalty was imposed and where there was not even a rough relationship between the amount of the penalty and the cost to the government resulting from the false claims. The Court noted that the rule is one for "the rare case."

This case is distinguishable both legally and factually from Halper. First, this case involves a state conviction and Halper involved a federal conviction. Double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. Chapman v. U.S. Dept. of Health & Human Services, 821 F.2d 523 (10th Cir. 1987); Abbate v. United States, 359 U.S. 187 (1959). Second, the major purpose of the exclusion law is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. Greene v. Sullivan, supra, at p. 3. See, H.R. Rep. No. 97-158, 97th Cong., 1st Sess. Vol. III, 329, 344, (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62 (1981), 1981 U.S. Code Cong. & Admin. News 727-28; Preamble to the Regulations (48 Fed. Reg. 38827 to 38836, August 26, 1983). Accordingly, the I.G. is not barred by the principles of double jeopardy. See also, United States of America v. Neville Anthony, No. CV 89-1351 (E.D. N.Y., Nov. 22, 1989).

IV. The I.G.'s Notice Was Not Issued In A Timely Manner.

The State of Maryland excluded Petitioner from Medicaid participation for five years from the date of his conviction, October 28, 1987. FFCL 7. The I.G. became aware of Petitioner's conviction on November 12, 1989. FFCL 8. The I.G. excluded Petitioner from Medicare and Medicaid for five years from the date of the I.G.'s Notice, May 18, 1989. FFCL 9,10,11. Petitioner contends that, since the I.G.'s Notice excluding him was issued some seventeen months after the I.G. had been notified by the State of Maryland of Petitioner's conviction, (1) the I.G.'s Notice was not issued in a timely manner and (2) that such a delay in a five-year minimum mandatory exclusion effectively adds time to the length of such exclusion. Petitioner argues that the I.G. violated section 1128(c) of the Act, which requires the I.G. to "promptly notify" an individual of an exclusion and that the I.G.'s untimely exclusion results in an "inequitable

tacking on of additional time to the State's Medicaid exclusion." P. Br. 7. Petitioner also argues, in effect, that the doctrines of laches, equitable estoppel, and fairness dictate relief in this situation, require a reduction in the number of years Petitioner is excluded, or, in the alternative, require the effective date of the exclusion to be modified. P. Br. 7-12.

The I.G. argues, in effect, that Petitioner cannot be granted relief from this situation. I.G. Rep. Br. 5-7. The I.G. argues that the State's Medicaid suspension or exclusion is separate from this federal exclusion from Medicare and Medicaid and that laches does not apply. The I.G. contends that he has no discretion to reduce the period of exclusion, argues that estoppel does not apply, and contends, in the alternative, that an ALJ has no authority to grant the relief sought by Petitioner. I.G. Rep. Br. 4-7.

I conclude that the doctrines of laches and equitable estoppel have no application to this case. I find that the I.G. issued his Notice some 17 months after the I.G. became aware of Petitioner's conviction. This was not timely and not reasonable notice. Sections 1128(c) and 1128(f)(1) of the Act and section 1001.123 of the Regulations require reasonable notice and an opportunity for a timely hearing. The delay of 17 months in issuing the Notice in this case is contrary to those provisions. During oral argument in this case, counsel for the I.G. admitted that the delay in sending the Notice was due to administrative error. This means that the I.G. did not intentionally delay the Notice, but it does not mean that Petitioner should suffer the consequences of the I.G.'s error, however inadvertent. In such a situation, there should be relief which redresses the potential wrong. See Federal Deposit Insurance Corp. v. Mallen, 108 S.Ct. 1780, 1787, 1788 (1988); Brock v. Roadway Express, Inc. 107 S.Ct. 1740 (1987); Ram v. Heckler, 792 F2d 444 (4th Cir. 1986); ADL, Inc. v. Perales, ___ F. Supp. ___ (S.D.N.Y., Aug. 2, 1988).

I conclude that, while neither the I.G. nor an ALJ have the authority to reduce the minimum mandatory period of exclusion of five years required by section 1128 (c)(3)(B) of the Act, I do have authority to correct mistakes which impact in such a way so as to deny a petitioner due process or fundamental fairness and which are in direct contradiction to the specific requirements of of the Act and the Regulations. Accordingly, I find and conclude that to correct the mistake made and to insure compliance with the Act, the Notice to Petitioner should have been issued within a reasonable time from the

date that the I.G. became aware of Petitioner's conviction. One year from notification of a conviction is a reasonable period to effect an exclusion. See Thomas C. Chestney, D.M.D., DAB Civ. Rem. C-53, fn. 8 (1989). To hold otherwise would effectively punish Petitioner for a mistake made by someone on the I.G.'s staff.

I find that the I.G. was notified by letter on November 12, 1987 of Petitioner's conviction and that the I.G.'s exclusion of Petitioner, to be reasonable, should have been effective within one year from that date. Accordingly, the five year exclusion of Petitioner from Medicare and Medicaid programs was effective on November 12, 1988.

It would not be fair for Petitioner to unreasonably profit from this situation by keeping any monies paid to him by Medicare for items or services provided after November 12, 1988. Thus, to have the advantage of adjusting the period of exclusion, Petitioner must return any such monies paid by Medicare. The State of Maryland had already excluded Petitioner from Medicaid as of October 28, 1987.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for the minimum mandatory period of five years. The effective date of this five-year exclusion is November 12, 1988.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge