

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: October 19, 1990
Willie B. Sherman, Jr.,	)	
D.D.S.,	)	
	)	
Petitioner,	)	
	)	Docket No. C-235
- v. -	)	
	)	Decision No. CR105
The Inspector General.	)	

DECISION

In this case, governed by section 1128 of the Social Security Act, Petitioner timely filed a request for a hearing before an administrative law judge to contest the March 22, 1990 notice of determination (Notice) issued by the Inspector General (I.G.). The Notice informed Petitioner that he was excluded from participating in the Medicare and Medicaid programs for five years.<sup>1</sup>

Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(i) of the Social Security Act. Petitioner was further advised that his exclusion was mandated by section 1128 of the Social Security Act.

I held a telephone prehearing conference on June 22, 1990, at which both parties expressed their intent to move for summary disposition. During the prehearing conference, Petitioner admitted that he had been convicted of a criminal offense, within the meaning of section 1128(i) of the Social Security Act. However, Petitioner contended that his conviction was not related

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<sup>1</sup> "State Health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

to the delivery of an item or service, within the meaning of section 1128(a)(1) of the Social Security Act. I issued a prehearing Order on July 6, 1990 which established a schedule for disposition of the case. Both parties moved for summary disposition. Neither party requested oral argument.

I have considered the parties' arguments, the applicable law, and the undisputed material facts. I conclude that the exclusion imposed and directed against Petitioner by the I.G. was mandated by section 1128(a)(1) of the Social Security Act. Therefore, I enter summary disposition in favor of the I.G. and affirm the exclusion.

### ISSUES

The issues in this case are whether:

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 Social Security Act.
2. The 1987 amendments to section 1128 of the Social Security Act mandating a minimum five-year exclusion for program-related convictions apply to this case.
3. I have authority to decide whether the exclusion in this case was imposed in violation of the eighth amendment to the United States Constitution.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a dentist licensed to practice in the State of Florida. Stipulations of Fact and Law, page 1 (Stip. 1).
2. On December 9, 1988, the Office of the State Attorney for the State of Florida filed a criminal information (information) against Petitioner in State court, charging him with two counts of Medicaid fraud, one count of grand theft, and two counts of employing uncertified dental assistants. Stip. 1; Inspector General's Exhibit A (I.G. Ex. A).
3. On June 30, 1989, the original charges in the December 9, 1988 information were nolle prosequi. Stip. 1.

4. A second information was filed on June 30, 1989, charging Petitioner with unlawfully and knowingly receiving, attempting to receive, or aiding and abetting in receiving, an unauthorized payment, on various days between March 1, 1987 and March 31, 1988, from the Medicaid program in reimbursement for dental services not rendered. Stip. 1-2; I.G. Ex. A.

5. On July 5, 1989, Petitioner entered a plea of nolo contendere to the information and the court accepted the plea. Stip. 2; I.G. Ex. B.

6. The court withheld an adjudication of guilt and ordered Petitioner to pay investigative costs of \$325.00, restitution of \$137.00, and court costs of \$80.00. Stip. 2; I.G. Ex. B.

7. Petitioner's plea of nolo contendere constitutes a "conviction," within the meaning of section 1128(i) of the Social Security Act. Findings 2-6.

8. The offense to which Petitioner pled nolo contendere is a "criminal offense related to the delivery of an item or service" under the Medicaid programs, within the meaning of section 1128(a)(1) of the Social Security Act. Findings 2-6.

9. By letter dated March 22, 1990, the I.G. notified Petitioner that, effective twenty days from the date of the Notice, he would be excluded from participation as a provider in the Medicare and Medicaid program for a period of five years.

10. Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Finding 5.

11. 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. 21662, May 13, 1983.

12. 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 provision of section 1128(c)(3)(B) of the Social Security Act.

13. Petitioner was convicted after the effective date of the 1987 amendments to the Social Security Act, and under the terms of those amendments, the mandatory minimum

period of exclusion provided for in section 1128(c)(3)(B) applies to this case.

14. Section 15(b) of the Social Security Act provides that the mandatory five-year exclusion period applies to exclusions based on convictions occurring after August 18, 1987.

15. Since there are no material facts in dispute, there is no need for an evidentiary hearing in this case.

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

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

#### ANALYSIS

1. Petitioner was "convicted" of a criminal offense "related to the delivery of an item or service," within the meaning of section 1128(a)(1) of the Social Security Act.

There are no disputed material facts in this case. Petitioner admits that his plea of nolo contendere to a criminal offense constitutes a "conviction," within the meaning of section 1128(i) of the Social Security Act. Stip. 2. However, Petitioner argues that the offense of knowingly receiving unauthorized payments is not related to the delivery of an item or service, and does not properly fall within the five-year mandatory exclusion provision of 1128(a)(1). Petitioner's Brief pages 2-3 (P. Br. 2-3). Petitioner claims that 1128(a)(1) refers only to offenses that occur in the delivery of a health care item or service and that 1128(a)(1) does not apply to offenses for financial misconduct, such as the acceptance of unauthorized payments from Medicaid. P. Br. 2-3.

Petitioner further contends that the offense of knowingly receiving unauthorized payments falls within the permissive exclusion provision of 1128(b)(1) of the Social Security Act, which gives the Secretary authority to exclude individuals or entities convicted of a criminal offense related to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." P. Br. 2-3. Petitioner claims that his acceptance of unauthorized payments is an "act or

omission . . . relating to . . . other financial misconduct," and that under 1128(b)(1) there is no statutory requirement that such exclusions be for a minimum period of time. Therefore, according to Petitioner, the five-year exclusion imposed against him is not mandatory, and he is entitled to challenge the reasonableness of the length of the exclusion.

The I.G. contends that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. Thus, the I.G. argues that Petitioner was subject to the mandatory minimum five-year exclusion provisions of section 1128(a)(1). I.G. Br. 5.

It is manifest, both from the language of the statute, and from legislative history, that the offense committed by Petitioner is governed by section 1128(a)(1) of the Social Security Act. Furthermore, both the Departmental Appeals Board and a federal court have expressly rejected the arguments made by Petitioner concerning the interpretation of section 1128(a)(1). See Jack W. Greene, DAB Civ. Rem. C-56 at 7, aff'd, DAB App. 1078 at 18 (1989), aff'd 731 F. Supp. 835 (E.D. Tenn. 1990) [discussed infra at p. 7]. The I.G. had no choice but to exclude Petitioner from participation in Medicare, and to direct his exclusion from participation in Medicaid, for five years.

The plain meaning of the language of section 1128(a)(1) is to require exclusion from participation in the Medicare and State health care programs of those parties who commit offenses, including fraud or financial misconduct, in connection with the delivery of or billing for items or services rendered pursuant to these programs. The phrase in 1128(a)(1), "related to the delivery of an item or service," conveys legislative intent to sweep within the subsection all "financial" offenses directed against the Medicare and State health care programs. Petitioner's offense -- which amounts to theft or conversion of Medicaid funds -- is covered by this language.

Section 1128(a)(1), therefore, 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 and State health care 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

State health care programs, 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, a State health care program, his exclusion is mandated by section 1128(a)(1).

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. His conviction was for an act of fraud, and certainly constituted "financial misconduct" directed against a program financed in part by a State government agency. However, when this subsection is read in context with 1128(a)(1), it becomes clear that Petitioner's exclusion is not 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 1128(a)(1).

The legislative history of the 1987 revisions to section 1128 also makes it clear that Congress intended its enactment to enlarge the scope of offenses for which exclusions could be imposed and not limit or undercut the mandatory exclusion requirements which had previously been enacted. The Senate Report which accompanied the 1987 legislation explained Congressional intent in enacting 1128(b)(1):

[T]he Secretary would be authorized to exclude any individual or entity convicted under Federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or financial abuse if such offense was committed either in connection with the delivery of health care or with respect to a program that is financed, at least partially, by Federal, State, or local government. Under current law, the Secretary does not have the authority to exclude individuals or entities convicted of criminal offenses which are not related to Medicare or Medicaid or the other State health care programs. This provision would permit the Secretary to exclude persons and entities who have already been convicted of offenses relating to their financial integrity, if the offenses occurred in delivering health care to patients not covered by public programs or if

they occurred during participation in any other governmental program. (Emphasis added.)

S. Rep. No. 100-109, 100th Cong., 1st Sess. 5, 6-7, (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 682, 687. Thus, Congress intended the new subsection (b)(1) to enlarge the Secretary's authority to impose and direct exclusions by permitting the Secretary to exclude individuals and entities who were convicted of offenses which were not related to Medicare and Medicaid.

Petitioner's criminal offense is not materially different from the offense committed by the petitioner in Greene, supra. The petitioner in Greene was convicted of fraud against the Tennessee Medicaid program. His crime consisted of substituting a generic drug for a brand name drug, and billing the program for the more expensive brand name drug. In Greene and the present case, the petitioners attempted to obtain reimbursement for items or services which were not rendered as claimed. Both cases involve fraudulent acts against Medicaid programs, related to the delivery of services pursuant to those programs. The petitioner in the Greene case argued that 1128(a)(1) applied only to convictions for misfeasance or malfeasance in the delivery of items or services, as proposed to the commission of theft or fraud against Medicare or Medicaid programs. The Board expressly rejected this argument, holding that:

[The] . . . offense is directly related to the delivery of the item or service since the 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.

DAB App. 1078 at 7. The Board based its holding on the plain meaning of the law, and also on the law's legislative history, as well as on comparison of language in the current version of the law with language contained in previous versions. Id. In so holding, the Board found that the current legislation constituted a broadening of the scope of the mandatory exclusion provisions of the law and not a narrowing of that scope, as was contended by the petitioner. Id. at 11.

The Board has recently held that a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the intended victim of the crime is the Medicare or Medicaid program. Napoleon S. Maminta, DAB App. 1135 (1990). The criminal offense in Maminta consisted of the unlawful conversion of funds

from a Medicare reimbursement program. In the present case, the Florida Medicaid program was the victim of Petitioner's crime because the offense of which Petitioner was convicted consisted of filing a false claim against Medicaid.

In the instant case, the relationship between the criminal offenses for which Petitioner was convicted and the Medicaid program may also be found based upon the financial impact which Petitioner's criminal offense had on the Medicaid program. Petitioner submitted claims for reimbursement for services which were not provided as claimed. Further, Petitioner admits that he unlawfully and knowingly received an unauthorized payment from Medicaid. Thus, Petitioner's exclusion for a five-year period is mandatory under the statute.

2. The mandatory provisions of section 1128(c)(3)(B) of the Social Security Act apply to Petitioner's case.

Based on Petitioner's conviction, the I.G. excluded him from participating in Medicare, and directed that he be excluded from participating in Medicaid, for five years. The record demonstrates that the conduct for which Petitioner was "convicted" occurred between March 1, 1987 and March 31, 1988, and that the final disposition of the proceedings resulting in the criminal conviction did not occur until 1989. Petitioner contends that application of the five-year minimum mandatory exclusion to this case would violate the ex post facto clause of the United States Constitution, since application of the mandatory exclusion for conduct occurring prior to the effective date of the amendment of section 1128 is a retroactive application of the law. Petitioner's Exhibit F (P. Ex. F).

On August 18, 1987, section 1128(a) of the Act was amended by the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, 101 Stat. 680. Section 15(b) of this Act provides that the mandatory five-year exclusion period applies to exclusions based on convictions occurring after August 18, 1987.

There is no dispute that Petitioner was convicted after the effective date of these 1987 amendments. Petitioner pled guilty to, and was convicted of, a program-related offense on July 5, 1989, nearly two years after the enactment of the amendments to the Act. Further, the offense of which Petitioner was convicted occurred between 1987 and 1988. Thus, The I.G.'s authority to impose and direct exclusions against Petitioner arose



from the conviction on July 5, 1989, and that is the controlling event specified by Congress in its 1987 amendment. Accordingly, I conclude that the minimum mandatory provisions of section 1128(c)(3)(B) of the Social Security Act were intended to apply to cases like Petitioner's, and thus the I.G. was mandated by law to exclude Petitioner for a period not less than five years.

3. I am without authority to adjudicate the issue of whether the imposition of a five-year exclusion would violate the eighth amendment to the United States Constitution.

Petitioner is contending that the imposition of a five-year exclusion under the facts of this case would violate the prohibition against "cruel and unusual punishment" under the eighth amendment of the United States Constitution. P. Br. 6-7; P. Ex. F. The I.G. claims that Petitioner's argument, that his five-year exclusion violates the eighth amendment, is beyond the scope of the ALJ's authority to decide. I.G. Br. 6.

I have considered the constitutional issues raised in this case and I conclude that I am without authority to adjudicate them. The scope of my review in these cases is stated in 42 C.F.R. 1001.128(a). This section limits an appeal in this type of case to the issues of (1) whether a petitioner was, in fact, convicted; (2) whether the conviction related to a petitioner's participation in the delivery of medical care or services under the Medicare or Medicaid programs; and (3) whether the length of the exclusion is reasonable. These issues relate to the authority to impose an exclusion and the reasonableness of the length of the exclusion in a particular case. In addressing these issues, I have the authority to interpret section 1128 and the regulations promulgated thereunder. I do not have the authority to declare a federal statute unconstitutional or to invalidate a regulation. If Petitioner wants a resolution of this issue, he must address it in another forum. See Section 205(b) of the Social Security Act; Greene, supra; Samuel W. Chang, M.D., DAB App. 1198 at 9 (1990).

## CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusion was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

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Steven T. Kessel  
Administrative Law Judge