

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Daniel B. Salyer, R.Ph.,)	DATE: October 30, 1990
)	
Petitioner,)	
)	
- v. -)	Docket No. C-224
)	
The Inspector General.)	Decision No. CR106
)	

DECISION

Petitioner was notified by the Inspector General (I.G.) in a letter dated January 11, 1990 that he would be excluded from participation in the Medicare program and any State health care program, as defined in section 1128(h) of the Social Security Act, for a period of five (5) years.¹ The I.G. further advised him that his exclusion was due to his conviction in the Circuit Court, Franklin County, Division II, Kentucky, of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was also informed that exclusions from Medicare and State health care programs after a program-related conviction are made mandatory by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act for a period of not less than five years.

Petitioner timely requested a hearing by letter dated March 10, 1990. The case was originally assigned to Judge Steven T. Kessel. By Prehearing Order dated June 15, 1990, Judge Kessel established a timetable for the filing of motions and briefs for summary disposition. Subsequent to the submission of the requested pleadings by the parties, there was a reassignment of the case to me. Neither party contends that there is any question of

¹ "State health care program" is defined by Section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act, such as Medicaid. I use the term "Medicaid" to represent all state health care programs from which the Petitioner was excluded.

material fact which would necessitate an evidentiary hearing. Nor has either party requested oral argument on any issue raised in the motions for summary disposition.

Based on the applicable law, the parties' arguments, and the undisputed material facts, I conclude that the minimum mandatory exclusion of five years is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

1. Whether 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. Whether Petitioner's nolo contendere plea is within the definition of "convicted" of a criminal offense as set forth in section 1128(i) of the Social Security Act.
3. Whether I have the authority to review the underlying facts and circumstances leading to Petitioner's conviction or to consider certain alleged mitigating factors relating to the I.G.'s minimum mandatory exclusion of five years.
4. Whether the minimum mandatory five year exclusion required by section 1128(c)(3)(B) of the Social Security Act is applicable to this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time of his conviction, Petitioner, Daniel B. Salyer, a registered pharmacist, owned and operated the Big Sandy Drug, Paintsville Clinic Pharmacy, Medical Center Pharmacy, Village Pharmacy, and Kwik Script Pharmacy, all located in Paintsville, Kentucky. I.G. Ex. 1.²

2. Petitioner was charged with violating KRS sections 205.805(4) and 205.990(4), during the period of approximately July 1, 1985 through approximately November 10, 1987, for presenting or causing to be presented, to a representative of the Kentucky Medical Assistance Program (KMAP), in Franklin County, Kentucky, false or fraudulent claims or documents used in determining the extent of

²	I.G.'s Brief	I.G. Br. (page)
	I.G.'s Exhibit	I.G. Ex. (page)
	Petitioner's Brief	P. Br. (page)
	I.G.'s Reply Brief	I.G. R. Br. (page)

payment to the above-named pharmacies for products provided to KMAP recipients, knowing such claims and documents to contain false or fraudulent information. I G. Ex. 1.³

3. On August 7, 1989, Petitioner pled guilty to the charges and signed a Waiver of Further Proceedings and Petition to Enter Guilty Plea and a Plea Bargain Agreement. I.G. Exs. 2 and 3; P. Br. pg. 1.

4. Also on August 7, 1989, the Circuit Court for Franklin County entered a Judgement and Sentence on Plea of Guilty. The Court sentenced Petitioner to eight months in the Franklin County Jail, probation for an additional two years, and a fine of \$500; and ordered Petitioner to pay restitution of \$50,000 to the KMAP, and \$25,000 to the Kentucky Attorney General for investigative costs plus court costs. I.G. Ex. 4.

5. On December 13, 1989, the Kentucky Board Of Pharmacy (Board) found Petitioner "not guilty" of the charges for which Petitioner had previously pled "guilty" relating to reimbursement for false claims to the KMAP. The Board permitted Petitioner to retain his pharmacy license but admonished him to verify the correctness of future billings prior to their submission to agencies for payment. P. Br. Attachment.

6. The Secretary of the Department of Health and Human Services (DHHS) has 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); 42 U.S.C. 3521 et seq.

7. On January 11, 1990, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 7.

³ The I.G and the Petitioner differ in their statements as to the underlying facts of Petitioner's conviction. The I.G. asserts that Petitioner's criminal offense involved the delivery of "generic" drugs to KMAP recipients when in fact the KMAP was billed for "brand name" drugs. I.G. Br. page 1. Petitioner, on the other hand, avers that he provided recipients with "brand name" drugs that were subsequently billed to the KMAP when at times the costs of such drugs exceeded the program's maximum allowable costs. P. Br. pages 2-3. As will be discussed infra., the parties factual differences are not material in determining whether a Section 1128(a)(1) criminal offense was in fact committed.

8. There are no disputed issues of material facts in this case; therefore, summary disposition is an appropriate means of resolving this matter. See, F.R.C.P., Rule 56.

9. 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 Social Security Act. Findings 1 - 4; Social Security Act, Section 1128(a)(1).

10. Petitioner's conviction after submission of a Waiver of Further Proceedings and Petition to Enter Guilty Plea and Plea Bargain Agreement comes within the term "convicted" as that term is defined in section 1128(i)(3) of the Social Security Act.

11. Pursuant to section 1128(a)(1) of the Social Security Act, the Secretary is required to exclude Petitioner from participating in Medicare and Medicaid. Social Security Act, Section 1128(a)(1).

12. Petitioner's conviction occurred after the enactment of the 1987 amendments to section 1128 instituting the mandatory exclusion provision of section 1128(c)(3)(B) for exclusions under 1128(a) of the Social Security Act.

13. A minimum mandatory exclusion of five years is required by law under sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act and I do not have any authority to alter its imposition.

RATIONALE

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

Petitioner does not specifically challenge the I.G.'s exhibits 1 - 4 showing that, pursuant to a plea bargain agreement, he was convicted on August 7, 1989 of submitting false or fraudulent claims to representatives of the KMAP. There is a difference between the I.G. and Petitioner as to the underlying facts of that conviction. In deciding the nature of Petitioner's conviction, I must rely on the court documents which the parties do not dispute. In the Information, Petitioner was charged by the Attorney General of the state of Kentucky with presenting or causing to be presented to representatives

of KMAP, during the period of July 1, 1985 through November 10, 1987, false or fraudulent claims or documents used in determining the extent of payment to Petitioner's drug stores for products provided to KMAP recipients. I.G. Ex. 1. It was further charged that Petitioner knew the claims and documents to contain false or fraudulent information. Also before me is the Waiver of Further Proceedings and Petition to Enter Guilty Plea signed by Petitioner. I.G. Ex. 2. In this document, Petitioner acknowledged that he had received the Information, that he had discussed it with his attorney and that he understood the charges contained therein. In addition, such document shows that Petitioner pled "guilty" to the charges in the Information. Lastly, the Judgment and Sentence on Plea of Guilty, found Petitioner guilty of the charges in the Information. I.G. Ex. 4. For my part, it is not important or relevant to this proceeding whether I accept the I.G.'s version of the facts underlying the criminal offense or that of Petitioner. What is material to this proceeding is that Petitioner pled "guilty" to the charges contained in the Information which clearly demonstrate that his criminal offense related to the delivery of an item or service under the Medicaid program. Dewayne Franzen, DAB App. 1165 (1990); Jack W. Greene, DAB App. 1078 (1989), aff'd, 731 F. Supp. 835, (E.D. Tenn. 1990).

Petitioner concedes that the guilty plea resulted in a determination that he was convicted of a criminal offense related to the delivery of an item or service as required by section 1128(a)(1). However, he argues that "all services and items were properly delivered." P. Brief, page 5. He contends that he delivered "arguably superior drugs" (i.e., brand name rather than generic). P. Brief, page 6. The violation was that at times the drugs billed to KMAP exceeded the allowable costs under the program. Even if I accepted Petitioner's version of the facts underlying the offense, the consistent but illogical extension of his argument is that recipients of KMAP were not harmed by his criminal conduct. Petitioner's argument misses the point.

Petitioner's submission of billings for drugs over a two year period which exceeded the allowable costs for such drugs under KMAP were criminal offenses (misdemeanors) under state law (KRS sections 205.805(4) and 205.990(4)). The submission of such billings for reimbursement created overpayments under KMAP that clearly impacted adversely on the fiscal integrity of the program. Petitioner breached his duty to program recipients. The Medicaid program is authorized to pay for drugs only within the limitations of state and federal laws. 42 C.F.R.

440.120(a); Dewayne Franzen, supra. Moreover, the injury or cost to Medicaid by Petitioner's criminal conduct is shown by the fact that the Judgement and Sentence on Plea of Guilty issued by the state court required Petitioner to pay \$50,000 in restitution to the KMAP. It has been held that the intentional causing of an overpayment by the Medicaid program is an offense within section 1128. In Greene v. Sullivan, 731 F. Supp. 839 (E.D. Tenn. 1990), the district court stated that criminal offenses that caused the Medicaid program to overpay a provider were "program related" crimes within section 1128(a)(1). See also, Michael I. Sabbagh, M.D., DAB Civ. Rem. C-59 (1989); Robert W. Emfinger, R.Ph., DAB Civ. Rem. C-207 (1990); and Essa Abdulla, M.D., DAB Civ. Rem C-211 (1990).

Moreover, in deciding whether the I.G. has authority to impose an exclusion pursuant to section 1128(a)(1), it is not relevant that Petitioner believes that he is not guilty of the offense for which he entered a guilty plea. See, Michael Travers, M.D., DAB Civ. Rem. C-170 (1990); John W. Foderick, M.D., DAB App. 1125 (1990); Andy E. Bailey, C.T., DAB App. 1131 (1990). The operative facts in this case are that Petitioner's offense related to an item or service under Medicaid, that such offense was violative of state criminal code, and that he pled "guilty" to such an offense. See, findings 1 - 4. Thus, the statutory elements to meet the requirements of section 1128(a)(1) have been met.

2. Petitioner's "Alford" or nolo contendere plea and resultant conviction are within the meaning of the term "convicted" as that term is defined in section 1128(i) of the Social Security Act.

Petitioner argues that his entering of the "Alford" or nolo contendere plea demonstrates a lack of criminal intent in committing the violations of law.⁴ Criminal intent is not a prerequisite to a section 1128(a)(1) offense. The clear meaning of the statute is evident from its language:

(1) Conviction of Program-Related Crimes --
Any individual or entity that has been

⁴ Under an Alford plea, a defendant does not admit guilt but concedes that the state has sufficient evidence for conviction. It is nevertheless a guilty plea. Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990); see, North Carolina v. Alford, 403 U.S. 23 (1970).

convicted of a criminal offense related to the delivery or an item or service under Title XVIII or under any State health care program.

There is nothing in the statutory language that criminal intent is a necessary element of a section 1128(a)(1) offense. The Secretary (or his delegate the I.G.) has authority to exclude Petitioner from Medicaid based on the conviction alone. Such an interpretation is consistent with section 1128(i), which defines the term "convicted." Congress clearly intended to cover within the ambit of section 1128(a)(1) offenses where a guilty plea is accepted by the court as part of a plea bargain. This is reflected in section 1128(i)(3) which states that an individual or entity is considered to have been "convicted" of a criminal offense "when a plea of guilty or nolo contendere has been accepted by a Federal, State or local court." In similar cases where a nolo contendere plea has been entered by Petitioner, it has held that the resulting conviction meets the statutory definition. See, Carlos Z. Zamora, M.D., DAB App. 1104 (1989); James F. Allen, M.D.F.B., DAB Civ. Rem. C-152 (1990); Francis Shaenboen, R.Ph., DAB Civ. Rem. C-221 (1990).

3. I have no authority to review the facts and circumstances leading to Petitioner's conviction nor consider allegedly mitigating factors relating to the minimum mandatory exclusion imposed by the I.G.

The authority of an administrative law judge (ALJ) in an appeal of the I.G.'s imposition of an exclusion of a petitioner from the Medicare and Medicaid programs is limited by the regulations. Specifically, section 1001.128 restricts the issues that an ALJ can hear to the following:

- (1) whether Petitioner was in fact, convicted;
- (2) whether the conviction was related to his or her participation in the delivery of medical care o[r] services under the Medicare, Medicaid or social services programs; and
- (3) whether the length of the suspension is reasonable.

In the instant case, the I.G. has imposed the five year minimum mandatory exclusion under section 1128(c)(3)(B). As discussed at pages 7-9. infra., this is an exclusion mandated by statute which the I.G. has very limited

discretion to reduce. Neither the I.G. nor I have the authority to reduce a minimum mandatory exclusion. David S. Muransky, D.C., DAB Civ. Rem. C-229 (1990); Soon Jack Leung, DAB Civ. Rem. C-209 (1990). Therefore, mitigating factors are not relevant nor can they be considered. Barbara Johnson, D.D.S., DAB Civ. Rem. C-181 (1990); Charles W. Wheeler and Joan K. Todd, *supra.*; Guido Escalante, Sr., M.D., DAB Civ. Rem. C-175 (1990).

Thus, it is not relevant nor germane to this proceeding under what circumstances 1) Petitioner accepted the plea bargain; 2) whether Petitioner was aware of potential intervention of the I.G. under section 1128;⁵ 3) whether the Kentucky Board of Pharmacy found Petitioner "not guilty" of the charges in the Information and allowed him to retain his pharmacy license; 4) whether Petitioner was convicted of any other criminal offenses or was the subject of investigative or disciplinary proceedings by the Kentucky Board of Pharmacy; and 5) whether the I.G.'s exclusion will deprive Petitioner of his financial livelihood and lead to his financial destruction. See, Petitioner's arguments in his brief, pages 3-6.

4. The minimum mandatory exclusion of five years required by section 1128(c)(3)(B) is required in this case.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act required 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 such programs. The intent of Congress is clear from the express language of section 1128(c)(3)(B):

In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years...

⁵ I cannot accept Petitioner's assertion that he did not know the consequences of his "guilty plea" as relates to the statutory provisions of Section 1128. His Plea Bargain Agreement contains reference to the "Inspector General of the Department [of] Health and Human Services" and to the possibility that federal sanctions will be imposed by virtue of the plea entered in his criminal proceeding. I.G. Ex. 3, at pages 2-3.

The legislative history also supports the imposition of minimum mandatory five year exclusions for section 1128(a) offenses:

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. See, Barbara Johnson, D.D.S., supra.

The only basis in law to reduce a minimum mandatory exclusion is through a state request establishing that the individual or entity being excluded under section 1128(a) is the "sole community physician or sole source of essential specialized services in a community." Section 1128(c)(3)(B). Petitioner makes no such assertion in the instant case. Therefore, under the applicable statutes and regulatory principles, the I.G. was required to exclude Petitioner for a minimum of five years.

Petitioner argues that while his criminal offense comes within the purview of section 1128(a)'s mandatory exclusion criteria, I must look to the permissive provisions of section 1128(b) which would allow him to present mitigating circumstances relating to exclusionary period sought by the I.G. P. Br. Pages 4-5. There is no merit to Petitioner's argument. As stated by the DAB in Samuel W. Chang, M.D., DAB App. 1198 (1990) at page 8:

The permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid or other covered programs. While it is not inconceivable that one of the provisions of section 1128(b) could have been applied in the absence of section 1128(a), which provides that the Secretary "shall" exclude individuals where applicable, the permissive exclusion provisions of subsection (b) focus on different circumstances from those raised here, such as where an individual's conviction does not relate to the Medicare or Medicaid programs.

See, Jack W. Greene, supra.; Surabhan Ratanasen, M.D., DAB App. 1138 (1990); Soon Jack Leung, supra., Michael Travers, M.D., supra.; Napoleon S. Maminta, M.D., DAB

App. 1135 (1990), and Howard B Reife, D.P.M., DAB Civ
Rem. C-64 (1989).

Since Petitioner's criminal offenses meet the statutory requirements of section 1128(a), the I.G. has no discretionary authority to choose between the sanctions under section 1128(a) and section 1128(b), but must apply the minimum mandatory five year exclusion applicable to a section 1128(a) offense as set forth in section 1128(c)(3)(B).

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act.

/s/

Edward D. Steinman
Administrative Law Judge