

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Suwonnee Pongnorsing,)	DATE: November 14, 1990
)	
Petitioner,)	
)	Docket No. C-231
- v. -)	
)	Decision No. CR110
The Inspector General.)	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the February 12, 1990 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and any State health care programs for five years.¹

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum period of five years is mandated by federal law.

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. The Medicaid program in California is called Medi-Cal.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (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) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

BACKGROUND

The I.G.'s Notice alleged that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medi-Cal program and advised Petitioner that the law required a five-year minimum exclusion from participation in the Medicare and Medi-Cal programs for individuals convicted of a program-related offense. Petitioner requested a hearing to contest the I.G.'s determination and the case was assigned to me for hearing and a decision.

I conducted a prehearing conference in this case on May 11, 1990, and issued a prehearing Order on May 17, 1990, which established a schedule for filing motions and responses. On June 19, 1990, the I.G. requested an extension of time in which to file his motion for summary disposition in this matter, to which Petitioner made no objection. On July 26, 1990, the I.G. filed a motion for summary disposition, with a supporting memorandum attached. On August 24, 1990, Petitioner filed a response to the I.G.'s motion for summary disposition, and on August 27, 1990 Petitioner filed a supplemental response. I heard oral argument on September 12, 1990. It is my usual practice to tape record such arguments and to retain the tape in the record. Due to difficulties with the recording equipment, however, this argument was not recorded. On September 17, 1990, I gave the parties ten days to decide whether to again present oral argument or to prepare written summaries of their arguments. They

chose to forego the opportunity to do either, and elected instead to have me base my decision on their written submissions already in the record and on the oral argument I heard on September 12, 1990.

ADMISSIONS

Petitioner admits that she was "convicted," within the meaning of section 1128(i), of the misdemeanor offense of violating California Business and Professions Code section 4227(a) (dispensing a drug without a valid prescription).

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 Act.
- 2) Whether Petitioner is subject to the minimum mandatory five-year exclusion provisions of section 1128(c)(3)(B) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ^{2 3}

Having considered the entire record, the arguments and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner is a licensed pharmacist in the State of California. P. Ex. B/1.
2. At all times relevant to this case, Petitioner was the owner of the Modesto and Westside Pharmacies. P. Ex. B/1 - 2.
3. Petitioner pled guilty to Count VI of a Second Amended Felony Complaint issued by the Municipal Court of Stanislaus County, California. I.G. Ex. 4, 5; P. Ex. A.
4. Count VI alleged that "on or about June 29, 1988 . . . (Petitioner) . . . willfully and unlawfully furnished a dangerous drug, to wit, ampicillin, upon a prescription that was not from a physician, dentist, podiatrist, or veterinarian in violation of section 4227(a) of the Business and Professions Code, a misdemeanor." I.G. Ex. 4/17.
5. Imposition of sentence was suspended. Petitioner was placed on 36 months probation and ordered to pay a \$1,000 fine by July 14, 1989. I.G. Ex. 5.

² The citation to the record in this Decision and Order is noted as follows:

I.G.'s Exhibit	I.G. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Exhibits	P. Ex. (number)/(page)
Petitioner's Brief	P. Br. (page)
Petitioner's Supplemental Brief	P. Supp. Br. (page)
Finding of Fact and Conclusion of Law	FFCL (number)

³ Some of my statements in the sections preceding these formal findings and conclusions are also Findings of Fact and Conclusions of Law. To the extent that they are not repeated here, they were not in controversy.

6. "Medi-Cal" is the name for California's Medicaid program and it is a State health care program as defined by section 1128(h). I.G. Br. 1.

7. Petitioner's indictment by the Municipal Court of Stanislaus County on several counts, including Count VI, came as a result of an investigation by the Medi-Cal Fraud Unit of the State of California Department of Justice into the Medi-Cal billing and patient care practices of the Indochinese Medical Clinic, near which Petitioner had located her Westside Pharmacy. I.G. Ex. 1/22 - 23, 32, 55 - 57, 60, 70, 108, 111, 124, 160 - 163; I.G. Ex. 4; P. Ex. B/2.

8. An Huc Ngo was the name given to undercover operative SA-J-001. An Huc Ngo's Medi-Cal card, employed for purposes of this investigation, was 50350193671101. I.G. Ex. 1/9, 37.

9. Count VI was based upon a prescription presented to Petitioner on June 30, 1988 at her Modesto Pharmacy. I.G. Ex. 1/161 - 163.⁴

10. The prescription was written on June 29, 1990, for Anh Huc Ngo, for 40 tablets (250 ml.) of Ampicillin. I.G. Ex. 1/160 - 163.

11. An Huc Ngo presented the prescription to Petitioner on June 30, 1988, along with his photocopied Medi-Cal card number 50350193671101 as payment. An Huc Ngo was then given the Ampicillin. I.G. Ex. 1/ 160 - 163.

12. Petitioner filed a claim for payment with Medi-Cal for the Ampicillin which is the subject of Count VI. I.G. Ex. 12, 13, 14.

13. Medi-Cal paid Petitioner for the Ampicillin which is the subject of Count VI. I.G. Ex. 15.

14. On February 12, 1990, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years.

15. The Secretary of DHHS (the Secretary) delegated to the I.G. the authority to determine, impose, and direct

⁴ The prescription Ampicillin for Anh Huc Ngo also contained a prescription for Mylanta Liquid. Also, one other fictitious prescription was presented at the same time: a prescription for Mylanta Liquid and Erythromycin for Minh Van Nguyen. I.G. Ex. 1/160 - 163.

exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983); 42 U.S. C. 3521 et seq.

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

17. Summary disposition is appropriate in this case. See 56 F.R.C.P.

18. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(a) and 1128(i) of the Act.

19. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medi-Cal program within the meaning of section 1128(a)(1) of the Act.

20. A minimum mandatory exclusion of five years is required in this case by section 1128(c)(3)(B) of the Act.

DISCUSSION

I. Petitioner's Conviction Was "Related To The Delivery Of An Item Or Service" Within The Meaning Of Section 1128 Of The Act.

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 (Medi-Cal) programs when 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. See Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990), affirming Jack W. Greene, DAB App. 1078 (1989). Petitioner admits that she was convicted under section 1128(i), but argues that her conviction contained no reference to the Medicare or Medi-Cal programs.

I find, however, that the I.G. has established through collateral evidence that this conviction was "related to the delivery of an item or service" under the Medi-Cal program. As I held in Clarence H. Olson, DAB Civ. Rem. C-85 at 7 (1989), and as I reiterated in Hai Nuh Bui, DAB Civ. Rem. C-103 (1990) and Essa Abdulla, M.D., DAB Civ. Rem. C-211 (1990), the issue of whether a conviction is program-related should not be decided in a vacuum or with a strict hypertechnical interpretation of the term

"related to." It is appropriate for me to consider all relevant documents pertaining to the trial court proceeding. This includes any evidence which explains or assists me in determining whether the criminal offense to which she pled guilty relates to the Medi-Cal program.

Petitioner pled guilty to Count VI of a second amended felony complaint, I.G. Ex. 4. Count VI states on its face that it is "connected in the Commission of Count I." Count I, while alleging various acts for which Petitioner has not been convicted, alleges in "Overt Act No. 12," that "said defendant Suwonnee Pongnorsing in the County of Stanislaus on or about June 29, 1988 in her capacity as pharmacist did fill a prescription signed by K. Quinn, R.N." It is this act which is made the basis of Count VI. To determine whether this act is related to the delivery of an item under the Medi-Cal program, I refer to the Report of Investigation, I.G. Ex. 1.⁵

The specific act to which Petitioner pled guilty was to having "willfully and unlawfully furnish(ed) a dangerous drug, to wit, ampicillin, upon a prescription that was not from a physician, dentist, podiatrist, or veterinarian in violation of section 4227(a) of the Business and Professions Code, a misdemeanor." The I.G. proved, through use of the Medi-Cal Fraud Unit's "Report of Investigation", I.G. Ex. 1, that this prescription for Ampicillin was written for a Medi-Cal patient, and that Petitioner furnished goods, i.e. the Ampicillin, to that Medi-Cal patient. The I.G. also proved that Petitioner then sent a claim in for payment to the Medi-Cal program, and the Medi-Cal program paid Petitioner for furnishing the Ampicillin. FFCL 3 - 13. Petitioner pled guilty to a specific offense, and that offense is a violation of sections 1128(a)(1) and 1128(c)(3)(B).

Petitioner argues that this result does not comport with Congressional intent, and she lists factors which she

⁵ Petitioner came to the attention of the Medi-Cal Fraud Unit during the Medi-Cal Fraud Unit's investigation of the Indochinese Medical Clinic. Petitioner's conviction, however, is not predicated on anything having to do with the Indochinese Medical Clinic itself. The Medi-Cal Fraud Unit's investigation of Petitioner stands alone as it relates to Count VI. FFCL 7 - 13. It is not necessary for the I.G. to establish that Petitioner was a knowing participant in any alleged wrongdoing on the part of the Indochinese Medical Clinic to establish a nexus between Petitioner and the delivery of an item under the Medi-Cal program.

alleges should mitigate her exclusion. Petitioner states that excluding her would mean that any pharmacy who accepted a prescription such as the one in this case, filled it and then sent in a claim for it, would be subject to an exclusion. P. Br. 10 - 11. Petitioner asserts that she did not know the prescription was unlawful and that she did not intend to circumvent any laws. P. Br. 8, 10. Furthermore, Petitioner asserts that a pharmacist is entitled to rely on the validity of a prescription such as the one contained in Count VI. P. Br. 8 - 10. Petitioner also stresses that if she had known she would be excluded she would not have made her plea. P. Ex. B/5 - 6. Petitioner offers collateral evidence in support of her contentions.

As was held in Thomas M. Cook, DAB Civ. Rem. C-106, however, "it is consistent with Congressional intent to admit evidence which explains the circumstances of the offense of which a party is convicted." In this case the only extrinsic evidence necessary to establish whether Petitioner was convicted of an offense within the meaning of section 1128(a)(1) is the Report of Investigation which is contained in Ex. 1. Evidence of the degree of Petitioner's guilt is not relevant. Where the I.G. has imposed a five year minimum mandatory exclusion under sections 1128(a)(1) and 1128(c)(3)(B), I do not have the authority to reduce the length of the exclusion.⁶ Petitioner's conviction required the I.G. to impose and direct her exclusion. Petitioner pled guilty to furnishing that Ampicillin without a valid prescription. Her reasons for making that plea are not relevant here. Also, Petitioner's attacks on the validity of her conviction are not a basis on which I can set aside or modify her exclusion.

I conclude that the I.G. has demonstrated the necessary relationship between Petitioner's "conviction" and the "delivery of an item or service" under the Medicaid program. Accordingly, I find that 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 Act.

⁶ If the exclusion were for more than five years, I would have the authority to consider the reasonableness of the length of that part of the exclusion that was over five years.

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

Section 1128(c)(3)(B) of the Act provides for a minimum exclusion period of five years for program-related exclusions. As I have concluded, the I.G. correctly determined that Petitioner was convicted of an offense as defined by sections 1128(a)(1) and 1128(i) 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. Accordingly, I conclude that the I.G.'s exclusion of Petitioner for a period of five years is required by section 1128(c)(3)(B) of the Act.

III. 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. See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 at 10 (1990), and Rule 56 F.R.C.P.

CONCLUSION

Based on the law and undisputed 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.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge