

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Mark D. Bornstein, D.P.M.,)	DATE: January 17, 1991
)	
Petitioner,)	
)	
- v. -)	Docket No. C-218
)	
The Inspector General.)	Decision No. CR115
)	

DECISION

This case is before me on Petitioner's request for a hearing to contest his exclusion from participation in the Medicare program and certain federally-assisted State health care programs.

By letter of January 26, 1990, the I.G. notified Petitioner that he was being excluded from participation in the Medicare program, and any State health care program (such as Medicaid), as defined in section 1128(h) of the Social Security Act (Act). The I.G.'s notice informed Petitioner that his exclusion resulted from his conviction in the United States District Court for the Middle District of Florida of a criminal offense related to the delivery of an item or service under Medicare. The I.G. further informed Petitioner that section 1128(a)(1) of the Act requires that individuals convicted of such program-related offenses be excluded for a minimum period of five years. The I.G. told Petitioner that he was being excluded for the mandatory minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. The I.G. moved for summary disposition of the case. Petitioner opposed the motion and cross-moved for an evidentiary hearing. Neither party requested oral argument.

I have considered the parties' arguments, the undisputed material facts, and the law. I conclude that there are no disputed questions of material fact that would require

an evidentiary hearing. I further conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issues in this case are whether:

1. Petitioner, who was convicted under a repealed and recodified statute, was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and

2. The I.G. was required to exclude Petitioner for the mandatory minimum five-year period prescribed by section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On October 31, 1988, Petitioner and the United States Attorney for the Middle District of Florida (U.S. Attorney) entered into a plea agreement. I.G. Ex. 1.¹

2. Petitioner agreed to plead guilty to a misdemeanor violation of 42 U.S.C. 1395nn, knowingly causing to be made a false statement or representation in an application for payment under the Medicare program. I.G. Ex. 1.

3. Pursuant to the plea agreement, on or about November 1, 1988, the U.S. Attorney filed an information in the United States District Court for the Middle District of Florida charging that, on or about September 8, 1984, Petitioner knowingly and willfully made and caused to be made and presented to an agency of the United States a claim for Medicare payments in the amount of \$35.00 for podiatry care which Petitioner knew or should have known

¹ The parties' exhibits and memoranda will be cited as follows:

I.G. Exhibit	I.G. Ex. (number)
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Memorandum of the I.G.	I.G. Mem. at (page)
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Memorandum of Petitioner	P. Mem. at (page)
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was false, fictitious, and fraudulent, a misdemeanor, in violation of 42 U.S.C. 1395nn. I.G. Mem. at 2; I.G. Ex. 2.

4. On March 7, 1989, Petitioner pled guilty to the charge contained in the information. I.G. Ex. 3.

5. The court found Petitioner guilty and convicted him of making a false statement in an application for payment under the Medicare Program in violation of 42 U.S.C. 1395nn. I.G. Ex. 3.

6. The court sentenced Petitioner to one year of imprisonment, which sentence was suspended, and placed Petitioner on probation for a period of five years. The court further ordered Petitioner to pay a \$10,000 fine and a \$90,000 payment under the False Claims Act and to provide 1,000 hours of community service, as provided in the plea agreement. I.G. Ex. 3.

7. On August 18, 1987, Congress enacted Public Law 100-93, which repealed section 1877 of the Social Security Act (42 U.S.C. 1395nn) and enacted a new section 1128B (42 U.S.C. 1320a-7b). Pub. L. No. 100-93, section 4, 101 Stat. 680, 688-89 (1987).

8. Section 1128B of the Social Security Act recodifies section 1877, which formerly governed fraud against the Medicare program, and combines that section with section 1909, which formerly contained the criminal provisions dealing with fraud against the Medicaid program. S. Rep. No. 109, 100th Cong., 1st Sess. 17, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 698.

9. Section 1128B (42 U.S.C. 1320a-7b) criminalizes precisely the same conduct covered by the former section 1877 (42 U.S.C. 1395nn).

10. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Findings 1-6; Social Security Act section 1128(i).

11. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Findings 1-6; Social Security Act section 1128(a)(1).

12. The Secretary of Health and Human Services (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).

13. On February 15, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128 of the Social Security Act. I.G. Ex. 6.

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

15. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required for exclusions pursuant to section 1128(a)(1) of the Social Security Act. I.G. Ex. 6; Social Security Act section 1128(c)(3)(B).

16. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Finding 11; Social Security Act sections 1128(a)(1), 1128(c)(3)(B).

ANALYSIS

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

There are no disputed issues of material fact in this case. Petitioner and the U.S. Attorney for the Middle District of Florida entered into an agreement which provided that Petitioner would plead guilty to a single misdemeanor count of making a false statement in an application for payment under the Medicare program.

In November of 1988, the U.S. Attorney filed a criminal information charging that, in 1984, Petitioner had made a false claim for Medicare payment in the amount of \$35.00. The U.S. Attorney characterized this conduct as a violation of 42 U.S.C. 1395nn (section 1877 of the Social Security Act). On August 18, 1987, the U.S. Congress enacted Pub. Law No. 100-93, which repealed section 1877 of the Social Security Act and redesignated its substantive provisions as section 1128B of the Act. Pub. L. No. 100-93, 101 Stat. 680, 688-89 (1987).

Petitioner pled guilty to the offense charged in the information. The U.S. District Court for the Middle District of Florida found Petitioner guilty and imposed a one year prison term, which was suspended. The court

placed Petitioner on five years' probation and sentenced Petitioner to pay the fines and provide the community service recited in his plea agreement.

Petitioner does not dispute that he pled guilty to the charge of making a false claim against the Medicare program nor that the United States District Court for the Middle District of Florida accepted his plea and found him guilty of the charge. P. Mem. at 1. However, he asserts that because the U.S. Attorney charged him with violating 42 U.S.C. 1395nn (section 1877 of the Act), which was no longer in force on the date the information was filed, his conviction is fatally defective. Therefore, according to Petitioner, he was not "convicted" of a criminal offense within the meaning of sections 1128(i) and (a)(1). P. Mem. at 4.

The I.G. argues that Petitioner's contention amounts to a collateral attack on his conviction. According to the I.G., I may not hear such collateral attacks because my authority is limited to deciding whether Petitioner was, in fact, convicted of a program-related crime. I.G. Mem. at 5.

Petitioner counters that he is not asking me to reexamine the underlying facts which led to his conviction. Rather, Petitioner characterizes his argument as raising the legal question of whether a conviction that he alleges is invalid can be the basis for his exclusion from the Medicare and Medicaid programs. P. Mem. at 4-5. In essence, Petitioner argues that a conviction under a repealed statute should not be regarded as a "conviction" within the meaning of section 1128(i) and therefore cannot require an exclusion under section 1128(a)(1).

Under the applicable regulations, I am authorized to decide the issues of whether: (1) the petitioner was, in fact, convicted; (2) the conviction was related to the delivery of medical care or services under the Medicare or Medicaid programs; and (3) the length of the exclusion is reasonable. 42 C.F.R. 1001.128. Therefore, at a minimum, I have authority to hear and decide whether a conviction pursuant to a repealed and recodified statute is a "conviction" within the statutory definition of section 1128(i).

Section 1128(i) defines the term "convicted" to include the following dispositions of criminal cases:

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there

is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

(4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

It is apparent that Petitioner was "convicted" within the meaning of the statute. Petitioner's conviction meets the statutory definition of subsection 1128(i)(2) in that the United States District Court for the Middle District of Florida entered a finding of guilt against Petitioner. I.G. Ex. 3; Finding 5. Petitioner was also "convicted" within the meaning of subsection (i)(3) in that his guilty plea was accepted by the court. I.G. Ex. 3; Finding 4. Nothing in the statute supports Petitioner's contention that a conviction under a repealed and recodified statute is not a "conviction" for purposes of section 1128.²

² I note that the assumption underlying Petitioner's argument--namely, that his conviction under section 1877 of the Act is invalid--is of doubtful merit. The conduct which gave rise to Petitioner's conviction occurred in 1984. At that time, section 1877 was in full force and effect; it was not repealed until 1987. Title 1 section 109 of the U.S. Code contains a general savings provision governing the effect of repeals of federal statutes. That section specifies that existing liabilities are not extinguished by the repeal of a statute:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

(continued...)

Indeed, the statute, its legislative history, and the regulations all require the conclusion that a conviction, once entered by a federal, state, or local court, is a proper basis for an exclusion unless or until that conviction is reversed or vacated. See H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S. Code Cong. & Admin. News, 3607, 3665. See also 42 C.F.R. 1001.136. Thus, the I.G. correctly argues that Petitioner's remedy, if he believes his conviction to be unlawful, is to seek reversal of that conviction by the U.S. District Court or the U.S. Court of Appeals.

Based on my analysis of the law, I conclude that Petitioner was "convicted" of a program-related offense within the meaning of section 1128(a)(1) of the Act. Therefore, the five-year exclusion imposed and directed by the I.G. is required by law.

2. The exclusion imposed and directed against Petitioner is required under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

Section 1128(a)(1) of the Act requires the I.G. to exclude from participation in the Medicare and Medicaid programs individuals and entities that 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, 838 (E.D. Tenn. 1990), affirming Jack W. Greene, DAB App. 1078 (1989). Section 1128(c)(3)(B) provides that, where mandatory exclusions are imposed, the minimum length of such exclusions shall be for five years.

² (...continued)

Thus, the repeal of section 1877 very likely does not render Petitioner's conviction invalid.

Moreover, as the I.G. correctly points out, the substantive provisions of section 1877 of the Act were not simply repealed, but were, in essence, relocated to another section of the Act--section 1128B. This fact only serves to make more plain that Congress fully intended to continue to impose criminal liability for fraud against the Medicare program. That the U.S. Attorney charged Petitioner with violating the statutory section in force at the time Petitioner filed the false claim to which he pled guilty, rather than the section in force at the time the information was filed, is immaterial.

Petitioner argues that his exclusion is not required for the mandatory minimum five-year period specified in section 1128(c)(3)(B) of the Act because, in his view, his conviction falls within the permissive exclusion provisions of section 1128(b)(1) rather than the mandatory exclusion provisions of section 1128(a)(1). Petitioner's argument is that because he was convicted of a criminal offense related to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," his conviction is within the ambit of section 1128(b)(1). P. Mem. at 5.

This argument has been fully addressed in the Greene decisions cited above. Those decisions make clear that where, as here, financial crimes, such as fraud, theft, or embezzlement are committed in connection with the rendering of services under the Medicare or State health care programs, section 1128(a)(1) mandates exclusion. By contrast, section 1128(b)(1) applies to convictions for financial misconduct committed against programs other than Medicare and State health care programs. The fraud committed by Petitioner was directed against the Medicare program. Accordingly, his exclusion is governed by section 1128(a)(1).

The I.G. has imposed and directed Petitioner's exclusion for the mandatory minimum five year period required under section 1128(c)(3)(B) of the Act. Because I have concluded that the I.G. correctly determined that Petitioner was convicted of an offense as defined by section 1128(a)(1) of the Act, Petitioner's exclusion for a period of five years is required as a matter of law.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare and to direct that Petitioner be excluded from participation in any State health care program, for five years, was mandated by law. Therefore I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge