

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:	)	
	)	
Richard G. Philips, D.P.M.,	)	DATE: June 7, 1991
	)	
Petitioner,	)	
	)	Docket No. C-347
- v. -	)	
	)	Decision No. CR133
The Inspector General.	)	

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DECISION

On December 20, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.<sup>1</sup> The I.G. told Petitioner that he was being excluded as a result of his conviction in a New York court of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years. The I.G. informed Petitioner that he was being excluded for the minimum mandatory period of five years.

Petitioner timely requested a hearing and the case was assigned to me for a hearing and a decision. The I.G. moved for summary disposition. Petitioner filed a response to the motion. Both parties filed reply briefs. Neither party requested oral argument.

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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-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

I have considered the parties' arguments, the undisputed material facts, and the law. I conclude that the five-year exclusion imposed and directed by the I.G. against Petitioner 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 was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act;
2. Petitioner may collaterally challenge his state conviction in this proceeding;
3. the Secretary of Health and Human Services (the Secretary) or his delegate, the I.G., is barred from imposing and directing an exclusion against Petitioner by a state certificate of relief from civil disabilities; and
4. I do have authority to change the effective date of the exclusion.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a podiatrist. I.G. Ex. 1/11.<sup>2</sup>
2. On August 2, 1989, Petitioner pleaded guilty in a New York State court to the criminal offense of filing a false instrument, a felony under New York law. I.G. Ex. 1/11, 12.

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<sup>2</sup> The I.G. submitted seven numbered and paginated exhibits in support of his motion for summary disposition. They will be referred to as I.G. Ex. (number)/(page). Petitioner submitted three unnumbered exhibits in support of his response to the motion. They consist of: a presentence memorandum, which I have designated P. Ex. 1; a notice of exclusion from the New York Medicaid program sent to Petitioner by the New York State Department of Social Services, which I have designated P. Ex. 2; and a document entitled "Balanced Inlay Supports and Medicaid Requirements: Fraud, Confusion or Prosecutor's Mistake," which I have designated P. Ex. 3. So designated, the parties' exhibits are admitted into evidence.

3. In his guilty plea, Petitioner admitted that he had knowingly submitted a false claim for an item or service to a fiscal agent for the New York State Medicaid program. I.G. Ex. 1/10, 11.

4. As an element of his plea, Petitioner agreed to pay restitution in the amount of \$34,292.00. I.G. Ex. 2/4.

5. Petitioner was sentenced to five years' probation. I.G. Ex. 2/7.

6. In connection with Petitioner's sentence, the New York State court issued to Petitioner a Certificate of Relief from Disabilities. I.G. Ex. 2/8, 3/1, 2.

7. The Certificate of Relief from Disabilities relieved Petitioner from forfeitures, disabilities, and bars to employment which otherwise would have been imposed automatically against Petitioner under New York law by virtue of his conviction of a felony. I.G. Ex. 3/1, 2.

8. The Certificate of Relief from Disabilities did not purport to insulate Petitioner from any remedy that might be imposed against him pursuant to a federal statute. I.G. Ex. 3/1, 2.

9. On September 15, 1989, the New York State Department of Social Services advised Petitioner that it had determined to exclude him from participation in the New York Medicaid program. P. Ex. 2.

10. The New York State Department of Social Services advised Petitioner that after two years of the state exclusion he would be eligible to apply for reinstatement. P. Ex. 2

11. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. Findings 2, 3; Social Security Act, section 1128(a)(1).

12. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

13. On December 20, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.

14. There are no disputed issues of material fact in this case, and summary disposition is appropriate. Findings 1-3.

15. Petitioner may not collaterally challenge his state conviction in this proceeding. Social Security Act, section 1128(a)(1).

16. The I.G.'s authority to impose and direct exclusions pursuant to section 1128 of the Act is independent of any authority to impose exclusions vested in the New York Medicaid program by state law or regulations. Social Security Act, section 1128.

17. I do not have authority to change the effective date of the exclusion. Social Security Act, section 1128.

18. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required by section 1128(a)(1) of the Act.

19. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 11, 18; Social Security Act, section 1128(a)(1).

#### ANALYSIS

There are no disputed material facts in this case. The undisputed facts are that in August 1989, Petitioner pleaded guilty in New York to a state felony charge of filing a false instrument. In pleading guilty, Petitioner admitted that he had knowingly filed a false claim for a Medicaid item or service. The New York court imposed a sentence of probation against Petitioner, which was in part conditioned on Petitioner's agreement to pay restitution of more than \$34,000.00. As an element of the sentence, the New York court entered an order which relieved Petitioner from certain forfeitures and disabilities which otherwise would have been automatically imposed against him under New York law by virtue of his felony conviction. In September 1989, the New York Medicaid program suspended Petitioner from participation for two years, based on his state felony conviction. The I.G. imposed and directed a five year exclusion against Petitioner in December 1990, pursuant to section 1128(a)(1) of the Act.

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

Section 1128(a)(1) of the Act requires the Secretary (or his delegate, the I.G.) to exclude from participation in

Medicare, and to direct the exclusion from participation in Medicaid, of:

any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Petitioner's conviction for filing a false instrument constitutes a conviction of a criminal offense within the meaning of section 1128(a)(1). The offense consists of the knowing filing of a false Medicaid claim. It is a settled matter that conviction for presentation of a false Medicaid claim is a conviction of an offense related to the delivery of an item or service under Medicaid. Jack W. Greene, DAB App. 1078 (1989), aff'd, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990); Michael Travers, M.D., DAB App. 1237 (1991). As the Departmental Appeals Board held in Greene:

[S]ubmission 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.

Id. at 7 and 11. The Board has also held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Napoleon S. Maminta, DAB App. 1135 (1990). That was plainly the case here.

2. Petitioner may not collaterally challenge his state conviction in this proceeding.

In his hearing request, Petitioner asserted that the conduct which was the basis for his conviction was his preparation of orthotic devices from tracings of patients' feet and his presentation of Medicaid claims for these devices. Petitioner asserted that recent New York case law held that Medicaid claims could legitimately be presented for orthotic devices made from tracings. In response to the I.G.'s motion for summary disposition, Petitioner presented an article, the gist of which is that New York prosecutors and the New York Medicaid program were unfairly prosecuting providers who made orthotic devices from tracings and presented Medicaid claims for such devices. See P. Ex. 3.

Although Petitioner has not articulated his argument, he appears to be asserting that his conviction for filing a false instrument is unfair, inasmuch as it derived from

items or services provided by Petitioner which are, or ought to be, reimbursable under the New York Medicaid program.

Petitioner's argument devolves into a collateral attack on his state criminal conviction. He is in effect arguing that he really wasn't guilty of a criminal offense, because the item or service which he provided to Medicaid patients (orthotic devices generated on tracings) was a reimbursable item or service under the New York Medicaid program. He apparently contends that his conviction, therefore, is invalid and the I.G. is without authority to exclude him.

I accept Petitioner's assertions of fact as true for purposes of deciding the I.G.'s motion for summary disposition.<sup>3</sup> However, they are not relevant to the issue of whether the I.G. was required to impose and direct exclusions against Petitioner. The mandatory exclusion which the I.G. imposed and directed against Petitioner resulted from Petitioner's conviction of a criminal offense within the meaning of section 1128(a)(1). The conviction, and not the underlying conduct, is the triggering event which mandates the Secretary to impose and direct an exclusion. The law does not require the Secretary to look behind the conviction to determine whether it is valid. It is not relevant to the issue of the I.G.'s authority that the criminal conviction may have been defective or that the conduct which resulted in the conviction may no longer be unlawful. See Andy E. Bailey, C.T., DAB Civ. Rem. C-110 (1989), aff'd DAB App. 1131 (1990); John W. Foderick, M.D., DAB App. 1125 (1990).

3. The I.G. is not barred from imposing and directing an exclusion against Petitioner by a state certificate of relief from civil disabilities.

Petitioner argues that he was freed from any additional liability for the conduct which resulted in his conviction by the New York court's execution of a certificate of relief from disabilities. I disagree with

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<sup>3</sup> I note, however, that Petitioner was convicted of a dishonest act. Petitioner admitted to, and was convicted of, falsifying a claim for an item or service. Petitioner admitted to falsely claiming that orthotic devices were made from moldings of patients' feet. I.G. Ex. 2/11. Petitioner was guilty of this dishonest act regardless whether he could have legitimately claimed reimbursement for some other item or service.

this argument. First, the document alluded to by Petitioner does not relieve him of any liability beyond that which otherwise would be imposed automatically against Petitioner under New York law by virtue of his conviction of a felony in that state. The document provides that:

This certificate is issued to relieve the holder, an "eligible offender" as defined in [section] 700 of the Correction Law, of all or of enumerated forfeitures, disabilities, or bars to employment automatically imposed by law by reason of his conviction of the crime or offense specified on the face of this certificate.

I.G. Ex. 3/2. The reasonable reading of this document is that it relieves Petitioner of civil disabilities otherwise imposed against him under New York law by virtue of his New York state criminal conviction. There is nothing in the document or in the statements made by the court at the time that Petitioner was sentenced which suggests that the certificate even purported to insulate him from civil remedies which might be imposed pursuant to section 1128. Id.; see I.G. Ex. 2.

Second, section 1128 is a federal enactment which Congress enacted to provide civil remedies independent from punishments which might be applied to a party under state criminal law or from state or other federal civil remedies. There is nothing in section 1128 which suggests that Congress intended that the authority to impose and direct remedies be subject to limitations imposed by the states. Indeed, to the extent Congress addressed the issue, it made it plain that deference to state action was not intended. See James F. Allen, M.D.F.P., DAB Civ. Rem. C-152 (1990); Social Security Act, section 1128(i). Therefore, even if the certificate was intended to operate precisely as contended by Petitioner, it would not protect him from imposition and direction of an exclusion under section 1128.

4. I do not have authority to change the effective date of the exclusion.

Petitioner asserts that it is inequitable to now exclude him for five years, in light of the fact that, on September 15, 1989, the New York Medicaid program excluded him for two years. He argues that, at least with respect to Medicaid, the effective length of the exclusion directed against him by the I.G. is more than six years. Therefore, according to Petitioner, the

exclusion ought to be reduced or its effective date changed to reflect the previous New York Medicaid exclusion.

As I hold above, the authority to impose and direct exclusions pursuant to section 1128 exists independently from other civil remedies enactments. Sections 1128(a)(1) and (c)(3)(B) require the Secretary to impose and direct an exclusion of at least five years against any party who is convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. The Act does not permit the Secretary to offset the minimum mandatory exclusion against previously imposed state exclusions.<sup>4</sup> In imposing the minimum mandatory exclusion without an offset:

The I.G. is merely carrying out the specific directive of section 1128 of the Act that a criminal conviction related to the delivery of a Medicare [or Medicaid] item or service mandates a five-year exclusion. By his plea of guilt to submitting fraudulent . . . claims, Petitioner must be excluded . . . for the minimum period of five years.

David S. Muransky, D.C., DAB App. 1227 at 8 (1991).

I do not have authority to reduce the minimum mandatory exclusion imposed and directed against Petitioner by the I.G. The mandatory provisions of section 1128(a)(1) apply equally to me as they do to the I.G. Thus, I am without the authority to consider the equitable arguments raised by the Petitioner concerning the effect the previously imposed Medicaid exclusion should have on the exclusion at issue in this case.

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<sup>4</sup> Under section 1128(a)(1), the I.G. has the authority to impose and direct exclusions of greater than five years in the appropriate cases. In such cases, it is conceivable that the I.G. might find it within the Act's remedial framework to take into account the fact that exclusions have already been imposed against parties pursuant to state law, and to adjust the federal remedy accordingly.

## CONCLUSION

Based on the undisputed material facts and the law, I conclude that the five-year exclusion from participating in Medicare and Medicaid imposed and directed against Petitioner by the I.G. was mandated by sections 1128(a)(1) and (c)(3)(B) of the Act. Therefore, I enter summary disposition in favor of the I.G., sustaining the five-year exclusion.

/s/

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Steven T. Kessel  
Administrative Law Judge