

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Michael P. Hiotis,)	DATE: May 16, 1994
Petitioner,)	Docket No. C-94-018
- v. -)	Decision No. CR316
The Inspector General.)	

DECISION

By letter dated October 22, 1993, Michael P. Hiotis, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.¹ The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action. The I.G. moved for summary disposition. Petitioner made a cross-motion for summary disposition.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and to direct that

¹ Unless the context indicates otherwise, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

Petitioner be excluded from Medicaid for a period of five years.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW²

1. During the period relevant to this case, Petitioner was a pharmacist employed in Baltimore, Maryland. I.G. Ex. 4 at 4.

2. On May 6, 1993, the State of Maryland indicted Petitioner on three counts of Medicaid fraud, four counts of fraudulently obtaining a controlled substance, and four counts of forgery. I.G. Ex. 3.

3. The indictment alleged that Petitioner had forged the signatures of physicians on prescriptions for controlled substances and had then submitted claims for Medicaid reimbursement for filling those prescriptions. I.G. Ex. 3.

² The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s Brief	I.G. Br. (at page)
Petitioner's Brief	P. Br. (at page)
I.G.'s Reply Brief	I.G. R. Br. (at page)
My Findings of Fact and Conclusions of Law	FFCL

The I.G. submitted five exhibits. I admit I.G. exhibits 1-5 into evidence. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) (at page)." Petitioner submitted three exhibits. I admit Petitioner's exhibits 1-3 into evidence. I cite Petitioner's exhibits as "P. Ex. (number) (at page)."

4. On June 9, 1993, Petitioner entered into a plea agreement with the State in the Circuit Court for Baltimore City (Baltimore court). I.G. Ex. 4.

5. Pursuant to the agreement, Petitioner pled guilty to count one of the indictment (charging him with Medicaid fraud) and count four of the indictment (charging him with obtaining a controlled substance by fraud and forgery). I.G. Exs. 4, 5.

6. The "Statement of Facts" accompanying Petitioner's plea agreement alleged that Petitioner had been engaged in dispensing controlled substances to himself, for his own use. I.G. Ex. 4.

7. Based on Petitioner's guilty plea, the Baltimore court entered a guilty verdict against Petitioner on both counts, and sentenced him to one year of imprisonment (suspended), two years' supervised probation, a \$500 fine, \$145 in costs, \$169.41 in restitution to the Medicaid program, and 350 hours of community service. I.G. Exs. 4, 5.

8. On or about September 3, 1993, Petitioner moved the Baltimore court to reduce his sentence on each count to probation before judgment, pursuant to Md. Ann. Code art. 27, § 641 (1957). P. Ex. 3.

9. A docket entry made by the Baltimore court, dated November 17, 1993, indicates that Petitioner's motion for reduction of sentence was granted, the guilty verdict against Petitioner was stricken, and Petitioner was placed on probation pursuant to Md. Ann. Code art. 27, § 641 (1957). I.G. Ex. 5.

10. Md. Ann. Code art. 27, § 641 (1957) provides in part:

Whenever a person accused of a crime pleads guilty or nolo contendere or is found guilty of an offense, a court exercising criminal jurisdiction, if satisfied that the best interests of the person and the welfare of the people of the State would be served thereby, and with the written consent of the person after determination of guilt or acceptance of a nolo contendere plea, may stay the entering of judgment, defer further proceedings, and place the person on probation

Upon fulfillment of the terms and conditions of probation, the court shall discharge the person

from probation. The discharge is a final disposition of the matter. Discharge of a person under this section shall be without judgment of conviction and is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime.

11. The Baltimore court made a finding of guilt against Petitioner, within the meaning of section 1128(i)(2) of the Act. FFCL 7.

12. Petitioner's guilty plea was accepted by the Baltimore court, within the meaning of section 1128(i)(3) of the Act. FFCL 5, 7.

13. Petitioner entered into a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld, within the meaning of section 1128(i)(4) of the Act. FFCL 9, 10.

14. Petitioner did not prove that his conviction was reversed or vacated on appeal.

15. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. FFCL 11-14.

16. Determination of whether an individual has been convicted within the meaning of section 1128(i) of the Act is a matter of federal law and thus does not deny "Full Faith and Credit" to any State court's factual determination.

17. Petitioner's conviction is related to the delivery of items or services under the Medicaid program within the meaning of section 1128(a)(1) of the Act because, by pleading guilty, Petitioner admitted to billing the Medicaid program for controlled substances which were not delivered to Medicaid recipients. FFCL 1-7.

18. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that Petitioner be excluded from the Medicare and Medicaid programs for a minimum of five years.

PETITIONER'S ARGUMENT

Petitioner contends that neither his original conviction in the Baltimore court, nor the probation before judgment which replaced it, provides legal justification for the I.G. to exclude him from Medicare and direct his

exclusion from Medicaid. Petitioner asserts that the principle of "Full Faith and Credit," established by the United States Constitution, and codified in statutory form at 28 U.S.C. § 1738, requires that Maryland law be honored by other jurisdictions by being given the same effect it would have in Maryland. In particular, Petitioner argues that Maryland law (which holds that neither a vacated judgment nor probation before judgment is the equivalent of a conviction) should be binding in this proceeding, as should all State courts' factual determinations. P. Br. at 12-14.

Petitioner states that the Baltimore court granted his request to vacate his guilty plea because the court believed, as he did, that a criminal conviction based upon such a plea could lead to disproportionate and unjustifiable collateral consequences. P. Br. at 7; P. Ex. 3.

DISCUSSION

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

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question must have been convicted of a criminal offense under federal or State law. The term "convicted" is defined at section 1128(i) of the Act. Section 1128(i) provides that an individual or entity has been convicted of a criminal offense:

- (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.

The disposition of an individual's criminal case need meet only one of the statutory definitions for that person to be deemed "convicted" within the meaning of section 1128(i).

Petitioner argues that none of the definitions of "convicted" found in section 1128(i) of the Act may be applied to him. Petitioner advances two arguments. First, Petitioner contends that neither section 1128(i)(2) nor section (i)(3) applies, because the Baltimore court vacated its previous guilty verdict when it changed its disposition of Petitioner's case to probation before judgment, pursuant to Md. Ann. Code art. 27, § 641. Second, Petitioner contends that, under Maryland law, the disposition of his case was not the equivalent of a conviction and that failure to give Maryland law the same effect in this proceeding would violate the principle of Full Faith and Credit, as codified at 28 U.S.C. § 1738.

The I.G. contends that Petitioner was convicted within the meaning of section 1128(i)(3). I agree. In addition, I conclude that Petitioner was convicted also within the meaning of sections 1128(i)(2) and 1128(i)(4).

A. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act.

In the present case, it is undisputed that, pursuant to a plea bargain, Petitioner pled guilty in the Baltimore court to one count of Medicaid fraud and one count of unlawfully obtaining a controlled substance by fraud and forgery. FFCL 5. Also, it is undisputed that the Baltimore court entered a guilty verdict and imposed a penalty upon him. FFCL 7. The I.G. has not offered a transcript of Petitioner's plea allocution, and the Baltimore court's docket sheet (I.G. Ex. 5) does not state unequivocally that the plea was accepted. Nevertheless, the facts surrounding Petitioner's guilty plea, and the imposition of sentence, lead me to conclude that the Baltimore court accepted Petitioner's plea.

The term "accept" is not defined in section 1128(i)(3). However, other administrative law judges have held that a plea is accepted within the meaning of section 1128(i)(3) whenever a party offers a plea and a court consents to receive it as part of an arrangement to dispose of a pending criminal matter. Robert W. Emfinger, R.Ph., DAB CR92 (1990). Here, the Baltimore court consented to receive Petitioner's plea as an element of an arrangement to dispose of the criminal charges against him. The plea agreement between Petitioner and the State of Maryland's

Attorney General's Office states that the parties will present the agreement to the Baltimore court for approval. I.G. Ex. 4 at 2. The agreement states that, if the court rejects the agreement, the parties will have the right to withdraw from the agreement. Here, the court did not reject the agreement. Instead, the court received guilty pleas from Petitioner pursuant to the plea agreement and, as provided in the plea agreement, imposed sentence. Thus, the court accepted Petitioner's plea. Accordingly, Petitioner was convicted within the meaning of section 1128(i)(3).

B. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(2) of the Act.

The facts of this case also demonstrate that Petitioner was convicted within the meaning of section 1128(i)(2). Here, the Baltimore court entered a verdict of guilty against Petitioner. This is indicated by the letter "G" entered in the court docket sheet in the space labeled "VERD." I.G. Ex. 5, at 2. I conclude that the court's entry of a guilty verdict against Petitioner represents a finding of guilt against Petitioner, within the meaning of section 1128(i)(2).

Petitioner contends that his guilty plea and the Baltimore court's guilty verdict may not be the basis for a finding that he was "convicted" within the meaning of section 1128(i). Petitioner appears to argue that because the court's guilty verdict was stricken when the court changed the disposition of Petitioner's case to probation before judgment, his guilty plea and the court's finding of guilt were nullified. I do not agree. As Petitioner recognizes in his brief (P. Br. at 15), convictions which have been expunged remain convictions under section 1128(i). The only convictions which cannot serve as the basis for an exclusion are those which have been reversed or vacated.³ Nothing in section 1128(i)(2)

³ This conclusion is reinforced by the legislative history:

With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

or (i)(3) states or suggests that the definition of conviction is qualified or limited by judicial actions taken subsequent to acceptance of the plea or a finding of guilt. Douglas L. Reece, D.O., DAB CR305 (1994) (decision on remand).

In the present case, the Baltimore court's action in striking the guilty verdict it had entered against Petitioner did not amount to a finding that he was not guilty of the offenses to which he had pled. Indeed, by the terms of Md. Ann. Code art. 27, § 641, a plea of guilty or a finding of guilt is required before a court may place a person on probation before judgment. Thus, the court's original acceptance of Petitioner's guilty plea and its guilty verdict were not deprived of their force as convictions within the meaning of sections 1128(i)(2) and (i)(3) by the Baltimore court's later action in striking the verdict. However, even were I to find that Petitioner had not been convicted within the meaning of sections 1128(i)(2) and (i)(3), I would nevertheless find that Petitioner has been convicted within the meaning of section 1128(i)(4).

C. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act.

Petitioner also was convicted within the meaning of section 1128(i)(4). The Baltimore Court granted Petitioner's motion for a reduction of sentence, and imposed probation pursuant to Md. Ann. Code art. 27, § 641. As quoted above, that statutory provision permits a court, after a plea or finding of guilt, to stay the entering of judgment, defer further proceedings, and place the offender on probation. If the offender successfully completes probation, the court will dispose of the matter by discharging the offender from probation, without judgment of conviction. This disposition falls squarely within the definition of conviction at section 1128(i)(4), which includes all dispositions involving deferred adjudications and arrangements where a judgment of conviction is withheld.

Moreover, if there were any doubt that the language of section 1128(i)(4) encompasses the disposition of Petitioner's case pursuant to Md. Ann. Code art. 27, § 641, examination of the legislative history of section 1128(i) would remove all doubt that Congress intended to cover situations like the present case. The congressional committee charged with drafting the 1986 amendments to the Act stated:

The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.

These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986),
reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

I find that disposition of Petitioner's criminal case pursuant to Md. Ann. Code art. 27, § 641 constitutes a conviction under the definition of the first offender and deferred adjudication provisions mentioned in the committee report. Petitioner pled guilty to Medicaid fraud and was found guilty of that crime. Even if he ultimately is discharged by the Baltimore court without a judgment of conviction, Congress has made clear that it does not intend for Medicare and Medicaid to do business with him. Therefore, Petitioner was convicted within the meaning of section 1128(i)(4).

D. The principle of "Full Faith and Credit" is not applicable to this case.

It is precisely the clarity with which Congress spoke in enacting section 1128(i)(4) which demonstrates the flaw in Petitioner's argument that treating his probation before judgment as a conviction denies full faith and credit to the Baltimore court's judgment. Congress defined the effect that was to be given State criminal dispositions such as the one at issue here. Congress stated that such arrangements were to be treated as convictions for purposes of the federal exclusion law, even if they were not convictions under State law. The governing principle here is the Supremacy clause, not the principle of "Full Faith and Credit."⁴ The I.G. has not ignored the Baltimore court's judgment; rather, the I.G.'s decision to exclude Petitioner from Medicare and to direct his exclusion from Medicaid is a matter governed by federal law, based on the Supremacy clause.

The fact that Md. Ann. Code art. 27, § 641 further purports to remove all disabilities imposed by virtue of conviction does not compel a different result. Administrative law judges' decisions have held that State court orders purporting to relieve an offender from civil disabilities arising from a conviction cannot shield the offender from an exclusion imposed under federal law. See, e.g., Richard G. Philips, D.P.M., DAB CR133, at 7, aff'd DAB 1279 (1991); Janet Wallace, L.P.N., DAB CR155, at 4 (1991), aff'd DAB 1326 (1992). Similarly, in the present case, Maryland may define what scope probation before judgment is given under State law, but it cannot bind the federal government. See Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983).

⁴ The Supremacy clause of the U.S. Constitution states that "all laws made in pursuance of the Constitution and all treaties made under the authority of the United States shall be the 'supreme law of the land' and shall enjoy legal superiority over any conflicting provision of a State constitution or law." Black's Law Dictionary, 5th Ed. 1979.

Although Petitioner relied on the Full Faith and Credit statute, 28 U.S.C. § 1738 (1966), rather than the Full Faith and Credit clause of the U.S. Constitution, the principle behind both is the same. Nevertheless, as discussed above, "Full Faith and Credit" is not applicable here.

Specifically, in the case at hand, the I.G. is not refusing to honor a State court's factual determination. Indeed, there is no dispute at all as to matters of fact. The I.G.'s role was to decide whether these undisputed facts amounted to a conviction under federal law. This is a legitimate federal function, not violative of the principle of "Full Faith and Credit." See Id. Therefore, it is my determination that the I.G. was not precluded from acting on Petitioner's exclusion by the Baltimore court's having previously expunged his conviction and imposed probation pursuant to Md. Ann. Code art. 27, § 641.

II. Petitioner's conviction relates to the delivery of an item or service under the Medicare or Medicaid programs.

I find also that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied here.

Petitioner's conviction is related to the delivery of items or services under the Medicaid program, within the meaning of section 1128(a)(1) of the Act, because, by pleading guilty, Petitioner admitted to billing the Medicaid program for controlled substances which were not delivered to Medicaid recipients. FFCL 17. Pursuant to his plea agreement with the State, Petitioner pled guilty to count one of the State's indictment (charging him with Medicaid fraud) and count four of the indictment (charging him with obtaining a controlled substance by fraud and forgery). FFCL 5. Specifically, count one alleged that Petitioner:

did knowingly and willfully make and cause to be made false statements and misrepresentations of material fact in applications for benefits and payments submitted to the Maryland Medical Assistance Program in Baltimore City, Maryland, which is a State plan established pursuant to Title XIX of the Social Security Act . . . in that [Petitioner] did fraudulently obtain a controlled dangerous substance. . . by forging the name of a physician. . . on a blank medical assistance prescription and did knowingly and willfully prepare and cause to be submitted an invoice claiming

reimbursement for such controlled dangerous substance. . .

I.G. Ex. 3 at 2.

This language plainly establishes a direct connection between the criminal offense for which Petitioner was convicted and the Medicaid program. Moreover, because Petitioner's fraudulent claims for Medicaid reimbursement related to the alleged furnishing of drugs to Medicaid recipients, I find that there exists the requisite nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicaid. Berton Siegel, D.O., DAB 1467, at 5 (1994).

It is well established that financial misconduct directed at the Medicare and Medicaid programs, connected with the delivery of items or services under a covered program, constitutes a program-related offense invoking mandatory exclusion. Id. at 5-6. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute program-related misconduct. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Further, as an appellate panel of the Departmental Appeals Board pointed out in Niranjana B. Parikh, M.D., DAB 1334 (1992), the Board "has consistently recognized common sense connections between an offense and the delivery of an item or service, even if the individual at issue did not physically deliver the item or service." Id. at 5.

Thus, I find that the criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of his criminal conviction for, among other things, filing a false Medicaid claim, which conviction is related to the delivery of items or services under these programs. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year mandatory minimum exclusion. Greene, DAB CR19, at 12-14; Stanley

H. Guberman, D.C., DAB CR111, at 9 (1990) (citing Samuel W. Chang, M.D., DAB 1198 (1990)).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge