DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Gordon Lee Hanks, R.Ph.,	
Petitioner,	DATE: September 22, 1989
- v. -	Docket No. C-112
The Inspector General.	DECISION CR 44

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On February 28, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in Utah State Court of an offense related to the delivery of an item or service under Medicaid. Petitioner was advised that exclusions from participation in Medicare and Medicaid of individuals or entities convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such exclusions be not less than five years. Petitioner was advised that his exclusions were for the minimum five-year period.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G. moved for summary decision in the case, and Petitioner opposed the motion. I heard oral argument of the motion in Salt Lake City, Utah, on September 6, 1989.

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[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" hereafter to represent all State health care programs from which Petitioner was excluded.

I have considered the parties' arguments, their fact submissions, and applicable law. I conclude that the exclusions imposed and directed by the I.G. in this case are mandated by section 1128(a)(1) of the Social Security Act. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issues in this case are whether:

1. Summary disposition is appropriate;

2. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act;

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

4. The exclusions imposed and directed by the I.G. against Petitioner were mandated by law;

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is the proprietor of a pharmacy in Holladay, Utah. Oral Arg.[2]

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[2] The parties' exhibits, memoranda, and the recorded oral argument will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Exhibit	P. Ex. (number)
Inspector General's Brief in Support of Motion to Affirm	I.G.'s Brief at (page)
Petitioner's Brief in Response to Inspector General's Motion to Affirm & Petitioner's Request for Dismissal	P.'s Brief at (page)
Oral Argument	Oral Arg.

2. On September 14, 1988, Petitioner was charged with the criminal offense of filing false Medicaid claims. P. Ex. 4; I.G. Ex. 3.

3. On October 6, 1988, Petitioner entered a plea bargain agreement. P. Ex. 2; I.G. Ex. 5.

4. Petitioner agreed to plead guilty to filing false claims. P. Ex. 2; I.G. Ex. 5.

5. Petitioner agreed to pay the sum of $4,200.00 to the Utah Bureau of Medicaid Fraud, as restitution, penalty, and to cover the costs of investigating his case. P. Ex. 2; I.G. Ex. 5.

6. Petitioner acknowledged that if he failed to comply with each and every term of the plea agreement and the orders of the Third Circuit Court, Salt Lake County, State of Utah (the Court), the Court would accept Petitioner's guilty plea and impose a sentence in his case. P. Ex. 2; I.G. Ex. 5.

7. The parties to the plea agreement recommended that the Court receive Petitioner's plea and hold the plea and imposition of sentence in abeyance pending Petitioner's successful completion of probation.
P. Ex. 2; I.G. Ex. 5.

8. On October 6, 1988, Petitioner pleaded guilty to filing false claims with Medicaid. P. Ex. 3; I.G. Ex. 6.[3]

9. The Court agreed to accept the terms of the plea agreement, and advised Petitioner that if he violated the agreement, the Court would enter Petitioner's guilty plea and impose a sentence.
P. Ex. 3; I.G. Ex. 6.

10. On December 6, 1988, the Court dismissed the charges against Petitioner, based on Petitioner's assertion that he had complied with the terms of the plea agreement.
P. Ex. 1.

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

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[3] Neither party offered a copy of the statute to which Petitioner pleaded guilty to having violated. At oral argument, counsel agreed that Petitioner had pleaded guilty to filing false claims with Medicaid.

Security Act. Findings 3-9; Social Security Act, section 1128(i).

12. Petitioner was convicted of an offense related to the delivery of an item or service under a Medicaid program. Findings 4, 8; Social Security Act, section 1128(a)(1).

13. 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.

14. On February 28, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act. I.G. Ex. 1.

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

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

17. The exclusions imposed and directed against Petitioner by the I.G. are mandated by law. Finding 12; Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).

ANALYSIS

1. Summary disposition is appropriate in this case.

The I.G. moved for summary disposition in this case, contending that he is entitled to a favorable decision as a matter of law. The motion raises the threshold question of whether this is an appropriate case to enter summary disposition.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. John W. Foderick, M.D., v. The Inspector General, Docket No. C-113, decided September 8, 1989; Howard B. Reife, D.P.M., v. The Inspector General, Docket No. C-64, decided April 28, 1989; Michael I. Sabbagh, M.D., v. The

Inspector General, Docket No. C-59, decided February 22, 1989; Jack W. Greene v. The Inspector General, Docket No. C-56, decided January 31, 1989, appeal docketed, DAB No. 89-59, Decision No. 1078 (1989); see F.R.C.P. 56.

Summary disposition should not be granted unless, after considering the facts in the light most favorable to the party against whom the motion is made, the decision maker is convinced that there exists no genuine issue of material fact remaining for trial; the moving party then is entitled to a decision as a matter of law. Continental Casualty Co. v. City of Richmond, 763 F.2d 1076, 1078-79 (9th Cir. 1985); Lang v. New York Life Ins. Co., 721 F.2d 118, 120 (3rd Cir. 1983); D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1146 (Fed. Cir. 1983). Summary disposition is an appropriate method of disposing of a legal question of statutory construction in which the legislative history and policy are the primary considerations. Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87, 92 (Temp. Emer. Ct. App. 1977).

I conclude that the material facts in this case are not disputed. Indeed, the parties both rely on the identical documents to establish the facts of this case. The parties vigorously dispute the meaning of the language in section 1128 of the Social Security Act, and how that language should be applied to the undisputed facts of this case. Therefore, the issues which must be decided in this case are issues of legal interpretation, and summary disposition is an appropriate mechanism to resolve these issues.[4]

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[4] In his Request for Oral Argument on the motion for summary disposition, Petitioner stated that he intended to call witnesses to rebut the I.G.'s motion. After hearing the parties' contentions as to whether testimony was appropriate, I ruled that there existed no dispute as to material facts which justified supplementation of the record through testimony or additional evidence in the form of affidavits or other documents. See Prehearing Order and Notice of Hearing for Oral Argument, August 7, 1989. At oral argument, I permitted Petitioner's counsel to make an offer of proof as to any additional facts he deemed relevant to the case. I accept counsel's representations as true for purposes of deciding the I.G.'s motion for summary disposition.

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

Petitioner's principal contention is that he was not "convicted" of a criminal offense within the meaning of section 1128 of the Social Security Act. Therefore, according to Petitioner, there exists no authority for the I.G. to impose and direct exclusions against him.

Section 1128(a)(1) of the Social Security 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:

> any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program. (Emphasis added).

The term "convicted of a criminal offense" is defined at section 1128(i) of the Social Security Act. The law provides that an individual or entity is considered to have 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;
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> (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 undisputed facts in this case establish that Petitioner was charged under Utah law with the crime of submitting false Medicaid claims. Finding 2. Petitioner entered a plea agreement with the prosecutor, which was accepted by the Court. Findings 3-9. Petitioner pleaded guilty to filing false claims against Medicaid, and he agreed to pay restitution, a penalty, and the costs of

investigation. Id. The Court held Petitioner's plea in abeyance pending Petitioner's compliance with the terms of the plea agreement. Id. The court then dismissed the charges against Petitioner, based on his representation that he had complied with the terms of the plea agreement. Finding 10.

Petitioner contends that he made his guilty plea as part of a "unique" arrangement with the prosecutor. P.'s Brief at 7. According to Petitioner, the terms of this arrangement enabled him to discharge a "civil" obligation to the State without any criminal judgment being entered against him. The key to this arrangement was that the court agreed to hold Petitioner's guilty plea in abeyance pending satisfaction of the terms of the plea agreement. Once the agreement was complied with by Petitioner, the court dismissed the criminal charges against Petitioner. P.'s Brief at 7-8.

Petitioner argues that his plea agreement does not fall within any of the definitions of conviction contained in section 1128(i). He contends that no judgment of conviction was entered against him, as is specified by subsection (i)(1). Nor, according to Petitioner, was any finding of guilt made by the court, as would be necessary to meet the criteria of subsection (i)(2). Petitioner asserts that no plea of guilty or nolo contendere was accepted by the Utah court within the meaning of subsection (i)(3). Finally, Petitioner claims that his plea agreement is not a first offender, deferred adjudication, or "other arrangement or program where judgment of conviction has been withheld" as described in subsection (i)(4).

The I.G. argues that the plea agreement was not "civil" in character, pointing out that Petitioner expressly pleaded guilty to a criminal offense in both the plea agreement and at his court appearance. The I.G. asserts that Petitioner was convicted of a criminal offense because the plea agreement falls within the express criteria of subsections (i)(3) and (4).

For purposes of this decision, I accept Petitioner's assertion that his plea agreement was a "unique" arrangement. I also accept Petitioner's argument that the plea agreement reflected his belief that he was not actually guilty of the offense to which he pleaded, but embodied his desire to put to rest the criminal charges which had been filed against him. See P.'s Brief at 7-8. Nonetheless, I conclude that Petitioner was convicted of a criminal offense as defined by section 1128(i).

I conclude that Petitioner's plea agreement is a "guilty plea" pursuant to subsection (i)(3). It also constitutes entry into a deferred adjudication or other arrangement or program where judgment of conviction has been withheld pursuant to subsection (i)(4). I base my conclusion on both the plain meaning of the law and on legislative history.

Both the plea agreement and the transcript of Petitioner's court appearance establish that Petitioner pleaded guilty to a criminal offense. Findings 4, 8-9. Petitioner's guilty plea was voluntary and was made as a choice among the alternative courses of action available to him, including a trial of the charges. The court "accepted" Petitioner's plea. The statutory definition of acceptance of a plea was met when Petitioner offered to plead guilty and the court accepted his offer. Petitioner's plea and the court's acceptance of the plea precisely conform to the criteria established in section 1128(i)(3). The fact that the court held entry of the plea in abeyance and subsequently dismissed the charges against Petitioner, conditioned on Petitioner's satisfying the terms of his plea agreement, is not relevant, because there is no language in subsection (i)(3) which states or suggests that the definition of "conviction" in this subsection is qualified or limited by judicial actions taken subsequent to acceptance of a plea. Carlos E. Zamora, M.D., v. The Inspector General, Docket No. C-74, decided March 30, 1989; Roberto V. Salinas, v. The Inspector General, Docket No. C-72, decided April 12, 1989.

The language of subsection (i)(4) is also plain and without qualifying terms or conditions. It encompasses those arrangements where a party pleads guilty, but the court agrees to withhold entry of the conviction pending the party's satisfaction of the terms of a plea agreement. I conclude that the court's agreement to hold Petitioner's plea in abeyance pending Petitioner's satisfying the terms of the plea agreement is an "other program where judgment of conviction has been withheld." This is evident from the transcript of Petitioner's court appearance:

MR. KROLL (the prosecutor): Just so the defendant is clear or that I make on the record my clear intention: This is a plea given, and as the Court indicated, if there was violations of probation, the defendant would be brought back and sentenced. We would not come back and have a trial. The defendant is waiving his opportunity for trial.

THE COURT: He's pled guilty at this point but I'm holding him, conditioned upon his compliance with that agreement. If he doesn't, then we enter the guilty plea and sentence.

MR. KROLL: That's my understanding.

MR. McCONKIE (Petitioner's counsel): Right. But the guilty plea hasn't been entered. That's the critical thing to us in this hearing.

P. Ex. 3 at 8-9; I.G. Ex. 6 at 8-9.

Petitioner asserts that a plea agreement does not meet the criteria of subsections (i)(3) or (i)(4) absent an admission of guilt by an individual or a finding of guilt by the court which accepts the plea. I disagree with this assertion. Section 1128(i) establishes four alternative definitions of "conviction". A finding of guilt is a necessary element of a "conviction" as defined by section (i)(2). It is not an element of the definitions of conviction contained in either subsection (i)(3) or (i)(4).

I also disagree with Petitioner's argument that a guilty plea must be "entered" by a court in order to establish a conviction under section 1128(i). Subsection (i)(1) does require that a judgment be "entered" by a court. However, that requirement is absent in the definition of conviction contained in subsection (i)(3), which only requires that a court accept an individual's offer to plead guilty. Subsection (i)(4) does refer to "entry" by an individual in a first offender program or other program where judgment of conviction has been withheld. This is distinguishable from "entry" of a plea as the term is used in subsection (i)(1). In the former subsection, "entry" refers to an action taken by a court based on a conviction. In the latter subsection, "entry" refers to an action taken by an individual in lieu of admitting guilt.

As I noted in the Zamora decision, the plain meaning of the law is underscored by legislative history. Congress intended the definition of "conviction" in section 1128(i) to include all circumstances where a party pleaded guilty to an offense, except where a conviction is vacated on appeal. The law providing for exclusion of individuals and entities who are convicted of certain offenses from participating in Medicare and Medicaid is a legislative judgment that such individuals and entities cannot be trusted with public funds or to treat beneficiaries or recipients of such funds. Congress

determined that parties who pleaded guilty to such offenses were as untrustworthy as those convicted after a trial. Zamora, supra, at 8-9; 1986 U.S. Cong. Code & Adm. News, 3664-65.

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

Petitioner contends that, assuming he was convicted of a criminal offense, he was not convicted of an offense related to the delivery of an item or service under the Medicaid program. Petitioner asserts that the I.G. improperly excluded him pursuant to section 1128(a)(1) of the Social Security Act. I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1).

The undisputed facts of this case are that Petitioner was charged with filing false Medicaid claims. Finding 2. Petitioner pleaded guilty to a lesser offense, but the crime to which he pleaded nevertheless consisted of the offense of fraud against a Medicaid program. Finding 8.

Section 1128(a)(1) of the Social Security Act has been consistently interpreted to encompass convictions for fraud or other financial crimes directed against Medicare and Medicaid. Greene and Reife, supra. On its face, the conviction in this case does not appear to be distinguishable from those at issue in the aforementioned cases.

Petitioner attempts to distinguish the conviction in the present case on two grounds. First, he argues that, notwithstanding his guilty plea, he "was never involved in any criminal conduct . . . ." P.'s Brief at 10. Second, he argues that he was not "found guilty" of criminal conduct. Id. By the latter argument, Petitioner evidently means that the Utah court never found as fact that Petitioner had committed the crime to which he pleaded guilty.

I conclude that these purported distinctions are not meaningful. The mandatory exclusion provisions of section 1128(a)(1) of the Social Security Act are triggered by conviction of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. It is not relevant that a petitioner subsequently contends that he did not commit the offense of which he was convicted. Reife, supra, at 10. Nor does section 1128(a)(1) require that a conviction of a

program-related offense be supported by a finding of guilt. See Part 2 of this Analysis, supra [5]

4. The exclusions imposed and directed by the I.G. against Petitioner were mandated by law.

The exclusion law requires the Secretary (or his delegate, the I.G.) to impose and direct exclusions against individuals or entities convicted of offenses described in section 1128(a)(1) for a minimum period of five years. Social Security Act, section 1128(c)(3)(B). In this case, the I.G. correctly determined that Petitioner was convicted of a criminal offense described in section 1128(a)(1), and excluded him for the minimum period required by law.

Petitioner argues that the mandatory exclusions imposed against him are unreasonable, because he allegedly did not participate in any criminal activity against Medicare or Medicaid. P.'s Brief at 11. However, even as the mandatory exclusion provisions of section 1128(a)(1) are triggered by conviction of an offense related to the delivery of an item or service under the Medicare or Medicaid programs, so also are the five-year minimum exclusion requirements of section 1128(c)(3)(B). The I.G. was required by law to exclude Petitioner for at least five years. Evidence concerning the degree of Petitioner's culpability does not obviate this requirement. Therefore, it is not relevant.[6]

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[5] Petitioner asserts, without elaboration, that the I.G. failed to comply with the Administrative Procedure Act, at 5 U.S.C. 552-553, "through the use of unpublished guidelines, policies, and procedures which not only were applied without adherence to the law but also violates the purpose and intent of the recent revisions to the Social Security Act." P.'s Brief at 11. There is nothing in the record of this case to suggest that the I.G. relied on anything other than the terms of section 1128 of the Social Security Act, and on legislative history, in determining to impose and direct exclusions against Petitioner. The sections of the law at issue in this case are unambiguous, and were properly relied on and applied by the I.G. Greene, supra.

[6] The I.G. has discretion in section 1128(a)(1) cases to impose and direct exclusions for terms exceeding five years. Had the I.G. done so in this case, then evidence as to the degree of Petitioner's culpability would have been relevant in weighing the reasonableness of the length of the exclusions.

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 Medicaid, 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