

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
Roberto V. Salinas,)	
)	DATE: APR 12, 1989
Petitioner,)	
)	
- v. -)	Docket No. C-72
)	
The Inspector General.)	DECISION CR 23
)	

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On October 14, 1988, the I.G. sent notice to Petitioner, advising him that he was being excluded from participation in Medicare and any State health care programs for a period of five years.^{1/} Petitioner was advised that his exclusions were due to his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. Petitioner was further advised that the law required minimum five year mandatory exclusions from participation in Medicare and State health care programs for individuals convicted of a program-related offense.

Petitioner timely requested a hearing as to the exclusions, and the matter was assigned to me for a hearing and decision. I conducted a prehearing conference on January 17, 1989, at which the parties expressed their intent to move for summary disposition. I issued a prehearing Order on January 26, 1989, which established a schedule for moving for summary disposition but did not request oral argument on the motion.

^{1/} "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. 1320a-7(h), to include any State Plan approved under Title XIX of the Act (Medicaid).

Petitioner neither filed a motion for summary disposition nor responded to the I.G.'s motion. The time limit established by my Order for responding to the I.G.'s motion has expired. I have considered the uncontested facts asserted by the I.G., as well as the I.G.'s arguments and the contention made by Petitioner in his hearing request. I conclude that the exclusions imposed and directed by the I.G. are mandatory. Therefore, I am deciding this case in favor of the I.G.

ISSUE

The issue raised by Petitioner in his hearing request and argued by the I.G. in his motion for summary disposition is whether Petitioner was "convicted" of an offense within the meaning of 42 U.S.C. 1320a-7(i).

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: Section 1128(a)(1) of the Social Security Act, 42 U.S.C. 1320a-7(a)(1), requires the Secretary to exclude from participation in the Medicare program, and to direct the exclusion from participation in State health care programs, of any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under Medicaid or any State health care program.

Prior to July 1988, "conviction" was defined at 42 U.S.C. 1320a-7(i) to include those circumstances when: (1) a judgment of conviction has been entered against a physician or individual, regardless of whether there is an appeal pending or the judgment of conviction or other record of criminal conduct has been expunged; (2) there has been a finding of guilt against the physician or individual; (3) a plea of guilty or nolo contendere by the physician or individual has been accepted; and (4) the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld. In July 1988, Congress revised subsection (i)(4), substituting the language "first offender, deferred adjudication, or other arrangement or program" for the language "first offender or other program." Pub. L. 100-360, Sec. 411 (July 1, 1988).

The law provides at 42 U.S.C. 1320a-7(c)(3)(B), that for those excluded under section 1320a-7(a), "the minimum period of exclusion shall be not less than five

years. . . . It further provides that an excluded party may request a hearing as to the exclusions. 42 U.S.C. 1320a-7(f).

2. Texas Code of Criminal Procedures: The Texas Code of Criminal Procedure states at Art. 42.12, Sec. 3d(a), that a court may, after receiving a defendant's guilty plea or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilty, and place the defendant on probation. It further states, at Sec. 7, that after a defendant convicted in a criminal proceeding has satisfactorily completed a term of probation, the sentencing court shall "amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant." This section further states that, with exceptions, the court may, in discharging the defendant, "set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense."

3. Regulations Governing Suspension, Exclusion, or Termination of Practitioners, Providers, Suppliers of Services, and Other Individuals: 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. Regulations governing suspension and exclusion pursuant to section 1128 and this delegation are contained in 42 C.F.R. Part 1001. Section 1001.123(a) provides that when the I.G. has conclusive information that an individual has been convicted of a program-related crime, he shall give that individual written notice that he is being suspended (excluded) from participation. Section 1001.128 provides that an individual excluded based on conviction of a program-related offense may request a hearing before an administrative law judge on the issues of whether: (1) he or she was, in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) whether the length of the exclusion is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On April 15, 1988, a criminal information was issued against Petitioner in Texas state court, charging him with the felony of Securing Execution of Document by Deception. I.G. Ex. 1.2/

2. The information accused Petitioner of intending to defraud the Texas Department of Human Services by making a false entry in a claims form for services. I.G. Ex. 1.

3. On April 15, 1988, Petitioner pleaded guilty to the charge in the information. I.G. Ex. 2. In accepting his plea, the Texas court found that there existed sufficient evidence to find Petitioner guilty of the offense. Id.

4. The court decided that the interests of society and Petitioner would be served by deferring further proceedings without entering an adjudication of guilty. I.G. Ex. 2. It imposed a four-year term of probation on Petitioner, and assessed a \$1000.00 fine. Id.

5. The court concluded that, upon successful completion of Petitioner's probation, Petitioner would be discharged and the proceeding against him dismissed, except that Petitioner's sentence would be admissible in any future proceedings against Petitioner, to be considered on the issue of penalty. I.G. Ex. 2.

6. On October 14, 1988, the I.G. excluded Petitioner from participating in the Medicare program, and directed that he be excluded from participating in State health care programs, for five years. The exclusions were based on the I.G.'s determination that Petitioner had been convicted of an item or service under the Medicaid program.

7. ~~Petitioner's~~ guilty plea in Texas state court constitutes a "conviction" within the meaning of 42 U.S.C.

2/ The I.G.'s exhibits and memorandum will be cited as follows:

I.G.'s Exhibit
I.G.'s Memorandum

I.G. Ex. (number)
I.G.'s Memorandum at (page)

1320a-7(i), notwithstanding the terms of the sentence imposed on Petitioner pursuant to Texas law.

8. The actions taken by the I.G., excluding Petitioner from participating in the Medicare program and directing his exclusion from participating in State health care programs, were mandated by 42 U.S.C. 1320a-7(a)(1).

ANALYSIS

There are no contested issues of material fact in this case. The I.G. offered evidence to establish that Petitioner entered a guilty plea to a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. contends that this plea is a "conviction" within the meaning of 42 U.S.C. 1320a-7(i) and that Petitioner's exclusions from participation in the Medicare and State health care programs were, therefore, mandated by 42 U.S.C. 1320a-7(a)(1). I.G.'s Memorandum at 4-12.

Petitioner did not file a response to the I.G.'s motion for summary disposition of this case. However, Petitioner asserted in his hearing request that he was not "convicted" within the meaning of the law. Apparently, Petitioner's sole contention is that his guilty plea does not fall within the definition of "conviction" contained in 42 U.S.C. 1320a-7(i). This contention appears to be premised on the fact that Petitioner's plea was received and his sentence entered under the deferred adjudication provisions of the Texas Code of Criminal Procedure.

The issues in this case duplicate those presented in another recent case, Carlos E. Zamora, M.D. v. The Inspector General, Docket No. C-74. Petitioner in Zamora entered a nolo contendere plea in Texas court to an offense related to the delivery of an item or service under the Medicaid program. As with Petitioner in this case, his plea was entered under the deferred adjudication provisions of Texas law.^{3/} Petitioner in Zamora argued that, because his plea was subsequently expunged under Texas law, it did not constitute a "conviction" within the

^{3/} Petitioner in Zamora completed his probation and his conviction was expunged under Texas law. In the present case, Petitioner is serving a term of probation, and, under Texas law, will be eligible to have his conviction expunged if he satisfactorily completes his probation. See Texas Code of Criminal Procedure, Art. 42.12, Sec. 7.

meaning of 42 U.S.C. 1320a-7(i). He also asserted that to the extent his plea does constitute a "conviction" within the meaning of federal law, the federal statute conflicted with Texas law. He argued that Congress had not intended in enacting exclusion legislation to preempt state penal law. Therefore, according to Petitioner in Zamora, the conflict between federal and state law must be resolved by holding that his nolo contendere plea was not a "conviction."

I reject these arguments. As I concluded in Zamora, both the plain meaning of the federal exclusion law and legislative history establish that the definition of "conviction" in 42 U.S.C. 1320a-7(i) encompasses pleas accepted under state deferred adjudication statutes. The definition of "conviction" is premised on the entry of a plea by an individual and its acceptance by a court. It is irrelevant that the conviction may subsequently be expunged.

There exists no issue of preemption because there is no conflict between the federal exclusion law and Texas penal statutes. The purpose of the federal law is remedial and not punitive. It does not impose criminal penalties in addition to those imposed by state criminal laws. There is nothing in the Texas Code of Criminal Procedure which suggests that its deferred adjudication provisions immunize defendants from federal remedies.

CONCLUSION

Based on the uncontested material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, 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