DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Jerry L. Edmonson,	DATE: December 20, 1989
Petitioner,	
- v. -	Docket No. C-138
The Inspector General.	DECISION CR 59

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On June 12, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs for a period of five years.[1] The I.G. told Petitioner that his exclusion was due to his conviction in a Texas state court of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. advised Petitioner that exclusions of individuals convicted of such offenses are mandated by subsection 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that subsection 1128(c)(3)(B) of the Social Security Act provides that the minimum period for a mandatory exclusion is five years.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I conducted a prehearing conference by telephone on August 14, 1989, As indicated at the conference, the I.G. filed a motion for

[1] "State health care program" is defined by subsection 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.

summary disposition, and Petitioner replied to the motion. Neither party requested oral argument.

I have considered the parties' arguments, the undisputed material facts, and applicable law. I conclude that the exclusion imposed and directed by the I.G. is mandated by subsection 1128(a)(1) of the Social Security Act, and is for the minimum period required by law. Therefore, I am deciding this case in favor of the I.G.

ISSUES

The issues in this case are whether Petitioner was:

1. "Convicted" of a criminal offense within the meaning of section 1128 of the Social Security Act.

2. Convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was employed as a nursing home administrator. I.G. Ex. B.[2]

2. Petitioner was charged by criminal information under Texas law with the offense of recklessly misapplying property he held as a fiduciary. I.G. Ex. B.

3. Petitioner was charged with violating his fiduciary duty by: (1) signing a blank check from the

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

I.G.'s Exhibit	I.G. Ex. (letter designation)
Brief in Support of Motion For Summary Disposition (page)	I.G.'s Brief at
Petitioner's Reply to Respondent's Motion for Summary Disposition (page)	P.'s Brief at

patients' trust fund account which was used by another employee of the nursing home at which Petitioner was employed for the purchase of furniture, (2) by failing to limit the amount of the purchase, (3) by failing to determine if the debited patients approved such a purchase, and (4) by failing to ensure that patients received the furniture purchased with their funds. I.G. Ex. B.

4. Specifically, Petitioner was charged with misapplying the funds of a patient at the nursing home at which Petitioner was employed and a Medicaid recipient. I.G. Ex. B; see I.G.'s Brief at 9.

5. On January 6, 1989, Petitioner admitted that he knowingly and intentionally committed the acts alleged in the criminal information and pleaded guilty to the offense of misapplication of fiduciary property. I.G. Ex. A.

6. On January 6, 1989, the sentencing court deferred further proceedings in Petitioner's case, fined Petitioner $350.00, assessed court costs of $82.50, and placed Petitioner on probation for a period of one year. I.G. Ex. C.

7. The sentencing court ordered that, upon successful completion of Petitioner's probation, Petitioner would be discharged and the proceedings against him dismissed. I.G. Ex. C.

8. Petitioner was convicted of a criminal offense within the meaning of section 1128 of the Social Security Act. Findings 2-7; Social Security Act, subsections 1128(a)(1); 1128(i).

9. Petitioner was convicted of a criminal offense relating to the delivery of an item or service under the Medicaid program. Findings 2-7; Social Security Act, subsection 1128(a)(1).

10. 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).

11. On June 12, 1989, the imposed and directed a five year exclusion against Petitioner from participation in the Medicare and Medicaid programs, pursuant to subsection 1128(a)(1) of the Social Security Act.

12. The exclusion imposed and directed against Petitioner is mandated by law. Findings 1-11; Social Security Act, subsection 1128(a)(1).

ANALYSIS

There are no disputed material facts in this case. The evidence establishes that Petitioner pleaded guilty in a Texas court to one count of misapplying funds held in trust for a Medicaid recipient-patient in the nursing home in which Petitioner was employed as administrator. The evidence also establishes that the Texas court fined Petitioner and placed him on probation, but deferred further proceedings in Petitioner's case. The court ordered that, upon successful completion of Petitioner's probation, the charges against him would be dismissed.

The I.G. determined that these undisputed facts established that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. The I.G. excluded Petitioner from participating in Medicare and directed that Petitioner be excluded from participating in Medicaid, for five years.

The Social Security Act mandates an exclusion 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].

Social Security Act, subsection 1128(a)(1).

The law further requires, at subsection 1128(c)(3)(B), that in the case of an exclusion imposed and directed pursuant to subsection 1128(a)(1), the minimum term of such an exclusion shall be five years. The I.G. contends that the exclusion imposed and directed against Petitioner was mandated by law.

Petitioner contests his exclusion on two grounds. First, Petitioner asserts that his guilty plea does not fall within the meaning of the term "conviction" as that term is defined in subsection 1128(i) of the Act. Thus, according to Petitioner, he has not been convicted of a criminal offense within the meaning of section 1128 of the Act. P.'s Brief at 2-3. Second, Petitioner argues that, even if he was convicted of a criminal offense, the

criminal offense was not related to the delivery of an item or service under the Medicaid program. P.'s Brief at 4-6. Therefore, according to Petitioner, the I.G. had no authority to impose and direct an exclusion against him.

I disagree with Petitioner's arguments. I conclude that Petitioner's guilty plea was a "conviction" within the meaning of subsection 1128(i) of the Social Security Act. I also conclude that the criminal offense of which Petitioner was convicted related to the delivery of an item or service under the Medicaid program. Therefore, the I.G. was required to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs for at least the minimum period required by law.

1. Petitioner was "convicted" of a criminal offense within the meaning of section 1128 of the Social Security Act.

The term "conviction" is defined, for purposes of section 1128 of the Social Security Act, at subsection 1128(i). That subsection provides that a party is considered to have been convicted of a criminal offense:

> (1) when a judgment of conviction has been entered against . . . [that party] 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;
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> (2) when there has been a finding of guilt against . . . [that party] by a Federal, State, or local court;
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> (3) when a plea of guilty or nolo contendere by . . . [that party] has been accepted by a Federal, State, or local court; or
>
> (4) when . . . [that party] has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

The issue in this case is not whether a judgment of conviction was entered against Petitioner, or whether a finding of guilt was made against Petitioner by the Texas court in which Petitioner made his guilty plea. What is

at issue is whether the court "accepted" Petitioner's guilty plea, or whether Petitioner entered into a deferred adjudication or other arrangement or program where judgment of conviction has been withheld.

Petitioner asserts that receipt of a guilty plea by a court does not constitute "acceptance" of that plea within the meaning of Texas law. Petitioner does not elaborate on this contention, but apparently means that under Texas law, a court's decision to defer further proceedings against a party based upon that party's guilty plea does not constitute "acceptance" of a plea.

There is nothing in section 1128 of the Social Security Act which suggests that Congress intended to subordinate the exclusion law to state enactments or procedures. To the contrary, section 1128 was plainly intended to create a federal exclusion remedy which operated independently of state laws. Thus, it is not relevant whether the Texas court "accepted" Petitioner's guilty plea within in the meaning of Texas law. What is relevant is whether the plea was "accepted" within the meaning of subsection 1128(i)(3) of the exclusion law.

The evidence establishes that Petitioner made a voluntary plea of guilty in which he admitted the facts of the criminal information filed against him. His plea was made as a choice among the alternative courses of action available to him, including a trial. I conclude that 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 that offer. Petitioner's plea and the court's acceptance of that plea precisely conform to the criteria of subsection 1128(i)(3). The fact that the court deferred further proceedings against Petitioner and agreed to dismiss the criminal charges against Petitioner, conditioned on his satisfying the terms of his probation, is not relevant. There is no language in subsection 1128(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 (1989), appeal

docketed, Appellate No. 89-100, Decision No. 1104 (1989).[3]

Furthermore, I conclude that the arrangement entered into by Petitioner as an adjunct to his guilty plea constituted entry into a deferred adjudication program within the meaning of subsection 1128(i)(4). Therefore, even if a plea had not been "accepted" within the meaning of subsection 1128(i)(3), Petitioner's guilty plea would nevertheless constitute a "conviction" for purposes of section 1128.

Petitioner asserts that the criminal conduct which resulted in his guilty plea occurred in 1986. He notes that the term "deferred adjudication program" was not added to subsection 1128(i)(4) until July, 1988, and asserts that the law should not apply retroactively to him. Alternatively, he argues that retroactive application of the law would constitute an unconstitutional deprivation of due process. P.'s Brief at 4.

The I.G. asserts that Congress' 1988 addition of the term "deferred adjudication" to subsection 1128(i)(4) was a clarification designed to rectify an inadvertent omission of language from the law, rather than a substantive addition. To support his argument, the I.G. cites legislative history to the 1986 legislation which enacted the present definition of conviction. I.G.'s Brief at 5.

It is unnecessary for me to resolve whether the July 1988 addition of the term "deferred adjudication" to subsection (i)(4) was a substantive amendment, as is contended by Petitioner, or merely a clarification of terms, as is contended by the I.G. Petitioner made his guilty plea after the 1988 enactment. It is evident from the language of subsection 1128(i) that a "conviction" constitutes the events described in subsections (i)(1) through (i)(4), and not the criminal conduct which leads to the occurrence of any of these events. The fact that

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[3] The Zamora case involved a nolo contendere plea entered under the identical section of Texas law as the plea in this case.

the criminal conduct in this case may have occurred prior to Congress' 1988 enactment is, therefore, not relevant.[4]

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

Petitioner argues that, even if he was "convicted" of a criminal offense within the meaning of section 1128, he was not convicted of an offense described in subsection 1128(a)(1). He concedes that his crime involved an offense directed against a Medicaid recipient. P.'s Brief at 4. He argues that subsection 1128(a)(1) does not sweep into its ambit all crimes directed against program recipients. Petitioner asserts that his offense did not relate to the delivery of an item or service under Medicaid, and therefore, does not fall within subsection 1128(a)(1).

I agree with Petitioner's contention that an offense directed against a Medicaid recipient does not fall within subsection 1128(a)(1) unless it is related to the delivery of an item or service under the Medicare or Medicaid program. However, it is apparent from the undisputed material facts of this case that Petitioner's offense relates to the delivery of an item or service under Medicaid.

The essential elements of Petitioner's criminal offense, which were admitted by Petitioner when he made his guilty plea, are that Petitioner, operating as a nursing home administrator, misapplied patients' funds which were deposited in a trust account. These funds included monies paid into the account for the benefit of a Medicaid recipient. Findings 2-5.

Regulations governing skilled nursing facilities eligible to receive Medicaid reimbursement require those facilities to protect the funds of their patients, as a

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[4] I conclude that there is no foundation for Petitioner's due process argument, because contrary to his assertion, the law is not being applied retroactively in this case. However, I note that I do not have authority to decide questions concerning the constitutionality of statutes or their application in particular cases. Jack W. Greene v. The Inspector General, Docket No. C-56 (1989), appeal docketed Appellate No. 89-59, Decision No. 1078 (1989).

condition of participation in the Medicaid program. 42 C.F.R. 1125(m). Protection of patients' funds is therefore an integral element of Medicaid services delivered by nursing facilities. Petitioner's criminal acts interfered with the nursing home's ability to provide the protection required by the Medicaid program. I conclude that Petitioner's breach of his fiduciary duty related to the delivery of Medicaid services at the nursing home which employed Petitioner. Therefore, the criminal offense of which Petitioner was convicted therefore related to the delivery of an item or service under the Medicaid program within the meaning of subsection 1128(a)(1) of the Social Security Act.

Petitioner argues that this case is distinguishable from cases in which subsection 1128(a)(1) was held to apply, because the offense of which Petitioner was convicted did not directly affect the payment of reimbursement by Medicaid. P.'s Brief at 5. Petitioner cites the Greene case as an example of the kind of case which should fall within the ambit of subsection 1128(a)(1). In Greene, the petitioner was convicted of filing fraudulent claims for Medicare reimbursement.

It is true that the Greene case involved a crime which directly affected the payment of reimbursement for services under a federally financed health care program. However, that is not to suggest that only theft of Medicare or Medicaid funds or fraud directed against these programs are offenses which fall within subsection 1128(a)(1). The language of that subsection plainly intends that a broader range of criminal offenses be covered by the mandatory exclusion provisions.

The impact of Petitioner's offense on the delivery of Medicaid services is not tangential or ephemeral. Petitioner was convicted of an offense affecting an integral element of Medicaid services at skilled nursing facilities -- the protection of patients' funds. I conclude that Petitioner's offense involved conduct which had a direct effect on the integrity of the Medicaid program.

Petitioner argues that his offense falls within the ambit of subsection 1128(b)(1) of the Social Security Act, a subsection which permits the Secretary to exclude persons who have been convicted of a criminal offense "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or

service, or "with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency." Therefore, according to Petitioner, the Secretary (and his delegate, the I.G.) was not required by law to exclude him.

This argument is virtually the same argument which was made by the petitioner in Greene and found to be without merit. If subsection 1128(b)(1) is read in isolation, its language would literally encompass the criminal offense of which Petitioner was convicted. However, such a reading would ignore a legislative scheme in which Congress mandated exclusion of persons convicted of criminal offenses related to the delivery of items or services under Medicare and Medicaid, and permitted exclusion of persons convicted of criminal offenses related to the delivery of items or services under other health care programs. Social Security Act, subsections 1128(a)(1); 1128(b)(1). This case falls within the mandatory exclusion provisions of subsection 1128(a)(1) because it involves a conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

Petitioner additionally argues that the offense of which he was convicted was not directed against the Medicaid program, but against an individual. P.'s Brief at 6. While this assertion is technically correct, it does not serve to distinguish this case from those which fall within the mandatory exclusion provisions of subsection 1128(a)(1). That subsection does not require offenses to be directed against Medicare or Medicaid in order to be covered by the mandatory exclusion provisions. The offense need only relate to the delivery of items or services under Medicare or Medicaid to trigger the mandatory exclusion provisions. Here, the offense relates to the delivery of Medicaid services, whether it was directed against the Medicaid program or a program recipient.

Petitioner asserts that he did not personally benefit from his criminal offense. P.'s Brief at 6. The evidence does not establish that Petitioner personally benefitted from his crime. For purposes of deciding the I.G.'s motion I am willing to accept Petitioner's assertion that he did not benefit. However, there is nothing in subsection 1128(a)(1) which suggests that an individual must personally benefit from his crime in order to be covered by the mandatory exclusion

provisions. Therefore, Petitioner's assertion is not relevant.

Finally, Petitioner argues that there is no evidence to show that the nursing home at which Petitioner was employed as an administrator failed to comply with applicable law or regulations. P.'s Brief at 6. That may be so, but it is not relevant. The issue is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

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. which sustains the five-year exclusion imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge