Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	)	DATE: March 14, 2007
Henry L. Gupton,	)	
Petitioner,	)	Civil Remedies CR1505 App. Div. Docket No. A-07-6 Reconsideration of Decision No. 2058
- v. -	)	
Inspector General.	)	Ruling No. 2007-1

RULING ON RECONSIDERATION

On January 18, 2007, the Board issued an order granting reconsideration of Henry L. Gupton, DAB No. 2058 (2007), the Board's decision in the above-captioned case. The Board had issued its decision without providing the opportunity for oral argument that Petitioner requested and the Board had granted. Consequently, the Board set a date for oral argument and determined with the parties' consent to provide reconsideration of its decision in light of any arguments presented at oral argument. Having heard the oral argument, the Board affirms its decision.

Background

Petitioner appealed the September 14, 2006 decision of Administrative Law Judge (ALJ) Keith W. Sickendick. Henry L. Gupton, DAB CR1505 (2006) (ALJ Decision). The ALJ upheld the Inspector General's (I.G.) mandatory five-year exclusion of Petitioner from participation in Medicare, Medicaid and all

federal health care programs under section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)). Section 1128(a)(1) provides that the Secretary shall exclude from participation in any federal health care program any individual who 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." Under section 1128(c)(3)(B) of the Act, such an exclusion must be for a minimum period of five years.

Petitioner entered a plea of *nolo contendere* (no contest) in a Tennessee court to a charge of attempted state health care fraud; he was placed on supervised probation for 60 days and ordered to pay restitution. The charge against Petitioner was dismissed and his criminal record expunged after he completed the requirements of a deferral program. In his decision, the ALJ rejected Petitioner's argument that he was thus not "convicted" of a criminal offense within the meaning of the Act.

Petitioner appealed the ALJ Decision and requested oral argument before the Board. The Board granted Petitioner's request in a letter acknowledging the appeal and setting procedures for briefing. However, on January 8, 2007, the Board issued its decision upholding the ALJ Decision and affirming the exclusion without having scheduled the oral argument. After counsel for Petitioner inquired about the status of his granted request for oral argument, the Board issued its January 18 order, stating that the Board had determined to consider counsel's communication a request for reconsideration of the Board's decision, and that the decision was thus not final for the purpose of the deadline for appealing a Board decision to federal court. See sections 1128(f)(1) and 205(g) of the Social Security Act and 42 C.F.R. § 1005.21(k)(1). The I.G. did not object to this process. The Board then convened the oral argument that Petitioner had requested.[1]

Legal standard

Generally, a decision-maker has inherent authority to reopen and reconsider a decision even in the absence of express authorization in its procedures. Such authority serves the Department by ensuring fair process and sound decisions. As the Board noted in its order, procedures applicable to many types of disputes heard by the Board provide for reconsideration of a

[1] A digital recording of the oral argument has been retained in the record.

Board decision when a party promptly alleges a clear error of fact or law. See, e.g., 45 C.F.R. § 16.13. This is a common standard for an adjudicatory body to apply to determine whether to exercise its discretion to reconsider its own decision, and is reasonably applied here as well.

Analysis

In the appeal leading to DAB No. 2058, Petitioner argued that he was not "convicted" of a criminal offense as that term is defined for the purposes of section 1128(a)(1) of the Act. Section 1128(i) of the Act states that for the purpose of exclusions under sections 1128(a) and (b), "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.

In DAB No. 2058, the Board upheld the ALJ's conclusion that Petitioner had been "convicted" for the purposes of section 1128(a)(1) of the Act, regardless of the fact that no conviction was entered against him and the criminal charge was dismissed and his record expunged after he completed a deferral program. The Board rejected Petitioner's argument that the fact Congress included language directing that an expungement be disregarded in only subsection 1128(i)(1) means that expungement must negate convictions in cases that fall under the other subsections. The Board held that the disposition of the criminal charge against Petitioner fell within the plain language of subsections (3) and (4) and that the expungement of his record did not undo his *nolo contendre* plea or participation in a deferral program. Hence, he remained "convicted" for the purpose of section 1128(a)(1) of the

Act. The Board held that its conclusion was supported by the legislative history of section 1128(i).

During the oral argument, Petitioner reiterated the principal points of his briefs on appeal of the ALJ Decision. Petitioner argued that he was not convicted under Tennessee or federal law because the criminal charge against him was dismissed and the record of that charge expunged. That record, he pointed out, was not a record of conviction as no judgment of conviction was ever entered against him.[2] Petitioner noted that the prosecutor in the criminal case stated in a sworn declaration that Petitioner has not been convicted under Tennessee law.

As we observed in our decision, however, the statutory definition of "conviction" at section 1128(i) specifically includes dispositions of criminal charges other than judgments of conviction, such as situations where an individual, like Petitioner, pleads *nolo contendere* or participates in a deferred adjudication program. We noted that the Board has often rejected the argument that individuals whom state law may not regard as "convicted" should also not be considered to have been convicted for the purposes of the exclusion statute. As we discussed, the rationale for the different treatment of the term "conviction" under the federal exclusion law and state criminal law is based on differences in their goals. The federal exclusion law aims to protect beneficiaries of health care programs and the federal fisc through remedial actions such as exclusions, whereas criminal law generally involves punishment, rehabilitation, and the deterrence of future misconduct. That state law might not regard as "convicted" some individuals who enter pleas of *nolo contendere*, participate in deferred adjudication programs or have their criminal convictions expunged does not negate the concerns over their integrity and trustworthiness to participate in federal health care programs that are raised by the conduct that led to criminal charges. DAB No. 2058, at 5-8, and citations therein. The fact that Tennessee law may not regard the Petitioner as having a criminal conviction has no bearing on whether the I.G. is authorized to exclude him from receiving federal health care monies based on circumstances that fall within the definition of conviction for the purpose of the federal statute.

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[2] Petitioner confirmed during the oral argument that he does not argue that the offense involved was not "related to the delivery of an item or service" under Medicare or a state health program.

During the oral argument, Petitioner again argued that the disposition of the criminal charge against him is excluded from the definition of "conviction" by the plain language of section 1128(i), when read under the principle of statutory interpretation that a negative inference may be drawn from the presence of language in one statutory provision that is absent from other provisions of the same statute. Petitioner argued that the only place where section 1128(i) specifies that expungement of a criminal record does not negate a conviction is in subsection (1), which applies "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court . . ." That subsection does not apply here, Petitioner noted, because the court did not enter a judgment of conviction against him. He argued that the absence of such language nullifying the effect of an expungement from the other subsections, which apply when no judgment of conviction has been entered and include his case, shows that Congress intended that expungement be given effect in actions covered by those subsections.

We do not agree that the language of section 1128(i) compels that result. During the oral argument, Petitioner emphasized, as he did in his appeal, that the four subsections in section 1128(i) are singular, discrete, and mutually exclusive definitions that should be read separately. We agree. So read, as we previously determined, subsections (3) and (4) by their plain terms cover Petitioner because they apply "when a plea of . . . nolo contendere . . . has been accepted by a Federal, State, or local court" and "when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Thus, under section 1128(i), Petitioner is considered to have been convicted of a criminal offense requiring his exclusion under section 1128(a) of the Act.

We further do not agree that the principle of statutory interpretation that Petitioner cited requires that we adopt his reading of the statute. "'As one court has aptly put it, '[n]ot every silence is pregnant.'" George Costello, Statutory Interpretation: General Principles and Recent Trends at 16, Congressional Research Service Report for Congress (updated Mar. 30, 2006), quoting Burns v. United States, 501 U.S. 129, 136 (1991) (quoting Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)). Thus, "'[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.'" Id. As we observed in our decision, the legislative history indicates that Congress intended that the

definition of "conviction" in section 1128(i) include dispositions such as first offender or deferred adjudication programs where no judgment of conviction is entered, regardless of whether those dispositions are considered convictions under state law. DAB No. 2058, at 6-7. We cited a report of a House committee stating that "[w]ith 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." Id. at 12, citing H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S.C.C.A.N. 3607, 3665 (emphasis added). We noted that the legislative history shows that Congress intended to exclude individuals who admit, by entering *nolo contendere* pleas to criminal charges of defrauding the Medicaid program, that they engaged in criminal abuse against a federal health care program, including individuals who plead guilty or *nolo contendere* and then have their criminal cases dismissed without any judgment of conviction being entered upon their completion of court-imposed conditions such as community service or good behavior. Id. at 10-12.

During the oral argument, Petitioner argued, however, that when the legislative history discusses the meaning of "conviction," it is referring only to "conviction" as used in subsection 1128(i)(1), which applies only when a judgment of conviction has been entered. That argument ignores the overarching introductory language of section 1128(i), which states that an individual covered by any of the subsections of 1128(i) is considered to have been "convicted" of a criminal offense for the purpose of the exclusion statute. The legislative history confirms this reading and leaves no doubt that Congress was using the word "conviction" as encompassing all criminal dispositions referenced in section 1128(i). To the extent that Petitioner's argument about statutory interpretation raises some ambiguity about the meaning of section 1128(i), the legislative history resolves it in favor of the reading adopted by the ALJ and the Board. DAB No. 2058, at 10-11.

Conclusion

For the reasons discussed above, we affirm our decision.

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Leslie A. Sussan
Presiding Board Member