Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Larry W. Dabbs, R.Ph.,	
and	DATE: September 9, 1991
Gary L. Schwendimann, R.Ph.,	
Petitioners,	Docket Nos. C-370 C-371
- v -	
The Inspector General.	Decision No. CR151

DECISION

On February 25, 1991, the Inspector General (I.G.), in separate letters (Notices), told Petitioners that they were being excluded from participation in Medicare and State health care programs for a period of five years.[1] The I.G. stated that Petitioners were being excluded as a result of their convictions of a criminal offense related to the delivery of an item or service under Medicaid. Petitioners were advised that the exclusion of individuals convicted of such an offense was mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioners that the law required that the minimum period of such an exclusion be for not less than five years. The I.G. informed Petitioners that they were being excluded for the minimum mandatory period of five years.

Petitioners timely requested a hearing and their cases were assigned to me for hearings and decisions. I

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

identical facts and legal issues and with the consent of the parties.

On June 7, 1991, the I.G. moved for summary disposition. Petitioners responded on August 19, 1991. I have considered the arguments made by the I.G. in his motion as well as those made by Petitioners in their response. I have also considered the undisputed material facts of the case and applicable law. I conclude that the five-year exclusions imposed and directed by the I.G. against Petitioners are mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUES

The issue in this case is whether Petitioners were convicted of criminal offenses related to the delivery of an item or service under a Medicaid program within the meaning of section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioners are pharmacists in the State of Tennessee. I.G. Ex. A/2; See P. Br. at 3.[2]

2. Petitioners and their wives owned and operated a retail pharmacy where Petitioners worked as pharmacists. I.G. Ex. A/1, /2; See P. Br. at 3.

3. On May 5, 1987, Petitioners were indicted separately in the Circuit Court for Lewis County, Tennessee (Circuit Court). I.G. Ex. B, C.

4. Petitioners were each charged with violating Section 14-23-118 of the Tennessee Code Annotated (TCA) by billing the State of Tennessee, Department of Health and Environment, Bureau of Medicaid (Tennessee Medicaid), for brand-name drugs, when allegedly Petitioners had filled the prescriptions in question with generic drugs of lesser value. I.G. Ex. B/1 - /6, C/1 - /3.

5. On January 30, 1989, Petitioner Larry W. Dabbs (Petitioner Dabbs) pled guilty to two counts of

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[2] The I.G.'s exhibits and brief are cited as I.G. Ex. (letter/page) and I.G. Br. (page). Petitioners' exhibits and brief are cited as P. Ex. (number/page) and P. Br. (page). For purposes of creating a record in these cases, I have admitted all of the I.G.'s and Petitioners' exhibits into evidence.

mislabeling prescription drugs in violation of TCA 47-25-403. I.G. Ex. F/1 - /2; P. Ex. 8/1 - /2.

6. Petitioner Dabbs specifically pled guilty to two counts of having mislabeled prescription drugs on May 30, 1986. I.G. Ex. F/1 - /2; P. Ex. 8/1 - /2.

7. The date of the offenses to which Petitioner Dabbs pled guilty is identical to the date of the offenses alleged in the first two counts of the indictment against Petitioner Dabbs. I.G. Ex. C/1 - /2, F/1 - /2; P. Ex. 6/1 - /2, 8/1 - /2.

9. The first two counts of the indictment against Petitioner Dabbs allege that his unlawful conduct related to the filling of prescriptions for Tennessee Medicaid recipients and presenting reimbursement claims for those prescriptions. I.G. Ex. C/1 - /2; P. Ex. 6/1 -/2.

10. Petitioner Dabbs was sentenced to: 1) pay a fine of $500 per count to the Tennessee Bureau of Investigation, Medicaid Fraud Division (TBI Medicaid); 2) payment of restitution to Medicaid; and 3) 11 months and 29 days of probation. I.G. Ex. F/1 - /2; P. Ex. 8/1 - /2.

11. On January 30, 1989, Petitioner Gary L. Schwendimann (Petitioner Schwendimann) pled guilty to four counts of mislabeling prescription drugs in violation of TCA 47-25-403. I.G. Ex. F/3, G/1 - /3; P. Ex. 9/1 - /4.

12. Petitioner Schwendimann specifically pled guilty to having mislabeled drugs on August 13, September 19, October 22, and November 5, 1986. I.G. Ex. F/3, G/1 - /3; P. Ex. 9/1 - /4.

13. The dates of the offenses to which Petitioner Schwendimann pled guilty are identical to the dates of the offenses alleged in the first four counts of the indictment against Petitioner Schwendimann. I.G. Ex. B/1 - /3, F/3, G/1 - /3; P. Ex. 7/1 - /3, 9/1 -/4.

14. The first four counts of the indictment against Petitioner Schwendimann allege that his unlawful conduct related to the filling of prescriptions for Tennessee Medicaid recipients and presenting reimbursement claims for those prescriptions. I.G. Ex. B/1 - /3; P. Ex. 7/1 - /3.

15. Petitioner Schwendimann was sentenced to: 1) pay a fine of $500 per count to TBI Medicaid; 2) payment of restitution to Medicaid; and 3) 11 months and 29 days of probation. I.G. Ex. F/3, G/1 - 3; P. Ex. 9/1 - /4.

16. The drugs for which Petitioners were convicted of mislabeling consisted of drugs which Petitioners sold to Tennessee Medicaid recipients and for which Petitioners claimed reimbursement from Tennessee Medicaid. Findings 6, 12; I.G. Ex. B/1 - /3, C/1 - /2; P. Ex. 6/1 - /2, 7/1 - /3.

17. Petitioners were convicted of criminal offenses related to the delivery of an item or service under the Tennessee Medicaid program. Findings 3 - 16; Social Security Act, section 1128(a)(1).

18. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

19. On February 25, 1991, the I.G. excluded Petitioners from participating in Medicare and directed that they be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.

20. There are no disputed issues of material fact in this case and summary disposition is appropriate.

21. The exclusion imposed and directed against Petitioners by the I.G. is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

22. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 13; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in these cases. Petitioners are pharmacists who jointly owned and operated a pharmacy, where they worked together as pharmacists. Petitioners were indicted for the crime of billing the Tennessee Medicaid program for brand name drugs while dispensing lower cost generic drugs. However, Petitioners were not convicted of this crime. Instead, Petitioners pled guilty to the misdemeanor criminal offense of mislabeling drugs. Based on this conviction, the I.G. excluded Petitioners under section 1128(a)(1) of the Act.

Petitioners admit that they were convicted of the crime of mislabeling drugs. Petitioners contend that their convictions are not convictions of a criminal offense related to the delivery of an item or service pursuant to the Medicaid program within the meaning of section 1128(a)(1).[3]

I disagree with Petitioners' contentions. I find that the offenses of which Petitioners were convicted were related to the delivery of items or services under Tennessee Medicaid. These offenses fall within the ambit of those offenses for which section 1128(a)(1) of the Act mandates an exclusion. The exclusion which the I.G. imposed and directed against Petitioners, which was for the minimum period required by the Act, was required by law.

Section 1128(a)(1) of the Act requires the Secretary (or his delegate, the I.G.) to impose and direct an exclusion against 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 any . . . [Medicaid] program.

Section 1128(c)(3)(B) provides that the minimum term for any exclusion imposed under section 1128(a)(1) is five years.

The Act does not define the term "criminal offense related to the delivery of an item or service." In Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990), an appellate panel of the Departmental Appeals Board (Board) held that a conviction for submission of a false Medicaid claim fell within the reach of section 1128(a)(1). The appellate panel held that the offense was directly

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[3] There is no dispute that Petitioners pled guilty to a criminal offense within the meaning of the Act. Section 1128(i)(1) defines a conviction of a criminal offense to include the circumstance where a judgment of conviction has been entered against a party by a court. Judgments of conviction were entered against Petitioners. See I.G. Ex. F, G; P. Ex. 8, 9.

related to the delivery of an item or service under Medicaid:

> since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB App. 1078 at 7; See Michael Travers, M.D., DAB App. 1237 (1991). Thus, under the rationale of Greene, a criminal offense is an offense which is related to the delivery of an item or service under Medicare or Medicaid where the delivery of a Medicare or Medicaid item or service is an element in the chain of events giving rise to the offense.

Petitioners in these cases were not convicted of submitting false Medicaid reimbursement claims. However, their convictions directly resulted from their submission of claims for Medicaid items or services. The indictments against Petitioners establish that the chain of events which led to their convictions necessarily included their filling certain prescriptions for Medicaid items or services and presenting claims to Tennessee Medicaid for those items or services. Therefore, the offenses of which Petitioners were convicted were related to the delivery of items or services pursuant to a Medicaid program even as was the offense in Greene.

A Board appellate panel also has held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Napoleon S. Maminta, M.D., DAB App. 1135 (1990). The petitioner in the Maminta case was convicted of converting to his own use a Medicare reimbursement check that was intended to be paid to another health care provider.

Although the facts of the present cases are not on all fours with the facts of Maminta, the rationale used by the appellate panel in deciding that case is equally applicable here. Both the indictments and the sentences imposed against Petitioners demonstrate that the victims of Petitioners' crimes included the Tennessee Medicaid program.[4] The offense to which Petitioners pled guilty,

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[4] One term of Petitioners' sentences was that they pay restitution to Tennessee Medicaid. This condition in (continued...)

mislabeling of drugs, involves the element of fraudulent intent. See TCA 47-25-403. The intent of that fraud was to deceive Medicaid recipients and Tennessee Medicaid as to the drugs which Petitioners dispensed. Tennessee Medicaid and Medicaid recipients were victims of Petitioners' crimes.

Petitioners argue that, in revising section 1128 in 1987, Congress narrowed the reach of section 1128(a)(1) so as not to exclude the kinds of offenses of which Petitioners were convicted. The pre-1987 version of section 1128(a) mandated that the Secretary exclude any physician or other individual

> "convicted . . . of a criminal offense related to such individual's participation in the delivery of medical care or services under . . . [Medicare or Medicaid] . . . ."

Petitioners contend that, in enacting a revised section 1128(a)(1) applicable to criminal offenses "related to the delivery of an item or service" under Medicare or Medicaid, Congress intended to make this mandatory exclusion provision applicable to a more restricted class of cases than it had previously intended. Added support for this contention exists, according to Petitioners, in Congress' enactment of section 1128(b)(1) - (14), which enumerates a class of offenses giving the Secretary permissive exclusion authority. Petitioners assert that Congress' intent in 1987 was to make most enumerated offenses a basis for permissive rather than mandatory exclusions and to narrow the reach of section 1128(a).

This argument reduces to the assertion that Congress' intent in 1987 was to provide for more flexible (and, arguably, less stringent) remedies for those individuals and entities who were convicted of crimes in which Medicare or Medicaid programs were the actual or intended victims, than had previously been the case under the pre-1987 version of the Act. I strongly disagree with this assertion. The history and evolution of section 1128 evidences Congressional intent to broaden the mandatory exclusion provisions, and not narrow them, as is contended by Petitioners. See S. Rep. No. 109, 100th Cong., 1st Sess. p. 5 (1987), reprinted in 1987 U.S. Code Cong. & Adm. News 686.

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[4] (...continued)
and of itself establishes that the victims of Petitioners' crimes included Tennessee Medicaid. Findings 10, 15.

Virtually the identical argument was raised by the petitioner in Greene. In rejecting that argument, the Board's appellate panel held that both the specific language of the 1987 revision of section 1128(a) and the legislative history to that section demonstrate that Congress intended to expand and strengthen, rather than weaken, the pre-existing mandatory exclusion requirements. 1078 DAB App. at 11 - 12. This analysis was reaffirmed in Travers. Nothing which Petitioners raise in these cases convinces me that this analysis needs to be revisited here.[5]

Petitioners also contend that the facts in the present cases are distinguishable from those in Greene. They note that in Greene, the petitioner was convicted of presenting a false Medicaid claim, whereas in these cases Petitioners were charged with, but not convicted of, presenting false Medicaid claims. It is true that in the present cases Petitioners were not convicted of presenting false Medicaid claims. However, the distinction raised by Petitioners is not meaningful. The common material element in these cases and in Greene is that the offenses arose from the petitioners' sale of drugs to Medicaid recipients and their presentation of Medicaid reimbursement claims for those sales.

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[5] Petitioners argue that the caption to section 1128(a)(1), entitled "Conviction of Program-Related Crimes," suggests that this section be given a narrow interpretation which would exclude the offense of which Petitioners were convicted. The language of section 1128(a)(1) is plain and unambiguous. As the appellate panel in Maminta noted in rejecting the identical argument made by Petitioners in these cases:

> [A] title cannot change the effect of the plain import of the words of the underlying provision. See Caminetti v. United States, 242 U.S. 470 (1917).

DAB App. 1135 at 7, n. 5. Furthermore, I disagree with Petitioners' assertion that the language of the caption suggests an inconsistent Congressional intent from that which I have read in the unambiguous language of the section. The caption is, as captions frequently are, broader and more general in its terms than is the text. The offense of which Petitioners were convicted plainly is "program-related" in that it constitutes a fraud against both Tennessee Medicaid and its recipients.

Petitioners additionally argue that it would be improper to conclude that they had been convicted of criminal offenses within the meaning of section 1128(a)(1) based on elements of their indictments to which they did not plead guilty. Thus, according to Petitioners, I should not find that they had unlawfully substituted generic for brand name drugs, or falsely claimed reimbursement from Medicaid for the sale of brand name drugs when in fact Petitioners did not plead guilty to such offenses. I do not disagree with Petitioners' contention that I should not make findings that they were convicted of an offense to which they neither pled guilty nor of which they were found guilty. But I make no such findings in this case. I rely on the indictments and judgments of conviction as proof that the offenses to which Petitioners pled guilty related to the sale of drugs to Medicaid recipients and claims for reimbursement from Tennessee Medicaid for the sales. These undisputed facts are sufficient to show that the offenses of which Petitioners were convicted were related to the delivery of an item or service under the Tennessee Medicaid program.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioners from participation in Medicare, and to direct their exclusion from Medicaid, for five years was mandated by law. Therefore, I am entering a decision in this case sustaining the five-year exclusion imposed and directed against Petitioners.

/s/

Steven T. Kessel
Administrative Law Judge