Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Mark Gventer, D.P.M.,	DATE: January 21, 1992
Petitioner,	
- v. -	Docket No. C-397 Decision No. CR173
The Inspector General.	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), the Inspector General (I.G.) of the Department of Health and Human Services notified Petitioner by letter dated May 17, 1991, that he was being excluded from participation in the Medicare and State health care programs for five years.[1]

Petitioner was advised that his exclusion resulted from the fact that he was convicted of a criminal offense related to the delivery of a health care item or service under Medicaid. Petitioner was further advised that his exclusion was authorized by section 1128(a)(1) of the Act and that section 1128(c)(3)(B) of the Act provides that such exclusions be for a period of not less than five years.

Petitioner timely filed a request for a hearing before an administrative law judge (ALJ), and the case was assigned to me for hearing and decision. During the prehearing conference held on August 1, 1991, Petitioner admitted that his conviction of a criminal offense came within the purview of section 1128(i) of the Act. Moreover, the parties agreed that this matter could proceed by motion

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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.

for summary disposition on other issues relating to the I.G.'s authority to exclude and the reasonableness of the mandated five-year exclusion. In my prehearing order of August 2, 1991, I established a schedule for the submission of briefs. The I.G. filed a motion for summary disposition and supporting brief, and Petitioner filed a brief in response to the I.G.'s motion. Both the I.G. and Petitioner filed reply briefs. Neither party requested oral argument.

I have considered the arguments, the evidence, and the applicable law. I conclude that there is no dispute as to any material facts, the parties do not seek oral argument, and that summary disposition is therefore appropriate. I also conclude that the five-year exclusion imposed and directed by the I.G. against Petitioner is mandated by law, under section 1128(a)(1) of the Act, and that the exclusion imposed is the minimum mandatory period required by section 1128(c)(3)(B) of the Act.

ISSUES

The issues in this case are whether:

(1) Petitioner was convicted of a criminal offense "related to the delivery of a health care item or service," within the meaning of section 1128(a)(1) of the Act;

(2) Petitioner is subject to the minimum mandatory five-year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act;

(3) The I.G.'s exclusion determination amounts to an unlawful retroactive application of the mandatory exclusion provisions of the Act;

(4) Petitioner may collaterally challenge his state conviction in this proceeding; and

(5) Petitioner may rely on mitigating circumstances to reduce the period of his exclusion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. Petitioner is and has been a licensed, self-employed podiatrist in Brooklyn, New York. P. Ex. 2/1[3] P. Memo. 2.

2. In or before 1985, Petitioner agreed to purchase from Dr. Mark Nelson's laboratory, Midstance, orthotics for his patients. The orthotics fabricated by Midstance were based on Petitioner's specifications and were cast on the basis of a two-dimensional impression. Such orthotics were used to provide support/correction for patients with gait deformities. Petitioner was led to believe that these were custom orthotics and were reimbursable under Medicaid billing code 90473, which had a reimbursement rate of $46.00. P. Memo. 3 - 6; P. Ex. 8.

3. In 1987, the New York State Podiatry Society obtained a clarification from Medicaid that a three-dimensional casting was necessary to support reimbursement under billing code 90473. Orthotics which were based on less than a three-dimensional casting were

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[2] The I.G. filed four exhibits with his memorandum, accompanied by the required declaration. Although the I.G. designated these exhibits in his memorandum as Respondent's exhibits, I have designated the exhibits as I.G. exhibits. These exhibits are admitted into evidence. Petitioner filed seven exhibits with his memorandum, without the required declaration. Petitioner submitted his exhibits with letters (A - G). However, I have designated the exhibits as Petitioner's exhibits 1 - 7. Petitioner filed an attachment with his reply and this is designated as Petitioner's exhibit 8. Since the I.G. did not object to the authenticity of any of Petitioner's exhibits, these exhibits are admitted into evidence.

[3] Citations to the record in this Decision are as follows:

Petitioner's Exhibit	P. Ex. (number)
Petitioner's Memorandum	P. Memo. (page)
Petitioner's Sur-Reply	P. Reply (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
I.G.'s Memorandum	I.G. Memo. (page)
I.G.'s Reply	I.G. Reply (page)
Findings of Fact and Conclusions of Law	FFCL (number)

reimbursable under billing code 90477 at a rate of $18.00. P. Memo. 4 - 5; P. Ex. 4, 8.

4. An 11-count indictment was filed against Petitioner in the Supreme Court of New York, County of Albany, charging Petitioner with one count of grand larceny in the fourth degree and ten counts of offering a false instrument for filing in the first degree. I.G. Ex. 1.

5. On January 8, 1991, Petitioner pled guilty to, and was convicted of, count one of the indictment, attempted grand larceny in the fourth degree, a misdemeanor. I.G. Ex. 2/4; I.G. Ex. 1.

6. Count one of the indictment states that from February 20, 1985 to November 6, 1985, Petitioner submitted to McAuto Systems, Inc., fiscal agent of the State of New York, numerous claims stating that he had provided foot molds fabricated from casts to various Medicaid recipients, when in fact he did not provide appliances made from a cast.[4] In reliance on these false claims, the State paid Petitioner approximately $1,794 to which he was not entitled. I.G. Ex. 1; 2/16.

7. During his sentencing, Petitioner admitted that he had wrongfully billed an orthotic device under a Medicaid code, that he should have received less payment from Medicaid for that device, and that he should have billed for the device at a different Medicaid code. I.G. Ex. 2/16.

8. Petitioner was sentenced to a conditional discharge and as an element of his plea he was required to make full restitution to the State in the amount of $7,396.80 (for a total of $9,671.44, which includes interest) for the incorrectly billed orthotics. I.G. Ex. 2/20; P. Memo. 8.

9. Petitioner's criminal conviction in the Supreme Court of the State of New York, County of Albany, is within the meaning of section 1128(i) of the Act. Admission of Petitioner.

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

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[4] At the sentencing, Petitioner's attorney stated for the record that Petitioner was making restitution for false claims over a three-year period, and not the few months stated in the indictment. I.G. Ex. 2/16, 17.

Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCL 4 - 6.

11. 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).

12. On May 17, 1991, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 3.

13. There are no disputed issues of material fact in this case, and summary disposition is appropriate. FFCL 1 - 10.

14. Petitioner may not collaterally challenge his state conviction in this proceeding nor are mitigating circumstances surrounding Petitioner's conviction relevant to the length of his exclusion.

15. The I.G.'s exclusion determination does not amount to an unlawful retroactive application of section 1128(a)(1) of the Act to the facts of this case.

16. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required by the Act. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

17. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

RATIONALE

1. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

Petitioner, Mark Gventer, is a licensed podiatrist in Brooklyn, New York. FFCL 1. Petitioner pled guilty to, and was convicted of, attempted grand larceny in the fourth degree, a misdemeanor. FFCL 3, 5-6. Specifically, Petitioner was charged with submitting to McAuto Systems, Inc., a fiscal agent of the State of New York, numerous claims which stated that he had provided foot molds fabricated from casts to various Medicaid recipients, when, in fact, he did not provide appliances

made from a cast. FFCL 6. In reliance on these false claims, the State paid Petitioner in 1985 approximately $1,794 to which he was not entitled. FFCL 6; I.G. Ex. 1; P. Memo 3. Petitioner was sentenced to a conditional discharge and ordered to make full restitution to the State in the amount of $7,396.80 (for a total of $9,671.44, which includes interest) for the incorrectly billed orthotics over a three-year period. FFCL 6, 8. The I.G. imposed and directed a five-year exclusion against Petitioner in May 1991, pursuant to section 1128(a)(1) of the Act. FFCL 11.

Petitioner admits that he was convicted of a criminal offense, within the meaning of section 1128(i). However, Petitioner argues that the criminal offense to which he pled guilty was not related to the delivery of an item or service under section 1128(a)(1) of the Act and therefore does not fall within the mandatory five-year exclusion period. I.G. Ex. 4; P. Memo. 1.

The I.G.'s authority to impose and direct an exclusion under section 1128(a)(1) is based on the fulfillment of the following statutory criteria: (1) an individual or entity must be "convicted" of a criminal offense, within the meaning of sections 1128(a)(1) and 1128(i) of the Act, and (2) the conviction must be "related to the delivery of an item or service" under the Medicare or Medicaid programs.

While the Act does not specifically define the term "criminal offense related to the delivery of an item or service," a criminal offense related to the delivery of an item or service has been held to fall within the reach of section 1128(a)(1) where:

> [T]he 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.

Jack W. Greene, DAB 1078 (1989) at 7, aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835 and 838 (1990). See also Ricardo Santos, DAB CR165 (1991) at 7. 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.

In H. Gene Blankenship, DAB CR42 (1989) at 11, the ALJ stated that the determination of whether a conviction is related to the delivery of an item or service under the

Medicare program "must be a common sense determination based on all the relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court."

The facts in this case are that Petitioner pled guilty to, and was convicted of, attempted grand larceny for falsifying Medicaid reimbursement claims. FFCL 5. Petitioner incorrectly submitted reimbursement claim forms to Medicaid under billing code 90473 at a rate of $46.00 for orthotics fabricated from less than three-dimensional casts. FFCL 2. The correct billing code for such orthotics was 90477 at a rate of $18.00. FFCL 3. Petitioner improperly billed Medicaid over a three-year period. FFCL 6. Because of these incorrect billings, Petitioner received $7,396.80 in excess of the amount he was entitled, to the detriment of the Medicaid program. FFCL 8.

Common sense, as well as prior decisions of the Departmental Appeals Board (DAB), lead me to conclude that Petitioner's conviction was program related, within the meaning of section 1128(a)(1). The conviction is, both under the Blankenship test of "common sense determination based on all of the relevant facts," and under the Greene test of "an act that directly and necessarily follows from the delivery of the item or service," directly related to the Medicare and Medicaid programs. An appellate panel of the DAB has also 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, DAB 1135 (1990). That was plainly the case here.

2. The exclusion imposed and directed against Petitioner is mandated by law.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years when such individuals and entities have been convicted of a criminal offense relating to the delivery of a health care item or service. Congressional intent is clear from the express language of section 1128(c)(3)(B):

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . .

The I.G. must apply the minimum mandatory exclusion of five years once a section 1128(a) violation is established. Also, in such a case, the review by the ALJ is limited to determining whether there is a basis for the exclusion. The I.G. proved here that there was a basis, and thus I affirm the exclusion.

3. The I.G.'s exclusion determination does not amount to an unlawful retroactive application of section 1128(a)(1) of the Act to the facts of this case.

On August 18, 1987, section 1128(a) of the Act was amended by the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, 101 Stat. 680 (1987). While the pre-August 1987 version of section 1128 provided for an exclusion for a conviction of a program-related criminal offense, there was no mandatory minimum exclusion. Congress provided for the first time on August 18, 1987 that the exclusion must be for a mandatory minimum period of five years for program-related criminal offenses.

Petitioner contends that the conduct which formed the basis of his conviction occurred in 1985, prior to the effective date of the legislation mandating a minimum five-year exclusion. Petitioner argues that the exclusion amounts to an unlawful retroactive application of the mandatory exclusion provisions of the Act. I.G. Ex. 4.

Although I do not have the authority to declare the 1987 amendments unconstitutional, I do have the authority to interpret and apply the federal statute and regulations. In addition, where there is room to decide how to apply the statute, I have a duty to apply it in a manner that is constitutional and valid. See Betsy Chua, M.D., et al., DAB CR76 (1990), aff'd, DAB 1204 (1990).

I disagree with Petitioner that the exclusion law was applied retroactively in this case. The 1987 amendments were enacted by Public Law 100-93, and section 15(b) of Public Law 100-93 specifically states:

> Mandatory minimum exclusions apply prospectively. Section 1128(c)(3)(b) of the Social Security Act (subsec (c)(3)(B) of this section) (as amended by this Act [Pub. L. 100-93, section 2]) which requires an exclusion of not less than 5 years in the case of certain exclusions, shall not apply to exclusions based on convictions occurring before the date of the enactment of this Act [Aug. 18, 1987].

The Senate Report discussing this provision states:

> The provision establishing mandatory five year minimum exclusion periods for conviction of certain crimes would apply to convictions occurring on or after the date of enactment.

S. Rep. No. 109, 100th Cong., 1st Sess. 27, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 708.

It is clear from both the language of the statute itself and its legislative history that Congress intended the mandatory minimum exclusion provisions to apply prospectively from the date of the statute's enactment to all convictions occurring on or after August 18, 1987. Obviously, if a conviction occurred on August 18, 1987 or shortly thereafter, the misconduct giving rise to the conviction would necessarily have occurred prior to August 18, 1987. Accordingly, in enacting this provision, Congress must have been aware that there would be many convictions that would be entered after the effective date of the amendments and these convictions would be based on acts that were committed prior to that date. Thus, by logical inference, Congress intended the 1987 amendments to apply even in those cases, as long as the conviction resulting from the misconduct occurred on or after August 18, 1987. This logical inference is inescapable, and the only way it could be overcome would be by specific language in the text of the statute itself or in its legislative history, indicating Congressional intent not to apply the mandatory exclusion to convictions based on misconduct occurring prior to August 18, 1987.

In this case, there is no dispute that Petitioner was convicted after the effective date of the 1987 amendments. Petitioner was convicted of a program-related offense on January 8, 1991, more than three years after the enactment of the amendments to the Act. The I.G.'s authority to impose and direct exclusions against Petitioner arose from his conviction on January 8, 1991, and that is the controlling event specified by Congress in its 1987 amendments. Therefore, the act which gave the I.G. grounds to exclude Petitioner occurred after the date that Congress enacted the 1987 statutory revisions.

Based on the foregoing, I conclude that since Petitioner was convicted of a program-related offense after August 18, 1987, the I.G. had no choice but to apply the mandatory minimum exclusion provisions and exclude Petitioner for at least five years.

4. Petitioner may not collaterally challenge his State conviction in this proceeding.

Petitioner appears to be arguing that his conviction for submitting false claims to Medicaid was not program related because of the following:

> (1) He pled guilty even though he could not truthfully state at his sentencing to knowingly engaging in criminal conduct when he submitted billings for the orthotics in 1985. P. Memo. 6; P. Reply.
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> (2) He only ordered orthotics when they were medically necessary; and, in any event, the orthotics were reimbursable by Medicaid, although at a lower billing rate than Petitioner claimed. I.G. Ex. 4.
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> (3) His conduct was the result of being misled by the lab he used. P. Memo. 4 - 7.
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> (4) It was not until November 1987 that the New York State Podiatry Society was able to get clarification on the correct billing classification for custom orthotics for Medicaid purposes. P. Ex. 3; P. Memo. 4 - 5. See also P. Ex. 4.

The I.G. argues that Petitioner may not now collaterally attack his State court conviction. I.G. Reply 2 - 5.

Even assuming that all of Petitioner's assertions of fact are true, they are not relevant to the issue of whether the I.G. was required to impose and direct an exclusion against Petitioner. The I.G.'s authority to exclude a party under section 1128(a)(1) arises by virtue of that party's conviction of a criminal offense, as described in the Act. The underlying conduct behind the conviction, except for the limited purpose of establishing the "related to" requirement of the statute, is not relevant in considering whether the I.G. had authority to impose and direct a mandatory exclusion pursuant to section 1128(a)(1). The conviction, and not the underlying conduct, is the triggering event which requires the I.G. to impose and direct an exclusion. It is not relevant to the issue of the I.G.'s authority that the criminal conviction may have been defective or that the conduct which resulted in the conviction may no longer be unlawful. See Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991); Andy E. Bailey, C.T., DAB CR47 (1989), aff'd, DAB 1131 (1990); John W. Foderick, M.D., DAB 1125 (1990). A party who believes his

conviction was defective is not without recourse. That party may appeal the conviction in a court which has jurisdiction over the matter. If the conviction is overturned on appeal, then the I.G. would reinstate the excluded party. See 42 C.F.R. 1001.136(a).

5. I do not have the authority to grant Petitioner the extraordinary relief requested.

Petitioner argues that, if an exclusion is ordered, there are mitigating circumstances which compel a reduction in the proposed five years, regardless of the minimum mandatory provisions. Petitioner contends that at the time he submitted the orthotic billings for Medicaid patients, he did not intentionally engage in conduct to defraud Medicaid and he believes this is mitigating in terms of his intent. P. Memo. 7; I.G. Ex. 4. Petitioner asserts that because he practices podiatry in a community serving an elderly and disabled population, these clients would not have immediate access to podiatric care. I.G. Ex. 4. Since Petitioner would like me to consider his personal and professional devotion to the community in which he practices, he presents character letters from colleagues, patients, elected officials, and community leaders. P. Memo. 2; P. Ex. 2.

I do not have the authority to grant the type of extraordinary relief which Petitioner seeks. However, Petitioner pled guilty to a single count of attempted grand larceny, pursuant to section 155.30 of New York State's Penal Law, as further defined in section 110 of the State's Penal Law. Section 110 of the Penal Law states that "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." N.Y. Penal Law section 110 (McKinney 1991).

Petitioner pled guilty to attempted grand larceny for falsifying Medicaid claims and "intent" is a requisite element of the crime to which he pled guilty. Petitioner's argument that he did not intend to falsify Medicaid claims is contrary to his plea. Further, the provisions of section 1128(a)(1) do not require that the individual must intend to commit the criminal offense in order for an exclusion to be proper. Section 1128(a)(1) requires only that the individual's acts cause the individual to be convicted of an offense and that the offense be related to the delivery of an item or service under the Medicaid program. Dewayne Franzen, DAB 1165 (1990) at 8.

I might be inclined to reduce Petitioner's period of exclusion if the law permitted me to consider mitigating circumstances. It is quite possible that Petitioner was misled or at least misinformed as to Medicaid's requirements for billing of orthotics under billing code 90473. However, in this proceeding, the scope of my review does not include mitigating circumstances, such as the degree of Petitioner's culpability as evidenced by his intent (or lack thereof), or other evidence of his trustworthiness to be a provider of Medicare or Medicaid as reflected in his character letters. There is no equitable relief from the minimum mandatory provisions of section 1128 of the Act. The equities of a particular case are not relevant with respect to the issue of whether the minimum mandatory exclusion provisions apply to that case, and I do not have the authority to reduce the minimum exclusion mandated by section 1128(c)(3)(B). See Orlando Ariz, et al., DAB CR69 (1990).

CONCLUSION

Based on the law and the undisputed material facts of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Accordingly, I grant summary disposition in favor of the I.G.

/s/

Edward D. Steinman
Administrative Law Judge