Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Nguyen Kim Phan, M.D.,	DATE: August 4, 1992
Petitioner,	Docket No. C-92-026
- v. -	Decision No. CR219
The Inspector General.	

DECISION

In a letter dated September 26, 1991, the Inspector General (I.G.) notified Petitioner, Nguyen Kim Phan, M.D., that he would be excluded from participating in the Medicare and federally assisted State health care programs for a period of five years.[1] The I.G. advised Petitioner that this action was being taken because Petitioner was convicted in State court of a criminal offense related to the delivery of an item or service under Medi-Cal.[2] The I.G. informed Petitioner that exclusions from Medicare and State health care programs after such a conviction are made mandatory by section 1128(a)(1) of the Social Security Act (Act). Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion shall be not less than five years.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. I conducted a prehearing conference on December 16, 1991, at which time the I.G. moved for summary disposition. By my prehearing

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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.

[2] Medi-Cal is the name used for the California State Medicaid program.

Order of December 23, 1991, I established a schedule to allow the parties to file their submissions on the I.G.'s motion for summary disposition. In his response to the I.G.'s motion for summary disposition, Petitioner requested oral argument. I granted Petitioner's request and conducted oral argument on July 17, 1992.

I have considered the arguments, the evidence and the applicable law. I conclude that there is no dispute as to any material fact 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 Petitioner:

1. was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act; and

2. was properly excluded from the Medicare and Medicaid programs for a five year period, pursuant to section 1128(c)(3)(B) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Nguyen Kim Phan, M.D. (Petitioner) is a physician licensed to practice medicine in the State of California. I.G. Ex. 4/3; P. Br. 16.[3]

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[3] I admit all of the parties' exhibits into evidence. The parties' exhibits, briefs, and my findings of fact and conclusions of law will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G.'s Brief	I.G. Br. at (page)
Petitioner's Brief	P. Br. at (page)
I.G.'s Reply Brief	I.G. R. Br. at (page)

2. Petitioner was investigated by the Bureau of Medi-Cal Fraud of the California Department of Justice for allegedly improperly and fraudulently billing Medi-Cal for his services. I.G. Ex. 1.

3. On April 10, 1990, Petitioner was charged in the Alameda County Municipal Court (California) with two felony counts for willfully, unlawfully, and with intent to defraud filing false Medi-Cal claims, in violation of California Welfare and Institutions Code, section 14107. I.G. Ex. 3.

4. On April 12, 1990, Petitioner pled guilty to both felony counts listed in the April 10, 1990 felony complaint (complaint). Petitioner's guilty plea was accepted by the California Superior Court, Alameda County. I.G. Exs. 5/6, 6, 7.

5. Petitioner's conviction was reduced to a misdemeanor at the sentencing proceedings of June 7, 1990. The court sentenced Petitioner to probation for three years, a fine of $5,000.00, restitution of $194.00, and 150 hours of volunteer community service. I.G. Exs. 6, 7.

6. Medi-Cal is the name given to the Medicaid program in California and is a State health care program as defined by section 1128(h) of the Act. P. Br. 17; I.G. Br. 6, 12-13.

7. 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. 21622 (May 13, 1983).

8. On June 4, 1991, the I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for a period of five years. I.G. Ex. 8.

9. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCL's 3-6.

10. There are no disputed issues of material fact in this case, and summary disposition is appropriate. FFCL's 1-9.

My Findings of Fact and Conclusions of Law FFCL (number)

11. 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 (c)(3)(B) of the Act; FFCL's 1-10.

12. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Sections 1128(a)(1) and (c)(3)(B) of the Act; FFCL's 1-11.

RATIONALE

Petitioner is a licensed physician who maintains a medical practice in the State of California. The I.G. alleges that the following scenario developed on and after October 14, 1987:

> Petitioner was visited in his office by an undercover agent from the California Bureau of Medi-Cal Fraud (agent). The agent was posing as a Medi-Cal recipient. The agent brought his own Medi-Cal card and two other Medi-Cal cards, one for his fictitious wife and another for his fictitious daughter. After complaining of a sore throat and cough, the agent was examined by Petitioner, who subsequently prescribed medication for the agent. The agent then asked Petitioner for additional prescriptions for his fictitious wife and daughter, who were said to have similar symptoms. Petitioner gave the agent prescriptions for his fictitious wife and daughter, although he never saw them. I.G. Ex. 1/29-31.
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> The undercover agent again visited Petitioner's office on January 19, 1988. The agent was briefly examined after complaining of a cough, and Petitioner wrote him a prescription. Petitioner also wrote the agent a prescription for his fictitious wife, again without examining any such person. I.G. Ex. 1/34-36.
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> Petitioner subsequently submitted claims to Medi-Cal for services rendered on October 14, 1987, January 19, 1988 and other dates, for treatment for the undercover agent's fictitious family members. I.G. Exs. 1/44-45, 4/1.

On April 10, 1990, Petitioner was charged with two felony counts of willfully, unlawfully, and with intent to defraud filing false or fraudulent Medi-Cal claims, in violation of section 14107 of the California Welfare and Institutions Code. On April 12, 1990, Petitioner's

guilty plea was accepted. On June 7, 1990, Petitioner was sentenced by the Superior Court, Alameda County, State of California. At the sentencing proceedings, the court reduced Petitioner's conviction from a felony to a misdemeanor and sentenced Petitioner to probation for three years, a $5,000 fine, $194 in restitution, and 150 hours of community service. I.G. Exs. 3, 6-7.

1. Petitioner's contention that he was improperly denied discovery is without merit.

In his brief, Petitioner contends that 42 C.F.R. § 1005.3(a)(3) guarantees him the right to conduct discovery of documents and that he has not been given this right. Petitioner further contends that he has not had the opportunity to discover if there are any exculpatory documents in the I.G.'s possession and that "this complete denial of discovery has fundamentally denied the Petitioner one of the few rights specifically afforded petitioners in the administrative process." P. Br. at 5.

At the July 17, 1992, oral argument, Petitioner reiterated his contention that he was improperly denied the opportunity for discovery. Petitioner stated that if he is granted discovery in this case, he will be able to show significant wrongdoing and entrapment on the part of the State of California -- conduct that he contends would compel me to find Petitioner's conviction to be invalid. Petitioner alleged that the I.G. attached to his motion for summary disposition investigative materials that went beyond the information upon which Petitioner's conviction was based. He further contended that if I were to examine the facts underlying Petitioner's guilty plea, they would show that Petitioner could have pled guilty to another offense which Petitioner contends was not program related under section 1128(a)(1) of the Act.

In Behrooz Bassim, M.D., DAB 1333 at 5-9 (1992), an appellate panel of the DAB held that the new regulations, which became effective on January 29, 1992, may not be applied to cases pending as of the date of their publication, if they deprive parties of previously vested rights. However, to the extent that specific provisions of the regulations govern merely the procedural aspects of the hearing process and do not strip parties of preexisting substantive rights, application of those provisions to pending cases would not create manifest injustice to the parties and would not be an unlawful retroactive application of the regulations. Accordingly, I conclude that application of the discovery provisions contained in 42 C.F.R. § 1005.7 to this case is not an

unlawful retroactive application of the new regulations, to the extent they do not deprive the parties of preexisting substantive rights to a full hearing.

a. Petitioner's request for discovery is untimely.

The parties in this case were given a full opportunity to brief the issue of the application of the new regulations to this case. In my Order of February 18, 1992, I established a schedule through which the parties could, if they desired, submit briefs as to the effect of the new regulations. The I.G. submitted a timely brief, and Petitioner chose to brief the effect of the new regulations in his response to the I.G.'s motion for summary disposition. Petitioner did not request discovery in the prehearing conference or at anytime before filing his response brief. Petitioner's request is therefore untimely.

b. Petitioner has failed to meet his burden of showing that discovery should be allowed.

The regulation states: "Except as otherwise limited by this part, all parties may . . . Conduct discovery of documents as permitted by this part." 42 C.F.R. § 1005.3. Section 1005.7(a) states: "A party may make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the [administrative law judge (ALJ)]." Section 1005.7(e)(3) further provides that "[T]he burden of showing that discovery should be allowed is on the party seeking discovery."

Petitioner contends that the denial of his right to discovery has prejudiced him because of certain exculpatory evidence that may be in the possession of the I.G. P. Br. at 1, 4. At the July 17, 1992, oral argument, Petitioner was asked to identify the exculpatory evidence that he contended was in the possession of the I.G. Petitioner admitted that he did not know of any such exculpatory evidence in the I.G.'s possession. However, Petitioner did contend that if he were allowed to review all of the I.G.'s files, he could show that the I.G. and the State of California acted in an outrageous and improper manner in conducting an undercover operation against him. However, whether the actions of the State of California in securing the conviction were outrageous or improper is not a matter that is properly before me.

Petitioner has made no showing of any improper conduct by the I.G. or the State of California. However, even if he

were able to make such a showing, it would not have relevance to the issues of whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare and whether the minimum mandatory provisions apply.

The I.G. argues that Petitioner has failed to identify with any reasonable specificity the documents he seeks, why such documents are relevant and material to the issues before me, and why such documents cannot be secured by other means. I.G. R. Br. at 13. The I.G. further argues that I should deny Petitioner's request for discovery because Petitioner has failed to carry his burden of showing that discovery should be allowed. Id. The I.G. also denies that he has any exculpatory documents. Id.

I conclude that Petitioner has not made a showing that any exculpatory documents in the possession of the I.G. would bear on the issue of the I.G.'s authority to exclude him under section 1128(a) of the Act. It is evident that Petitioner is attempting to use the limited right of discovery provided in the regulations as a means to oppose the I.G.'s motion for summary disposition. Petitioner has made no showing that discovery is needed in connection with any issue that is before me to decide. If anything, exculpatory evidence goes to the issue of the reasonableness of the exclusion.

As this case involves a minimum mandatory exclusion only, I have no authority to rule on the length of the exclusion. Moreover, it is evident that the principal purpose of Petitioner's discovery request is to obtain documents which will show misconduct leading up to his state conviction. This effort clearly is a collateral attack on the underlying proceeding upon which this derivative action is based. Such collateral attacks have been uniformly rejected in determining whether the I.G. has authority to exclude under the Act. Ian C. Klein, D.P.M., DAB CR177 (1992); Olufemi Okunoren, M.D., DAB CR150 (1991).

Lastly, even if I were to assume that Petitioner could obtain evidence through discovery that would show he engaged in activities that could have resulted in his conviction for an offense that is not program related, that possibility does not change the fact that he was convicted of a program related crime under section 1128(a)(1) of the Act. It is this conviction that provides the I.G. with the authority to exclude him. Thus, Petitioner has not met the burden of showing that discovery should be allowed.

2. I do not rely on the investigative reports of the I.G. in making my determination, because Petitioner's conviction is, on its face, program-related.

At oral argument, Petitioner contended that he was entitled to cross-examine the I.G.'s agents who compiled the investigative reports. However, the issue before me is whether Petitioner's criminal conviction was program related such that the mandatory minimum provisions of section 1128(a)(1) apply. I do not rely on the investigative reports in this case because the court documents alone, on their face, prove that Petitioner's criminal conviction was related to the Medi-Cal program.

Petitioner contends that I have the authority to consider information and circumstances beyond the scope of his conviction. Petitioner further contends that I could use that authority to examine the underlying facts and circumstances and determine that Petitioner could have easily pled guilty to an offense that was not program related. Petitioner cited Francis Craven, DAB CR143 (1991), to support his position.

However, Petitioner did not seem to understand that where, as here, the court documents unequivocally show that Petitioner's criminal conviction is program related, I have no authority to contradict that information and substitute my personal judgment. Petitioner's cite to Craven is inapposite, because, in Craven, Petitioner's conviction was not, on its face, related to the Medicare program. In Craven, the ALJ looked to the facts and circumstances surrounding the conviction to determine that the petitioner was convicted, in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.[4]

Petitioner's argument is that he could have pled guilty to another offense, because the underlying facts are more

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[4] Although the petitioner in Craven was convicted of two criminal offenses relating to fraud, conspiracy, and filing false tax returns, the I.G. based the petitioner's exclusion solely on the conspiracy conviction. In Craven, ALJ Stratton found that the petitioner's conviction for conspiracy to defraud the United States by attempting to impair or impede the lawful functions of the IRS was a conviction relating to fraud, theft, embezzlement breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1).

correctly classified under a different section of California's criminal statutes. I have no authority to decide to what offenses Petitioner could have pled guilty. My decision is based solely on the record of Petitioner's conviction. That record shows that the offense to which Petitioner did plead guilty is program related.

Petitioner conceded at the July 17, 1992, oral argument that he pled guilty to Medi-Cal fraud. Petitioner also conceded at oral argument that Medi-Cal is a State Health care program within the meaning of section 1128(h) of the Act. The guilty plea, in which Petitioner admits to criminal actions involving Medi-Cal, proves that Petitioner was convicted of program related crimes under section 1128(a)(1) of the Act. Petitioner's conviction is, therefore, on its face, program related. There is no merit to Petitioner's contention that I can set aside his criminal conviction and make my own determination as to the criminal offense of which Petitioner could have been convicted. I do not have that authority.

3. .Summary Disposition is appropriate in this case.

Petitioner contends that an in-person hearing is required in order for me to fairly and properly resolve this case. The I.G. counters that Petitioner has not identified any material issues that are in dispute, and that, therefore, summary disposition is appropriate in this case. I.G. R. Br. at 1, 9-16.

Under section 205(b)(1) of the Act, Petitioner has a right to a hearing to review the I.G.'s determination to exclude him. That right includes issues pertaining to the I.G's authority to exclude and the reasonableness of the period of exclusion. The Act does not require that Petitioner be afforded an in-person hearing. Summary disposition is an appropriate procedure to follow where there are no material facts in dispute and the only issues involve questions of law. Michael I. Sabbagh, DAB CR20 at 11 (1989). James F. Allen, M.D.F.P, DAB CR71 (1990) and John W. Foderick, M.D., DAB CR43 (1989), aff'd DAB 1125 (1990) (summary disposition may be entered over the objection of a petitioner where an ALJ finds no dispute as to any material fact).

In this case, Petitioner asserts that the I.G.'s statement of facts creates a dispute as to material facts because it does not disclose that the California Department of Health Services suspended Petitioner from the Medi-Cal program with the express proviso that he could re-apply to the program after one year. P. Br.

at 2. If he were allowed to testify at a hearing, Petitioner asserts he could prove that there were numerous occasions when he refused to work with one of the State's undercover agents. P. Br. at 1. Finally, Petitioner accuses the I.G. of misstating the original number of charges against him. P. Br. at 2.

Petitioner admits he was convicted of two charges involving Medicaid. I.G. R. Br. at 10.[5] As to the other alleged disputed facts, they are not material, as the only material facts relate to whether Petitioner was convicted of a criminal offense in accordance with section 1128(a)(1).

Petitioner has failed to raise any issue of material fact. In determining whether there is a dispute as to a material fact so as to preclude summary judgment, "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes which are irrelevant or unnecessary will not be counted." Travers v. Sullivan, No. CS-91-232-JLQ (E.D. Wash. 1992). In ruling on the I.G.'s motion for summary disposition, I have to decide only whether Petitioner was convicted of a program-related crime, thereby mandating the five year exclusion imposed by the I.G. Id.

The facts raised by Petitioner are not material or relevant to my determination of whether Petitioner was convicted of a program related offense within the meaning of section 1128(a)(1). "Petitioner must do more than just claim there are disputed material facts, he must offer challenges to the facts which are relevant and material." John W. Foderick, M.D., DAB 1125 at 10 (1990). Petitioner has not identified any material facts that are in dispute. Petitioner relies solely on his contention that, if I permitted him to conduct discovery, he might be able to document the alleged prosecutorial misconduct of the State. Apparently, he would use this to attack the validity of his conviction. However, it is the fact of Petitioner's conviction, not its validity,

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[5] In Petitioner's letter of November 15, 1991 requesting a hearing, Petitioner admitted that he was convicted of a criminal offense under the California Medi-Cal program, but asserted that Medi-Cal was not the Medicare or Medicaid program within the meaning of 42 C.F.R. § 1001.122. However, Petitioner subsequently admitted that Medi-Cal is the name given to the Medicaid program in California and is a State health care program as defined by section 1128(h) of the Act. P. Br. at 17.

that triggers the mandatory minimum exclusion of section 1128(a)(1).

The I.G. has proved, and Petitioner has admitted, that he was convicted of a criminal offense and that the offense involved claims to Medi-Cal. Thus, the elements of section 1128(a)(1) are present. Some of the factual issues addressed by Petitioner arguably could be material in the determination of the reasonableness of the length of a permissive exclusion, but are not relevant to a mandatory exclusion. Resolution of this case by summary disposition is therefore appropriate.

a. There is no merit to Petitioner's contention that the evidence presented by the I.G. is inadmissible hearsay.

Petitioner contends that the I.G.'s exhibits should not be relied upon because they contain "multiple heresy [sic]." P. Br. 1. Petitioner also contends that there are "genuine disagreements as to the facts." P. Br. 2. Petitioner asserts that he is entitled to an in-person hearing at which he could cross-examine the declarants whose statements are contained in the investigative reports, letters, and memoranda submitted by the I.G. as exhibits.

It is well settled that hearsay is admissible in administrative proceedings, as long as it is credible, trustworthy, reliable, and used in a fair manner. Richardson v. Perales, 402 U.S. 389 (1971); Jimmy Paul Scott, Ph.D, DAB CR8 (1986), citing Catholic Medical Center v. NLRB, 589 F.2d 1166 (2d Cir. 1978); NLRB v. McLure Associates, Inc., 556 F.2d 725 (4th Cir. 1975). Petitioner was not denied due process by not having the opportunity to cross-examine the declarants of the statements in the I.G. exhibits. In making my determination that Petitioner's conviction is program related within the meaning of section 1128(a)(1), I do not rely on the reports, letters, and memoranda to which Petitioner objects. My finding is based solely on the court documents, submitted by the I.G., that indicate Petitioner was convicted of defrauding the Medi-Cal program. Since Petitioner has admitted that Medi-Cal is a state health care program as defined by section 1128(h), Petitioner has, by implication, admitted that he was convicted of a criminal offense involving Medicaid.

Petitioner's reliance on a hearsay objection is misleading as well as being misplaced. Apparently what he really wants is to call the I.G.'s investigators as

witnesses to establish certain facts he deems favorable to his case. As discussed previously, these facts, even if proven, at best have to do with the length of his exclusion. As this is a minimum mandatory exclusion, I have no discretion as to its length and thus the proposed testimony is not relevant.

3. 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.

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 at 7 (1989); aff'd sub nom. Greene v. Sullivan, 731 F. Supp 835, 838 (1990). 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. Larry W. Dabbs, R.Ph., et al., DAB CR151 (1991). A criminal offense also has been held to meet the statutory test where the unlawful conduct can be shown to affect an identifiable Medicare or Medicaid item or service or to affect reimbursement for such an item or service. DeWayne Franzen, DAB CR58 (1989); Danny E. Harris, R.Ph., DAB CR166 (1991). In addition, a criminal offense has been held to meet the statutory test where either Medicare or a Medicaid program is the victim of the crime. Napoleon S. Maminta, M.D., DAB 1135 (1990).

Petitioner was convicted by a California court of fraudulently submitting claims to the Medi-Cal program. Under each of the tests set forth above for determining whether a criminal conviction falls within the purview of section 1128(a)(1), Petitioner's conviction is program related as required by the Act. The court document sentencing Petitioner specifically refers to his plea of guilty to a violation of Section 14107 of the Welfare and Institutions Code of California, as charged in the first and second counts of the Complaint. The Complaint specifically charges Petitioner with willfully,

unlawfully, and with intent to defraud presenting false or fraudulent Medi-Cal claims. Thus, the conviction is related to the Medicaid program.

In an apparent effort to avoid the consequences of his being convicted of a program related crime under section 1128(a)(1), Petitioner argues that he could have chosen to plead guilty to other criminal offenses, which he maintains would have resulted in a permissive rather than mandatory exclusion. P. Br. at 13. Although he admits that his conviction for violating California Welfare and Institutions Code section 14107 falls "under the mandatory provisions", he contends that the two other counts of the complaint, for violations of Health and Safety Code section 11153(1), would be "permissive in nature." Id. Petitioner's position makes no sense. What Petitioner could have done is not relevant. What he did was to plead to a program related offense and that plea resulted in a conviction. What Petitioner could have done is not relevant to my determination in this case.

At oral argument, Petitioner contended that I have the authority to set aside his conviction because of the outrageous conduct of the State of California in conducting the undercover operation against him. Petitioner's argument amounts to a collateral attack on his guilty plea. The proper forum for any challenge to the validity of a plea is likely in the State court which accepted the plea, but definitely not in this proceeding. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990). Petitioner may not use the proceedings before me to collaterally attack the State action which gave rise to the derivative federal exclusion. Olufemi Okunoren, M.D., DAB CR150 (1991).

Petitioner contends that the distinction between the mandatory and permissive exclusions of 1128(a) and 1128(b) is blurred, arbitrary, and unclear. P. Br. at 7-10. In effect, Petitioner contends that his conviction should have been considered under section 1128(b)(1) of the Act, which does not require that the conviction be program related. Again, Petitioner's position is bound in faulty logic and law. As stated by the appellate panel in Samuel W. Chang, M.D., DAB 1198 at 8 (1990):

> The permissive exclusion provisions of section 1128(b) apply to convictions for offenses other than those related to the delivery of an item or service under either the Medicare or Medicaid or other covered programs. While it is not inconceivable that one of the provisions

> of section 1128(b) could have been applied in the absence of section 1128(a), which provides that the Secretary "shall" exclude individuals where applicable, the permissive exclusion provisions of subsection (b) focus on different circumstances from those raised here, such as where an individual's conviction does not relate to the Medicare or Medicaid programs.

See, Charles W. Wheeler, DAB 1123 (1990); Leon Brown, M.D., DAB 1208 (1990); Jack W. Greene, supra.

Additionally, it is well settled that:

> [t]he I.G. has no discretion to choose under which section to proceed. Where a conviction falls under section 1128(a)(1), the I.G. is required to impose a mandatory minimum exclusion. The statute gives the Secretary no option to choose between 1128(a) and 1128(b). Therefore, the ALJ need not first consider whether the offense falls under 1128(b).

Baron L. Curtis, DAB CR122 at 9 (1991), citing Samuel Chang at 8; Charles Wheeler, DAB 1123 at 6 (1990); Leon Brown, M.D., DAB 1208 at 4 (1990). Thus, I conclude that Petitioner was properly excluded under the mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B).

4. 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. Unlike cases brought under section 1128(b) of the Act, where I have the authority to consider the reasonableness of the exclusions and the trustworthiness of petitioners, I have no discretion here and must affirm the exclusion.

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. Petitioner's request for an in-person hearing is denied.

/s/

Edward D. Steinman
Administrative Law Judge