

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
Thomas C. Chestney, D.M.D.,	)	DATE: MAR 29, 1989
Petitioner,	)	
- v. -	)	Docket No. C-53
The Inspector General.	)	DECISION CR 21

DECISION AND ORDER

The Petitioner waived his right to a formal evidentiary hearing in this five year federal exclusion case, and the parties jointly requested that I issue a decision and order based on the uncontested facts.

APPLICABLE STATUTES AND REGULATIONS

I. Federal Statutes

This case is governed by section 1128 of the Social Security Act (Act); section 1128 is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1988 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those "convicted of a criminal offense related to the delivery of an item or service" under the Medicare or "any State health care" (Medicaid) programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those, like the Petitioner, excluded under section 1128(a)(1). The Inspector General (I.G.) is required to exclude such individuals from participation in Medicare, and to direct each State to exclude such individuals from participation in Medicaid for a period which is at least the "same as" the period of the Medicare exclusion. 42 U.S.C. 1320a-7(d)(1), (d)(2), (d)(3). See also, 42 U.S.C. section 1396(a)(39). Section 1128(d)(3)(B)(ii) of the Act allows a State to independently exclude a convicted individual from Medicaid for a period which is "longer" than the federally directed period of exclusion.

## II. Federal Regulations

The governing federal regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1987). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Sections 1001.123, and 1001.124, at 42 C.F.R., consistent with section 1128(d)(2) of the Act, provide that the I.G. must direct a State to exclude such individual from the Medicaid program for at least the "same period" that the I.G. has excluded the individual from the Medicare program. Section 1001.123 requires the I.G. to issue a notice to an excluded individual whenever the I.G. has "conclusive information" that such individual has been convicted of a crime related to the delivery of Medicare or Medicaid items or services; such exclusion must begin "15 days from the date on the notice." A State must follow the I.G.'s direction to exclude convicted individuals from Medicaid for at least the "same period" as the federal Medicare exclusion. Sections 1002.211(a) and 1002.211(b), consistent with section 1128(d)(3) of the Act, provide that a State may also impose separate Medicaid exclusions under State law.

Sections 1001.125 and 1001.130 provide that the individual shall remain excluded from the Medicare and Medicaid programs until reinstated by the I.G. Section 1002.230(a) provides that a State may not reinstate until the I.G. notifies the State that the individual may be reinstated.

## III. State Statutes

Pennsylvania law, similar to section 1128 of the Act, provides for a separate five year termination from Medicaid of any person convicted of a program-related crime. 62 P.S. 1407(b)(3). The State termination, however, begins as of the date of conviction, rather than 15 days after the notice is received.

### PROCEDURAL AND FACTUAL BACKGROUND

On March 30, 1988, the State of Pennsylvania notified the Petitioner that, pursuant to State law, it had terminated his participation in the Medicaid program for a period of

five years beginning January 19, 1988 and ending on January 19, 1993.<sup>1/</sup>

By letter dated July 25, 1988 (Notice), the I.G. notified the Petitioner, that pursuant to federal law, the Petitioner was being excluded from Medicare for a period of five years, commencing 20 days from the date of the Notice. The Notice also stated that the I.G. had directed the State of Pennsylvania to exclude the Petitioner from Medicaid for at least the "same period"; the basis for these exclusions was the Petitioner's criminal conviction.

Pursuant to the I.G.'s directive, Pennsylvania notified the Petitioner on August 16, 1988 that he was excluded from Medicaid for the period August 13, 1988 to August 13, 1993.<sup>2/</sup>

By letter dated September 21, 1988 (Request), the Petitioner requested a hearing before a federal Administrative Law Judge (ALJ) and this case was docketed. I conducted a telephone prehearing conference with counsel for the parties on October 25, 1988. On October 27, 1988, I issued a Prehearing Order and Notice of Hearing, noting that the parties had agreed that the only dispute was legal and not factual. Thereafter, the parties submitted briefs in support of their respective motions for summary disposition.

The Petitioner admitted that he was convicted of a criminal offense related to the delivery of Medicaid services and does not contest that the I.G. is required by federal law to exclude him from both the Medicare and Medicaid programs for a five year minimum period. Also,

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<sup>1/</sup> January 19, 1988 was the date of the Petitioner's criminal conviction in Blair County Pennsylvania of a criminal offense related to the delivery of services under the Medicaid program. Specifically, the Petitioner was found guilty of submitting Medicaid claims stating that less than six (6) teeth were extracted (when, in fact, more than five (5) teeth were extracted) in order to avoid obtaining prior authorization for Medicaid payment, which is required when more than five (5) teeth are extracted. The Petitioner pled guilty to "Theft By Deception" and committing a "Provider Prohibited Act" in violation of 18 P.C.S.A. 3922(a)(1) and 62 P.S. 1407(a)(7).

<sup>2/</sup> The I.G. excluded the Petitioner from August 14, 1988 to August 13, 1993. I.G. Br/3; I.G. Ex./II.

the Petitioner does not contest the timing of or the period of his Medicare exclusion. P.Br/3. Instead, the Petitioner argues that since the State of Pennsylvania had already terminated him from Medicaid for five years, beginning seven months prior to his federally directed Medicaid exclusion, the federally directed Medicaid exclusion should last only four years and five months, rather than five years. He argues, in effect, that the I.G. added seven months to his five year Medicaid exclusion by simply delaying the sending of the Notice for seven months, a result that is contrary to the Act and Congressional intent.

#### ISSUE

The issue in this case is whether the timing or length of the federally directed Medicaid exclusion imposed upon the Petitioner by the I.G. is reasonable.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW 3/

Having considered the entire record, the arguments and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:

1. The Petitioner, a provider of dental services, admits that he was "convicted of a criminal offense" on January 19, 1988 and that the criminal offense to which he pled guilty is "related to the delivery of an item or service" under Medicaid within the meaning of section 1128 of the Act. P.Br./1,2,7; P.Ex./A. 4/

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3/ Any part of this Decision and Order preceding and following the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is incorporated herein; these are primarily the facts and conclusions that were not disputed or which are clear and do not need to be repeated.

4/ The citations in this Decision and Order are as follows:

Petitioner's Brief	P. Br./ (page)
I.G.'s Brief	I.G. Br./ (page)
Petitioner's Exhibit	P. Ex./ (letter)
I.G.'s Exhibit	I.G. Ex./ (number)

2. Pursuant to Pennsylvania law, an individual who is convicted of "Provider Prohibited Acts" must be terminated from participation in Medicaid for a five year period, to begin on the date of conviction. P. Br./7; I.G. Br./3; 62 Pa. Stat. Ann. Section 1407(b)(3); See P. Ex./A.

3. Pennsylvania properly terminated the Petitioner from the Medicaid program for the five year period from January 19, 1988 through January 19, 1993. P. Br./2; I.G. Br./7; P. Ex./B.

4. In accordance with section 1128 of the Act and the Regulations, the I.G. did properly exclude the Petitioner from Medicare for a five year period, from August 14, 1988 through August 13, 1993. P.Ex./C.

5. As required by sections 1128(d)(2) and (d)(3)(A) of the Act, the I.G. properly notified Pennsylvania of the Petitioner's exclusion from participation in Medicare and properly directed Pennsylvania to exclude the Petitioner from Medicaid for at least the "same period" of time as the federal exclusion from Medicare.

6. Pursuant to federal direction from the I.G., Pennsylvania properly excluded the Petitioner from Medicaid for the same five year period as the federal exclusion from Medicare, from August 14, 1988 through August 13, 1993.

7. Both the length and the timing of the five year period of exclusion from Medicare, imposed by the I.G., and the five year period of exclusion from Medicaid, directed by the I.G., are reasonable within the meaning of section 1128 of the Act and the Regulations.

8. The State of Pennsylvania's March 30, 1988 Medicaid termination is independent of both the Medicare exclusion and the federally directed Medicaid exclusion. I have no authority to decide any issues with respect to this State imposed termination.

9. The I.G. acted appropriately and properly under the Act and Regulations in this case, and the Petitioner is not entitled to the relief he sought.

DISCUSSION

Section 1128 of the Act clearly requires the I.G. to exclude from Medicare, for a minimum of five years, individuals who are convicted of "a criminal offense related to the delivery of" a Medicare or Medicaid "item or service." The I.G. has no discretion in reducing the period of time for such an exclusion. 42 U.S.C. (c)(3)(B). The I.G. must exclude for at least five years and the exclusion must begin 15 days from the date on the notice.<sup>5/</sup> 42 U.S.C. 1320a - 7(c)(B)(B); 42 C.F.R. 1001.123, 1002.206. This provision of federal law also requires the I.G. to direct any State to exclude such individuals from Medicaid for a minimum of five years, with the five year period being at least "the same as any period" of Medicare exclusion. 42 U.S.C. 1320a-7(a)(1), (c)(3)(B), and (d)(3)(A); 42 C.F.R. 1002.211. The I.G. has no authority to reduce the time or alter the Medicaid period of exclusion, nor does the State, pursuant to the I.G.'s directive, possess any authority to reduce the time or alter the Medicaid period of exclusion. Congressional intent on this matter is clear:

A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . . Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 100-109, 100th Cong. 1st Sess. 2; 1987 U.S. Cong. & Ad. News 682, 686.

In this case, the I.G. properly excluded the Petitioner from participation in Medicare for a five year period, beginning on August 14, 1988 and ending on August 13, 1993. The exclusion by the I.G. resulted from the Petitioner having been "convicted of a criminal offense related to the delivery of" Medicaid services. The I.G. then properly directed Pennsylvania to exclude the Petitioner from the Medicaid program for at least the "same period" as the Petitioner's Medicare exclusion. The State of Pennsylvania complied with this federal direction and properly excluded the Petitioner for a period at least "the same as" the period of the Petitioner's Medicare exclusion. 42 U.S.C. 1320a-7(d)(3)(A). In addition, the Petitioner was separately terminated from participation in

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<sup>5/</sup> The I.G. allowed an additional 5 days for mailing.

the Medicaid program by the State of Pennsylvania under its own authority.

The Petitioner complains that the difference in the timing of the State law Medicaid termination, which was seven months prior to the federally directed Medicaid exclusion, effectively results in a five year and seven month exclusion from Medicaid. The Petitioner argues that this result is due to the I.G.'s instruction to the State of Pennsylvania to exclude the Petitioner from the Medicaid program for at least the "same period" the period of his Medicare exclusion. The Petitioner asserts that an exclusion from Medicaid for a period in excess of five years is both unintended and unreasonable. He argues that the federally directed Medicaid exclusion should run concurrently with the State Medicaid termination (*i.e.*, January 19, 1988 through January 19, 1993) rather than concurrently with the Medicare exclusion (*i.e.*, August 14, 1988 through August 13, 1993). Thus, the issue raised by the Petitioner concerns the reasonableness of the length or period of the federally directed Medicaid exclusion.<sup>6/</sup>

The Petitioner's loss in being effectively excluded from Medicaid for a period in excess of five years, is something for which there is no relief for.<sup>7/</sup> The reason for this is that the Act and Regulations clearly provide no discretion for reducing a five year minimum period of

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<sup>6/</sup> In federal exclusion cases, the Regulations, at section 1000.128(a), enumerate three issues which may be considered by an ALJ in a federal exclusion case. The ALJ may consider whether: (1) the Petitioner was convicted of a criminal offense, (2) the conviction was related to the Petitioner's delivery of Medicare or Medicaid items or services, and (3) the length of the exclusion is reasonable. The Petitioner does not contest the first two issues.

<sup>7/</sup> The only relief available to the Petitioner under the Act and Regulations appears to be pursuant to section 1002.214 of the Regulations, which allows a State to request reinstatement by the I.G. if there is a "shortage of providers or other health care personnel in the area." The Petitioner must first seek such relief from the State, and the I.G.'s decision does not appear to be reviewable. Also, the Petitioner had the option of appealing the August 16, 1988 Notice from Pennsylvania, but solely on the grounds of mistaken identity. I.G. Ex/II.

exclusion or for altering the effective dates of that five year period. The I.G. properly complied with the Act and Regulations in excluding the Petitioner from August 14, 1988 through August 13, 1993, and Pennsylvania correctly followed the I.G.'s directive to exclude the Petitioner from Medicaid for at least the same period. Furthermore, the timing of the I.G.'s Notice in this case, some seven months after the Petitioner's conviction, was reasonable considering that seven months is a reasonable amount of time for the I.G. (1) to obtain "conclusive information" of the Petitioner's program-related conviction in State court, (2) to make a determination regarding that program-related conviction, and (3) to issue his notice of said determination.<sup>8/</sup> In summary, under the circumstances in this case, the I.G. acted reasonably and had no authority under the Act and Regulations to reduce the length or alter the period of the federally directed Medicaid exclusion.

CONCLUSION

I conclude that the Petitioner is not entitled to the relief sought. Accordingly, I decide this case in favor of the I.G. Based on the law and the undisputed material facts in the record, I conclude that the length and the period of the five year Medicare exclusion imposed upon the Petitioner by the I.G. was reasonable and that the period of the federally directed exclusion from the Medicaid program was correctly imposed to run concurrently with the Petitioner's exclusion from Medicare.

IT IS SO ORDERED.

/s/

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Charles E. Stratton  
Administrative Law Judge

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<sup>8/</sup> A delay in issuing a notice of exclusion much beyond seven months from the date of conviction in a minimum five year exclusion case, like this one, might result in the necessity of an evidentiary hearing to determine if the I.G. issued the notice in a timely fashion as required by section 1003.123 of the Regulations.