DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Mark M. Akagi, R.Ph.,	Date: November 6, 1989
Petitioner,	
- v. -	Docket No. C-91
	DECISION CR 53
The Inspector General.	

DECISION AND ORDER

This case is governed by section 1128 of the Social Security Act (Act). Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the January 11, 1989 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and Medicaid programs for five years.[1]

A motion to consolidate this case with the case of Dale Bain v. The Inspector General, Docket No. C-92, was filed on May 4, 1989, and a telephone prehearing conference was held on June 9, 1989. The motion to

[1] Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section 1128(h) and, for the sake of brevity, I refer only to it.

consolidate was granted in my June 12, 1989 Order.[2] Thereafter, the I.G. filed a motion for summary disposition and thirteen exhibits in support of his motion.[3] Petitioner filed a response to the I.G.'s motion, a motion to dismiss, and, in the alternative, Petitioner sought an evidentiary hearing on the issue of the length of exclusion. Oral argument was held by telephone on October 24, 1989, and the record was closed.

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum period of five years is mandated by law.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to" the delivery of an item or service under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

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[2] Petitioner Bain withdrew his request for a hearing and his case was dismissed on September 1, 1989. I.G. Exhibits 2,4,6,8 and 10 are applicable only to Petitioner Bain's case and have not been considered by me in rendering this Decision and Order.

[3] The citations to the record in this Decision and Order are designated as follows:

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

While section 1128(a) is the pertient section at issue in this case, I note that 1128(b) of the Act provides for permissive exclusion for convictions relating to fraud, obstruction of an investigation, and controlled substances, and for nine other types of infractions.

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or the social services program.[4]

ISSUES

1. Whether Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and (i) of the Act.

2. Whether 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.

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

4. Whether the exclusion should be terminated by this ALJ on the ground that the I.G. failed to comply with the Administrative Procedure Act.

5. Whether the I.G. is prohibited by the provisions of 42 U.S.C. 3526(a) from excluding Petitioner.

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[4] The I.G.'s Notice allows an additional five days for receipt.

6. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [5]

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. Petitioner is a licensed pharmacist in the State of Utah. P. Ex. A-1

2. A summons was filed against Petitioner in the Third Circuit Court for the County of Sandy, Utah (the court), alleging that Petitioner had submitted false claims for medical benefits. I.G. Ex. 5

3. On September 1, 1988, the Utah Attorney General filed charges alleging that Petitioner had filed false Medicaid claims. The complaint stated that Petitioner had presented claims for Medicaid benefits for services allegedly performed, knowing the claims to be false, ficticious, or fraudulent. I.G. Ex. 7

4. Petitioner signed a plea agreement in which he agreed to enter a plea to Medicaid fraud and pay the sum of $1000.00 to the Bureau of Medicaid Fraud. I.G. Ex. 9.

5. The court agreed to accept the terms of Petitioner's plea agreement, and Petitioner was advised that if he violated the agreement, the court would enter Petitioner's guilty plea and impose a sentence. I.G. Ex. 11

6. On September 15, 1988, Petitioner pled guilty to one charge of Medicaid fraud. I.G. Ex. 9

7. The court "accepted" Petitioner's plea of guilty of the charge of Medicaid fraud within the meaning of sections 1128(a)(1) and 1128(i)(3) of the Act.

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[5] Any part of this Decision and Order preceding the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is incorporated herein.

8. Petitioner's plea agreement and subsequent guilty plea were an arrangement "where judgment of conviction was withheld", and I conclude that Petitioner was "convicted" within the meaning of section 1128(i)(4).

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

10. On December 22, 1988, the court dismissed the charges against Petitioner. I.G. Ex. 12

11. The December 22, 1988 court order does not alter the fact that Petitioner was "convicted," as a matter of federal law, for purposes of section 1128 of the Act.

12. The I.G. properly excluded Petitioner from participation in Medicare, and properly directed his exclusion from Medicaid, for a period of five years, as required by section 1128 of the Act.

13. The I.G. did not violate the federal Administrative Procedure Act, 5 U.S.C. 551, et seq., by not promulgating regulations to distinguish the exclusion authorities in section 1128(a)(1) and 1128(b)(1) of the Act.

14. The I.G. did not rely upon an "unpublished guidance/directive" in classifying Petitioner as subject to the mandatory exclusion authority of section 1128(a)(1) of the Act.

15. The I.G. is not prohibited by federal law or regulations from participation in the exclusion process.

16. The material and relevant facts in this case are not contested.

17. The classification of Petitioner's criminal offense as subject to the authority of 1128(a)(1) is a legal issue.

18. There is no need for an evidentiary hearing in this case.

19. The I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

I. Petitioner was "Convicted" of a Criminal Offense as a Matter of Federal Law.

Section 1128(i) of the Act provides that an individual has been "convicted" of a criminal offense when:

(1) 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) there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

(3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

(4) 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.

I find and conclude that Petitioner was "convicted" within the meaning of section 1128(a)(1), (i)(3) and (i)(4).

The interpretation of a federal statute or regulation is a question of federal not state law. United States v. Allegheny Co., 322 U.S. 174, 183 (1944); United States v. Anderson Co., Tenn., 705 F.2d 184, 187 (6th Cir., 1983), cert. denied, 464 U.S. 1017 (1984). My task is to interpret the words of section 1128 of the Act in light of the purposes that section 1128 was designed to serve. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

Petitioner argues that no plea of guilty was "accepted" by the court and that Petitioner was, therefore, not convicted within the meaning of 1128(i)(3). He further contends that since no guilty plea was accepted, there is no judgment of conviction to withhold, and, thus, Petitioner was not convicted within the meaning of subsection(i)(4).

In support of his argument that no guilty plea was "accepted" by the court, Petitioner points to the language of the court order of December 22, 1988, which states that "the defendant's plea of guilty which was not received by the court, but held in abeyance ..." I.G. Ex. 12. The proceedings at which Petitioner pled guilty occurred on June 19, 1989. It is clear that the court "accepted" Petitioner's plea of guilty within the meaning of section 1128(i)(3) and held the plea in abeyance. Petitioner was advised that he was giving up his legal rights and acknowledged that he had waived the rights which would have been accorded him in a trial on the charges.

The December 22, 1988 order is irrelevant to whether the plea was "accepted" in the first place. The statutory definition of acceptance of a guilty plea was met on June 19, 1989. The transcript clearly demonstrates that Petitioner pled guilty to Medicaid fraud and that the court "accepted" his plea. I.G. Ex. 11 Accordingly, Petitioner pled guilty and was convicted within the meaning of section 1128(i)(3).

Petitioner also contends that he was not "convicted" within the meaning of subsection (i)(4). He argues that since there is no conviction under subsection (i)(3), there is no judgment of conviction to withhold, and thus, Petitioner was not "convicted" within the meaning of subsection (i)(4). Petitioner entered a plea agreement in which he agreed to enter a plea to Medicaid fraud and pay the sum of $1000.00 to the Bureau of Medicaid Fraud. I.G. Ex. 9 The court held his plea in abeyance and subsequently, upon Petitioner's compliance with the terms of the agreement, the court dismissed the charges. This arrangement is clearly one in which a judgment of conviction has been withheld, and meets the statutory definition of conviction. Therefore, I conclude that Petitioner was also "convicted" within the meaning of 1128(i)(4).

II. Petitioner's Conviction "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128 of The Act.

Petitioner argues that even if I rule that he was "convicted," he should not be excluded because 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, but, rather, relates to the reimbursement function under the Medicaid program.

Petitioner was charged with filing false Medicaid claims and pled guilty to Medicaid fraud. The inquiry is whether the conviction "related to the delivery of an item or service" under Medicare or Medicaid. In the case of Jack W. Greene v. Inspector General, Docket No. C-56, decided January 31, 1989, appeal docketed, DAB No. 89-59, Decision No. 1078 (1989), the Departmental Appeals Board (DAB) addressed this argument and held that "the false Medicaid billing and the delivery of the drugs to the Medicaid recipient are inextricably interwined and therefore 'related' under any reasonable reading of that term".

The record establishes that Petitioner was "convicted" of a criminal offense "related to" the delivery of a Medicaid item or service within the meaning of section 1128 of the Act. He was charged with submitting false claims and pled guilty to Medicaid fraud. The two are also "inextricably interwined" and "related". I conclude that Petitioner's conviction was "related to" the delivery of a Medicaid item or service" within the meaning of 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion Was Required In This Case.

Section 1128(a)(1) of the Act clearly requires the I.G. to exclude individuals and entities from the Medicare program, and direct their exclusion from the Medicaid program, for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act. 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. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

Since Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required to exclude Petitioner for a minimum of five years.[6]

IV. The I.G. Has Complied With The Administrative Procedure Act.

Petitioner argues that the I.G. (1) failed to comply with the federal Administrative Procedure Act, 5 U.S.C. 552(a)(1) and 553, by not promulgating regulations.

This issue was also raised in Greene, supra. The DAB held that the revised statutory provisions concerning a mandatory exclusion on their face cover a conviction for false billing and do not require the promulgation of regulations before they may be implemented.

V. The I.G.'s Participation In The Exclusion Process Does Not Violate The Act.

The I.G.'s "participation" in the exclusion process is not contrary to the Act, because it does not conflict with the prohibition of the "transfer of program operating responsibilities" to the I.G. 42 U.S.C. 3526(a).

The arguments raised here by Petitioner are similar, if not identical, to the arguments raised by Petitioner in Arthur B. Stone, D.P.M., v. The Inspector General, Docket No. C-52, decided May 5, 1989, and Charles W. Wheeler, v. The Inspector General, Docket No. C-61, decided June 8, 1989. As I stated in Stone and Wheeler, I feel that Petitioner's arguments are without merit. The legislative history of the 1987 amendments to the law clearly reflects the intent of Congress, and approves the Secretary's delegation of the exclusion authority to the

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[6] Since I have found and concluded that the mandatory exclusion provisions of section 1128(a)(1) apply in this case, I need not address the issue, raised by the Petitioner, of whether I should make a de novo determination to reclassify the Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

I.G. S. Rep. No. 109, 100th Cong., 1st Sess. 14, reprinted in 1987 U.S. Code Cong. and Admin. News 682, 695.

VI. There Is No Need For An Evidentiary Hearing In This Case.

I also find Petitioner's argument that he is entitled to an evidentiary hearing concerning the classification of his exclusion to be without merit for the same reasons expressed in Stone supra, at p. 15, and Wheeler, supra, at pp. 17 and 18.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. The I.G. is entitled to summary disposition as a matter of law.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare program, and directed his exclusion from the Medicaid program, for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge