DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Michael I. Sabbagh, M.D.,	DATE: FEB 22, 1989
Petitioner,	
- v. -	Docket No. C-59
The Inspector General.	DECISION CR 20

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTIONS FOR SUMMARY DISPOSITION

Petitioner requested a hearing to contest the Inspector General's (the I.G.) determination excluding him from participating in the Medicare program, and directing that he be excluded from participating in State health care programs, for five years.1/ Both parties filed motions for summary disposition of this case. I have considered the supporting memoranda of both parties. Based on the undisputed facts, the law, and the applicable regulations, I conclude that the exclusions imposed and directed by the I.G. are mandatory. There remain no questions of fact, to be addressed at a hearing, which could affect the outcome of this case. Therefore, I am deciding this case in favor of the I.G.

BACKGROUND

On August 31, 1988, the I.G. sent notice to Petitioner, advising him that he was being excluded from participation in Medicare and any State health care programs for a period of five years. Petitioner was advised that his

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1/"State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. 1320a-7(h), to include any State Plan approved under subchapter XIX of the Act (such as Medicaid).

exclusions were due to his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. Petitioner was further advised that the law required minimum five year mandatory exclusions from participation in Medicare and State health care programs for individuals convicted of a program-related offense. The I.G. told Petitioner that, because of the circumstances of his case, he was being excluded for the minimum period required by law.

Petitioner timely requested a hearing as to the exclusions, and the case was assigned to me for a hearing and decision. I conducted a prehearing conference on November 18, 1988, at which both parties expressed their intent to move for summary disposition. I issued a prehearing Order on November 22, 1988, which established a schedule for moving for summary disposition and for responding to such motions. The Order also provided for oral argument on the motions, at the request of either party. The I.G. moved for summary disposition. Petitioner opposed the motion, and filed cross motions for summary relief. Petitioner requested oral argument, and, by agreement of the parties, I conducted oral argument via telephone on February 7, 1989.

ISSUES

The issues raised by the parties in their respective motions are whether:

1. the delegation of authority by the Secretary of Health and Human Services (the Secretary) to the I.G. to determine and impose or direct exclusions pursuant to 42 U.S.C. 1320a-7 is unlawful;

2. the Secretary is required to adopt regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7 before the I.G. may make exclusion determinations pursuant to the law;

3. summary disposition is appropriate in this case;

4. given the undisputed material facts, the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that he be excluded from participation in State health care programs, for five years, is mandated by law; and

5. I have authority to review the I.G.'s decision that there exists no basis to waive the exclusions imposed on Petitioner or to consider Petitioner's request that I grant a waiver from the exclusions that have been imposed on him.

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: Section 1128(a)(1) of the Social Security Act, 42 U.S.C. 1320a-7(a)(1), requires the Secretary to exclude from participation in the Medicare program, and to direct the exclusion from participation in any State health care programs, of any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under Medicare or any State health care program. Exclusions are also mandated by 42 U.S.C. 1320(a)(2), for "any individual or entity that has been convicted . . . of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." "Conviction" is defined at 42 U.S.C. 1320a-7(i) to include those circumstances when: (1) a judgment of conviction has been entered against a physician or individual, regardless of whether there is an appeal pending or the judgment of conviction or other record of criminal conduct has been expunged; (2) there has been a finding of guilt against the physician or individual; (3) a plea of guilty or nolo contendere by the physician or individual has been accepted; and (4) the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld. The law provides at 42 U.S.C. 1320a-7(c)(3)(B), that for those excluded under section 1320a-7(a), "the minimum period of exclusion shall be not less than five years. . . ."

The law also provides the Secretary with discretionary authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in State health care programs, in certain enumerated circumstances. These include conviction "in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." 42 U.S.C. 1320a-7(b)(1). The law does not prescribe a minimum period of exclusion in such cases.

The law further provides that the Secretary may waive exclusions imposed pursuant to 42 U.S.C. 1320a-7(a)(1), in the case of an individual or entity that is the sole community physician or the sole source of essential specialized services in the community, "upon the request of a State." 42 U.S.C. 1320a-7(c)(3)(B). However, "the Secretary's decision whether to waive the exclusion shall not be reviewable." Id..

The current law was enacted in August 1987 and embodies revisions of preexisting law. Prior to August 1987, the law provided, at 42 U.S.C. 1320a-7(a), that the Secretary must bar from participation in Medicare, and direct debarment from participation in State plans approved under title XIX, 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 title XVIII, XIX, or XX . . . ." Unlike current law, the law did not prescribe a minimum suspension or exclusion period for such mandatory suspensions. Furthermore, the law did not grant the Secretary the discretionary exclusion authority now provided by 42 U.S.C. 1320a-7(b)(1).

Both the pre-1987 law and current law provide that an excluded party may request a hearing as to the exclusion. The law presently states, at 42 U.S.C. 1320a-7(f), that an excluded party is entitled to a hearing to the same extent as is provided in 42 U.S.C. 405(b). That section provides that a party entitled to an administrative hearing by virtue of an adverse decision by the Secretary shall be given reasonable notice and opportunity for a hearing before the Secretary "with respect to such decision."

2. Regulations Governing Suspension, Exclusion, or Termination of Practitioners, Providers, Suppliers of Services, and Other Individuals: 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. Regulations governing suspension and exclusion of individuals pursuant to section 1128 and this delegation are contained in 42 C.F.R. Part 1001. Section 1001.123(a) provides that when the I.G. has conclusive information that an individual has been convicted of a program-related crime, he shall give that individual written notice that he is being suspended (excluded) from participation. Section 1001.125(b) establishes criteria for the I.G. to use in determining the appropriate length of exclusions in those

circumstances where the I.G. may exercise discretion. Section 1001.128 provides that an individual excluded based on conviction of a program-related offense may request a hearing before an administrative law judge on the issues of whether: (1) he or she was in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) whether the length of the exclusion is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who has practiced in Michigan. P. Ex. 1/10.2/

2. Petitioner was indicted for, and on March 7, 1988, pleaded guilty to, the crime of Attempted False Medicaid Claim, a high misdemeanor under the laws of the State of Michigan. P. Ex. 1/2, 8; P.'s Memorandum at 1.

3. In his guilty plea, Petitioner admitted submitting a fraudulent claim to the State Medicaid program for reimbursement for an office visit, which in fact did not occur. P. Ex. 1/9, 12. The crime to which Petitioner pleaded guilty exposed him to a potential prison sentence of two years. P. Ex. 1/6.

4. During the hearing on Petitioner's guilty plea, counsel represented to the court that, as a condition for the plea, "the Medical Services Administration, which is Medicaid, and the Department of Social Services will, before sentencing, provide to . . . [Petitioner] a letter affirmatively assuring . . . [him] that as a result of this conviction, Medicaid Services Administration will take no affirmative action against . . . [Petitioner's] present provider enrollment." P. Ex. 1/7.

2/The parties' exhibits and memoranda will be cited as follows:

Petitioner's Exhibit	P. Ex. (number)/(page)
Inspector General's Exhibit	I.G. Ex. (number)/(page)
Inspector General's Memorandum	I.G.'s Memorandum at (page)
Petitioner's Memorandum	P.'s Memorandum at (page)
Inspector General's Reply Memorandum	I.G.'s Reply Memorandum at (page)

5. In October, 1988, the St. Clair, Michigan, county health department requested that Petitioner be allowed to continue treating indigent patients, because Petitioner was "the only OB-GYN specialist from our county accepting new Medicaid General Assistance patients at this time." P. Ex. 2.

6. The offense to which Petitioner pleaded guilty is a "criminal offense related to the delivery of an item or service" under the Medicaid program. 42 U.S.C. 1320a-7(a)(1).

7. Petitioner's guilty plea is a "conviction" as defined by 42 U.S.C. 1320a-7(i).

8. The minimum mandatory exclusion period is five years for a person who has been excluded based on conviction of a criminal offense related to the delivery of an item or service under Medicaid. 42 U.S.C. 1320a-7(c)(3)(B).

9. The Secretary delegated to the I.G. the duty to exclude from participation in Medicare, and to direct the exclusion from participation in State health care programs, persons whose exclusion is required or permitted under 42 U.S.C. 1320a-7. 48 Fed. Reg. 21662, May 13, 1983.

10. I do not have authority to decide whether the Secretary's delegation of duties to the I.G. pursuant to 42 U.S.C. 1320a-7 is lawful. 42 U.S.C. 1320a-7(f); 42 U.S.C. 405(b); 42 C.F.R. 1001.128.

11. I do not have authority to decide whether the Secretary is required to adopt regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7 before the I.G. may make exclusion determinations pursuant to the law. 42 U.S.C. 1320a-7(f); 42 U.S.C. 405(b); 42 C.F.R. 1001.128.

12. There do not exist disputed issues of material fact in this case; therefore, summary disposition is appropriate. See F.R.C.P. 56.

13. The I.G. has excluded Petitioner from participation in the Medicare program and has directed that Petitioner be excluded from participation in State health care programs, for five years, based on Petitioner's conviction of a criminal offense related to

the delivery of an item or service under the Medicaid program. The exclusions are mandatory and for the minimum period of time required by law. 42 U.S.C. 1320a-7(a)(1); (c)(3)(B).

14. I do not have authority to review the I.G.'s determination that there exists no basis to waive the exclusions imposed on Petitioner. 42 U.S.C. 1320a-7(c)(3)(B). I have no authority to consider Petitioner's request that the exclusions be waived. 42 U.S.C. 1320a-7(c)(3)(B); 42 C.F.R. 1001.128.

ANALYSIS

Petitioner pleaded guilty to, and was convicted of, a crime involving a claim he submitted for Medicaid reimbursement. As a consequence of Petitioner's conviction, the I.G. imposed on Petitioner a five-year exclusion from participating in Medicare and directed that he be excluded from participating in State health care programs for five years. Petitioner challenged his exclusions, asserting that: (1) the Secretary's delegation of authority to the I.G. to impose and direct exclusions pursuant to 42 U.S.C. 1320a-7 is unlawful; (2) Petitioner's exclusions are contrary to law because the Secretary has not yet adopted regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7, and the I.G. is instead relying on a "verbal directive, rule, or writing" to determine exclusions; (3) the I.G. improperly characterized the crime for which Petitioner was excluded as an offense "related to the delivery of an item or service" under the Medicare or State health care programs and improperly imposed and directed mandatory five-year exclusions on Petitioner pursuant to 42 U.S.C. 1320a-7(a)(1), whereas the offense for which he was convicted should be characterized as an offense for which discretionary exclusions, rather than mandatory exclusions, would be appropriate, pursuant to 42 U.S.C. 1320a-7(b)(1); and (4) assuming Petitioner was properly excluded pursuant to 42 U.S.C. 1320a-7(a)(1), his exclusions ought to be waived because he is the sole provider of Ob-Gyn medical services to indigent patients in St. Clair County, Michigan.

Petitioner also contends that, in any event, he is entitled to an evidentiary hearing as to these issues. He asserts that "this matter is factually contested" and that, therefore, an evidentiary hearing is required to resolve contested issues. P.'s Memorandum at 44. He

further asserts that an evidentiary hearing is necessary for fact finding on "constitutional issues" to "permit subsequent judicial review." Id. at 50.

I have carefully considered the contentions of the parties, their exhibits, and relevant law and regulations. I conclude that the Secretary's delegation of authority to me to hear and decide cases concerning exclusions does not include jurisdiction to decide whether the Secretary's delegation of authority to the I.G. was lawful, or whether the Secretary is required to issue regulations to implement the 1987 revisions to 42 U.S.C. 1320a-7 before the I.G. may make exclusion determinations pursuant to the law. I conclude that when the relevant factual assertions of the parties are considered in a light most favorable to Petitioner, there exist no disputed issues of material fact in this case and, consequently, summary disposition is appropriate.

I further conclude that the offense for which Petitioner was convicted is an offense "related to the delivery of an item or service" under the Medicare and State health care programs, for which exclusions of at least five years are mandated by 42 U.S.C. 1320a-7(a)(1). I conclude that I have no authority to decide the propriety of any decision the I.G. may have made concerning Petitioner's request for waiver of his exclusions. Furthermore, I have no authority to consider a request that I determine whether a waiver is appropriate in this case.

Several of the arguments made by Petitioner in this case are identical to arguments made by petitioner in Jack W. Greene v. The Inspector General, Docket No. C-56. Indeed, counsel for Petitioner also represented petitioner in Greene. I will not repeat verbatim my analysis in the Greene decision in deciding this case; however, where relevant, I will cite to aspects of that decision.

1. I do not have authority to decide whether the Secretary lawfully delegated to the I.G. the duty to impose and direct exclusions pursuant to 42 U.S.C. 1320a-7. Petitioner contends that the duty to impose and direct exclusions is a "program operating responsibility" which is prohibited from transfer to the I.G. by 42 U.S.C. 3526(a). P.'s Memorandum at 30. Petitioner argues that exclusions imposed or directed pursuant to this allegedly illegal delegation are invalid. Id. at 31. Therefore, according to Petitioner, I should enter a "default judgment" (summary disposition) in his favor, voiding the exclusions imposed and directed against him by the I.G.

Id. at 32. The I.G. disputes these contentions, asserting that the delegation of exclusion authority to the I.G. is not a "program operating responsibility" as is defined by law. Furthermore, according to the I.G., the delegation has been expressly condoned and directed by Congress. I.G.'s Memorandum at 3-6.

The identical contentions as to the delegation of exclusion authority were raised by petitioner in Greene. I held in Greene that neither 42 U.S.C. 1320a-7 nor 42 U.S.C. 405(b) (incorporated by reference in 42 U.S.C. 1320a-7) provided for administrative review of regulations or policy determinations in exclusion cases. Furthermore, the Secretary's regulatory grant of jurisdiction to administrative law judges to hear and decide exclusion cases did not include a grant of authority to decide the lawfulness of regulations and policies. 42 C.F.R. 1001.128. I concluded that I did not have authority to hear and decide contentions concerning the lawfulness of delegations of authority from the Secretary to the I.G. Neither party to this case has provided anything which adds to the arguments presented by the parties in Greene. Therefore, I again conclude that I do not have authority to hear and decide Petitioner's contentions concerning the delegation of exclusion authority to the I.G. I make no findings or conclusions as to the merits of this issue, and I deny Petitioner's motion for summary disposition.3/

2. I do not have authority to decide whether the Secretary is required to adopt regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7 before the I.G. may make exclusion determinations pursuant to the law. Petitioner argues that the exclusions imposed on him are invalid because the Secretary has not adopted regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7. Petitioner premises this conclusion on his contention that the 1987 law is ambiguous. According to Petitioner, the I.G. is interpreting the ambiguous provisions of the law in a manner which classifies Petitioner's case as a "mandatory" exclusion case pursuant to 42 U.S.C. 1320a-7(a)(1). The Petitioner argues that this alleged classification is invalid because the Secretary has not first conducted a rulemaking proceeding pursuant to the Administrative Procedure Act. 5 U.S.C. 552 et seq..

3/I make no finding as to Petitioner's right to challenge the lawfulness of regulations or policies on appeal.

Instead, according to Petitioner, the I.G. is relying on "unpublished, internal . . . guidelines/directives" to interpret and apply the law. P.'s Memorandum at 7. Petitioner also argues that these alleged acts or omissions by the Secretary are unfair because Petitioner, at the time he pleaded guilty, did not know that his offense would be characterized as one which mandated exclusions. P.'s Memorandum at 2-11.

In response to these assertions, the I.G. contends that no regulations are required for an agency to carry out its statutory responsibilities, so long as it proceeds in accordance with ascertainable standards. Petitioner's exclusions were imposed according to such standards and, therefore, were lawful. I.G.'s Memorandum at 6-7. Moreover, according to the I.G., Petitioner received more than adequate notification of the standards pursuant to which the I.G. proceeded. Id..

As with the issue of the lawfulness of the delegation of exclusion authority to the I.G., this issue was argued by petitioner in Greene. I held in my Greene decision that I am without authority to decide the issue for the same reason that I lack authority to decide the lawfulness of the Secretary's delegations. I decided that neither the law nor regulations conferred jurisdiction upon me to decide the circumstances in which the Secretary must issue regulations. I held that my jurisdiction is limited by law to deciding whether the I.G. has acted reasonably in applying law, regulations, and policies to the facts of individual cases. 42 U.S.C. 1320a-7(f); 42 U.S.C. 405(b); 42 C.F.R. 1001.128.

Neither party to this case has offered anything which adds to the arguments presented in Greene. Therefore, I again conclude that I am without jurisdiction to decide whether the Secretary is obligated to issue regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7.4/

3. Summary disposition is appropriate in this case. Petitioner has advanced several arguments to support his contention that this case cannot be decided without an evidentiary hearing. Petitioner contends that a hearing is necessary to adduce evidence which will clarify the

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4/It is not necessary for me, at this point, to discuss Petitioner's claim that the law is ambiguous. However, as my discussion at Part 4 of this Analysis makes clear, the law is not ambiguous.

nature of the offense pleaded to by him, and how it should be classified pursuant to 42 U.S.C. 1320a-7. He argues that if his offense falls under the "discretionary" exclusion provisions of 42 U.S.C. 1320a-7(b)(1), a hearing will be necessary to determine which, if any, exclusions are reasonable. He asserts that a hearing is required to determine whether a waiver of exclusions is appropriate in his case. Finally, Petitioner contends that an evidentiary hearing is necessary in order to make a factual record upon which to premise appeals concerning the constitutionality of the actions taken by the I.G. P.'s Memorandum at 44-50.

Summary disposition has long been utilized as an efficiency-promoting mechanism to decide federal cases where there exist no disputed issues of material fact or where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. 56 F.R.C.P; Collins v. American Optometric Ass'n., 693 F. 2d 636 (7th Cir. 1982). The remedy must be cautiously employed to assure that parties are not unfairly deprived of their hearing rights. Summary disposition should not be granted unless, after viewing the facts in the light most favorable to the party against whom the motion is made, the decision-maker is convinced that there exists no genuine issue of material fact remaining for trial; the moving party then is entitled to a decision as a matter of law. Continental Casualty Co. v. City of Richmond, 763 F.2d 1076, 1078-79 (9th Cir. 1985); Lang v. New York Life Ins. Co., 721 F.2d 118, 120 (3rd Cir. 1983); D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1146 (Fed. Cir. 1983). Summary disposition is an appropriate method of disposing of a legal question of statutory construction in which the legislative history and policy are the primary considerations. Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87, 92 (Temp. Em. Cir. 1977).

It is clear that 42 U.S.C. 1320a-7 and 42 U.S.C. 405(b) require that petitioners in exclusion cases be granted hearings on all issues of disputed material facts. However, the law is silent as to whether summary disposition is appropriate in cases where material facts are not in dispute. I conclude that, so long as petitioners are provided hearings on issues of disputed material fact, there is nothing in the law which would prohibit use of summary disposition as an appropriate technique for deciding cases where material facts are not controverted or where the only issues involve questions of law.

Petitioner's contentions that an evidentiary hearing is necessary in this case are without merit. He asserts that a "factual controversy" exists concerning the nature of his offense and how it should be characterized pursuant to the law. However, Petitioner and the I.G. agree that Petitioner pleaded guilty to an attempt to defraud the Medicaid program and rely on the same document to establish these facts. See P. Ex. 1; I.G. Ex. 1. My findings of fact concerning the offense pleaded to by Petitioner are based entirely on Petitioner's own exhibits and his allegations and accept as true the facts most favorable to Petitioner. See Findings 1-5. The area of disagreement between the parties is the manner in which Petitioner's conviction ought to be characterized under the law. That is a legal question.

At oral argument on the motions for summary disposition, Petitioner's counsel stated that he wanted to offer expert testimony as to whether the offense of which Petitioner was convicted is an offense encompassed by 42 U.S.C. 1320a-7(a)(1). He also stated that he wished to take the testimony of the I.G. employee who reviewed Petitioner's case in order to ascertain the criteria that employee used in deciding that the case fell under the aforesaid subsection. But how the offense of which Petitioner was convicted is classified pursuant to 42 U.S.C. 1320a-7 is not a question of fact, but of law. Expert opinion, or the state of mind of the I.G.'s employees, is irrelevant to this issue.

Petitioner's assertion that a hearing is necessary to determine which, if any, discretionary exclusions should be imposed pursuant to 42 U.S.C. 1320a-7(b)(1) hinges on his claim that the offense to which he pleaded guilty should be classified pursuant to that statutory subsection. As I shall discuss at Part 4 of this Analysis, Petitioner's offense falls within the ambit of 42 U.S.C. 1320a-7(a)(1), and not subsection (b)(1). Therefore, Petitioner's argument fails.

I also conclude that Petitioner's claim that he must have a hearing to offer evidence regarding why he deserves a waiver from the exclusions imposed on him is without merit because there exists no authority for me to review the I.G.'s determination on that issue or to independently decide whether a waiver should be granted. See Part 5 of this Analysis. In so concluding, I accept as true, albeit irrelevant, that the St. Clair County, Michigan, health department has certified that Petitioner is the only Ob-Gyn specialist in St. Clair County accepting indigent

referrals, and that Petitioner's guilty plea was conditioned on the prosecutor's representation that Medicaid would provide Petitioner with a letter assuring him that it would take no action against his "present provider enrollment" as a result of the conviction. See Findings 4 and 5.

Petitioner argues that he must take testimony as to the I.G.'s exclusion determination process, so that he can challenge its constitutionality. But there is not any meaningful factual dispute regarding what the I.G. has done in this case. The I.G.'s exclusion determinations, and the reasoning which supports those determinations, are described in the notice of exclusion which the I.G. sent to Petitioner on August 31, 1988.

I conclude that there are no disputed issues of material fact in this case. The only issues in dispute are legal issues. Summary disposition is, therefore, an appropriate mechanism for deciding the matter.

4. Given the undisputed material facts, the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that he be excluded from participation in State health care programs, for five years, is mandated by law. The undisputed facts of this case are that Petitioner pleaded guilty to, and was convicted of, a criminal offense consisting of attempted fraud against the Michigan state Medicaid program. Specifically, Petitioner, a physician, sought to obtain reimbursement from the program for an office visit by a patient when, in fact, the service that he rendered was a telephone consultation--a service not covered by the Medicaid program. Petitioner attempted to fraudulently obtain reimbursement which he was not owed and to deceive the Medicaid program into making a payment to Petitioner which it was not obligated to make.

The I.G. excluded Petitioner from participation in the Medicare program, and directed that he be excluded from participation in State health care programs, for five years, pursuant to 42 U.S.C. 1320a-7(a)(1) and (c)(3)(B). Subsection (a)(1) requires the Secretary to exclude from participation in Medicare and to direct the exclusion from participation in State health care programs (including Medicaid) "any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service" under Medicare or any State health care program. (Emphasis added.) Subsection (c)(3)(B) directs that for those parties excluded pursuant to

subsection (a), the minimum exclusion period shall be for five years.

The I.G. contends that, given the undisputed facts of this case, the law requires that Petitioner be excluded from participation in Medicare and State health care programs for at least five years. I.G.'s Memorandum at 16-25.

Petitioner asserts that the I.G. has mischaracterized the offense to which Petitioner pleaded guilty and was convicted. According to Petitioner, his conviction was for "financial misconduct" and was not related to the delivery of an item or service under the Medicare or State health care programs. Petitioner contends that exclusions of parties convicted of such offenses are governed by 42 U.S.C. 1320a-7(b)(1), which gives the Secretary discretion to exclude from Medicare and to direct the exclusion from participation in State health care programs, parties convicted "in connection with the delivery of a health care item or service with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other misconduct." There is no statutory requirement that such exclusions be for a minimum period. Therefore, according to Petitioner, if any exclusion is appropriate, it must be determined without regard to statutory minimum standards. P.'s Memorandum at 23-29.

The crime committed by Petitioner is not materially different from that committed by the petitioner in the Greene case. Petitioner in Greene was convicted of fraud against the Tennessee Medicaid program. His crime consisted of substituting a generic drug for a brand name drug, and billing the program for the more expensive brand name drug. In Greene and the present case, the petitioners attempted to obtain reimbursement for items or services which were not rendered as claimed. Both cases, therefore, involve fraudulent acts against Medicaid programs, related to the delivery of services pursuant to those programs.

In Greene, I concluded that the conduct at issue fell within the ambit of the mandatory exclusion provisions of 42 U.S.C. 1320a-7(a)(1) and not the permissive exclusion provisions of 42 U.S.C. 1320a-7(b)(1). My conclusion was based on the plain meaning of the law, comparison of the current law with the pre-1987 version, and legislative

history. Petitioner, in this case, has simply reiterated the arguments that were made by the petitioner in Greene. He has offered nothing new which would derogate from my analysis or my conclusion.

The plain meaning of 42 U.S.C. 1320a-7(a)(1) is that individuals or entities who are convicted of "financial" crimes against the Medicare or State health care programs, including all forms of fraudulent billing schemes directed against those programs, must be excluded from participation. That meaning is evident when the section is read in context with the other sections of 42 U.S.C. 1320a-7. Congress' intent was to require exclusion of those individuals or entities who committed offenses directed against the Medicare and State health care programs and to permit exclusion of those individuals or entities who committed offenses directed against government-financed health care programs other than Medicare or State health care programs. See 42 U.S.C. 1320a-7(b)(1).

The law is the latest version of a series of Congressional enactments which have progressively strengthened remedies against providers of services and others who commit crimes related to or directed against government-financed health care programs. In 1977, Congress passed a law requiring the Secretary to suspend physicians or practitioners convicted of criminal offenses related to their involvement in Medicare or State health care programs. 91 Stat. 1175, 1192-1193 (1977) (codified as section 1862(e)(1) of the Social Security Act). By its terms and history, this mandatory exclusion law was directed against physicians or practitioners who were convicted of fraud against the Medicare or State health care programs. In the legislative history to the law, Congress specifically stated its intent to mandate exclusion of those who were convicted of acts of fraud against these programs. H.R. Rep. No. 95-393-Part II, 95th Cong., 1st Sess. 44 (1977).

The law was revised in 1980 to assure that exclusions would also be imposed against health professionals other than physicians who committed program-related crimes. 94 Stat. 2599, 2619 (1980) (codified as section 1128(a) of the Social Security Act). The 1980 revision maintained the mandatory exclusion features of the 1977 enactment, but broadened the scope of its coverage.

The current law was adopted by Congress in August 1987. Congress again broadened the reach of the law by adding sections which: (1) required exclusion of individuals or

entities from participation in the Medicare and State health care programs who were convicted of offenses involving patient neglect or abuse (42 U.S.C. 1320a-7(a)(2)); and (2) permitted exclusion of individuals or entities convicted of a range of other offenses, including fraud directed at government-financed health care programs other than Medicare or Medicaid. See 42 U.S.C. 1320(b)(1).

Petitioner would stand this history on its head. The thrust of his argument is that in 1987 Congress weakened the mandatory exclusion requirements of 42 U.S.C. 1320a-7(a)(1) by enacting subsection (b)(1). He asserts that exclusions which were mandated prior to the 1987 enactment, including exclusions based on convictions for fraud against Medicare or State health care programs, became discretionary by virtue of the 1987 revision. I conclude that this argument ignores both the plain meaning of the law and Congress' intent as expressed through legislative history and is without merit. As I noted in Greene, this argument can only appear credible if subsection (b)(1) is read out of context, without reference to the rest of the law.

Petitioner attempts to distinguish this case from Greene by arguing that in Greene the offense involved charging more for a covered item or service than Medicaid was required to reimburse, whereas in the present case the offense involved an attempt to obtain reimbursement for an act or service that was not covered by the Medicaid program. He argues that even if some "financial crimes" fall within the ambit of 42 U.S.C. 1320a-7(a)(1), the offense committed by him does not, because it did not relate to a service actually rendered and reimbursable under the Medicaid program. According to Petitioner, a fraudulent claim for reimbursement which represents that a covered service had been rendered when, in fact, it had not would not fall within the coverage of the section, even if a fraudulent overcharge for a covered service does.

This is a distinction without a difference. The language of 42 U.S.C. 1320a-7(a)(1) is plainly broad enough to include false claims as well as overcharges. The history of the law makes it clear that a primary objective of Congress has always been to mandate exclusion of those who sought to defraud Medicare and State health care programs with charges for fictitious services, as this Petitioner did. In the legislative history to the 1977 enactment, Congress stated that:

> Perhaps the most flagrant fraud involves billings for patients whom the practitioner has not treated. A related form of fraud involves claims for services to a practitioner's patients that were not actually furnished and intentionally billing more than once for the same service.

H.R. Rep. No. 95-393-Part II, 95th Cong., 1st Sess. 44 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 3050. (Emphasis added.) Legislative revisions since 1977 (1980 and 1987) do not suggest that Congress' intent is any different today than it was then.

I conclude that this case involves a conviction of a criminal offense related to the delivery of an item or service under the Medicaid program, and is governed by the mandatory exclusion provisions of 42 U.S.C. 1320a-7(a)(1).5/

5. I do not have authority to review the I.G.'s decision that there exists no basis to waive the exclusion imposed on Petitioner or to consider Petitioner's request that I grant a waiver from the exclusions that have been imposed on him. Petitioner has produced a letter from the St.Clair County, Michigan, health department which states that he is the only provider of Ob-Gyn services in that county willing to accept referrals of indigent patients, and Petitioner requests that he be allowed to continue serving them. See Finding 5. He argues that the I.G. should have considered this as a request to waive the exclusions imposed on him. Alternatively, he argues that I should construe this letter to be a waiver request and either waive the exclusions or grant a hearing so that he may prove that a waiver is justified.

5/It was represented at Petitioner's plea hearing that, as a condition for his plea, state authorities would provide him with a letter assuring Petitioner that they would take no action against Petitioner's provider enrollment. Petitioner has not argued that state authorities have authority to prevent exclusions from being directed pursuant to 42 U.S.C. 1320a-7, but he has contended that the plea condition should be viewed as a mitigating circumstance in determining the length of his exclusion. However, the exclusions imposed on Petitioner are mandatory, and Petitioner received the minimum prescribed exclusions. Mitigating facts cannot be considered in this case.

The I.G. challenges the significance of the letter and has produced letters from the Michigan Department of Social Services which arguably dispute the conclusions set forth in the letter from the County health department. Furthermore, the I.G. argues that I lack authority to review waiver decisions or to independently decide whether a waiver of exclusions should be granted.

The law provides that the Secretary may waive exclusions imposed pursuant to 42 U.S.C. 1320a-7(a)(1), "upon the request of a State," "in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community." 42 U.S.C. 1320a-7(c)(3)(B). The Secretary's decision whether to waive exclusions "shall not be reviewable." Id..

It is unclear from the record of this proceeding whether "a State" has actually requested that Petitioner's exclusions be waived. The letter request is from a County department, and not from the State Department of Social Services or from some other State government authority. It is not addressed to the Secretary, but "to whom it may concern," and it does not specifically request that the Secretary grant waivers. It is also unclear whether the Secretary or his delegate, the I.G., has denied the request, or simply not considered it. I need not resolve these ambiguities, because I am without authority to order relief based on their resolution.

The law is specific in its injunction that the Secretary's decisions on waiver requests are not reviewable. Irrespective of whether the "decision" at issue is to deny or to not consider a request, I do not have authority to review that decision.

Petitioner has urged that, as the Secretary's delegate to hear and decide exclusion cases, I have the authority to grant a waiver request, even if the I.G. has not made a determination on the request. This assertion is incorrect. There is nothing in the law or regulations which either states or suggests that the Secretary has delegated to administrative law judges the authority to consider waiver requests. The administrative law judge's jurisdiction in hearings concerning exclusions is limited to those issues specified in 42 C.F.R. 1001.128(a)(1)-(3). The issues which may be heard and decided do not include the issue of waiver.

CONCLUSION

Based on the undisputed material facts, the law, and regulations, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge