DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
Lectoy T. Johnson, M.D.,	)	DATE: JUL 3, 1989
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-69
	)	
The Inspector General.	)	DECISIOM CR 32
	)	

DECISION AND ORDER

The Petitioner requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude him from participation in the Medicare and Medicaid programs for a period of five years.[1] This Decision and Order resolves this case on the basis of written briefs and a stipulated record. I hereby deny the Petitioner's motion for summary disposition and I conclude that the I.G. was required under federal law to exclude the Petitioner for five years from Medicare and Medicaid.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

This case is governed by section 1128 of the Social Security Act (Act), codified at 42 U.S.C. 1320a-7 (West U.S.C.A. Supp., 1988). Section 1128(a) of the Act, headed " Mandatory exclusion," provides in subsection (1) for the exclusion from Medicare, and a directive to the State to exclude from State health care programs, any individual who is "convicted of a criminal offense related to the delivery of an item or service" under the

[1] Section 1128 of the Act provides for an exclusion from the Medicare program and "any State health care program" as defined in section 1128(h). The Medicaid program is only 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.

Medicare or Medicaid programs. Section 1128 (c)(3)(B) provides that the period of exclusion from Medicare and Medicaid, for a person convicted of a criminal offense related to the delivery of an item or service, shall be for a minimum period of five years.[2]

The term "convicted" is defined in section 1128(i) to include when a plea of guilty or nolo contendere has been "accepted by a Federal, State, or local court" (subsection (i)(3)) and when under a "first offender or other program" a "judgment of conviction has been withheld" (subsection (i)(4)).

II. The Federal Regulations.

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

In accordance with section 498.5(i), a practitioner, provider, or supplier who has been excluded from program coverage is "entitled to a hearing before an ALJ (Administrative Law Judge)." Pursuant to section 1001.128, an individual who has been excluded from participation has a right to request a hearing before an ALJ on the issues of whether: (1) he or she was, in fact, convicted; (2) the conviction was related to the delivery of an item or service under Medicare or Medicaid; and (3) the length of the exclusion is reasonable.

Section 1001.123(a) requires the I.G. to send written notice of his determination to exclude an individual or entity from participation in Medicare and Medicaid when he has "conclusive information" that the individual or entity has been convicted of a crime related to the delivery of an item or service under Medicare or Medicaid.[3]

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[2] Before August 1987, the Act did not prescribe a minimum period of exclusion.

[3] Section 1001.123 provides that the period of exclusion is to begin 15 days from the date on the notice; however, the I.G. allowed five days for mailing. 42 C.F.R. 1001.123.

III. Texas Code Of Criminal Procedure.

The Texas Code of Criminal Procedure states that the trial court, after (1) receiving a plea of guilty or a plea of nolo contendere, (2) hearing the evidence, and (3) finding that the evidence substantiates a defendant's guilt, may defer further proceedings without entering an adjudication of guilt, and place the defendant on probation. Article 42.12, Section 3d. Upon expiration of the defendant's term of probation, if the court has not proceeded to adjudication of guilt, it "shall dismiss the proceedings against the defendant and discharge him." Id. at 3d.(c). Cf., Article 42. 12, Section 7. Section 3d.(c) also states:

> A dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense, except that upon conviction of a subsequent offense, the fact that the defendant had previously received probation shall be admissible before the court or jury to be considered on the issue of penalty.

BACKGROUND

By letter dated October 14, 1988 (Notice), the I.G. notified the Petitioner that, as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid, he would be excluded from participation in Medicare and Medicaid for a mandatory five year period, commencing 20 days from the date of the Notice. The I.G.'s stated basis for the exclusion was the Petitioner's conviction in the State Court in Harris County, Texas, of a criminal offense related to the delivery of an item or service under Medicaid.

By letter received in the Dallas, Texas Regional Office of the Department of Health and Human Services (DHHS) on November 18, 1988, the Petitioner requested a hearing on the I.G.'s determination. (The Petitioner's letter was dated August 28, 1988 and the I.G. deemed it to be a timely request for a hearing. See December 9, 1988 letter from James F. Patton to the Petitioner.) This case was received in the Civil Remedies Division on December 12, 1988 and I held a prehearing telephone conference call on January 17, 1989, at which time I determined that the issues raised by the Petitioner's hearing request were legal issues, which could be further developed by the parties in written briefing and that there was no dispute as to any material fact. As

reflected in the January 23, 1989 Prehearing Order and Schedule for Filing Motions for Summary Disposition, I scheduled a subsequent conference call for April 5, 1989 (after the conclusion of the briefing process). The purpose of the subsequent call was to determine whether to schedule oral argument, an evidentiary hearing, or to proceed to decision based on the written record. During the April 5, 1989 call, I asked the Petitioner to file a short reply brief addressing why the decision in the case of Carlos Z. Zamora, M.D., v. The Inspector General, Civil Remedies Docket No. C-74, decided March 30, 1989 (pending on appeal under Docket No. 89-100), should not control this case. I also gave either party until May 10, 1989 to request oral argument. Neither party requested oral argument.

EVIDENCE

The material facts in this case are stipulated to and evidenced by exhibits concerning the Petitioner's plea of nolo contendere, such as the probation order and deferment of adjudication of guilt (I.G. Ex 1).[4] See also Tape (containing the stipulation by the parties as

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

February 15,1989 Stipulation	2/15 Stip (number)
March 17, 1989 Stipulation	3/17 Stip (number)
Tape of April 5, 1989 telephone conference	Tape
Petitioner's Brief	P Br (page)
Petitioner's Reply Brief	P Rep Br (page)
Petitioner's Additional Brief	P Add Br (page)
Petitioner's Exhibit	P Ex (number)/(page)
I.G. Brief	I.G. Br (page)
I.G. Reply Brief	I.G. Rep Br (page)
I.G's Exhibit	I.G. Ex (number)/ (page)

By letter dated February 15, 1989, the I.G. filed his proposed stipulations of material facts in this matter. By letter dated March 17, 1989, the Petitioner filed his proposed stipulations of material facts. During the April 5, 1989 telephone conference call, the parties each agreed to the factual stipulations made by the other. (Neither party agreed to any conclusions of law stated by the other in the stipulations.) References to the stipulations are by the dates the stipulations were proposed.

to the authenticity of all exhibits).[5] The Petitioner acknowledges that he pleaded nolo contendere in State court to nine counts of securing execution of a document by deception, specifically submitting a false Medicaid claim to obtain a payment in the form of a check.

ISSUE

The sole issue presented in this case is whether the Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and (i) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [6]

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

1. The Petitioner is an anesthesiologist and has been enrolled as a physician participating in the Medicaid program since August 15, 1985. 2/15 Stip 1,2; 3/17 Stip 1,2.

2. On August 20, 1987, the Petitioner was indicted in the 174th District Court of Harris County, Texas of nine counts of securing execution of a document by deception, TEXAS PENAL CODE ANN. Section 32.46; specifically, submitting a false Medicaid claim to obtain payment in the form of a check. 2/15 Stip 3; 3/17 Stip 3.

3. On March 28, 1988, the Petitioner pleaded no contest (I.G. Ex 1) or nolo contendere to the above criminal offense and the court deferred adjudication of his guilt and placed him on probation for one year. 2/15 Stip 4; 3/17 Stip 4.

4. The conditions of the Petitioner's probation were controlled by the Texas Code of Criminal Procedure, Article 42.12, Section 3d. Tape; I.G. Ex 1. See also, Texas Code Crim. Pro., Art. 42.12, Section 7.

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[5] During the April 5 call, the Petitioner also stipulated that the Exhibits attached to the I.G.'s February 15 submission were authentic.

[6] 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.

5. The Petitioner was "convicted" of a criminal offense "related to the delivery of an item or service" under Medicaid, within the meaning of sections 1128(a)(1) and 1128(i)(3) and (i)(4) of the Act, notwithstanding the provisions of Art. 42.12 of the Texas Code of Criminal Procedure, or the terms of any Orders which may be, or may have been, entered in Texas State courts pursuant to that State law provision.

6. In accordance with section 1128 of the Act, the Petitioner was properly excluded from participation in Medicare and Medicaid for a period of five years.

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

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

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

DISCUSSION

I. The Petitioner Was "Convicted" Of A Criminal Offense As A Matter Of Federal Law.

The Petitioner argued that he received deferred adjudication treatment before deferred adjudication was considered to be within the definition of "convicted" under applicable federal law. The Petitioner argued that the definition of "convicted" at the time of his indictment on August 20, 1987 and his deferred adjudication on March 28, 1988 was as follows:

> (i) Convicted defined
> For purposes of subsections (a) and (b) of this section, a physician or other individual is considered to have been "convicted" of a criminal offense--
>
> (1) when a judgment of conviction has been entered against the physician or individual by a Federal, State, or local court, regardless of whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the physician or individual by a Federal, State, or local court;

> (3) when a plea of guilty or nolo contendere by the physician or individual has been accepted by a Federal, State, or local court; or;
>
> (4) when the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld. [Emphasis Added.]

See P Br 3.

The Petitioner argued that the definition of "convicted" in section 1128 (i)(4) of the Act as underlined above did not include deferred adjudication and was not amended to include deferred adjudication until the July 1988 amendment, some three months after the Petitioner was sentenced. P Br 3, 4. See Pub. L. 100-360, Section 411, July 1, 1988. The Petitioner argued further that deferred adjudication was not contemplated by Congress in defining "convicted" prior to that time, and that the July amendment cannot be applied retroactively. P Br 4, 5.

The I.G. argued that he was not applying the July 1988 amendment retroactively, because deferred adjudication was contemplated under the definition effective at the time of the Petitioner's plea. I.G. Rep Br 1, 2. The I.G. argued that the addition of the term "deferred adjudication" to section (i)(4) was merely a "technical amendment." I.G. Rep Br 2, 3. Neither party directly or fully addressed the applicability of section 1128(i)(3) of the Act to the facts here.

I find and conclude that the Petitioner was "convicted" within the meaning of sections 1128(a)(1) and (i)(3) of the Act because he pleaded nolo contendere to the charges against him and the State Criminal Court "accepted" his plea. Section 1128(i)(3) provides that "convicted" includes a plea of nolo contendere "accepted by a Federal, State, or local court." See Arthur B. Stone, D.P.M. v. The Inspector General, Civil Remedies Docket No. C-52, decided May 5, 1989.

As I said in Stone, the term "accepted" in section 1128(i)(3) is defined by Webster's Third New International Dictionary, 1976 Unabridged Edition, as the past tense of "to receive with consent," and is the opposite of the term rejected. The State Criminal Court did not reject the Petitioner's plea. Quite the contrary, the State Criminal Court "accepted" the Petitioner's plea within the meaning of section 1128(i)(3). Once that happened, the provisions of

section 1128(i)(3) were triggered, and what happened after that is of no consequence to the determination that the Petitioner was "convicted," as a matter of federal law.

The circumstances of the Petitioner's case fall not only within the plain meaning of subsection (i)(3), but within the plain meaning of subsection (i)(4), as well. As of the date the Petitioner entered his plea, the latter subsection included within the definition of "convicted" the situation in which "the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld." The Order memorializing the Petitioner's plea is captioned "Deferment of Adjudication." I.G. Ex 1. Pursuant to Texas law, the Petitioner could have the proceedings dismissed and be discharged based on satisfactory completion of his probation. On its face, the treatment of the Petitioner's case by the Texas Court falls within the term "other program where judgment of conviction has been withheld." See Carlos Z. Zamora,M.D., v. The Inspector General, supra.

The Zamora case involved essentially the same law and facts as this case. Dr. Zamora pleaded nolo contendere in a Texas State court to a criminal offense related to the delivery of an item or service under Medicaid. He was placed on probation under the Texas Code of Criminal Procedure, Article 42.12, Section 7, a later section of the same Article involved in this case (i.e., 3d.) and having essentially the same effect as 3d for purposes relevant here. Dr. Zamora successfully completed his probation and his prosecution was subsequently dismissed in accordance with the terms of section 7. Zamora Decision, pp. 5,6.

Dr. Zamora made essentially the same arguments presented by the Petitioner in this case. Dr. Zamora's case was somewhat stronger than the Petitioner's here. Dr. Zamora had his record "expunged" upon satisfactory completion of his probation, whereas the Petitioner here did not argue that he had completed probation or that his nolo contendere plea had been withdrawn.

The question before the court in Zamora was whether, under the same version of section 1128(i) of the Act as was in effect at the time of the nolo contendere plea in

this case Dr. Zamora was "convicted."[7] The ALJ hearing that case determined that he was, both under sections i(3) and i(4). See Zamora Decision, pp. 7, 8.

During the April 5, 1989 telephone conference call, mentioned above, I informed the Petitioner that the Zamora decision appeared to control this case, and I gave the Petitioner the opportunity to address its applicability.

The Petitioner did not distinguish this case factually from Zamora, nor did he contend that there were any substantive differences between sections 7 and 3d. of the Texas Code of Criminal Procedure. Instead, the Petitioner made several broad challenges to the Zamora decision itself.

First, the Petitioner argued that the holding in Zamora violated the Tenth Amendment proscription that powers not delegated to the United States by the Constitution are reserved to the States. Specifically, the Petitioner contended that to conclude that the Petitioner is "convicted" under federal law when he is not considered to be under state law conflicts with the Tenth Amendment. The Petitioner argued that the Zamora holding also conflicted with the judicial doctrine of "comity" (courtesy between courts dealing with the same matter). Under this doctrine, he asserted, the federal government should "honor, respect, or accommodate" the previous no conviction disposition of the state court. P Add Br 2, 3.

I am not persuaded by these arguments. My conclusion that the Petitioner was "convicted," as defined by section 1128(i)(3) and (i)(4), is based on the principle that the interpretation of a federal statute or regulation is a question of federal, not state, law. Thus, to the extent that the definition of "convicted" in a federal statute is different from state law, the federal law definition controls. 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). The doctrine of

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[7] Even though I find that the Petitioner was "convicted," as the term was defined in section 1128(i)(4) prior to July 1, 1988, I find and conclude that the July 1988 addition of the term "deferred adjudication" to section 1128(i)(4) was merely a technical amendment and that the I.G. did not apply the July 1988 amendment retroactively.

comity does not override the principle of the supremacy of federal law.

Finally, the Petitioner argued that application of the holding in Zamora conflicted with the double jeopardy and due process clauses of the Fifth Amendment. Specifically, the Petitioner argued: (1) that the charges against Dr. Zamora were resolved without a conviction under State law and then, for the same actions, treated under federal law as if he had been "convicted," violating the prohibition against double jeopardy; and (2) that the "perfunctory" action of declaring that Dr. Zamora had been "convicted" of a violation under state law, when no actual state conviction had occurred, violated the right to due process. P Add Br 2, 3.

I am not persuaded by these arguments, and I conclude that the Section 3d. of Texas deferred adjudication statute and the federal exclusion law do not conflict. In Zamora, addressing a similarly worded Section 7, the ALJ stated:

> It is evident from the face of the federal statute, as well as the legislative history cited above, that Congress' intent in enacting the exclusion legislation was remedial and not punitive. A principal objective of the law was to protect the financial integrity of federally funded health care programs from those who have proven themselves to be untrustworthy. That excluded individuals might find themselves to be financially disadvantaged by their exclusions is an incidental effect. Because the intent of Congress was not to "punish," the exclusion remedy cannot be viewed as constituting an additional punishment beyond that contemplated by Texas law.

Zamora, supra, p. 9.

The Petitioner's double jeopardy/due process arguments are necessarily premised on the assertion that the exclusion is an additional punishment. An exclusion is not a punishment, but a consequence of certain court actions defined by the federal statute as "convicted." The Petitioner has not been subjected to double jeopardy, nor has he been denied due process, by application of the federal definition of "convicted."

II. 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. and Ad. News 682, 686.

Since the 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 the Petitioner for a minimum of five years.

CONCLUSION

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

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge