DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
H. Gene Blankenship,	
Petitioner,	Date: September 7, 1989
- v. -	Docket No. C-67
	DECISION CR 42
The Inspector General.	

DECISION AND ORDER

Petitioner requested a hearing to contest the determination of the Inspector General (I.G.) excluding him from participating in the Medicare and Medicaid programs for five years.[1] Both parties filed motions for summary disposition of this case. I granted the I.G.'s motion on one issue and conducted an evidentiary hearing on the remaining issues. Based on the entire record before me, I conclude that the exclusion imposed and directed by the I.G. is mandatory and that the I.G. was required to exclude Petitioner for five years.

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., 1989 Supp.). Section 1128(a) (1) of the Act provides for the exclusion from Medicare and Medicaid of

[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.

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). While section 1128(a) of the Act provides for a minimum five-year mandatory exclusion for (1) convictions of program-related crimes and (2) convictions relating to patient abuse, section 1128(b) of the Act provides for the permissive exclusion of "individuals and entities" for twelve types of other convictions, infractions, or undesirable behavior, such as convictions relating to fraud, license revocation, or failure to supply payment information.

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 issue an exclusion notice to an individual whenever the I.G. has "conclusive information" that such individual has been "convicted of a criminal offense related to the delivery of" a Medicare or Medicaid item or service; such exclusion must begin "15 days from the date on the notice."[2]

III. The State Statutes.

The Tennessee Code Annotated (TCA) states at section 47-25-403 that it is unlawful for any person to knowingly misrepresent the manufacture or origin or commercial sponsorship of any drug sold or offered for sale. This criminal offense, entitled "Trade Practices" and "Prohibited Acts", is a misdemeanor punishable by fines of not less than $100 nor more than $500, and by confinement for not less than 30 days, nor more than 11 months, 29 days. T.C.A., section 47-25-405.

Section 40-21-109, T.C.A., states that if any person who had not previously been convicted of a felony or misdemeanor is found guilty of, or pleads guilty to, a misdemeanor which is punishable by imprisonment, the court may, without entering a judgment of guilt, place him on probation and, upon satisfactory completion of the probation, dismiss the proceedings against him.

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[2] The I.G.'s notice letter allows an additional five days for receipt by mail.

Thereafter, the official record may be expunged. However, section 40-21-109, T.C.A., provides that, even if the official record is expunged, (1) nonpublic records are retained by the court, (2) these "constitute the official record of conviction," and (3) they are admissible in court proceedings where the person has assumed the role of plaintiff in a civil action based on the same transaction.

BACKGROUND [3]

On October 11, 1988, the I.G. issued a notice (Notice) to Petitioner stating that, pursuant to federal law, Petitioner was being excluded from both the Medicare and Medicaid programs for a period of five years, commencing 20 days from the date of the Notice.[4] The I.G. stated that the basis for these exclusions was H. Gene Blankenship's criminal conviction of an offense covered by the mandatory exclusion provisions of section 1128(a)(1) of the Act.

On November 3, 1988, Petitioner timely filed a request for a hearing (Request) before a federal Administrative

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[3] Citations to the record in this Decision and Order are as follows:

Petitioner's Brief	P.Br./(page)
Petitioner's Reply Brief	P.Rep.Br./(page)
Petitioner's Post Hearing Brief	P.P.H.Br./(page)
Petitioner's Post Hearing Reply Brief	P.P.H.R.Br./(page)
I.G.'s Pre-hearing Brief	I.G. Br./(page)
I.G.'s Reply Brief	I.G. Rep.Br./(page)
I.G.'s Post Trial Brief	I.G.P.T.Br
I.G.'s Post Trial Reply Brief	I.G.P.T.Rep.Br.
Petitioner's Exhibits	P.Ex. (letter)/ (page)
I.G.'s Exhibits	I.G.Ex.(number)/ (page)
Joint Exhibits	J.Ex.(number)/ (page)
Transcript of May 24, 1989 Hearing	Tr. (page)

[4] The Notice letter excluded both H. Gene Blankenship and Blankenship Pharmacy. The I.G. did not object to Petitioner's motion to dismiss the Pharmacy as a party to the case, and I ordered that at the May 24, 1989 hearing. Tr. 13,14.

Law Judge (ALJ), and this case was docketed. I conducted a telephone prehearing conference with counsel for the parties on January 5, 1989. On January 13, 1989, I issued a Prehearing Order and Notice of Hearing, noting that the parties had agreed that there were no material facts in dispute. Thereafter, (1) the parties submitted briefs; and (2) the Petitioner presented oral argument in person on March 3, 1989, at my office in Washington, D.C., and the I.G. participated by telephone. On April 20, 1989, I granted the I.G.'s motion for summary disposition on the issue of whether Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and (i) of the Act and I scheduled an evidentiary hearing on the remaining issues in the case. I conducted an evidentiary hearing in Washington, D.C. on May 24, 1989. Thereafter, the parties submitted post-hearing briefs and post-hearing reply briefs.

EVIDENCE

The material facts in this case are evidenced by: (1) the parties' Stipulation of Authenticity (Stipulations of Fact) with eight exhibits attached thereto (and referred to in this Decision as J. Ex.), consisting of the underlying State court documents pertaining to H. Gene Blankenship's plea of guilty; and (2) testimony and exhibits received at the May 26, 1989 evidentiary hearing.[5] The Petitioner acknowledges that H. Gene Blankenship waived his right to a trial by jury in the Cumberland County, Tennessee, Criminal Court (State Criminal Court), and pled guilty to a misdemeanor.

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[5] The eight documents attached to the stipulation are: (1) order granting authority to proceed by information; (2) criminal information containing 31 counts brought against H. Gene Blankenship in the criminal court for Cumberland County; (3) petition for waiver of trial by jury and acceptance of pleas of guilty; (4) order authorizing waiver of jury trial and acceptance of guilty plea; (5) order amending counts 2, 4, 6, 8, 10, 12, 14, 15, 17, 19, 21, and 26 of the information herein; (6) order of nolle prosequi; (7) judgment dated April 11, 1988; and (8) Order of April 11, 1988 by Judge Leon C. Burns, Thirteenth Judicial District, Tennessee.

ISSUES

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

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

3. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [6]

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. On June 4, 1987, the State of Tennessee issued an Order (with an attached Criminal Information Sheet) requiring the District Attorney General to proceed against Petitioner by way of an "Information" on 31 counts of "substituting generic drugs for prescribed drugs and billing Medicaid for the brand name drugs" in violation of T.C.A. sections 39-6-451, 14-23-118b, and 47-25-403. J. Ex. 1.

2. On April 11, 1988, Petitioner moved the State Criminal Court for an "acceptance of pleas of guilty" to 12 counts charging him with violating T.C.A. section 45-205-403. J. Ex. 3.

3. All other counts in H. Gene Blankenship's Information were subject to an Order of nolle prosequi signed by State Criminal Court Judge Leon C. Burns, Jr. J. Ex. 6.

4. Judge Burns signed an Order of "Acceptance of Guilty Plea." J. Ex. 4.

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[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. On April 11, 1988, based on stipulated facts, the State Criminal Court found Petitioner guilty on 12 counts of violating T.C.A. 45-205-403; the Court issued the maximum sentence of $500.00 for each violation and a jail sentence of 11 month and 29 days on each count (to be served concurrently). J. Ex. 7.

6. On April 11, 1988, pursuant to T.C.A. 40-21-109, the State Criminal Court ordered that all proceedings be deferred for a period of 11 months and 29 days, that judgment of guilt not be entered until further order of the court, and that Petitioner be placed on probation for 11 months and 29 days. J. Ex. 7; J. Ex. 8.

7. The judgment dated April 11, 1988 and T.C.A. 45-205-403, themselves, do not establish that Petitioner's conviction was "related to" the delivery of an item or service under the Medicaid program, because the petitioner pled guilty under T.C.A. 45-205-403 to misrepresenting the origin of drugs.

8. The testimony of Special Agents Daniel and Wright is relevant. See, Tr. pp. 18-19.

9. The testimony of Special Agent Raymond Daniel, Jr., Medicaid Fraud Control Unit, Tennessee Bureau of Investigation, and Special Agent Douglas Wright, Office of the Inspector General, Department of Health and Human Services, establish that Petitioner's conviction was "related to" the delivery of an item or service under Medicaid. See, Tr. p. 23-35 and pp.41-44.

10. Although the Medicaid fraud charges in the criminal information were dismissed, the criminal information supports the testimony of Special Agents Daniel and Wright in establishing that Petitioner's conviction was "related to" the delivery of an item or service under Medicaid. See, J.Ex. 6.

11. Petitioner, a pharmacist, was "convicted" of a criminal offense on April 11, 1988 within the meaning of sections 1128 (a)(1) and 1128(i) of the Act.

12. Petitioner pled guilty and was convicted of a criminal offense "related to" the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

13. The I.G.'s action in excluding the Petitioner from the Medicare and Medicaid programs for five years was appropriate and required by the Act and Regulations.

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 had 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.

Petitioner argues, in essence, that his plea does not fall within the reach of section 1128(i) because: (1) the Tennessee State Court never "accepted" a plea of guilty within the meaning of section 1128(i)(3) of the Act; and (2) a "judgment of conviction" was never "entered," within the meaning of section 1128(i)(1) or "withheld" within the meaning of section 1128(i)(4) of the Act. Instead, Petitioner argues that there was a deferral of judgment or "diversion" which is akin to a situation where prosecution has been withheld. Petitioner also argues that the I.G.'s policy is that pre-trial diversions are not subject to mandatory exclusions.

The I.G. contends that section 1128(i)(4) encompasses H. Gene Blankenship's situation. I.G. Br. 4. The I.G. notes that Mr. Blankenship's period of probation has not yet expired and argues that whether judgment will ever be entered is, at this point, a speculative matter. The I.G. also argues that the Tennessee program in question does not have the characteristics of a pre-trial diversion program. In support of this argument, the I.G. notes that Mr. Blankenship was ordered to pay a fine, was not diverted to any community service or rehabilitation

program, and was placed on probation subject to supervision by a parole board. The I.G. argues that prosecution was not deferred because, under the plea arrangement, if parole were violated, trial would not be necessary prior to sentencing. The I.G. asserts that all that was withheld was a judgment of guilt under the terms of the substantive statute and that judgment was, in fact, "entered" under the terms of the plea agreement program (citing section 40-21-109 of the Code). Finally, the I.G. asserted that he does not have a policy that pre-trial diversions are not subject to mandatory exclusions.

I find and conclude that Petitioner was "convicted" within the meaning of section 1128(a)(1) and (i)(3) and (i)(4) because it is axiomatic that the interpretation of a federal statute or regulation is a question of federal and 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).

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." The term "accepted" is the opposite of the term rejected. Judge Burns of the Criminal Court of Cumberland County, Tennessee, did not reject H. Gene Blankenship's plea of guilty. Quite the contrary, I find from a reading of Joint Exhibits 6 and 7 that Judge Burns "accepted" the Petitioner's plea of guilty on April 11, 1988, within the meaning of section 1128(i)(3). Once Judge Burns signed the April 11, 1988 Order authorizing "Acceptance of Guilty Plea" (J. Ex. 4), the provisions of subsection 1128(i)(3) were triggered, and what happened after that is of no consequence to the determination that Mr. Blankenship was "convicted", as a matter of federal law, within the meaning of section 1128(i)(3) of the Act.

I also find and conclude that the circumstances of this case also fall within the reach of subsection 1128(i)(4). This subsection includes within the definition of convicted the situation in which an "individual has entered into participation in a first offender or other program where judgment of conviction has been withheld." The Order memorializing H. Gene Blankenship's plea specifically states that "all proceedings in this cause will be deferred for a period of . . . ." J. Ex. 8.

Pursuant to the Tennessee Code, section 40-21-109, the court could dismiss the proceedings only after satisfactory completion of probation. On its face, the treatment of Mr. Blankenship's case by the Tennessee court falls within the term "other program where judgment of conviction has been withheld," as a matter of federal law. Moreover, section 40-21-109 of the Tennessee Code states that even after dismissal of the proceeding and expungement of the public record, nonpublic records are retained which "constitute the official record of conviction" and are admissible in certain, albeit narrowly proscribed, court proceedings.[7]

II. H. Gene Blankenship's Conviction "Related to" the Delivery of a Medicaid Item 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 offense was not a program-related crime giving rise to a mandatory exclusion under section 1128(a)(1) of the Act. Petitioner argues that the offense was a trademark violation committed against the trademark owner, not against Medicare or Medicaid and, therefore, not "related to" the delivery of an item or service under Medicare or Medicaid. Petitioner states that it was Congress' intent that only a fraud against the Medicare and Medicaid programs would invoke the mandatory exclusion provisions of section 1128(a)(1) and that the State's action in dropping the Medicaid fraud charges against him effectively terminated the I.G.'s opportunity to exclude Petitioner from Medicare and Medicaid. Petitioner also argues that since the State statute (section 47-25-403) on its face does not mention Medicaid, Medicare, or any health care program, a conviction under the State provision could not logically be considered a violation against Medicaid. Petitioner argues that fraudulently

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[7] In July 1988, Congress enacted language revising section 1128(i)(4) by replacing the phrase "first offender or other program" with the phrase "first offender, deferred adjudication, or other arrangement or program." It appears that Congress intended that this language apply retroactively to all actions brought by the I.G. after September 1, 1987. See The Inspector General v. Donald O. Bernstein, D.C., Docket No. C-40, decided January 12, 1989. However, I make no findings or conclusions on this issue because the parties did not have an opportunity to address it. Moreover, the new language appears to more directly support the I.G.'s case and, therefore, the result here would be the same.

selling a vacuum cleaner to a Medicaid patient would not invoke the mandatory exclusion provisions and, accordingly, neither should selling a beneficiary prescription medication if the State statute under which a person admits guilt relates to a trademark violation rather than a Medicaid fraud violation. Finally, Petitioner argues that the mandatory exclusion would violate the double jeopardy clause, as he has already been convicted under Tennessee law and the federal exclusion would result in multiple punishments for the same offense. Petitioner cites the recent Supreme Court case of United States, v. Irwin Halper 57 U.S. Law Week 4526 (No. 87-1383, May 15, 1989), as support for his position and argues that the exclusion is "punitive" because it did not attempt to make the government whole (actual damages suffered and expenses incurred in prosecution), but caused economic loss to Petitioner (Mr. Blankenship had to sell his pharmacy).

The I.G. argues that the substance of the offense was dispensing generic prescription drugs under brand labels and billing Medicaid for the higher priced brand label drugs. The I.G. argues that Medicaid patients could have been harmed by not receiving the specific drug prescribed by the physician and that both the patients and the program were harmed. The I.G. argues that, in any event, H. Gene Blankenship's conviction is "related to" the delivery of prescription medication to Medicaid patients. The I.G. also argues that the Petitioner's restrictive reading of section 1128 of the Act is contrary to both the plain language of the law and to Congressional intent. Finally, the I.G. argues that I have no authority to invalidate the exclusion based on the double jeopardy clause because to do so would require me to invalidate as unconstitutional the mandatory exclusion statute itself. The I.G. also argues that Halper, supra, would not prohibit this exclusion because this case is legally and factually distinguishable.

I find and conclude, as a matter of federal law, that the mandatory exclusion provisions of section 1128 are not limited to situations where a medical provider or other individual or entity is convicted under a statute expressly criminalizing fraud against a federal or state health care program. Several State statutes were involved here: (1) TCA 14-23-118(b) (recodified as TCA 71-5-118(b)), a State statute specifying sanctions for fraudulently obtaining benefits for payments for medical assistance; (2) TCA 39-6-451, a State statute making it illegal to substitute a drug for one prescribed by the physician (except under specified circumstances); and (3) TCA 47-25-403, a State statute making it illegal to

knowingly misrepresent the origin of a drug without the written authority of the owner of the trademark for the drug. The original criminal information contained reference to TCA 14-23-118(b) and TCA 39-6-451, but the final judgment and order of the court referred only to TCA 47-25-403, inasmuch as all counts in the criminal information referring to TCA 14-23-118(b) were dropped and the order amending the remaining counts replaced references to TCA 39-6-451 with references to TCA 47-25-403. J.Exs. 2-6.

Petitioner bases much of his case on distinctions among these statutes and the fact that the judgment and order of the court referred only to a statute which did not expressly prohibit Medicaid fraud (i.e. not TCA 14-23-118(b)). One can only speculate as to why the State chose to proceed as it did. But the vagaries of state jurisprudence should not dictate an unreasonable and unfair result under the facts of a case such as this, where it is clear that the "conviction" was "related to" Medicaid within the meaning of section 1128(a)(1) and (i).

The test of whether a "conviction" is "related to" Medicaid must be a common sense determination based on all relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court.

The inquiry is whether the conviction "related to" Medicaid fraud, not whether the state court convicted Petitioner of Medicaid fraud. Thus, my task is not simply to examine the judgment and state criminal statute to determine whether they specifically refer to Medicaid fraud. Rather, my task is to examine all relevant conduct to determine if there is a relationship between the judgment of conviction and the Medicaid program. Had Congress intended a different result, it would have used the phrase "conviction for" or conviction "restricted to" instead of "related to." An examination of whether a conviction is "related to" Medicaid necessarily involves an inquiry into Petitioner's conduct.

Accordingly, the finder of fact must consider all relevant documents pertaining to the trial court proceeding. These may include the indictment, the transcript of the sentencing proceeding, and plea agreements. Of course, the finder of fact must also consider the relevant testimony of witnesses.

Here, the criminal information specifically referred to Medicaid fraud, and the uncontroverted testimony of two witnesses at the May 24, 1989 hearing established that the drugs were indeed purchased with Medicaid eligibility cards as part of a "sting" operation. The fact that the Medicaid fraud charges in the criminal information were dismissed is not a bar to considering evidence that this conviction was "related to" the Medicaid program. The original criminal information, along with the testimony of the two witnesses, establish that the "conviction" of Petitioner was "related to" the delivery of a Medicaid item within the meaning of section 1128 of the Act. Petitioner does not deny that he sold some of these drugs to Medicaid patients and that he billed Medicaid for them. The testimony of Special Agents Daniel and Wright establishes that the drugs were purchased with Medicaid eligibility cards and billed to Medicaid. Tr. at 23-26, 30-35 and 43. Thus, whether or not the State statute under which he was "convicted" specifically mentioned Medicaid, his conviction was "related to" the Medicaid program.

Black's Law Dictionary, Fifth Edition (West Publishing 1979) defines "related" as: "standing in relation; connected; allied; akin." Clearly, the offense for which H. Gene Blankenship was convicted was "connected" to the delivery of an item or service under Medicaid. This case should not be decided in a vacuum, or with a strict, hypertechnical interpretation of the term "related to" in section 1128(a)(1) of the Act. There is a simple, common-sense connection, supported by the record, between the actions associated with the conviction and the Medicaid program. Petitioner would have me rule that the billing of Medicaid for the higher-priced drugs was only incidental to the offense of misrepresenting the origin of the drugs. Petitioner's strained reading of section 1128 of the Act is not borne out by the plain words of the Act.

Petitioner also attempts to illustrate his point by arguing that if he had sold vacuum cleaners, instead of drugs, he would not have been excluded. I do not find this argument to be persuasive. The fact is, Medicaid was billed for higher priced drugs because the origin of the drugs was misrepresented; there was a direct monetary impact on the program which directly affected the financial integrity of the program. Clearly, the offense was one that "related to" the Medicaid program, and "related to" is all section 1128(a)(1) of the Act requires. The same outcome would result for the illegal

sale of vacuum cleaners if the Medicaid program were billed for the vacuum cleaners.

In the recent Decision in the case of Jack W. Greene v. Inspector General, Appellate Docket No. 89-59, Decision No. 1078 (July 31, 1989), the Appellate Division of the Departmental Appeals Board (in reviewing the decision of the ALJ) stated (at page 7): "The false Medicaid billing and the delivery of the drugs to the Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term."

I need not address the I.G.'s contention that I have no authority to rule on the double jeopardy question raised by the Petitioner, as I conclude that Halper, supra, does not apply to this case.

In Halper, the Supreme Court held that under some circumstances the imposition of civil penalties may violate the double jeopardy clause of the Sixth Amendment to the United States Constitution. The Court held that the imposition of a penalty under the False Claims Act, 31 U.S.C. 3729-3231, could constitute double jeopardy in the narrow circumstances where there existed a prior federal criminal conviction for the false claims for which the civil penalty was imposed and where there was not even a rough relationship between the amount of the penalty and the cost to the government resulting from the false claims.

This case is distinguishable both legally and factually from Halper. First, this case involves a state conviction whereas Halper involved a federal conviction. Double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. Chapman v. U.S. Dept. of Health & Human Services, 821 F.2d 523 (10th Cir. 1987); Abbate v. United States, 359 U.S. 187 (1959). Next, Halper involved the application of a different law, the False Claims Act. Finally, Halper involved different factual circumstances -- the federal government was attempting to recover approximately $130,000 in civil penalties based on an individual's federal conviction of overcharging the Medicare program by $585. 57 LW 4527. While the Court held that the double jeopardy clause prevented the government from recovering an excessively large amount not rationally related to the financial loss incurred, the Court noted that the rule is one for "the rare case ... where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly disproportionate to the damages he has caused." 57 LW at 4530. There has been no showing of such a sanction in

this case. Moreover, the major purpose of the exclusion law is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See, H.R. Rep. No. 97-158, 97th Cong., 1st Sess. Vol. III, 329, 344, (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62 (1981), 1981 U.S. Code Cong. & Ad. News 727-28; Preamble to the Regulations (48 Fed. Reg. 38827 to 38836, August 26, 1983).

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 for a minimum period of five years from the Medicare and Medicaid programs 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 ADMIN. NEWS 682, 686.

Since I have found and concluded that Petitioner was "convicted" of a criminal offense and it was "related to" the delivery of an item under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, I conclude that the I.G. was required to exclude the Petitioner for a minimum of five years.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude the Petitioner from participation in the Medicare and Medicaid programs for five years was appropriate and required by the Act and Regulations because H. Gene Blankenship was "convicted" of a criminal offense "related to" the delivery of an item under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge