DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	DATE: December 13, 1989
DeWayne Franzen,	)	
	)	
Petitioner,	)	Docket No. C-96
	)	
- v. -	)	DECISION CR 58
	)	
The Inspector General.	)	
	)	

DECISION AND ORDER

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the December 23, 1988 notice of determination (Notice) issued by the Inspector General (I.G.). The Notice advised Petitioner that an exclusion was being imposed and directed against him for a minimum period of five years based upon his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.[1]

Based on the entire record before me, I conclude that: (1) there are no material facts at issue, (2) Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and (3) based upon the facts of Petitioner's case, a five-year period of exclusion is mandated.

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

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C.A. 1320a-7 (West Supp. 1989). Section 1128(a)(1) of the Act requires the I.G. to impose and direct exclusion from participation in the Medicare and Medicaid programs those individuals or entities who are "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 that the period of exclusion for those excluded pursuant to section 1128(a)(1) shall be for a minimum of five years.

Section 1128(b) of the Act permits the I.G. to impose and direct exclusions from participation in the Medicare and Medicaid programs against individuals or entities who have engaged in other types of impermissible conduct.

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; the exclusion to begin 15 days from the date on the notice.[2]

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

BACKGROUND [3]

I conducted a prehearing conference by telephone on July 18, 1989. The parties agreed that this case could be decided based upon documentary evidence and briefs. The parties submitted stipulations and agreed findings of fact, and a stipulation as to the authenticity of eight joint exhibits. The I.G. submitted a brief in support of his motion for summary disposition. Petitioner submitted a brief which supported his motion for summary disposition and which opposed the I.G.'s motion for summary disposition. The I.G. also submitted a reply brief.

Petitioner admitted that he was "convicted" of criminal offenses within the meaning of section 1128(i) of the Act. P. Br. 2, 4.

ISSUES

The issues are:

1. Whether Petitioner's convictions are "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

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

3. Whether the principles espoused in the recent United States Supreme Court decision in United States v. Halper, 109 S.Ct. 1892 (1989), bar the I.G. from excluding Petitioner.

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[3] The citations in this Ruling are as follows:

Stipulations	Stip. (paragraph)
Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br.(page)
Joint Exhibits	J.Ex. (number)
Findings of Fact and Conclusions of Law	FFCL (number)

FINDINGS OF FACT AND CONCLUSIONS OF LAW [4]

1. Petitioner is a pharmacist who, at all times relevant to this case, was the owner and pharmacist at Bessemer Pharmacy in Greensboro, North Carolina. Stip. 1.

2. Petitioner was charged in Guilford County District Court with three misdemeanor counts of violating North Carolina General Statutes (N.C. Gen. Stat.) sections 90-85.29 and 90-85.40 (false prescription labeling), and one misdemeanor count of violating N.C. Gen. Stat. sections 90-106(c) and 90-108(a)(2) (unlawful dispensing of a controlled substance). J. Ex. 1,3,5,7.

3. On January 27, 1988, Petitioner pled guilty to all four charges and judgment was entered against him. Stip. 4; J. Ex. 2,4,6,8.

4. Petitioner violated the "False Prescription Labeling" provisions of N.C. Gen. Stat. sections 90-85.29 and 90-85.40 by placing brand name prescription labels on bottles in which generic drugs were dispensed. Stip. 8; J. Ex. 1,3,5.

5. Petitioner violated the "Unlawful Dispensing of a Controlled Substance" provisions of N.C. Gen. Stat. sections 90-106(c) and 90-108(a)(2) by unlawfully refilling a prescription for a controlled substance more than five times after the date of the prescription. Stip. 8; J. Ex. 7.

6. In each of the three instances where Petitioner was convicted of false prescription labeling, the drug product was dispensed to a Medicaid recipient. In the one instance where Petitioner was convicted of unlawfully dispensing a controlled substance, the controlled substance was dispensed to a Medicaid recipient. Stip. 9; J. Ex. 1,3,5,7.

7. Petitioner submitted a claim for reimbursement to the Medicaid program in each of the charges for which he was convicted. Stip.9.

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

8. Petitioner was reimbursed by the Medicaid program for each of the claims which he submitted. Payment to Petitioner by the Medicaid program resulted in an overpayment. Stip. 9.

9. Petitioner was sentenced to pay a fine of $1,000.00, plus $40.00 in court costs. Stip. 5; J. Ex. 2, 4, 6, 8.

10. Petitioner was ordered to make restitution in the amount of $4,000.00 to the North Carolina Medicaid Program. Stip. 6; J. Ex. 2, 4, 6, 8.

11. Section 1128(a)(1) of the Act requires the I.G. to impose and direct exclusions from participation in the Medicare and Medicaid programs against individuals who are convicted of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs.

12. Petitioner admitted that he was "convicted" of criminal offenses within the meaning of section 1128(i) of the Act. P. Br. 4.

13. The criminal offenses for which Petitioner was convicted are "related to the delivery of an item or service" under the Medicaid program. FFCL 4 - 8, 10.

14. Petitioner is subject to the minimum mandatory provisions of section 1128(a)(1) of the Act. FFCL 12, 13.

15. The I.G. properly imposed and directed an exclusion against Petitioner from participation in the Medicare and Medicaid programs for a minimum mandatory period of five years. FFCL 14.

16. The principles espoused in the recent United States Supreme Court decision in United States v. Halper, 109 S.Ct. 1892 (1989), do not bar the I.G. from imposing and directing exclusions from participation in the Medicare and Medicaid programs against Petitioner.

DISCUSSION

I. Petitioner's Convictions "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128(a)(1) of The Act.

Section 1128(a)(1) of the Act requires the I.G. to impose and direct exclusions against individuals who are convicted of a criminal offense which is related to the delivery of an item or service under the Medicare or Medicaid program. Thus, in order for Petitioner to be properly excluded from participation in the Medicare and Medicaid programs, he must satisfy a two-part test. First, he must be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and second, the conviction must be "related to the delivery of an item or service" under the Medicare or Medicaid programs.

In this case, the first part of the test has been satisfied in that Petitioner has admitted that he was "convicted" of criminal offenses within the meaning of section 1128(i) of the Act. FFCL 12. However, Petitioner argues that the I.G. has not satisfied the second part of the test because the criminal offenses for which Petitioner was convicted are not "related to the delivery of an item or service" under the Medicare or Medicaid programs. Petitioner argues that section 1128 authorizes the exclusion of individuals who are convicted of a criminal offense which is related to the delivery of an item or service under the Medicaid program only in instances where such individual possessed criminal intent in the commission of the offense.

I do not agree that a determination of whether a relationship exists between the criminal offense for which Petitioner is convicted and the delivery of an item or service under the Medicaid program should be based upon whether Petitioner intended to disobey the law.

The provisions of section 1128(a)(1) do not require that the individual must intend to commit the criminal offense in order for an exclusion to be proper. Section 1128(a)(1) requires only that there be a "reasonable" relationship between the criminal offense and the delivery of an item or service under the Medicaid program.

Petitioner's judgments of conviction state that a factual basis existed for the charges against Petitioner and that Petitioner pleaded guilty to each charge. Petitioner stipulated that the Misdemeanor Statement of Charges (Charges) accurately states the factual basis for each of the convictions. FFCL 3-6. The facts stated in the Charges were that: (1) in three instances, Petitioner mislabeled prescriptions dispensed to Medicaid recipients by placing the brand name label on the product when, in actuality, a generic product was dispensed; and (2) in one instance, Petitioner improperly refilled a Medicaid recipient's prescription for a controlled substance more than five times after the date of the prescription. FFCL 3-6. Further, Petitioner stipulated that a claim for reimbursement from the Medicaid program was submitted for each charge at issue. FFCL 8.

Pharmacists, such as Petitioner, play a key role in the dispensing of prescription medications. Doctors who prescribe medications for their patients and the patients who receive the medications trust that the pharmacist will provide the medication which has been prescribed. The Medicaid program which reimburses pharmacists for the items or services which they provide to Medicaid recipients trust that the pharmacist's claim will accurately reflect the item or service which has been provided and that the pharmacist will provide the Medicaid recipient with the item or service in both a professional and legal manner. A breach of these duties by an individual so charged with them, and a conviction resulting from the breach, represents a conviction for a criminal offense which is directly "related to the delivery of an item or service" under the Medicaid program. Petitioner was such an individual. The criminal offenses for which Petitioner was convicted constitute a direct relationship between the delivery of an item or service and the Medicaid program. See H. Gene Blankenship v. The Inspector General, DAB Docket No. C-67 (1989).

Further, the relationship between the criminal offenses for which Petitioner was convicted and the Medicaid program may also be found based upon the financial impact which Petitioner's criminal offense had on the Medicaid program. Petitioner submitted claims for reimbursement for services which were not provided as claimed. Petitioner admits that he received an overpayment from the Medicaid program as a result of the claims submitted for the charges at issue. FFCL 8-10. In the case of Jack W. Greene v. The Inspector General, DAB Docket No.

C-56, decided January 31, 1989, appeal docketed, DAB No. 89-59, Decision No. 1078 (1989), a review panel of the Departmental Appeals Board addressed this argument and held that "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".

Based on the above, I conclude that Petitioner's convictions are "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

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 to direct that they be excluded the Medicaid program, for a minimum period of five years, when such individuals or entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act. Congressional intent on this matter is clear:

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

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

Since Petitioner was "convicted" of criminal offenses which are "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required to exclude Petitioner for a minimum of five years.[5]

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

III. The Principles Espoused In The Recent Case Of United States v. Halper Do Not Apply To This Case.

In United States v. Halper, 109 S. Ct. 1892 (1989), 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 circumstance where (1) there was a prior federal criminal conviction, (2) based upon the same false claims for which a civil penalty was being imposed, and (3) there was no reasonable relationship between the amount of the penalty sought and the damages suffered by the government as a result of the false claims at issue.[6]

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). See also, Crofoot v. United States Government Printing Office, 761 F.2d 661, 665 (Fed. Cir. 1985). Secondly, the purpose of section 1128 of the Act is to protect the Medicare and Medicaid programs, not punishment. 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 for a $585.00 overcharge to the Medicare program -- and the Court concluded that such a result might be tantamount to punishment. In this case, there are no civil penalties. The principal thrust of the statute is protection, even though a section 1128 exclusion is also a deterrent. See Charles J. Burks, M.D. v. The Inspector General, DAB Docket No. C-111, at page 8 (1989).

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[6]Petitioner also argues that his convictions were based upon strict liability and that Congress did not intend to exclude providers whose convictions were based upon statutes imposing strict liability. There is no basis for deleting strict liability convictions from the coverage of the exclusion authority and Petitioner's reliance on excerpts from the legislative history are misplaced.

CONCLUSION

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

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge