DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Jack W. Greene,	DATE: Jan 31, 1989
Petitioner,	
- v. -	Docket No. C-56
The Inspector General	DECISION CR 19

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTIONS FOR SUMMARY DISPOSITION

Petitioner requested a hearing, protesting the Inspector General's (the I.G.) determination to exclude him from participating in the Medicare program, and to direct 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 and their stipulations. Based on the undisputed facts, the law, and applicable regulations, I conclude that the exclusions imposed and directed by the I.G. are mandatory. There remain no questions to be addressed at a hearing whose answers could affect the outcome of this case. Therefore, I am deciding this case in favor of the I.G.

BACKGROUND

On June 24, 1988, the I.G. sent notice to Petitioner, advising him that he was being excluded from Medicare and any State health care programs for a period of five years. Petitioner was advised that his exclusions were due to 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 (Medicaid).

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 mandatory exclusions from Medicare and State health care programs, of five years, for individuals convicted of a program-related offense. The I.G. told Petitioner that, in consideration 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 October 26, 1988, at which both parties expressed their intent to move for summary disposition in this case. I issued a prehearing Order on October 28, 1988, which established a schedule for moving for summary disposition and for responding to such motions. The Order also provided for exchanges of documents and for stipulations. It further provided for oral argument of motions at the request of either party. The parties filed and responded to motions and agreed to stipulations pursuant to my Order. At Petitioner's request, I heard oral argument by telephone as to the motions on January 24, 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 to 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. 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.

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 exclusion from participation in any State health care programs, 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 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 not be 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 current law was enacted in August 1987, and embodies revisions to 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 pharmacist who operated a pharmacy in Oliver Springs, Tennessee. Stip. 1.2/

2. On April 21, 1987, Petitioner was indicted on 18 counts of filing false reports, statements, or documents in violation of Tennessee law. Stip. 3; Ex. 7.

3. Petitioner pleaded guilty to one count of the indictment on January 29, 1988. Stip. 4. On February 3, 1988, a felony judgment was entered against Petitioner. Stip. 5; Ex. 6.

4. Petitioner was convicted of "unlawfully feloniously and willfully falsify(ing) a report or document required by (Tennessee law) by falsely billing the State for having filled a prescription with a brand-named medicinal drug(s), . . . when instead the defendant or one of his agents did dispense a generic drug of a lesser value, contrary to (Tennessee law), against the peace and dignity of the State of Tennessee." Stip. 6; Ex. 7.

5. In the indictment for which Petitioner was convicted, a Medicaid claim was submitted for brand name drugs when in fact, Petitioner had filled prescriptions with FDA-approved generic drugs. The claims were paid by Medicaid and caused a Medicaid overpayment. Stip. 7.

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

Stipulation	Stip. (number)
Agreed Exhibit	Ex. (number)
Memorandum of the I.G.	I.G.'s Memorandum at page)
Petitioner's Memorandum in Opposition to OIG's Exclusion	P.'s Memorandum at (page)
Reply Memorandum of the I.G.	I.G.'s Reply Memorandum at (page)
Petitioner's Memorandum in Response to OIG's Motion	P.'s Reply Memorandum at (page)

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 for a person excluded based on conviction of a criminal offense related to the delivery of an item or service under Medicaid is five years. 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, of 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. 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. 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).

ANALYSIS

Petitioner pleaded guilty to, and was convicted of, a crime involving claims 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) his 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 (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). According to Petitioner, 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).

I have carefully considered the contentions of the parties, their joint 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 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).

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). Therefore, according to Petitioner, "the imposition of an exclusion upon Petitioner by the (I.G.) is in violation of Congress' specific prohibition," and this in turn voids any exclusions imposed or directed by the I.G. P.'s Memorandum at 26. The I.G. contends that the duty to exclude and to direct exclusions is not a "program operating responsibility," asserting that the legislative history of the Inspector General statute shows that Congress intended the term to mean "day-to-day hands-on responsibilities for overall administration of HHS's health and safety programs." I.G.'s Memorandum at 6. The I.G. also cites legislative history to the 1987 revision

to 42 U.S.C. 1320a-7 to urge that Congress specifically approved the Secretary's delegation of exclusion authority to the I.G.

I am satisfied from the language of 42 U.S.C. 1320a-7, 42 U.S.C. 405(b), and relevant regulations that I do not have jurisdiction to decide this issue. Neither Congress nor the Secretary intended to confer that jurisdiction on me, and there exists no other source of authority which confers it.3/

Congress directed the Secretary to provide excluded parties with the opportunity to have hearings as to their exclusions. 42 U.S.C. 1320a-7(f); 42 U.S.C. 405(b). There is no language in 42 U.S.C. 1320a-7(f) which states or implies that in conducting hearings as to the propriety of exclusions, the Secretary is required to consider challenges to his broad regulatory and policy determinations. The law requires that an excluded party is entitled to reasonable notice and opportunity for a hearing by the Secretary "to the same extent as is provided in section 405(b) of this title." Section 405(b) states that:

> Upon request by any . . . individual who makes a showing in writing that his or her rights may be prejudiced by <u>any decision the Secretary has rendered</u>, (the Secretary) shall give such (individual) reasonable notice and opportunity for a hearing <u>with respect to such decision</u>, and, if a hearing is held, shall on the basis of evidence adduced at the hearing, affirm, modify, or reverse <u>his findings of fact and such decision</u>. (Emphasis added).

The plain meaning of this language is that the Secretary has the duty only to provide hearings as to decisions made in applying laws, regulations, and policies in specific cases. The law does not create hearing rights before the Secretary to challenge laws, regulations, or policy determinations.

The Secretary has issued regulations providing for administrative law judges to hear and decide exclusion cases involving criminal offenses. 42 C.F.R.

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

1001.128(a).4/ The regulations are consistent with the law. 42 C.F.R.1001.128 limits administrative law judges' authority to hear and decide such cases to the issues of whether: (1) the petitioner 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) the length of the suspension (exclusion) is reasonable. Id..

Subsection (a)(3) of this regulation appears on its face to permit administrative law judges to hear and decide issues pertaining to the reasonableness of the I.G.'s decision-making processes and procedures he used in determining, imposing and directing individual exclusions. Indeed, in adopting this regulation, the Secretary made it clear that the administrative law judge's role was to decide whether the I.G.'s exclusion determination in a particular case was reasonable. 48 Fed. Reg. 3744 (Jan. 27, 1983). For example, a question of whether the I.G. had improperly failed to consider relevant facts would clearly relate to the issue of whether the exclusions imposed and directed by the I.G. were reasonable, and would therefore be reviewable by an administrative law judge. Similarly, a question concerning whether the I.G. gave the excluded party reasonable notice and opportunity to be heard would ultimately relate to the issue of whether the length of the exclusion is reasonable.

There is no language in 42 C.F.R. 1001.128, or in other regulations, which states or implies that the Secretary has conferred on administrative law judges authority to examine the lawfulness of regulations or of departmental delegations. The jurisdiction conferred upon administrative law judges by 42 C.F.R. 1001.128 only

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4/ The only reference to administrative law judges in 42 U.S.C. 1320a-7 is at subsection (f)(2), which provides that except in limited circumstances, a party proposed to be excluded pursuant to subsection (b)(7) shall be entitled to a hearing before an administrative law judge prior to the exclusion becoming effective. Exclusions proposed pursuant to subsection (b)(7) involve those individuals whom the Secretary determines have committed acts of fraud, or engaged in other activities prohibited by 42 U.S.C. 1320a-7a or 7b. Such hearings shall be conducted as provided by 42 U.S.C. 405(b).

permits inquiry into the propriety of the I.G.'s decisions in individual cases.

Petitioner cites several decisions for the proposition that the administrative law judge's jurisdiction includes authority to decide the lawfulness of the Secretary's regulations and delegations. None of these decisions support this argument. Firth v. Celebrezze, 333 F.2d 557, 560 (5th Cir. 1964), and Taliferro v. Califano, 426 F. Supp. 1380 (N.D. Mo. 1977), hold that administrative law judges must apply correct legal standards in their decisions. Neither case addresses the question of whether an administrative law judge may rule on the Secretary's legal or policy determinations. Locklear v. Matthews, 424 F. Supp. 639, 646 (D. Md. 1976), holds that an administrative law judge correctly relied on the statutory standard for disability in a Social Security disability case. The case does not address a conflict between the Secretary's policies and the law, much less hold that administrative law judges had jurisdiction to decide that issue.

Marion v. Gardner, 359 F. 2d 175, 181 (8th Cir. 1966), merely holds that an administrative law judge too narrowly applied a regulation. Pollard v. Gardner, 267 F. Supp. 891, 907 (W.D. Mo. 1967), holds that the Secretary may not defeat Congressional intent through regulations. It says nothing about the administrative law judge's jurisdiction. Finally, Shrader v. Harris, 631 F. 2d 297, 302-303 (4th Cir. 1980), deals with the administrative law judge's responsibility to develop a record and to make findings on issues over which he has jurisdiction. It does not suggest that the administrative law judge has jurisdiction to overrule the Secretary's regulatory or administrative decisions.

Because I do not have jurisdiction to adjudicate questions concerning the lawfulness of the Secretary's delegations of authority to the I.G., I make no findings or conclusions as to the merits of this issue. I therefore deny Petitioner's motion for summary disposition on this issue.

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.

More specifically, he asserts that regulations are necessary to clarify any "ambiguities" that may exist between the mandatory exclusion provisions of 42 U.S.C. 1320(a) and the permissive exclusion provisions of 42 U.S.C. 1320(b). P.'s Memorandum at 12. He urges that I conclude that the Secretary is ignoring a need for clarifying regulations, and that the I.G. is relying on "unpublished, internal . . . guidelines/directives" to determine whether individual exclusion cases should be characterized as mandatory or permissive. P.'s Memorandum at 5. Such actions allegedly violate the Administrative Procedure Act, 5 U.S.C. 552 et seq.. Petitioner also contends that the Secretary's failure to adopt implementing regulations injured him, because had he known that the I.G. would conclude that mandatory five-year exclusions were required in his case, Petitioner "would not have agreed to his guilty plea . . . ." P.'s Memorandum at 4.

The I.G. responds to these arguments by asserting that Petitioner's contentions are based on a misunderstanding of 42 U.S.C. 1320a-7. I.G.'s Memorandum at 12. According to the I.G., the law clearly and unambiguously requires mandatory five-year exclusions in Petitioner's case, and therefore, no regulations are required to resolve nonexistent ambiguities. I.G.'s Reply Memorandum at 12. The I.G. also asserts that the Secretary is, in any event, entitled to execute his statutory duty in the absence of regulations, so long as he proceeds in accordance with "ascertainable standards" and "provides a statement showing (his) reasoning in applying the standards." I.G.'s Memorandum at 14. The I.G. contends that the Secretary complied with these legal requirements in this case.

Petitioner's argument reduces to the contention that the Secretary is obligated to adopt implementing regulations before applying 42 U.S.C. 1320a-7 to particular cases. I am without authority to decide this issue for the same reason that I lack authority to decide the lawfulness of the Secretary's delegations. Neither the law nor existing regulations confer jurisdiction on me to decide under what circumstances the Secretary must issue regulations.5/ As I have held supra, my jurisdiction is limited by law to

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5/ It is not necessary for me to discuss Petitioner's claim that the law is ambiguous at this point. However, as my discussion in the next section makes clear, the law is not ambiguous.

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.

Therefore, I make no findings or conclusions as to whether the Secretary is obligated to issue regulations implementing the 1987 revisions to 42 U.S.C. 1320a-7, and I deny Petitioner's motion for partial summary disposition on this issue.

3. 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 felony charge of fraud against the Tennessee Medicaid program. Specifically, Petitioner, a pharmacist, billed the Medicaid program for dispensing brand name drugs, when in fact, he had sold cheaper, generic medication. Petitioner fraudulently obtained reimbursement which he was not owed, and he deceived 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 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. The I.G. asserts that there exist neither facts nor law which could alter this conclusion; consequently he urges that I enter a summary disposition upholding the exclusions imposed on Petitioner. I.G.'s Memorandum at 8.

Petitioner asserts that the I.G. has mischaracterized the offense to which Petitioner pleaded guilty and was convicted of committing. 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 participation in Medicare, and 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 financial misconduct." There is no statutory requirement that such exclusions be for a minimum period. Therefore, according to Petitioner, if <u>any</u> exclusion is appropriate, it must be determined without regard to statutory minimum mandatory periods. P.'s Memorandum at 23. Petitioner also contends that in any event, he is entitled to an evidentiary hearing to determine which statutory section applies to the offense for which he was convicted. P.'s Memorandum at 19.

I conclude that it is manifest, both from the language of the statute, and from legislative history, that the offense committed by Petitioner is governed by 42 U.S.C. 1320a-7(a)(1). The I.G. had no choice but to exclude Petitioner from participation in Medicare, and to direct his exclusion from participation in State health care programs, for at least five years.

There is no question that if subsection (b)(1) of the law is read in isolation, its language would literally encompass the offense for which Petitioner was convicted. His conviction was for an act of fraud, and certainly constituted "financial misconduct" directed against a program financed in part by a State government agency. However, when this subsection is read in context with subsection (a)(1), it becomes clear that Petitioner's case is not governed by the permissive exclusion provisions.

This is so because the law specifically requires exclusions of parties who commit offenses described in subsection (a)(1), and Petitioner's offense obviously falls within the ambit of offenses characterized by that subsection. The plain meaning of the language of

subsection (a)(1) is to require exclusion from participation in the Medicare and State health care programs of those parties who commit offenses, including fraud or financial misconduct, in connection with the delivery of or billing for items or services rendered pursuant to these programs. The phrase in subsection (a)(1), "related to the delivery of an item or service," conveys legislative intent to sweep within the subsection all "financial" offenses directed against the Medicare and State health care programs. Petitioner's offense--which amounted to theft or conversion of Medicaid funds--is covered by this language.

Subsection (a)(1), therefore, encompasses the same kinds of "financial" offenses which are described in subsection (b)(1), but limited to those offenses which are directed against, or committed in connection with the rendering of services pursuant to, the Medicare and State health care programs. The legislative scheme apparent from reading subsections (a)(1) and (b)(1) in conjunction with each other is to mandate exclusions of those who commit financial crimes directed against Medicare and State health care programs, and to permit exclusions of those who commit financial crimes in connection with the delivery of a health care item or service pursuant to programs other than Medicare or State health care programs, which are financed by federal, state, or local government agencies. As the fraud committed by Petitioner was directed against Medicaid, a State health care program, his exclusion is covered by subsection (a)(1).

Petitioner asserts that subsection (a)(1) was intended to encompass only "the illegal delivery of services, themselves" and not "subsequent illegal billing" for services pursuant to the Medicare and State health care programs. P.'s Memorandum at 20. He seeks to distinguish "billing offenses" from such offenses as "taking sexual advantage of a patient" or "charging for medically unnecessary diagnostic and testing procedures," asserting that section (a)(1), by its terms, applies only to the latter offenses. However, although the language of subsection (a)(1) is arguably broad enough to apply to those kinds of offenses identified as covered by Petitioner, it also covers the offense he committed. Furthermore, 42 U.S.C. 1320a-7(a)(2) requires exclusion of parties convicted of "neglect or abuse of patients in connection with the delivery of a health care item or service." This subsection, then, covers the kinds of "abuse" cases that Petitioner asserts constitute the ambit of subsection (a)(1).

The purpose of the law is underscored when the current law is compared with the law in effect prior to enactment of the 1987 revisions. The law then in effect mandated suspensions from participation in the Medicare and state programs of physicians or other individuals convicted of a "criminal offense related to such individual's participation in the delivery of medical care or services under" Medicare, Medicaid, or the social services programs. The law then in effect did not specify a minimum suspension period. This law covered a narrower class of offenses than are covered by the present 42 U.S.C. 1320a-7(a) and (b). For example, the pre-1987 law would not have permitted exclusions of individuals committing offenses against government-financed health care programs other than Medicare and State health care programs, whereas exclusions of such persons are now permitted by subsection (b)(1). So, an obvious objective of the 1987 revisions was to broaden the kinds of offenses for which exclusions could be imposed.

The kind of offense for which Petitioner was convicted (fraud against the Medicaid program) would have resulted in a mandatory exclusion under the pre-revision version of the law. There is nothing in the language of the current law to suggest that Congress, in broadening the scope and reach of the law, narrowed the category of cases which require exclusions. Indeed, the mandatory exclusion language of the present subsection (a)(1) is, if anything, more sweeping than that of its predecessor.

Legislative history to the 1987 revisions also makes it clear that Congress intended its enactment to enlarge the scope of offenses for which exclusions could be imposed--and not limit or undercut the mandatory exclusion requirements which had previously been enacted. The Senate Report which accompanied the 1987 legislation explained Congressional intent in enacting subsection (b)(1):

> The Secretary would be authorized to exclude any individual or entity convicted under Federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or financial abuse if such offense was committed either in connection with the delivery of health care or with respect to a program that is financed, at least partially, by Federal, State, or local government.

> Under current law, the Secretary does not have the authority to exclude individuals or entities convicted of criminal offenses which are not related to Medicare or Medicaid or the other State health care programs. This provision would permit the Secretary to exclude persons and entities who have already been convicted of offenses relating to their financial integrity, if the offenses occurred in delivering health care to patients not covered by public programs or if they occurred during participation in any other governmental program.

S. Rept. No. 100-109, 100th Cong., 1st Sess. 5, 6-7 (1987), reprinted in, 1987 U.S. Code Cong & Admin. News 682, 687. (Emphasis added). Thus, Congress intended the new subsection (b)(1) to permit exclusion for offenses not related to Medicare and State health care programs. Subsection (a)(1) was reserved, in part, for those "financial" offenses which were related to the Medicare and State health care programs.

Finally, there is no merit to Petitioner's claim that he is entitled to an evidentiary hearing to determine under which statutory subsection his offense falls. Petitioner has stipulated to the material facts of this case. He has acknowledged that he was convicted of a criminal offense consisting of fraud against the Medicaid program. He has not offered any facts which would derogate from this admission or suggest that he was convicted of something other than that to which he has stipulated. At oral argument on the motions for summary disposition, Petitioner's counsel stated that he would like to consider offering expert testimony as to whether the offenses of which Petitioner was convicted are offenses encompassed by 42 U.S.C. 1320a-7(a)(1). But the question of how to legally classify facts to which the parties have stipulated is not an issue which can be resolved with expert testimony. How the offense for which Petitioner was convicted is characterized pursuant to 42 U.S.C. 1320a-7 is a question of law. Therefore, given the undisputed material facts, there is no need for an evidentiary hearing in this matter.

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 participating 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