DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Carlos E. Zamora, M.D.,	
Petitioner,	DATE: MAR 30, 1989
- v. -	Docket No. C-74
The Inspector General.	DECISION CR 22

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTIONS FOR SUMMARY DISPOSITION

Petitioner requested a hearing to contest the Inspector General's (the I.G.) determination excluding him from participating in the Medicare program, and directing that he be excluded from participating in State health care programs, for five years.1/ Both parties filed motions for summary disposition of this case. Neither party contends that there are questions of material fact which would require a hearing. Based on the undisputed facts and the law, I conclude that the exclusions imposed and directed by the I.G. are mandatory. Therefore, I am deciding this case in favor of the I.G.

BACKGROUND

On October 28, 1988, the I.G. sent notice to Petitioner, advising him that he was being excluded from participation in Medicare and any State health care programs for a period of five years. Petitioner was advised that his exclusions were due to his conviction of a criminal offense related to the delivery of an item or service

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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 Title XIX of the Act (Medicaid).

under the Medicaid program. Petitioner was further advised that the law required minimum five year mandatory exclusions from participation in Medicare and State health care programs for individuals convicted of a program-related offense.

Shortly after receiving this notice, Petitioner filed an action in United States District Court, Zamora v. Bowen, Civil Action No. A-88-CA-987 (W.D. Tex. 1988), seeking to enjoin the Secretary of Health and Human Services (the Secretary) from excluding or directing his exclusion from participating in Medicare or State health care programs. On November 16, 1988, the Court denied Petitioner's request for an injunction, concluding that Petitioner was not likely to succeed on the merits of his claim that the Secretary improperly excluded or directed his exclusion from participation in Medicare or State health care programs. I.G. Ex. C.2/

On December 7, 1988, Petitioner timely requested a hearing as to the exclusions, and the matter was assigned to me for a hearing and decision. I conducted a prehearing conference on January 18, 1989, at which both parties expressed their intent to move for summary disposition. I issued a prehearing Order on January 26, 1989, which established a schedule for moving for summary disposition and for responding to such motions. The Order also provided that either party could request oral argument on the motions. Pursuant to my Order, both parties moved for summary disposition. Neither party requested oral argument.

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

Petitioner's Exhibit P. Ex. (number)(page)
I.G.'s Exhibit I.G. Ex. (letter designation)(page)
(continued from previous page)

I.G.'s Memorandum I.G.'s Memorandum at (page)
Petitioner's Memorandum P.'s Memorandum at (page)
I.G.'s Reply Memorandum I.G.'s Reply Memorandum at (page)
Petitioner's Reply Memorandum P.'s Reply Memorandum at (page)

ISSUE

The issue argued by the parties in their respective motions is whether Petitioner was "convicted" of an offense within the meaning of 42 U.S.C. 1320a-7(i).

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: Section 1128(a)(1) of the Social Security Act, 42 U.S.C. 1320a-7(a)(1), requires the Secretary to exclude from participation in the Medicare program, and to direct the exclusion from participation in any State health care programs, of any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under Medicare or any State health care program.

Prior to July, 1988, "conviction" was defined at 42 U.S.C. 1320a-7(i) to include those circumstances when: (1) a judgment of conviction has been entered against a physician or individual, regardless of whether there is an appeal pending or the judgment of conviction or other record of criminal conduct has been expunged; (2) there has been a finding of guilt against the physician or individual; (3) a plea of guilty or nolo contendere by the physician or individual has been accepted; and (4) the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld. In July, 1988, Congress clarified this section by revising subsection (i)(4), substituting the language "first offender, deferred adjudication, or other arrangement or program" for the language "first offender or other program." Pub. L. 100-360, Sec. 411 (July 1, 1988).

The law provides at 42 U.S.C. 1320a-7(c)(3)(B), that for those excluded under section 1320a-7(a), "the minimum period of exclusion shall be not less than five years. . . ." It further provides that an excluded party may request a hearing as to the exclusion. 42 U.S.C. 1320a-7(f). 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. Texas Code of Criminal Procedure: The Texas Code of Criminal Procedure states at Art. 42.12, Sec. 7, that

after a defendant convicted in a criminal proceeding has satisfactorily completed a term of probation, the sentencing court shall "amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant." This section further states that, with exceptions, the court may, in discharging the defendant, "set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense."

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who has practiced in Texas. P.'s Memorandum at 1.

2. In 1988, the State of Texas indicted Petitioner for tampering with a governmental record for submitting false Medicaid claims. I.G.'s Memorandum at 1.

3. On May 18, 1988, Petitioner entered a nolo contendere plea in Texas state court to a misdemeanor offense of tampering with a government record. P. Ex. 2; I.G. Ex. A. In accepting the plea, the Court found that the evidence substantiated the Petitioner's guilt of tampering with a governmental record. Id..

4. The Court also found that the ends of justice and the best interests of both society and the Petitioner would be served by deferring further proceedings without entering an adjudication of guilt at that time, and by placing the Petitioner on probation. P. Ex. 2; I.G. Ex. A.

5. On November 2, 1988, an order was entered in Texas state court, pursuant to Art. 42.12, Sec. 7 of the Texas Code of Criminal Procedure, modifying Petitioner's period of probation to the time served from May 18, 1988, discharging Petitioner from probation, withdrawing Petitioner's nolo contendere plea, and dismissing the prosecution against him. P. Ex. 3.

6. On October 28, 1988, the I.G. advised Petitioner that he was excluding Petitioner from participating in the Medicare program, and was directing that Petitioner be excluded from participating in State health care programs, for five years. The exclusions were based on the I.G.'s determination that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

7. Petitioner's nolo contendere plea in Texas state court constitutes a "conviction" within the meaning of 42 U.S.C. 1320a-7(i), notwithstanding the provisions of Article 42.12 of the Texas Code of Criminal Procedure, or the terms of the November 2, 1988 Order entered in Texas state court in Petitioner's case.

8. The actions taken by the I.G., excluding Petitioner from participating in the Medicare program and directing his exclusion from participating in State health care programs, were mandated by 42 U.S.C. 1320a-7(a)(1).

ANALYSIS

There are no disputed material facts in this case. Petitioner acknowledges that he entered a nolo contendere plea to a misdemeanor, and, in fact, both the I.G. and Petitioner are relying on the same document to establish the circumstances and specifics of the plea. See P. Ex.

2; I.G. Ex. A. Petitioner does not deny that the offense to which he pleaded was an offense related to the delivery of an item or service under the Medicaid program, nor does he dispute that if his plea is a "conviction" of an offense within the meaning of 42 U.S.C. 1320a-7(a)(1) and 7(i), then his exclusions were mandated by law.

The only disputed issue in this case is whether Petitioner was "convicted" of an offense. Petitioner denies that his plea was a "conviction" and makes several arguments to support his contention. He notes that his nolo contendere plea of May 18, 1988 was withdrawn and the indictment against him dismissed upon satisfactory completion of his probation in November, 1988, pursuant to the terms of Art. 42.12, Sec. 7 of the Texas Code of Criminal Procedure. Petitioner bases his principal argument on these facts, claiming that the Texas court's November Order erases any action against him which could constitute a "conviction" within the meaning of 42 U.S.C. 1320a-7(a)(1) and 7(i). More specifically, Petitioner asserts that his plea could not constitute a plea of nolo contendere within the meaning of 42 U.S.C. 1320a-7(i)(3), because it has been withdrawn.

Petitioner argues further that his plea and its subsequent treatment by the Texas court does not fall within the definition of a "first offender or other program where judgment of conviction has been withheld" pursuant to 42 U.S.C. 1320a-7(i)(4). He contends that there are no statutory "first offender" programs under Texas law.

Petitioner also contends that the law of Texas intended that his discharge by the court in November 1988 released him "from all penalties and disabilities resulting from the crime or offense" to which he pleaded. P.'s Memorandum at 6. He asserts that the exclusions imposed on him and directed by the I.G. are "penalties and disabilities." He argues from this assertion that absent clear Congressional intent to preempt state law, the law of Texas should operate to insulate him from such additional "penalties and disabilities." He asserts that intent to preempt state law is not evident in 42 U.S.C. 1320a-7, and, therefore, any conflict between Texas law and the terms of 42 U.S.C. 1320a-7(i) must be resolved in his favor. He claims that the "attempted application of the federal exclusionary rules as sought by the Inspector General in this case thwart. . .[the] legitimate application of the State's police power." P.'s Memorandum at 8.

The I.G. asserts that Petitioner was "convicted" within the meaning of 42 U.S.C. 1320a-7(a)(i) and 7(i). The I.G. contends that Congress intended pleas of nolo contendere to constitute "convictions" even in those circumstances where such pleas were subsequently withdrawn or expunged, pursuant to deferred adjudication programs. I.G.'s Memorandum at 6-7.3/

The I.G. argues that there is no merit to Petitioner's contention that Texas law shields Petitioner from federally imposed or directed exclusions. The I.G. contends that the Texas law was not intended to shield Petitioner from federal exclusions. Furthermore, according to the I.G., the intent of Congress in enacting 42 U.S.C. 1320a-7 was not to displace state criminal law, but to define "conviction" in a way which would enable Congress to delineate the circumstances under which individuals would be excluded from federally operated and financed programs. See I.G.'s Reply Memorandum at 5. Finally, the I.G.argues that if a conflict exists between the terms of Texas and federal law, then federal law governs.

I conclude that Petitioner's nolo contendere plea constituted a "conviction" within the meaning of 42 U.S.C. 1320a-7(a)(i) and 7(i). I base this conclusion on both the plain meaning of the law and on legislative history. I conclude further that there is no conflict between this law and Texas law, and, as there is no conflict, it is unnecessary for me to consider the question of whether 42 U.S.C. 1320a-7 preempts state law.

In the applicable statute "conviction" is defined to include acceptance of a plea of nolo contendere by a court. 42 U.S.C. 1320a-7(i)(3). There exists nothing in this language to suggest that the definition is qualified by a subsequent act of expungement, or dismissal of a plea, based on satisfactory completion by the offender of a term of probation. The event described by the subsection as constituting a "conviction" is the entry and acceptance of the plea. Petitioner in this case entered a

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3/ In July 1988, Congress enacted language clarifying 42 U.S.C. 1320a-7(i)(4) by replacing the phrase "first offender or other program" with the phrase "first offender, deferred adjudication, or other arrangement or program." This clarification postdated Petitioner's May, 1988 nolo contendere plea, and the I.G. is not contending that the clarifying language governs this case.

plea of nolo contendere to an offense related to the delivery of an item or service under the Medicaid program. In accepting his plea, the Texas court found that there existed sufficient evidence to convict for the offense of which he was charged. His plea fell within the statutory definition of a "conviction." It is irrelevant that under Texas law Petitioner was permitted to subsequently withdraw his plea after satisfactorily completing a period of probation.

The circumstances of Petitioner's case fall not only within the plain meaning of subsection 7(i)(3), but within the plain meaning of subsection 7(i)(4), as well. As of the date Petitioner entered his plea, the latter subsection included within the definition of "conviction" 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 Petitioner's plea is captioned "Deferment of Adjudication." P. Ex. 2; I.G. Ex. A. Pursuant to Texas law, Petitioner was permitted to withdraw his plea, based on the fact that he had satisfactorily served his sentence. On its face, the treatment of Petitioner's case by the Texas court falls within the term "other program where judgment of conviction has been withheld."

Congress' enactment of mandatory exclusion requirements for individuals or entities convicted of program-related offenses was a legislative judgment that such parties could not be trusted with public funds. Congress determined that parties who pleaded guilty to such offenses were as untrustworthy as those convicted after a trial:

> If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H. Rep. No. 99-727, 99th Cong., 2d Sess. 1986 reprinted in 1986 U.S. Cong. Code & Adm. News, 3607, 3664-65. In Congress' view it was irrelevant that such parties might subsequently receive lenient treatment by the courts, or have their convictions expunged:

> With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason other than the

> vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

1986 U.S. Cong. Code & Adm. News, 3665. Therefore, the fact that Petitioner's plea may have been dismissed or expunged in state court based on his satisfactory completion of a probation period is of no consequence to the determination that the entry and acceptance of his plea constituted a "conviction" within the meaning of 42 U.S.C. 1320a-7(a)(1) and 7(i).

There is no conflict between 42 U.S.C. 1320a-7 and Article 42.12 of the Texas Code of Criminal Procedure which would raise the question of whether Congress intended to preempt state law. Petitioner's assertion that a conflict exists is premised on his argument that the exclusions mandated by 42 U.S.C. 1320a-7(a)(1) for persons convicted of program-related offenses constitute additional punishment to that imposed by state criminal laws. I disagree with this analysis. It is evident from the face of the federal statute, as well as from 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 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.

Furthermore, I am satisfied that it was not the purpose of the deferred adjudication provisions of the Texas Code of Criminal Procedure to immunize Petitioner from exclusions imposed pursuant to 42 U.S.C. 1320a-7(a)(1). In Gonzalez de Lara v. United States, 439 F.2d 1316 (5th Cir. 1971), the Fifth Circuit considered the meaning of Texas' deferred adjudication and expungement provisions in circumstances analogous to those presented in this case. Appellant was a resident alien whose deportation had been ordered based on his conviction under Texas law for possession of marijuana. He argued that he had not been finally "convicted" because, under Texas law, he had the right to petition to expunge and erase his conviction. The Court rejected this argument, holding that the Texas law was intended to provide a party with limited

protection from additional Texas penalties. 439 F.2d at 1318.4/

The I.G. notes that the issues raised by Petitioner in this case were considered in federal district court in Petitioner's action for injunctive relief. As I noted above, the Court denied Petitioner's request, on the ground that there was little probability that his claim would succeed on the merits. Zamora v. Bowen, Civil Action No. A-88-CA-987 (W.D. Tex. 1988). The I.G. urges that the Court's decision in that case is dispositive of the issues before me. It is clearly persuasive, and I agree with the Court's assessment of the merits. However, it is not dispositive; the Court there addressed only the issue of entitlement to injunctive relief and did not render a decision on the merits.

CONCLUSION

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

/s/

Steven T. Kessel
Administrative Law Judge

4/ The Court also held that the Texas law could not shield parties from the reach of federal enactments. 439 F.2d at 1318-19. As I have indicated, there is no need for me to address this conclusion in this case, because I find no conflict between federal and Texas law. I am also skeptical that the scope of my authority to hear and decide cases concerning exclusions includes authority to consider questions of preemption of state law by federal law. See 42 U.S.C. 405(b); 42 C.F.R. 1001.128.