DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Robert M. Buncher,	DATE: September 27, 1989
Petitioner,	
- v. -	Docket No. C-102
The Inspector General.	DECISION CR 45

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On December 29, 1988, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs for five years.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in a Florida court of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was advised that exclusions from participation in Medicare and Medicaid of individuals or entities convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be not less than five years.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G. moved for summary decision, and Petitioner opposed the

[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

motion. I heard oral argument of the motion on September 13, 1989.

I have considered the parties' arguments, their fact submissions, and applicable law. I conclude that the exclusions imposed and directed by the I.G. in this case are mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUE

The issue in this case is whether the exclusions imposed and directed by the I.G. against Petitioner are mandated by law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 28, 1987, Petitioner was charged with two felony offenses, pursuant to Florida law. I.G. Ex. 4.[2]

2. Count I of the information filed against Petitioner charged him with knowingly aiding or abetting in the filing of false or unauthorized claims for services under the Florida Medicaid program. I.G. Ex. 4.

3. On July 25, 1988, Petitioner entered a plea of nolo contendere to Count I of the information filed against him. I.G. Ex. 1.

4. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. I.G. Ex. 1, 4.

---

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

I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Exhibit	P. Ex. (number)
Memorandum in Support of the Inspector General's Motion for Summary Disposition	I.G.'s Brief at (page)
Memorandum in Response to the Inspector General's Motion for Summary Disposition	P.'s Brief at (page)

5. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Findings 1-3; Social Security Act, section 1128(i).

6. Petitioner was convicted of a criminal offense as defined by section 1128(a)(1) of the Social Security Act. Finding 4; Social Security Act, section 1128(a)(1).

7. The Secretary of Health and Human Services (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).

8. On February 28, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act.

9. The exclusions imposed and directed against Petitioner by the I.G. were for five years, the minimum period required by law for exclusions imposed and directed pursuant to section 1128(a)(1) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).

10. The exclusions imposed and directed against Petitioner by the I.G. are mandated by law. Finding 4; Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. The record establishes that Petitioner pleaded nolo contendere in a Florida court to a single count of fraud against the Florida Medicaid program. Based on this conviction, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, for five years.

The I.G. contends that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. I.G.'s Brief at 5. The I.G. argues that section 1128 of the Social Security Act mandates that individuals convicted of such offenses be excluded from participation in Medicare and Medicaid. Id. Furthermore, according to the I.G., Petitioner was excluded for the minimum period mandated by law, inasmuch as section 1128(c)(3)(B) of the Social Security Act

requires that an individual convicted of an offense, as defined by section 1128(a)(1), be excluded for at least five years. Id.

Petitioner conceded at oral argument that he was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, as defined by section 1128(a)(1) of the Social Security Act.[3] Petitioner's principal argument is that the five year exclusions imposed and directed against him are unreasonable, given the particular facts of his case. According to Petitioner, he should have a hearing and the opportunity to establish the presence of mitigating factors in his case. P.'s Brief at 3-5.

I disagree with Petitioner's contentions. The law not only mandates exclusions for individuals convicted of offenses related to the delivery of an item or service under the Medicaid program, it requires that the term of such exclusions be for at least five years. Social Security Act, section 1128(c)(3)(B). The law does not permit any exceptions to this rule, regardless of the equities that may be present in particular cases.[4] Petitioner's unique circumstances are not relevant in assessing the reasonableness of the five-year exclusions imposed and directed against him.

Petitioner argues that to decide this case without an evidentiary hearing as to the reasonableness of the length of the exclusions imposed and directed against him would contravene section 205(b) of the Social Security Act which provides for de novo hearings to review certain decisions by the Secretary. I agree that Petitioner's hearing rights in this case are provided by section

---

[3] In his brief, Petitioner argued that a nolo contendere plea under Florida law was not a conviction, but during oral argument in response to a question from me, Petitioner conceded that he had been convicted of an offense related to the delivery of an item or service under the Medicaid program. In any event, a nolo contendere plea is a conviction within the meaning of section 1128(i)(3).

[4] If the I.G. had imposed and directed exclusions against Petitioner for a period longer than five years, then there would exist an issue as to the reasonableness of that part of the exclusions which exceeded five years. In that event, either side would be permitted to introduce evidence as to the presence of aggravating or mitigating factors.

205(b), and that this law requires de novo hearings. But the law does not require the administrative law judge to admit and consider evidence which is not relevant to the issues in a case. In this case, Petitioner offered evidence to show that the five-year exclusions imposed and directed against him are unreasonable. This evidence is not relevant. I have provided Petitioner with an opportunity to contest the issue which is relevant--that is, whether Petitioner was convicted of an offense related to the delivery of an item or service under the Medicaid program.

Petitioner also contends that he should be permitted to offer evidence concerning the reasonableness of the exclusions in this case, in order to create a record for judicial review of my decision.

I disagree with the Petitioner's contention. I have concluded that evidence offered to show the reasonableness of exclusions for less than five years is not relevant, because the law mandates a minimum five year period of exclusion. It is inappropriate for me to admit irrelevant evidence on the possibility that a reviewer might disagree with my assessment of the issues. Were I to do so, there would be no boundaries on the admissibility of evidence in an administrative hearing.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusions were mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusions imposed and directed against Petitioner are sustained.

/s/

Steven T. Kessel
Administrative Law Judge