

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

_____ )	
In the Case of: )	
Kenneth Krulevitz, M.D., )	DATE: APR 20, 1989
Petitioner, )	
- v.- )	
The Inspector General. )	Docket No: C-75
_____ )	DECISION CR 24

DECISION AND ORDER

The Petitioner requested a hearing (Request) to contest the Inspector General's (I.G.'s) determination to exclude him from participation in Medicare and from participation in State health care programs (e.g. Medicaid), for a period of five years.<sup>1/</sup> The I.G. then filed a motion for dismissal of the Request and, in the alternative, for summary disposition.

APPLICABLE STATUTES AND REGULATIONS

I. Federal Statutes

This case is governed by section 1128 of the Social Security Act (Act); section 1128 is codified at 42 U.S.C. Section 1320a-7 (West U.S.C.A. Supp., 1988). Section 1128(a)(1) of the Act provides for the exclusion from Medicare, and a directive to the State to exclude from Medicaid, any individual or entity who is "convicted of a criminal offense related to the delivery of an item or service" under the Medicare or "any State health care" program. Section 1128(i)(3) provides that a physician or other individual is considered to have been "convicted"

---

<sup>1/</sup> The Act and the Notice refer to State health care programs. The primary federally funded State health care program is Medicaid. For the sake of brevity, I hereafter use "Medicaid" to represent all covered State health care programs.

of a criminal offense when "a plea of guilty or nolo contendere by the physician or individual has been accepted by a Federal, State, or local court. . . ."

Section 1128 (c)(3)(B) provides that the period of exclusion from Medicare and Medicaid, for conviction of a criminal offense related to the delivery of an item or service, shall be for a minimum period of five years.

## II. Federal Regulations

The governing federal regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002(1987). Part 498 governs the procedural aspects of this exclusion case and Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123(a) 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 crime 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/

In accordance with section 498.5(i), a practitioner, provider, or supplier who has been excluded from program coverage is "entitled to a hearing before an ALJ (Administrative Law Judge)." Pursuant to section 1001.128, an individual who has been excluded from participation has a right to request a hearing before an ALJ 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) the length of the exclusion is reasonable.

### BACKGROUND

By letter dated October 11, 1988 (Notice), the I.G. notified the Petitioner that, as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid, he would be excluded from participation in Medicare and Medicaid for a mandatory five year period, commencing 20 days from the date of the Notice.

---

2/ In his Notice, the I.G. allowed an additional five days, for receipt by mail.

In his December 8, 1988 Request, the Petitioner requested a hearing on the issues of (1) whether he was convicted, as that term is defined by the Act, (2) whether the acquisition and use of evidence and witnesses during the State's investigation was improper, and (3) whether there are factors of emotional and financial hardship which would mitigate the period of exclusion.

I conducted a telephone prehearing conference on January 17, 1989, during which the I.G. expressed his intent to file a motion for summary disposition of this case. On January 23, 1989, I issued a Prehearing Order and Notice of Hearing. Thereafter, the I.G. moved to dismiss or summarily decide the Petitioner's Request. The Petitioner declined to file a brief in response and did not request either an evidentiary hearing or oral argument.

#### EVIDENCE

For the authenticity of evidence in this record, the I.G. has submitted a Declaration of Counsel, declaring that the documents which he submitted are true and correct copies of the original documents filed in State of Maryland v. Keaciel K. Krulevitz, No. 28813325. The evidence consists of Exhibits 1(a), (b), (c), (d), (e) and 2 through 5.

#### 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 the Petitioner was "convicted" of a criminal offense within the meaning of 42 U.S.C. 1320a-7(i).
3. Whether the criminal offense for which the Petitioner was convicted "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 3/

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. The Petitioner, a medical doctor, is a resident of the State of Maryland who has been a provider of medical care and services for 45 years. Request 1. 4/
2. On May 16, 1988, the Petitioner pleaded guilty, and was found guilty by the State of Maryland, of knowingly and willfully making and causing to be made "a series of false statements and representations of material facts in application for payment submitted to the Medical Assistance Program of the Department of Health and Mental Hygiene of the State of Maryland, a state plan established by Title XIX of the Social Security Act. I.G. Ex. 1(a),1(d), and 2.
3. The Petitioner entered his guilty plea under the terms of North Carolina v. Alford, 400 U.S. 25 (1970). I.G. Ex. 1(e).
4. At the time the Petitioner entered his guilty plea, he was advised that the guilty plea would result in a judgment of guilt. I.G. Ex. 2/7.
5. The Petitioner's guilty plea was entered voluntarily and knowingly. I.G. Ex. 2.
6. The Petitioner's guilty plea was accepted by the State of Maryland. I.G. Ex. 2/8.

---

3/ Any part of this Decision and Order preceding and following the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is incorporated herein.

4/ The citations in this Decision and Order are as follows:

Petitioner's Request	Request (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)

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

8. The Petitioner 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.

9. In accordance with section 1128 of the Act, the Petitioner was properly excluded from participation in Medicare and Medicaid for a period of five years.

10. Neither the Petitioner's past performance as a physician, nor his financial and emotional state may be considered as mitigating factors to remove the exclusion or reduce its length. Regulations, section 1001.128

11. The alleged improprieties by the State, in the obtaining and use of evidence during its investigation, are not issues properly addressed in this forum. Id.

12. The I.G.'s determination to exclude the Petitioner, and to direct that the State also exclude the Petitioner, was required and made in accordance with the Act and Regulations.

13. There are no contested issues of material fact which would require an evidentiary hearing, and the Petitioner is not requesting an evidentiary hearing or oral argument.

14. The I.G. is entitled to summary disposition in this proceeding.

#### DISCUSSION

##### I. 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; 1987 U.S. Code Cong., and Ad. News 682, 686.

Since the 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, the I.G. was required to exclude the Petitioner for a minimum of five years.

II. The Petitioner was "Convicted" of a Criminal Offense as a Matter of Federal Law

Section 1128(i) of the Act provides that:

a physician or other individual is considered to have been "convicted" of a criminal offense --

- (1) when a judgment of conviction has been entered against the physician or individual 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) when there has been a finding of guilt against the physician or individual by a Federal, State, or local court;
- (3) when a plea of guilty of nolo contendere by the physician or individual has been accepted by a Federal, State, or local court; or
- (4) when the physician or individual has entered into participation in a first offender or other program where judgment of conviction has been withheld.

In his Request, the Petitioner states that he "took an Alford plea" and did not "admit guilt." Request 1. The Petitioner further alleges that he misunderstood the effect of his Alford plea and thus is not properly excluded from participation in Medicare and Medicaid. The Petitioner does not deny that he entered a guilty plea, but, in the alternative, argues that the factors which he considered in electing to enter his plea are controlling. The I.G. does not dispute the Petitioner's allegation that

he did not admit guilt. Although an Alford plea does not require an admission of guilt, it is nonetheless a plea of guilty.

I find and conclude that the Petitioner was "convicted" within the meaning of section 1128(a)(1) and (i). First, 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 the Act in light of the purposes they were designed to serve and to discern the meaning of those words. 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."

In Alford, the issue presented did not involve whether a plea of guilty was "accepted," as here, but concerned the validity of the guilty plea entered. Mr. Alford pleaded guilty, but maintained that he was innocent and was choosing to plead guilty only to avoid the possible imposition of a harsher penalty. The Court in Alford concluded that a guilty plea is valid if the plea represents a "voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 30. The Court held that the desire of the defendant in Alford to limit a possible penalty would not "demonstrate that the plea of guilty was not the product of free and rational choice, especially where the defendant was represented by competent counsel." Id.

The issue which the Petitioner raises may relate to the issue of whether his guilty plea was entered voluntarily and intelligently, prerequisites for a court determining that a guilty plea is valid. Id. However, this is not the proper forum in which to address those issues. The Court in Alford stated that it would defer to the States' wisdom in deciding whether to accept or reject guilty pleas under the terms of Alford. The State of Maryland has chosen to accept Alford pleas and view them as the guilty pleas which they are. See Deyermand v. State, 19 Md. App. 698, 313 A.2d 709 (1974), Baneguar v. Taylor, 312 Md. 609, 541 A.2d 969 (Md. 1988), and State of Maryland v. Keaciel Kenneth Krulevitz, Case No. 28813325 (1988).

The State presented the following questions to the Petitioner regarding the nature of his plea:

1) "Dr. Krulevitz, you understand that you are pleading guilty today to the charge that has been filed?" I.G. Ex. 2/3(2) "and are those factors that went into your decision along with the strength of the evidence produced by the State, are those factors that went into your decision to enter a plea under the Alford case, which is essentially a plea of guilty, which will result in a judgement of guilt . . .?" I.G. Ex. 2/7. The Petitioner answered affirmatively to the above questions. The State accepted the Petitioner's plea, and, by doing so, in its wisdom, determined in effect that the plea was entered voluntarily and intelligently. The finding of guilt and acceptance by the State of the Petitioner's plea thus satisfies the definition set forth in Section 1128(i)(3) for finding that the Petitioner was "convicted." I.G. Ex. 2.

### III. The Petitioner's Conviction Is "Related To" The Delivery Of A Service Under Medicaid

Section 1128(a)(1) requires the I.G. to exclude from participation any individual who is convicted of a criminal offense "related to the delivery of an item or service" under Medicaid. The Petitioner was convicted of "knowingly and willfully making and causing to be made, pursuant to a scheme and continuous course of conduct, a series of false statements and representations of material facts in applications for payment submitted to the Medical Assistance Program of the Department of Health and Mental Hygiene of the State of Maryland, a state plan established by Title XIX of the Act." I.G. Ex. 1(d); I.G. Ex. 2 Specifically, the Petitioner was charged with submitting Physician's Reports and Invoice forms to the State Medical Assistance Program in which he falsely represented that services had been performed which the Petitioner knew had not been performed I.G.Ex. 1(d).

The criminal offense for which the Petitioner was convicted evidences an attempt by the Petitioner to fraudulently obtain reimbursement from Medicaid for items or services which were not rendered as claimed. Congress intended to exclude individuals convicted of this type of



offense. In the legislative history to the 1977 enactment, Congress stated that:

Perhaps the most flagrant fraud involves billings for patients whom the practitioner has not treated. A related form of fraud involves claims for services to a practitioner's patients that were not actually furnished and intentionally billing more than once for the same service.

H.R. Rep. No. 393-Part II, 95th Cong., 1st Sess. 47; 1977 U.S. Code Cong. & Ad. News 3039, 3050.

In 1987, Congress reiterated its intent by enacting the Medicare and Medicaid Patient and Program Protection Act and stating that its purpose in enacting the legislation was:

to improve the ability of the Secretary and Inspector General of the Department of Health and Human Services to protect the Medicare, Medicaid, Maternal and Child Health Services Block grant, and Title XX Social Services Block Grant from fraud and abuse, and to protect the beneficiaries from incompetent practitioners and from inappropriate and inadequate care.

S. Rep. No. 109, 100th Cong., 1st Sess. 2; 1987 U.S. Code Cong. & Ad. News 682.

Thus, the criminal offense for which the Petitioner was convicted is one "related to" the delivery of an item or service within the meaning of section 1128(a)(1) of the Act.

#### IV. Mitigating Factors

The Petitioner alleges financial and emotional reasons for choosing to plead guilty under the terms of Alford. The court, in questioning the Petitioner prior to accepting his plea, and in subsequently accepting a guilty plea under Alford, apparently recognized this fact. The court specifically asked the Petitioner if he was primarily pleading guilty "because of the intense pressure that this case has placed upon you and your family emotionally and financially?" and "is it true that the pendency of this case and investigation has already had a significant impact upon your mental and physical health." I.G. Ex.2/7. Although the Petitioner's allegations may be

true, this forum is not the proper place to address those issues. The I.G. is required by section 1128(a) of the Act to exclude from participation, and to direct that the State exclude from participation, any individual who is "convicted of a criminal offense related to the delivery of an item or service under Title XVIII or under any State health care program," and to direct that the exclusion be for a minimum period of five years. The Petitioner was convicted of a criminal offense related to the delivery of a health care service or item, and thus, was properly excluded. Neither the I.G., nor I, have the discretion in a mandatory exclusion case to take into account the factors of emotional and financial hardship in determining whether the period of exclusion should be lessened, or removed in its entirety.

V. Alleged Improprieties During Investigation

The alleged improprieties in the State's gathering and use of evidence during its investigation and prosecution of the Petitioner are also not issues properly addressed in this forum. Section 1001.128 provides that an ALJ may consider: (1) whether there was a conviction, (2) whether the conviction was related to his or her participation in the delivery of medical care or services, and (3) whether the length of the exclusion is reasonable. Thus, I do not decide whether there were improprieties and, even if there were, whether the validity of the conviction was impaired.

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude the Petitioner was appropriate and required by the Act and Regulations.

IT IS SO ORDERED.

/s/

---

Charles E. Stratton  
Administrative Law Judge