DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	DATE: February 22, 1990
Orlando Ariz and	)	
Ariz Pharmacy, Inc.,	)	
	)	
Petitioners,	)	Docket No. C-115
	)	
- v. -	)	DECISION CR 69
	)	
The Inspector General.	)	
	)	

DECISION AND ORDER

In this case, governed by section 1128 of the Social Security Act (Act), Petitioners timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the March 3, 1989 notice of determination (Notice) issued by the Inspector General (I.G.) of the Department of Health and Human Services (DHHS) which excluded Petitioners from participation in the Medicare and "any State health care program" for five years.[1]

Based on the entire record before me, I conclude that there are no material facts at issue, that Petitioners are subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that it is required by federal law that Petitioners be excluded for a period of five years.

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioners are excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "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 for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

Section 1128(b) of the Act provides for the permissive exclusion of individuals and entities for certain types of convictions, infractions, or undesirable activities, with no minimum period of exclusion.

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 an item or service" under the Medicare or Medicaid programs; such exclusion must 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 AND STATEMENT OF THE CASE [3]

On June 14, 1989, I held a prehearing conference and I established a schedule for filing prehearing motions and briefs. Thereafter, the I.G. timely filed his motion for summary disposition on all issues and Petitioners timely filed their response and brief in opposition. Petitioners reasserted their right to an evidentiary hearing and also requested that I "waive" the exclusion, pursuant to section 1128(c)(3)(B) of the Act, because of the essential nature of their services to the community. On September 13, 1989, the parties presented their oral arguments by telephone. During his oral argument, the I.G. objected to the admission, and challenged the authenticity, of one of Petitioners' exhibits.

On October 17, 1989, I concluded that summary disposition of this case was inappropriate because of the dispute as to the relevance, authenticity, and weight to be accorded Petitioners' Exhibit 1. At that time, I also remanded the case to the I.G. for consideration of the issue of a waiver, because I determined that I did not have the authority to grant a waiver pursuant to section 1128(c)(3)(B) of the Act. Thereafter, the I.G. filed a response to my October 17, 1989 Order in which he objected to the remand, determined that Petitioners' Exhibit 1 was not a proper request for a waiver, and, accordingly, did not grant Petitioners' request for a waiver.

On December 14, 1989, I issued an Order Closing The Record. In that Order, I: (1) deemed the I.G.'s response to be a denial of Petitioners' request for a waiver, (2) acknowledged that an ALJ has no jurisdiction to decide the issue of a waiver because section 1128(c)(3)(B) of the Act provides that the I.G.'s determination on waivers is not reviewable, and (3) indicated that I would, thereafter, decide whether summary disposition was now appropriate in this case.

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

Petitioners' Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br.(page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)
Petitioners' Exhibits	P. Ex. (page)

ISSUES

The issues are:

1. Whether Petitioners were "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

2. Whether Petitioners were convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

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

4. Whether summary disposition is appropriate in this case.

5. Whether the I.G. is precluded from excluding Petitioners by reason of the principles of double jeopardy, due process, equitable estoppel, or fairness.

6. Whether I have authority to grant the extraordinary relief requested by Petitioners.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [4]

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

1. Petitioner Orlando Ariz is a licensed pharmacist in the State of Florida, and is the owner of Petitioner Ariz Pharmacy Inc. I.G. Br. 1.

2. Petitioner Ariz Pharmacy, Inc., is a Florida corporation located at 1956 West Flagler St., Miami, Florida 33135. P. Ex. 2.

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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.

3. Between May 22, 1987, and August 18, 1987, the Medicaid Fraud Control Unit of the Office of the Auditor General, State of Florida, conducted an undercover investigation which revealed that Petitioners were involved in a merchandising scheme to defraud the Medicaid program. I.G. Br. 1.

4. A pharmacy engages in "merchandising" when it provides non-medical merchandise in exchange for prescriptions which are submitted as claims to, and ultimately paid by, the Medicaid program. I.G. Br. 1.

5. On June 7, 1988, a criminal information was filed against Petitioners in the Circuit Court, Dade County, Florida, on two misdemeanor counts of Medicaid fraud. I.G. Ex. A.

6. On October 4, 1988, as a result of a plea agreement, Petitioners pled nolo contendere to the two counts of Medicaid fraud. I.G. Ex. B.

7. The Florida court withheld adjudication and ordered reimbursement of $49.28 to the State Medicaid agency and $2,788.84 to the State Office of the Auditor General for investigative costs. I.G. Ex. B.

8. The State court "accepted" Petitioners' nolo contendere plea within the meaning of section 1128(i)(3) of the Act.

9. Petitioners' plea agreement and subsequent nolo contendere pleas were an "arrangement where judgment of conviction was withheld" within the meaning of section 1128(i)(4) of the Act.

10. Petitioners were "convicted" of a criminal offense within the meaning of sections 1128(a)(1), 1128(i)(3), and 1128(i)(4) of the Act.

11. Petitioners were, as a matter of federal law, convicted of criminal offenses "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

12. The I.G. properly excluded Petitioners from participation in the Medicare and Medicaid programs for a period of five years, as required by section 1128(c)(3)(B) of the Act.

13. Since there are no material facts in dispute, there is no need for an evidentiary hearing in this case.

14. Since the material facts are undisputed in this case, the classification of Petitioners' conviction of a criminal offense as subject to the authority of 1128(a)(1) is a legal issue.

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

16. The I.G. is not barred by federal law or principles of double jeopardy, due process, or equitable estoppel from excluding Petitioners in this case.

17. I do not have the authority as an ALJ to grant the extraordinary relief requested by the Petitioners.

18. The Secretary of DHHS delegated responsibility to the I.G. to prevent and detect fraud and abuse in DHHS programs and operations, including exclusion sanction authority. 42 U.S.C. 3521 et seq. 48 Fed. Reg. 21662, May 13, 1983.

19. Section 1128(c)(3)(B) of the Act grants exclusive unreviewable authority to the Secretary to make determinations with respect to requests for a waiver; since the Secretary has redelegated that authority to the I.G., the I.G.'s decision is not reviewable.

DISCUSSION

I. Petitioners Were "Convicted" of a Criminal Offense as a Matter of Federal Law.

Petitioners contend that they are innocent of the Medicaid fraud charges brought against them by the State of Florida. They also contend that their plea of nolo contendere should not be considered a conviction within the meaning of section 1128(i) of the Act. P. Br. 4, 6.

Section 1128(i) of the Act provides that an individual has been "convicted" of a criminal offense when:

(1) a judgment of conviction has been entered against the individual or entity 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) there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

(3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

(4) the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Petitioners argue that their nolo contendere plea does not fall within the reach of section 1128(i) because Congress never intended such a harsh result for a $49.28 overcharge, that the nolo plea was based on bad advice from a law firm, that Petitioners' cooperation with the State of Florida is not being given any consideration in this case, and that fundamental principles of fairness militate for a more rational result in this case. P. Br. 1-5. The I.G. contends that Petitioners were "convicted" within the meaning of sections 1128(a), 1128(i)(3), and 1128(i)(4) of the Act and cite my Decision and Order in the case of H. Gene Blankenship, DAB Civ. Rem. C-67 (1989).

I find and conclude that Petitioners were "convicted" within the meaning of section 1128(a)(1) and (i)(3) and (i)(4). The interpretation of words and phrases contained in a federal statute or federal regulation is a question of federal, not state law, and my task is to interpret those words or phrases in light of the purposes that such federal statute or federal regulation were designed to serve. See, United States v. Allegheny Co., 322 U.S. 174, 183 (1944); Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979). Cf. Doe v. Bowen, Civ No. 87-1068-WD, Fn. 1, 2 (W. D. Mass, Aug. 30, 1987).

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." The Florida court "accepted" the Petitioners' nolo plea within the meaning of section 1128(i)(3) and that is all section 1128(i) requires for a plea to constitute a conviction for purposes of this federal law exclusion.

I also conclude that the circumstances of this case fall within the reach of section 1128(i)(4). This section includes within the definition of "convicted" the situation in which an individual has entered into participation in "a first offender, deferred

adjudication, or other arrangement or program where judgment of conviction has been withheld."

As a result of a plea agreement, Petitioners pled nolo contendere to two counts of Medicaid fraud. I.G. Ex. B. The Florida court withheld adjudication and ordered Petitioners to pay reimbursement of $49.28 to the State Medicaid agency and $2,788.84 to the State Office of the Auditor General for investigative costs. I.G. Ex. B. I conclude that Petitioners' plea agreement and the court's agreement to withhold adjudication is an "other arrangement or program where judgment of conviction has been withheld," and that Petitioners were "convicted" within the meaning of section 1128(i)(4).

II. Petitioners' Conviction "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128(a)(1) of The Act.

Petitioners assert that this case falls within the permissive provisions of Section 1128(b)(1), rather than the minimum mandatory provisions of Section 1128(a)(1) of the Act because the nolo plea entered into by Petitioners did not "relate to the delivery of an item or service" under the Medicare or Medicaid programs. Petitioners argue that this case involves a mere overcharge of $49.28 to the Florida Medicaid program and that, as such, did not "relate to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act. P. Br. 1-6.

I find and conclude that Petitioners' offenses were "related to the delivery of an item or service" under the Medicaid program. Petitioners were charged with and pled nolo contendere to two misdemeanor counts of Medicaid fraud. Petitioners' conviction related to defrauding the Medicaid program by engaging in "merchandising", a scheme which entailed providing non-medical merchandise in exchange for prescriptions. These prescriptions were then submitted to and paid by the Medicaid program. I.G. Br. 1.

In the case of Jack W. Greene, DAB App. 1078 (1989), the Departmental Appeals Board (DAB) held that "the false Medicaid billing and the delivery of drugs to a Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term." In Petitioners' conviction, the delivery of merchandise, instead of drugs, and the billing for drugs to the Medicaid program are also "inextricably intertwined" and, therefore, "related." Thus, Petitioners were "convicted"

of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion Is Required In This Case.

Petitioners contend that the permissive exclusion provisions of section 1128(b) should apply to this case, rather than the minimum mandatory provisions of section 1128(a)(1) of the Act. P. Br. 5, 6. The I.G. argues that this is a mandatory exclusion within the provisions of 1128(a)(1) of the Act and that five years is the required minimum length of exclusion.

Section 1128(c)(3)(B) of the Act requires the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years 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:

> 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 Petitioners were "convicted" of a criminal offense and it was "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 Petitioners for a minimum of five years.[5] See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990); Greene v. Sullivan, No. Civ-3-89-758 (E.D. Tenn. Feb 8, 1990).

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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 am authorized to make a de novo determination to reclassify Petitioners' criminal offense as subject to the permissive authority under section 1128(b) of the Act.

IV. There Is No Need For An Evidentiary Hearing In This Case.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Greene, supra; Wheeler and Todd, supra. The facts which Petitioners seek to establish in an evidentiary hearing would not materially affect the outcome of this case. Since the material facts are undisputed in this case, the issues I must decide are legal issues, and summary disposition is an appropriate mechanism for deciding legal issues. See Rule 56, F.R.C.P.

V. The I.G. Is Not Precluded From Excluding Petitioners In This Case.

Petitioners contend that the I.G. is barred from excluding them because such an exclusion in this case violates the double jeopardy clause of the United States Constitution and has no relationship to reality, due process, or fundamental fairness.

Petitioners cite the recent Supreme Court case of United States v. Halper, 109 S. Ct. 1892 (1989), in support of their arguments concerning double jeopardy. P. Br. 6-11. In Halper, the Supreme Court held that under some circumstances the imposition of civil penalties under the False Claims Act, 31 U.S.C. 3729-3231, could constitute double jeopardy in the narrow circumstances where there existed a prior federal criminal conviction for the false claims for which the civil penalty was imposed and where there was not even a rough relationship between the amount of the penalty and the cost to the government resulting from the false claims. The Court noted that the rule is one for "the rare case ... where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly dispropor-tionate to the damages he has caused." At first glance, this case might seem to fit that description. Five years seems like a long period of exclusion for the type of criminal offense involved here.

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). Second, the major purpose of the exclusion law is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See, H.R. Rep. No. 97-158, 97th Cong., 1st Sess. Vol. III, 329, 344, (1981); S. Rep. No. 139, 97th Cong., 1st Sess. 461-62 (1981), 1981 U.S. Code Cong. & Ad. News 727-28; Preamble to the Regulations (48 Fed. Reg. 38827 to 38836, August 26, 1983).

Next, Petitioners assert that the State's Stipulation of Dismissal estops the I.G. from taking this action. They also contend that they received bad advice from a law firm that assured them that a nolo plea would be an expedient way to dispose of the overcharge and that no further repercussions would result. Petitioners cannot use this action to collaterally attack the State criminal proceeding. The proper forum for any challenge to the validity of their pleas, and their acceptance by the State court, is in State court and not in this administrative proceeding. Wheeler, supra p. 9.

VI. I Do Not Have the Authority To Grant Petitioners The Extraordinary Relief Requested.

Petitioners argue that if an exclusion is ordered, there are mitigating circumstances which compel a reduction in the proposed five years, regardless of the minimum mandatory provisions. Petitioners argue that since they cooperated with the Florida State Attorney, this action against them is unfair. Finally, Petitioners assert that they are the sole source of essential specialized services in the community that they serve and that, accordingly, the federal exclusion should be waived.

I do not have the authority to grant the type of extraordinary relief which Petitioners seek. Section 1128(c)(3)(B) of the Act authorizes the Secretary's delegate, the I.G., to make determinations with respect to waivers and the ALJ does not have authority to review these determinations.

Finally, I might be inclined to reduce the Petitioners' period of exclusion if the law permitted me to consider mitigating circumstances. However, in this proceeding, the law does not permit me to consider mitigating circumstances, and, thus, I am unable to consider Petitioners' cooperation with State authorities as a mitigating circumstance which might require a reduction in the length of exclusion. There is no equitable relief from the minimum mandatory provisions of section 1128 of

the Act. Although Congress may not have envisioned this type of case when it enacted section 1128(c)(3)(B), the equities of a particular case are not relevant with respect to the issue of whether the minimum mandatory exclusion provisions apply to that case, and I do not have the authority to reduce the minimum exclusion mandated by section 1128(c)(3)(B).

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded Petitioners from the Medicare and Medicaid programs pursuant to section 1128 (a)(1) of the Act, and that the minimum period of exclusion for five years is mandated by federal law.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge