Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Alida C. Reinoso, M.D.,	DATE: November 16, 1992
Petitioner,	Docket No. C-92-119
- v. -	Decision No. CR243
The Inspector General.	

DECISION

By letter dated April 14, 1992, Alida C. Reinoso, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare program and those State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to these State programs.) The I.G. explained that an exclusion of at least five years is mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition. Because I conclude that there are no material and relevant factual issues in dispute, I have decided the case on the basis of written submissions in lieu of an in-person hearing. I conclude that, under the facts of this case, a five year exclusion is mandatory and I enter summary disposition in favor of the I.G.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

Section 1128(i) of the Act provides that an individual will be regarded as having been convicted when a judgment of conviction has been entered against him by a competent court (regardless of whether there is an appeal pending or whether the judgment is ultimately expunged); or when there has been a formal finding of guilt by a court; or when a court accepts a nolo or guilty plea; or when a court withholds judgment to allow a guilty defendant (who complies with certain conditions) to preserve a clean record.

Section 1128(b)(1) authorizes, but does not mandate, the exclusion of any person whom the Secretary of HHS concludes has been convicted of health care related fraud, theft, false claims, or similar financial misconduct.

ARGUMENT

Petitioner contends that she was not convicted of a criminal offense because the court did not adjudicate her guilty of the criminal charge, and she stands without a record of conviction. Petitioner maintains that she did not intend to defraud Medicaid and that she had no knowledge of the erroneous billing, which she alleges was the result of mistakes made by one of her employees. Petitioner contends also that the permissive exclusion provision of section 1128(b)(1) of the Act, rather than the mandatory exclusion provision of section 1128(a)(1), applies to this case. She argues that a five year exclusion is unreasonably lengthy because she has paid full restitution, none of her patients have been mistreated, she has no record of prior offenses, and she did not intend to engage in wrongdoing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [1]

1. During the period relevant to this case, Petitioner was a duly licensed physician (psychiatrist) in the State of Florida, and a Medicaid provider. I.G. Ex. 1/1.

2. Based upon an investigation conducted by the Florida Auditor General, the State concluded that Petitioner had billed the Medicaid program for services in excess of those she had actually provided to her Medicaid patients. I.G. Ex. 1.

3. On August 8, 1991, an Information filed in the Circuit Court for Dade County, Florida, charged Petitioner with the offense of Medicaid Fraud. The Information alleged that Petitioner knowingly and unlawfully received or attempted to receive unauthorized payments by submitting false claims to the Florida Medicaid Program in violation of Florida State law. This violation was a felony. I.G. Ex. 3; Petitioner's Hearing Request at 1.

4. Petitioner and the State entered into an agreement which provided that Petitioner would plead nolo contendere to the charge against her on the understanding that the court would withhold adjudication and sentence her to pay $5,425.00 restitution to the Florida Department of Health and Rehabilitative Services, $10,000.00 for investigative costs to the Medicaid Fraud Control Unit, a $1,000.00 donation to the S.A.V.E. program, and an unspecified amount for court costs. I.G. Ex. 2.

5. The Circuit Court for Dade County, Florida found Petitioner guilty of the offense of "Medicaid Fraud-Receiving Unauthorized Payments for False Claims" based upon Petitioner's entry of a nolo contendere plea. The court also sentenced Petitioner to pay restitution in the amount of $5,425.00 and ordered that an adjudication of guilt be stayed and withheld. I.G. Ex. 4.

6. Petitioner paid restitution in open court. I.G. Ex. 4.

7. The Secretary of HHS has delegated to the I.G. the duty to determine and impose exclusions pursuant to

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[1] Petitioner and the I.G. submitted written argument and the I.G. introduced documentary exhibits. I admitted all of the exhibits into evidence and refer to them herein as I.G. Ex. (number).

section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

8. Petitioner was convicted of a criminal offense within the meaning of sections 1128(i)(2), 1128(i)(3), and 1128(i)(4) of the Act.

9. The conviction of a criminal offense for Medicaid Fraud based upon receiving unauthorized payments for false claims constitutes a conviction of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1), and therefore justifies application of that exclusion provision.

10. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

11. The minimum mandatory period of exclusion for exclusions pursuant to section 1128(a)(1) of the Act is five years. Act, section 1128(c)(3)(B).

12. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

13. Neither the I.G. nor the administrative law judge has the authority to reduce the five year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

14. There are no disputed material facts in this case, and the I.G. is entitled to summary disposition.

DISCUSSION

The section of the Act under which the I.G. seeks Petitioner's exclusion, 1128(a)(1), contains two requirements. It requires that an individual: (1) be convicted of a criminal offense, and (2) that such criminal offense be related to the delivery of an item or service under Medicare or Medicaid.

A. Petitioner was "convicted" of a criminal offense within the meaning of the Act.

Petitioner asserts that she was not "convicted" of a criminal offense because she "was not adjudicated guilty

of the offense charged and stands without a record of conviction." Petitioner's Brief at 1.

The Act provides that an individual or entity is considered to have been convicted of a criminal offense under any of the following four conditions:

> (1) when 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 has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court; or
>
> (4) when 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.

Act, section 1128(i).

It is true, as Petitioner asserts, that no judgment of conviction was entered against Petitioner. Thus, I find that Petitioner was not convicted of a criminal offense within the meaning of section 1128(i)(1) of the Act. This finding, however, does not nullify a conclusion that Petitioner was convicted within the meaning of the Act, as long as it can be shown that the facts of the case fall within the meaning of any of the remaining three subsections of 1128(i). Based upon my review of the evidence, I conclude that Petitioner was convicted of a criminal offense within the meaning of sections 1128(i)(2), 1128(i)(3), and 1128(i)(4) of the Act.

Under section 1128(i)(2), an individual is defined as convicted "when there has been a finding of guilt against the individual or entity by a Federal, State, or local court". The Florida Circuit Court's order disposing of the underlying criminal case is entitled "Finding of Guilt and Order Withholding Adjudication and Special Conditions". It explicitly states on its face that "the defendant . . . has been found guilty of the charge" and indicates that what is being withheld is the formal adjudication of her guilt. I.G. Ex. 4. I conclude from

these facts that the Florida Circuit Court made a finding of guilt against Petitioner. The fact that the court withheld formal adjudication of Petitioner's guilt and declined to enter a judgment of conviction does not derogate from my conclusion that the court made a finding of guilt against Petitioner within the meaning of section 1128(i)(2) of the Act.

Pursuant to section 1128(i)(3), the statute defines the term convicted of a criminal offense to include those circumstances in which "a plea of . . . nolo contendere by the individual or entity has been accepted by a Federal, State, or local court". In this case, the Florida Circuit Court's Order does not state on its face that the court "accepts" Petitioner's nolo contendere plea. However, the absence of an explicit acceptance by the court does not mean that Petitioner's plea was not accepted, particularly where the totality of the facts and circumstances indicates otherwise. James D. Redd, M.D., DAB CR213 (1992).

Petitioner entered into an agreement with the prosecutor, an officer of the court. The agreement provided that Petitioner would plead nolo contendere to the offense of Medicaid Fraud on the understanding that the court would withhold adjudication and sentence Petitioner to pay restitution, costs and a donation. Pursuant to that agreement, Petitioner entered a nolo contendere plea to the charge against her. Based on that plea, the Florida court found Petitioner guilty of the charge and sentenced Petitioner to pay restitution. In accordance with the plea agreement, the court did not enter a judgment of conviction against Petitioner, but disposed of the case by withholding an adjudication of guilt. I.G. Exs. 2, 4. While the court did not explicitly declare that it accepted Petitioner's plea, its acceptance of the plea is implied by virtue of the fact that it found Petitioner guilty of the offense to which she pled nolo contendere. The fact that the Florida court withheld adjudication of guilt does not alter my conclusion that it accepted Petitioner's nolo contendere plea within the meaning of section 1128(b)(3) of the Act. I find that the inference to be drawn from the court's overseeing and approving of this entire process, from entry of the plea through final disposition of the charges, is that there was an acceptance of Petitioner's plea, in the context of a deferred adjudication arrangement. See Redd, DAB CR213 at 4.

I recognize that at least one federal court has refused to sustain a similar decision by an administrative law judge regarding acceptance of a plea. Travers v.

Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992). In Travers, however, the State court not only had not formally "accepted" the plea entered by the defendant, but also stated that it was taking the plea under advisement, and that plea acceptance would require a further petition by the parties. Thus, I find that the facts of the present case differ from Travers and are sufficient to support a finding that the court accepted Petitioner's nolo contendere plea within the meaning of section 1128(i)(3).

I find also that the facts of this case establish that the fourth alternative for establishing conviction -- the arranged deferral or withholding of judgment -- has been satisfied. The evidence shows that the agreement between Petitioner and the prosecutor which led Petitioner to plead nolo contendere and led the court to enter an order withholding adjudication was not solely an agreement involving only the prosecutor and Petitioner. The court involved itself in the process to find Petitioner guilty of the charge, to sentence Petitioner to pay restitution, and to enter an order withholding adjudication of guilt. This is indicative not only of the court's pervasive involvement and acceptance of the plea and process, as noted above, but shows also that there was a well-established deferred adjudication arrangement in the jurisdiction in question, which the court and parties all expected to utilize.

Section 1128(i)(4) of the Act expressly encompasses deferred or stayed judgments and first offender programs, and provides that a criminal defendant whose case is handled in such manner will still be regarded as having been convicted. Congress intended that disposition of a criminal charge based on a guilty plea or a plea of nolo contendere would be a conviction even under those circumstances where a court decided to hold in abeyance entry of a judgment against a party pending the party's satisfaction of the terms of a plea agreement. In H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S.C.C.A.N. 3607, 3665, the committee that drafted section 1128 declared that persons who defraud Medicare or Medicaid should not escape exclusion simply because their criminal cases are handled under first offender or deferred adjudication programs, whereby a defendant pleads guilty or nolo contendere but no actual judgment of conviction is entered against him provided he maintains good behavior and satisfies any other conditions that may be imposed. The arrangement entered into by Petitioner in this case falls squarely within the kinds of arrangements which the committee responsible for drafting the exclusion law sought to include within the

ambit of section 1128(i)(4). I find that the Florida court's disposition of Petitioner's plea under the terms of the plea agreement constitutes a deferred adjudication arrangement where judgment of conviction has been withheld within the meaning of section 1128(i)(4).

B. Petitioner's criminal offense is related to the delivery of an item or service under the Medicaid program.

Next, it is required by section 1128(a)(1) that the crime at issue be related to the delivery of an item or service under Medicaid or Medicare. It is well established that filing false Medicare or Medicaid claims constitutes clear program-related misconduct. Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

Furthermore, case precedent also expressly holds that it is the fact of conviction of a relevant offense that triggers exclusion; proof of criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). DeWayne Franzen, DAB 1165 (1990).

In sum, mandatory exclusion pursuant to section 1128(a) is applicable wherever it is shown that an appropriate criminal conviction has occurred. The I.G. does not look beyond the fact of conviction and Petitioner may not utilize this administrative proceeding to collaterally attack the criminal conviction by seeking to show that she did not do the act charged or that there was no criminal intent. Richard G. Philips, D.P.M., DAB CR133 (1991).

Petitioner argues that the criminal offense to which she pled nolo contendere relates to financial misconduct and therefore the I.G. should have treated her criminal conviction as grounds for a permissive action under section 1128(b)(1) of the Act. July 24, 1992 Prehearing Order at 2. As an appellate panel of the Departmental Appeals Board stated in Boris Lipovsky, M.D., DAB 1363 at 8 (1992):

> The Board has previously considered the relationship between section 1128(a)(1) and section 1128(b)(1). We have decided that, where a conviction falls within the terms of section 1128(a)(1), it is governed by that section. The fact that the conviction also meets the more inclusive elements of section 1128(b)(1) does not remove it from the ambit of

section 1128(a)(1) and the I.G. must impose a mandatory exclusion.

Section 1128(a)(1) encompasses the same kinds of "financial" offenses which are described in 1128(b)(1), but is limited to those offenses which are directed against, or committed in connection with, the rendering of services pursuant to the Medicare and Medicaid programs. Reading sections 1128(a)(1) and 1128(b)(1) in conjunction with each other makes it apparent that the legislative scheme is to mandate exclusions of those who commit financial crimes directed against Medicare and Medicaid 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 Medicaid, which are financed by federal, State, or local government agencies. In this case, Petitioner was convicted of a financial crime in connection with the delivery of an item or service under the Medicaid program, and I conclude that the I.G. properly classified Petitioner's offense as falling under the mandatory exclusion authority. Accordingly, the I.G. is required to exclude Petitioner for a minimum of five years under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

C. There is no need for an evidentiary hearing in this case.

Petitioner requested a hearing so that I would have the opportunity to consider mitigating circumstances which, in her view, would compel a reduction of the five year exclusion imposed on her. Petitioner contends that the five year exclusion should be reduced because she did not mistreat her patients, she has paid restitution to the Medicaid program, she has no prior offenses, and she did not intend to defraud the program.

Petitioner cites a Florida State statute to support the proposition that the exclusion in this case may be reduced to as low as one year. The I.G. imposed an exclusion pursuant to section 1128(a)(1) of the Act, and the statutory provision cited by Petitioner is not applicable to this proceeding.

Since I do not have the authority to reduce the five year minimum exclusion mandated by section 1128(c)(3)(B) of the Act, the facts which Petitioner seeks to establish in an evidentiary hearing would not materially affect the outcome of this case. There are no genuine issues of material fact which would require the submission of additional evidence, and, therefore, there is no need for

an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See, Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

CONCLUSION

Petitioner's conviction requires her exclusion for a period of at least five years, pursuant to section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge