DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Clarence H. Olson,	Date: October 5, 1989
Petitioner,	
- v. -	Docket No. C-85
	DECISION CR 46
The Inspector General.	

DECISION AND ORDER

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the December 14, 1988 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and Medicaid programs for five years.[1]

After a telephone prehearing conference, both parties filed motions for summary disposition. In addition, Petitioner sought, in the alternative, an evidentiary hearing on the issue of the length of exclusion. Thereafter, oral argument was held by telephone and the record was closed.

The parties filed a stipulation agreeing to the authenticity of six of eight exhibits filed by the I.G.

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[1] Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section 1128(h) and, for the sake of brevity, I refer only to it.

in support of the motion for summary disposition. Certified copies of the two remaining I.G. exhibits were filed and, during the oral argument, Petitioner stipulated to the authenticity of these two exhibits. Exhibits A-1 through A-10 were filed in support of Petitioner's motion and opposition and there was no objection made by the I.G. to these exhibits.[2]

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128 (a) (1) and 1128 (c) (3) (B) of the Act, and that it is appropriate for Petitioner to be excluded for a minimum period of five years.

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).

While section 1128(a) of the Act provides for a minimum five-year mandatory exclusion for (1) convictions of program-related crimes and (2) convictions relating to patient abuse, section 1128(b) of the Act provides for the permissive exclusion of "individuals and entities" for twelve types of other convictions, infractions, or undesirable behavior, such as convictions relating to fraud, license revocation, or failure to supply payment information.

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[2] The citations to the record in this Decision and Order are noted as follows:

Petitioner's Brief	P. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Stipulation of 5/11/89	Stip. (number)
Tape of oral argument (by telephone)	Tape

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 a Medicare or Medicaid item or service; such exclusion must begin 15 days from the date on the notice.[3]

ISSUES

The issues raised by the parties are:

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

2. Whether Petitioner was 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 Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128 (a) (1) and 1128(c)(3)(B) of the Act.

4. Whether the exclusion should be terminated by this ALJ on the ground that the I.G. failed to comply with the Administrative Procedure Act.

5. Whether the I.G. is prohibited by provisions of federal law (regarding program operating responsibilities) from excluding Petitioner.

6. Whether summary disposition is appropriate in this case.

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[3] The I.G.'s notice letter allows an additional five days for receipt by mail.

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 is a resident of California and, for the relevant periods in issue, he was a partner in the United Ambulance Company (aka United Health Enterprise) and a partner in Guardian Ambulance.

2. As part of his duties for both of the companies, Petitioner reviewed ambulance "tickets" (lists for services rendered during the course of the ambulance trip) for accuracy and completeness.

3. Petitioner was indicted in February of 1987 by a federal grand jury on 32 counts of causing false statements to be submitted on Medicare claims, in violation of 42 U.S.C. 1395nn(a)(1). I.G. Ex. 1.

4. The indictment charged that Petitioner directed employees to mark ambulance tickets for services that had not been rendered and instructed employees to bill Medicare for services that had not been rendered. I.G. Ex. 1.

5. On March 28, 1988, Petitioner pled nolo contendere to 32 misdemeanor counts of making false statements in applications for Medicare payments, from July, 1986 to December, 1986, in violation of federal law. I.G. Ex. 2.

6. On March 28, 1988,the United States District Court for the Central District of California "accepted" Petitioner's plea of nolo contendere to all 32 counts in the indictment within the meaning of sections 1128(a)(1) and 1128(i) of the Act. I.G. Ex. 2, 3, 4.

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

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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.

8. The I.G. properly excluded Petitioner from participation in Medicare, and properly directed his exclusion from Medicaid, for a period of five years and was required to do so under section 1128 of the Act.

9. The I.G. did not violate the federal Administrative Procedure Act, 5 U.S.C. 551, et seq., by not promulgating regulations to distinguish the exclusion authorities in section 1128(a)(1) and 1128(b)1) of the Act.

10. The I.G. did not rely upon an "unpublished guidance/directive" in classifying Petitioner as subject to the mandatory exclusion authority of section 1128(a)(1) of the Act.

11. The material and relevant facts in this case are not contested.

12. The classification of the Petitioner's criminal offense as subject to the authority of 1128(a)(1) is a legal issue.

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

14. The I.G. is not prohibited by federal law or regulations from participation in the exclusion process.

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

DISCUSSION

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

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 has 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.

I find and conclude that Petitioner was "convicted" within the meaning of section 1128(a)(1) and (i)(3) because 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 section 1128 of the Act in light of the purposes that section 1128 was designed to serve. 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." The term "accepted" is the opposite of the term rejected. The United States District Court for the Central District of California did not reject Petitioner's plea of guilty. Quite the contrary, the court "accepted" Petitioner's plea within the meaning of section 1128(i)(3).

II. Petitioner's Conviction "Related to the Delivery of an item or service" Within The Meaning of Section 1128 of The Act.

Petitioner argues that even if I rule that he was "convicted," he should not be excluded because the offense was not a program-related crime giving rise to a mandatory exclusion under section 1128(a)(1) of the Act.

I find and conclude, as a matter of federal law, that the mandatory exclusion provisions of section 1128 are not limited to situations where a medical provider or other individual or entity is convicted under a statute expressly criminalizing fraud against a federal or state health care program. See Arthur B. Stone, D.P.M., v. The Inspector General, Civil Remedies Docket No. C-52 (1989); and Charles W. Wheeler v. The Inspector General, Civil Remedies Docket No. C-61 (1989).

The test of whether a "conviction" is "related to the delivery of an item or service" must be a common sense determination based on all relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court.

The inquiry is whether the conviction "related to the delivery of an item or service" under Medicare, not whether the criminal court convicted Petitioner of actual fraud. My task is to examine all relevant conduct to determine if there is a relationship between the judgment of conviction and the Medicare program. Had Congress intended a different result, it would have used the phrase "conviction for" or conviction "restricted to" instead of "related to." An examination of whether a conviction is "related to the delivery of a item or service" under the Medicare program necessarily involves an inquiry into Petitioner's conduct.

Accordingly, the finder of fact must consider all relevant documents pertaining to the trial court proceeding. These may include the indictment, the transcript of the sentencing proceeding, and plea agreements.

The record establish that the "conviction" of Petitioner was "related to" the delivery of a Medicare item within the meaning of section 1128 of the Act.

Black's Law Dictionary, Fifth Edition (West Publishing 1979) defines "related" as: "standing in relation; connected; allied; akin." This case should not be decided in a vacuum, or with a strict, hypertechnical interpretation of the term "related to." Petitioner was convicted of submitting false Medicare claims. There is a simple, common-sense connection, supported by the record, between the actions associated with the conviction and the "delivery of an item or service" under the Medicare program.

III. 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 from the Medicare program, and direct their exclusion from the Medicaid program, 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:

> 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, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 682, 686.

Since Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicare 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.[5]

IV. The I.G. Has Complied With The Administrative Procedure Act.

The Petitioner argued that the I.G. (1) failed to comply with the federal Administrative Procedure Act, 5 U.S.C. 552(a)(1) and 553, by not promulgating regulations.

For the reasons I stated in my Decision and Order in Stone, supra, Docket No. C-52, and Wheeler, supra, Docket No. C-61, I find that Petitioner's argument has no merit.

V. The I.G.'s Participation In The Exclusion Process Does Not Violate The Act.

The I.G.'s "participation" in the exclusion process is not contrary to the Act, because it does not conflict with the prohibition on the "transfer of program operating responsibilities" to the I.G. 42 U.S.C. 3526(a).

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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, raised by the Petitioner, of whether I should make a de novo determination to reclassify the Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

The arguments raised here by Petitioner are similar, if not identical, to the arguments raised by Petitioner in Stone, supra, and Wheeler, supra. For the same reasons I stated in Stone and Wheeler, I feel that Petitioner's arguments are without merit.

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

I also find the Petitioner's argument that he is entitled to an evidentiary hearing concerning the classification of his exclusion to be without merit for the same reasons expressed in Stone supra, at p. 15, and Wheeler, supra, at pp. 17 and 18.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded the Petitioner from the Medicare program, and directed his exclusion from the Medicaid program, for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge