DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Surabhan Ratanasen, M.D.,	DATE: October 6, 1989
Petitioner,	
- v. -	Docket No. C-101
The Inspector General.	DECISION CR 48

DECISION AND ORDER

Petitioner requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude him from participation in the Medicare and Medicaid programs for a period of five years.[1] The I.G. filed a motion for summary disposition of this case. This Decision and Order resolves this case on the basis of written briefs and a stipulated record. I hereby grant the I.G.'s motion for summary disposition and conclude that the I.G. was required under federal law to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

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

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

This case is governed by section 1128 of the Social Security Act (Act), codified at 42 U.S.C.A. 1320a-7 (West Supp. 1989). 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 who is "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 or entities: (1) convicted of criminal offenses, such as fraud or financial misconduct, which are not related to the Medicare or Medicaid program, or (2) who have been convicted of, or have committed criminal offenses, or acts which are related to the Medicare, Medicaid, or other government funded health care programs.

II. The Federal Regulations.

The governing federal regulations (Regulations) are found in 42 C.F.R. Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case and Parts 1001 and 1002 govern the substantive aspects.

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)." The excluded individual or entity 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 the delivery of an item or service under Medicare or Medicaid; and (3) the length of the exclusion is reasonable. 42 C.F.R. 1001.128(1988).

The I.G. is required by section 1001.123(a) to send written notice of his determination to exclude an individual or entity from participation in Medicare, when he has "conclusive information that the individual or entity has been convicted of a crime related to the

delivery of an item or service" under the Medicare or Medicaid program.[2]

BACKGROUND

On December 28, 1988, the I.G. issued a notice (Notice) to Petitioner, which stated that Petitioner would be excluded from participation in the Medicare and Medicaid programs for a period of five years, commencing 20 days from the date of the Notice. The Notice stated that the basis for these exclusions was Petitioner's conviction of an offense covered by the mandatory provisions of section 1128(a)(1).

By letter dated February 23, 1989, (Request), Petitioner timely requested a hearing before a federal ALJ, and this case was docketed.

I conducted a prehearing telephone conference on April 25, 1989. During the prehearing conference: (1) Petitioner admitted that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, and (2) the I.G. expressed his intention to file a motion for summary disposition. I determined that Petitioner had raised legal issues in his Request, which could be further developed by the parties in written briefing. I further determined that the material facts of this case were not in dispute. On May 1, 1989, I issued a Prehearing Order and schedule for filing motions for summary disposition (Prehearing Order). Thereafter, the I.G. submitted a motion for summary disposition (Motion), a brief in support thereof, and nine exhibits. Petitioner submitted a brief in support of his opposition to the I.G.'s motion (Opposition) and one exhibit. The parties submitted a stipulation regarding the authenticity of I.G. Ex. 1 - 3. Petitioner subsequently filed supplemental points and authorities in opposition to the I.G.'s motion (Supplemental), and the I.G. filed a reply to Petitioner's Opposition and a reply to Petitioner's Supplemental.

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[2] Section 1001.123 provides that the period of exclusion is to begin 15 days from the date on the notice; however, the I.G. allows five days for mailing. 42 C.F.R. 1001.123.

ISSUES

1. 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.

2. Whether the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that he be excluded from participation in the Medicaid program, for a period of five years, is mandated by law.

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. Petitioner is a physician in private practice in Fresno, California. I.G. Br./2.

2. On May 18, 1987, Petitioner was charged with 12 counts of violating section 14107 of the California Welfare and Institutions Code, Fraudulent Claims; Intent;

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[3] Citations to the record in this Decision and Order are as follows:

Petitioner's Brief	P.Br./(page)
Petitioner's Supplemental Points and Authorities	P. Supp. Br./(page)
I.G.'s Brief	I.G. Br./(page)
I.G.'s Reply Brief	I.G. Rep. Br./(page)
I.G.'s Reply to Petitioner's Supplemental Points and Authorities	I.G. Supp. Rep. Br./(page)
Petitioner's Exhibits	P. Ex. (letter)/(page)
I.G.'s Exhibits	I.G. Ex.(number)/(page)

Punishment; Other Enforcement Remedies.[4] P. Br./2; I.G. Ex. 1.

3. Petitioner entered into a plea bargain by which he agreed to plead guilty to four counts of violating section 2261 of the Business and Professions Code.[5] I.G. Ex. 2; P. Br./3-4, 6; I.G. Br./3.

4. Petitioner pled guilty to and was convicted of four counts of violating section 2261 of the Business and Professions Code. I.G. Ex. 2; I.G. Ex. 3; P. Ex. A/2; P. Br./1.

5. Petitioner stipulated that the four counts to which he pled guilty were reasonably related to Counts One, Four, Seven, and Ten, of the May 18, 1987 charge filed against Petitioner.[6] I.G. Ex. 2; I.G. Br./3; P. Br./3-4.

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[4] Section 14107 provides that

> "Any person whom with intent to defraud, presents for allowance or payment any false or fraudulent claim for furnishing services or merchandise, knowingly submits false information for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services or merchandise, or knowingly submits false information for the purpose of obtaining authorization for furnishing services or merchandise under this chapter [Basic Health Care] or Chapter 8 [Prepaid Plans] is punishable by imprisonment in the county jail not longer than one year or in the state prison, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

[5] Section 2261 of the California Business and Professions Code provides that:

> "knowingly making or signing any certificate of other document directly or indirectly related to the practice of medicine or podiatry which falsely represents the existence or "non-existence of a state of facts, constitutes unprofessional conduct."

[6] Counts One, Four, Seven, and Ten of the May 18, 1987 Complaint alleged that Petitioner "did willfully, unlawfully, and with intent to defraud, present to

(continued...)

6. Petitioner admitted that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Prehearing Order/2.

7. The four counts to which Petitioner pled guilty were related to Petitioner's commission of fraud against the Medicaid program. I.G. Ex. 2; P. Br./2.

8. 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.

9. The I.G. must exclude individuals or entities from participation in the Medicare program, and direct their exclusion from participation in the Medicaid program, for a minimum five year period, if they have been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

10. The I.G. does not have the discretion to exclude an individual or entity from participation in the Medicare and Medicaid programs, based upon the permissive provisions of section 1128(b) of the Act, in instances where the individual or entity has been convicted of a criminal offense which is "related to the delivery of an item or service" under the Medicare or Medicaid program.

11. The I.G. acted properly in excluding and directing the exclusion of Petitioner from participation in the Medicare and Medicaid programs for the minimum period of five years.

12. The principles pronounced in United States v. Halper, 109 S. Ct. 1892 (1989), are not applicable to the facts of this case.

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[6](...continued)
Computer Sciences Corporation and the state of California for allowance or payment a false or fraudulent Medi-Cal claim for furnishing services." These counts pertained to Medi-Cal claim numbers 6157281909701, 6174122526001, 6195301108101, and 6210260300901 for services allegedly rendered to Bouakeo Phonexa, Medi-Cal Identification number 103046180002.

DISCUSSION

I. The Minimum Mandatory Five Year Exclusion Provisions Apply In This Case.

Section 1128(a)(1) of the Act requires the I.G. to exclude individuals or entities from the Medicare program, and direct their exclusion from the Medicaid program, for a minimum period of five years, when such individuals or 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.

Congress' purpose for the imposition of a five-year minimum period of exclusion for individuals or entities convicted of criminal offenses related to the delivery of an item or service under the Medicare and Medicaid programs is clear. In the legislative history of the enactment of the Medicare and Medicaid Patient and Program Protection Act of 1987, Congress stated that:

> "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. and Admin. News 682, 686.

In making the determination of whether an individual or entity must be excluded from participation in the Medicare and Medicaid programs based upon the mandatory provisions of section 1128(a), two major issues must be addressed: (1) whether the individual or entity was "convicted" of a criminal offense within the meaning of section 1128(a)(1) and (i) of the Act, and (2) whether the conviction was "related to the delivery of an item or service" under the Medicare or Medicaid program. Both of the above issues must be answered affirmatively in order for a petitioner to be properly excluded from participation in the Medicare and Medicaid programs based upon the mandatory provisions of the Act.

A. "Convicted"

In response to the first issue, Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 6.

B. Petitioner's Conviction Is "Related To The Delivery Of An Item Or Service" Under The Medicare or Medicaid Program.

With regard to the second issue, Petitioner does not specifically address the issue of whether his conviction was "related to the delivery of an item or service under the Medicaid program." However, this issue must be addressed in making a determination of whether Petitioner was properly excluded from participation in the Medicare and Medicaid programs. In order to determine the existence of a relationship between the criminal offense for which Petitioner was convicted, and the delivery of an item or service under the Medicare or Medicaid program, it is necessary to examine the specific criminal offense for which Petitioner was convicted, and the actions of Petitioner which formed the basis for the conviction.

Petitioner was convicted of four counts of violating section 2261 of the California Business and Professions Code, Unprofessional Conduct. FFCL 4. Originally, Petitioner was charged with 12 counts of violating section 14107 of the California Welfare and Institutions, Fraudulent Claims; Intent; Punishment; Other Enforcement. FFCL 2. However, pursuant to a plea-bargain, Petitioner pleaded guilty to, and was convicted of, four counts of violating section 2261 of the California Business and Professions Code. FFCL 3, 4.

Petitioner stipulated that the four counts, for which he was convicted, were reasonably related to Counts One, Four, Seven, and Ten, of the original twelve counts with which he was charged. FFCL 5. Those counts charged that Petitioner willfully, unlawfully, and with intent to defraud, presented to Computer Sciences Corporation and the State of California "for allowance or payment, a false or fraudulent Medi-Cal claim for furnishing services." FFCL 5. The charges specifically stated that Medi-Cal claims were involved and that the claims were for furnishing services. FFCL 5.

Two differing sets of facts were offered by the parties as the basis for Petitioner's conviction. The I.G. asserts that Petitioner billed Medi-Cal for undelivered services, whereas Petitioner asserts that he filled in information on the charts of patients after he was notified that Medi-Cal was going to audit his medical charts as part of its investigation. Either version of the facts underlying Petitioner's conviction is sufficient to prove that Petitioner was convicted of a

criminal offense related to the delivery of an item or service under the Medicaid program.

Based upon the I.G.'s version of the facts underlying the conviction, Petitioner billed the Medicaid program for services which were never provided. Congress specifically intended to exclude individuals convicted of this type of offense.[7] Based upon Petitioner's version of the facts, Petitioner filled in information on the charts of patients to insure that he would be reimbursed for services which he had rendered. Petitioner's failure to keep adequate records which demonstrate the need for services rendered is directly related to the delivery of the item or service for which he seeks reimbursement.

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[7] 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, reprinted in 1977 U.S. Code Cong. & Admin. News 3039, 3050.

Congress reiterated its intent by enacting the Medicare and Medicaid patient and Program Protection Act of 1987, Pub. L. 100-93 (August 1987), and by 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, reprinted in 1987 U.S. Code Cong. & Admin. News 682.

Congress did this by providing a minimum mandatory period of exclusion for those convicted of criminal offenses which relate to the delivery of an item or service.

The determination of whether a conviction is related to the delivery of an item or service under the Medicaid program "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 judgement and order of the criminal trial court." H. Gene Blankenship, v. The Inspector General, Civil Remedies Docket No. C-67 (1989) at p. 11. As stated in Jack W. Greene, v. The Inspector General, DAB Decision No. 1078 (1989) at p. 7, criminal offenses may be related to the delivery of an item or service because "they concern acts that directly and necessarily follow under the health care program from the delivery of the item or service."

In this case, Petitioner's stipulation and either version of the facts underlying Petitioner's conviction have provided the relationship between his conviction and the delivery of an item or service under the Medicaid program. The fact that Petitioner was not specifically convicted of Medi-Cal fraud is irrelevant.

Therefore, I conclude that Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning off section 1128 of the Act.

II. The Permissive Provisions Of Section 1128 Of The Act Do Not Apply To This Case.

Petitioner also asserts that his conviction was directly related to fraud or financial misconduct, as defined in section 1128(b)(1) of the Act, and therefore, the I.G. must exclude Petitioner based upon the permissive provisions of the Act, and, not the mandatory provisions of section 1128(a)(1).

Petitioner has misconstrued the requirements of the Act. The Act does not present the I.G. with an "option" to exclude an individual or entity, for a period of five years, who has been convicted of a criminal offense which is related to the delivery of an item or service under the Medicaid or Medicare programs, but requires that the I.G. exclude that individual or entity from participation in the Medicare program and to direct that he be excluded from participation in the Medicaid program.[8] The

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[8] Brown v. State Department of Health, 150 Cal. Rptr. 344, 86 Cal. App. 3d 548 (1978), cited by Petitioner's counsel, is not relevant to the facts of this case.

permissive provisions of 1128(b)(1) were enacted to broaden the category of individuals and entities which may be excluded from participation in the Medicare and Medicaid programs, not to provide an alternative basis for excluding, or alternative length of exclusion, for individuals whose behavior may be enunciated within the provisions of 1128(b). If there has been a conviction, the initial determination to be made by the I.G. is whether the conviction was related to the delivery of an item or service under the Medicaid or Medicare programs. If the response to that issue is in the affirmative, the inquiry ceases, and the individual or entity is properly excluded based upon the mandatory provisions of section 1128(a). If the response is in the negative, the I.G. will proceed to determine whether the individual's or entity's behavior or conviction falls within the realm of behaviors and convictions addressed in section 1128(b). As stated in Greene, the I.G. "has no obligation under the statute to decide that section 1128(b)(1) would not apply before imposing the mandatory provisions of section 1128(a)." Id. at 10.

Since the Petitioner was "convicted" of a criminal offense and I have concluded that the conviction 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, I conclude that the I.G. was required to exclude the Petitioner for a minimum of five years.[9]

III. The Principles Pronounced in United States v. Halper Do Not Apply In This Case.

Petitioner asserts that the recent Supreme Court decision in United States v. Halper, 109 S.Ct. 1892 (1989), should apply to excuse him from a mandatory five year exclusion from participation in the Medicare and Medicaid programs. I disagree with Petitioner's assertion. In Halper, the Supreme Court held that, under a limited number of circumstances, the imposition of a civil monetary penalty may be viewed as a "punishment," and as such, may violate the Double Jeopardy Clause of the Sixth Amendment to the United States Constitution. The issue to be addressed in determining the applicability of Halper to this case is

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[9] 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.

whether Petitioner's conviction was based upon federal law, and in a federal court. If Petitioner's conviction was in a state court, and based upon state law, the "Separate Sovereign Doctrine" would prohibit the Double Jeopardy Clause from taking effect.
Under the Separate Sovereign Doctrine, one sovereign, (i.e., the United States Government), is not barred from seeking a sanction against an individual, even though another sovereign (i.e., a state government), may already have imposed sanctions against the individual based upon the same conduct or crime.

In this case, Petitioner was convicted in a state court based upon his violation of state law. The sanctions imposed by that state court have no bearing upon the imposition of sanctions by the federal government based upon Petitioner's violation of federal law, even though both sanctions arise from the same conduct. Thus, I conclude that the principles pronounced in Halper do not apply to Petitioner's case.

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 and Medicaid programs for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge