DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Eulalia Sentmanat, M.D.,	DATE: December 26, 1989
Petitioner,	Docket No. C-88
- v. -	DECISION CR 61
The Inspector General.	

DECISION OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On December 9, 1988, the Inspector General (the I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs for five years.[1] The I.G. told Petitioner that she was being excluded as a result of her conviction in a Florida court of a criminal offense related to the delivery of an item or service under Medicaid. Petitioner was advised that exclusion from participation in Medicare and Medicaid of individuals or entities convicted of such an offense are mandated by section 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be not less than five years.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

moved for summary decision, and Petitioner opposed the motion. I heard oral argument of the motion on October 17, 1989.

I have considered the parties' arguments, their fact submissions, and applicable law. I conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ISSUE

The issue in this case is whether Petitioner was convicted of an offense within the meaning of 42 U.S.C. 1320a-7(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On November 23, 1987, Petitioner was charged with three felony offenses, pursuant to Florida law. I.G. Ex. 1.[2]

2. Count I and II of the information filed against Petitioner charged her with knowingly filing false claims for services under the Florida Medicaid program. Count III of the information charged Petitioner with grand theft. I.G. Ex. 1.

3. On June 20, 1988, Petitioner entered a plea of nolo contendere to Counts I, II, and III of the information filed against her in the Circuit Court of the Eleventh Judicial Circuit of Florida. I.G. Ex. 3.

4. Petitioner was convicted of a criminal offense as defined by section 1128(i) of the Social Security Act.

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[2] The parties's exhibits and memoranda will be cited as follows:

I.G. Exhibit	I.G. Ex. (number)
I.G. Brief	I.G. Br. (page)
Petitioner's Exhibit	P. Ex. (number)
Petitioner's Br.	P. Br. (page)

5. 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 Social Security Act.

6. On December 9, 1988, the I.G. excluded Petitioner from participating in the Medicare program and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act.

7. The exclusion imposed and directed against Petitioner by the I.G. was for five years, the minimum period required by law for an exclusion imposed and directed pursuant to section 1128(a)(1) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).

8. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. The record establishes that Petitioner pled nolo contendere in a Florida court to two counts of filing false claims for services under the Florida Medicaid program and one count of grand theft. Based on this conviction, the I.G. excluded Petitioner from participating in Medicare and directed that she be excluded from participating in Medicaid, for five years.

The I.G. contends that 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 Social Security Act. I.G. Br. 4, 5. The I.G. asserts that section 1128 of the Social Security Act mandates that individuals convicted of such offenses be excluded from participation in Medicare and Medicaid. Id. He further asserts that Petitioner was excluded for the minimum period mandated by law, inasmuch as section 1128(c)(3)(B) of the Social Security Act requires that an individual convicted of an offense, as defined by section 1128(a)(1), be excluded for at least five years. Id.

Petitioner argues that she was not "convicted" within the meaning of Florida law and that sections 1128(a)(1) and 1128(i) of the Social Security Act are unconstitutional.

1. Petitioner was convicted within the meaning of section 1128(a)(1) and 1128(i).

Petitioner asserts that she was not "convicted" of a criminal offense within the meaning of section 1128 of the Social Security Act. She admits that she entered a nolo contendere plea to a criminal offense related to the delivery of an item or service under Medicaid, but asserts that her plea does not constitute a "conviction" under Florida law.

Petitioner further asserts that the decisions in Carlos E. Zamora, M.D, v. The Inspector General, Docket No. C-74 (1989), Roberto V. Salinas v. The Inspector General, Docket No. C-72 (1989), and Lectoy T. Johnson v. The Inspector General, Docket No. C-69 (1989) are not controlling because her case involves a conflict between Florida law and federal law, whereas these cases involved the acceptance of nolo contendere pleas and deferred adjudication of those pleas pursuant to Texas law.

Although Petitioner's case may involve Florida law, rather than Texas law, the issue and basic principles enunciated in Zamora, Salinas, and Johnson remain the same. The issue is whether federal law or state law controls in interpreting section 1128 of the Social Security Act.
42 U.S.C. 1320a-7(a)(i) and 7(i).

It is Congress, not the state legislatures, which enacts federal law, and the interpretation of a federal statute is governed by federal, rather than state law. To the extent that the definition of "convicted" in a federal statute is different from state law, the federal law definition controls. United States v. Allegheny Co., 322 U.S. 174, 183 (1944).

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 conclude that Petitioner was "convicted" within the meaning of sections 1128(a)(1), (i)(3) and (i)(4).

Petitioner entered a plea of nolo contendere and that plea was accepted by the state court. Her plea of nolo contendere constituted a "conviction" within the plain meaning of 1128(i)(3).

Moreover, the legislative history of subsection 1128(i) makes it clear that Congress intended to include a plea of nolo contendere within the scope of the term "conviction", even though under state law and practice no judgment of conviction is ever entered. Carlos E. Zamora, M.D. v. the Inspector General, Docket No. C-74 (1989), appeal docketed, DAB No. 89-100, Decision No. 1104, p. 5 (1989).

"If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the perogative not to do business with those who have pleaded to charges of criminal abuse against them". H.R. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S. Code Cong. & Admin. News 3607, 3665.

Thus, Congress made the determination that persons who plead guilty or nolo contendere to program-related offenses are as untrustworthy as those convicted after a trial, and a state law cannot thwart that determination or override the acts of Congress. Section 1128(i)(3) contains no qualifying language or exceptions.

The I.G. has asserted that Petitioner was also "convicted" within the meaning of 1128(4). Petitioner pled nolo contendere and an "adjudication of guilt" was withheld by the state court pursuant to a Florida statute. Petitioner was placed on probation for three years and ordered to pay $445.00 in restitution to the Medicaid program and $3,785.00 for investigative costs to the Florida Medicaid Fraud Control Unit. Thus, Petitioner was "convicted" because this arrangement was one in which there was a "deferred adjudication," as defined by section 1128(i)(4).

2. Rule 410(2) of the Federal Rules of Evidence is not controlling in this case

Petitioner contends that the use of her nolo plea to exclude her from Medicare and Medicaid programs violates Rule 410(2) of the Federal Rules of Evidence as well as Florida law. She argues that the I.G.'s Exhibits 1 and 2 would be inadmissible at a hearing in this case and should not be used as a basis for summary disposition.

Petitioner is correct in her asssertion that Rule 410(2) provides that "evidence of a plea of nolo contendere is not in any civil or criminal proceeding admissible against the defendant who made the plea..."

However, Rule 410(2) was amended in 1975 to make it clear that the rule applied, except as otherwise provided by Congress, in order to preserve particular congressional policy judgment as to the effect of a plea of nolo contendere. Pub. L. 94-149. Section 1128 reflects just such a policy judgment by Congress that Rule 410(2) will not apply in exclusion cases.

Furthermore, this issue has been specifically addressed by Congress in section 205(b) of the Social Security Act which provides that:

> Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Thus, I conclude that Rule 410(2) is not applicable to this proceeding. Section 205(b) is dispositive of this issue and is controlling in this case. The I.G.'s submissions would be admissible at an exclusion hearing and constitute sufficient evidence on which to decide whether summary disposition is appropriate in this case.

3. I do not have the authority to grant petitioner relief based on her arguments that 42 U.S.C. 1320a-7(a)(1) and 7(i) are unconstitutional.

Petitioner requests that I hold 42 U.S.C. 1320a-7(a) and 1320a-7(i)(3) unconstitutional as enacted and as applied to the facts of this case. She asserts that these sections are contrary to substantive and procedural due process guarantees enumerated in the Fifth Amendment to the United States Constitution. She also argues that if her nolo contendere plea was obtained through ineffective assistance of counsel or was otherwise involuntary, it will be difficult for the plea to be set aside.

The current law provides that an excluded party may request a hearing as to an exclusion and is entitled to a hearing to the same extent as is provided in 42 U.S.C. 405(b). 42 U.S.C. 1320a-7(f). The scope of my review in these cases is stated in 42 C.F.R. 1001.128(a). This section limits an appeal in this type of case to the issues of (1) whether a petitioner was, in fact, convicted; (2) the conviction related to Petitioner's participation in the delivery of medical care or services under the Medicaid, Medicare or social services programs; and (3) whether the length of the suspension is reasonable.

These issues relate to the propriety of the imposition of the exclusion in a particular case and I have the authority to interpret section 1128 and the regulations promulgated thereunder. I do not have the authority to declare a federal statute unconstitutional or invalidate a regulation. Petitioner must address these arguments in another forum, since I do not have the authority to grant the relief she seeks.

4. The length of Petitioner's exclusion is reasonable.

Petitioner has not contended that the length of her exclusion is unreasonable. Section 1128 not only mandates exclusions for individuals convicted of offenses related to the delivery of an item or service under the Medicaid program, it requires that the term of such an exclusion be for at least five years. Social Security Act, section 1128(c)(3)(B).[3] Thus, I conclude that the length of Petitioner's exclusion is reasonable.

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[3] If the I.G. had imposed and directed an exclusion against Petitioner for a period longer than five years, then there would exist an issue as to the reasonableness of that part of the exclusion which exceeded five years. In that event, either side would be permitted to introduce evidence as to the presence of aggravating or mitigating factors.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusion is mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

Steven T. Kessel
Administrative Law Judge