

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Lila V. Nevrekar, M.D.,)	DATE: June 1, 1994
Petitioner,)	Docket No. C-94-027
- v. -)	Decision No. CR319
The Inspector General.)	

DECISION

By letter dated September 21, 1993, Lila V. Nevrekar, 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, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs. The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (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 have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

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 a State health care program to be excluded from participation in such programs for a period of at least five years. The definition of what constitutes a "State health care program" is contained at section 1128(h) of the Act, and it includes the Medicaid program.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)¹

1. It is undisputed that, during the period relevant to this case, Petitioner was a physician, practicing in Oklahoma, and was a Medicaid provider.
2. On January 11, 1993, Petitioner was charged, in an Information, with the offense of Medicaid fraud. I.G. Ex. 1.
3. The Information alleged that Petitioner willfully submitted or caused to be submitted false claims for reimbursement to the Oklahoma Medicaid program in the aggregate amount of \$8495. I.G. Ex. 1.
4. On January 21, 1993, Petitioner pled guilty in an Oklahoma court to Medicaid fraud, as alleged in the Information. I.G. Ex. 2.

¹ The I.G. submitted three exhibits. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) at (page)." I admit into evidence I.G. Exs. 1 - 3. In her request for a hearing, Petitioner submitted documents identified as exhibits "A" and "B." In a letter from my office dated November 24, 1993, counsel for Petitioner was informed that I would not consider these documents as evidence unless they were served on the I.G. and offered in evidence. During the proceedings and while the record was open, Petitioner did not offer these documents for admittance into the record. Thus, Petitioner's exhibits are not part of the record. The I.G. submitted a motion and brief for summary disposition to which Petitioner responded. I cite the I.G.'s brief for summary disposition as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)."

5. On March 5, 1993, pursuant to a plea agreement negotiated by Petitioner's counsel and the prosecution, the Oklahoma court levied a fine on Petitioner equal to approximately twice the sum she had obtained from Medicaid through fraud -- she had already made restitution of the amount taken -- and imposed a "deferred" sentence on her. I.G. Ex. 2; Petitioner's letter requesting hearing (Request for hearing).
6. In Oklahoma, a deferred sentence is a discretionary device available to the courts following a guilty plea or verdict, but before judgment of guilt is entered, whereby the court can suspend its proceedings while a defendant has the opportunity to satisfy conditions imposed by the court. Upon successfully satisfying the conditions imposed by the court, the defendant is discharged without a court judgment of guilt, the verdict or plea of guilty is expunged from the record, and the charge is dismissed. P. Br. at 5 - 9; I.G. Br. at 5 - 9.
7. Petitioner's sentencing was deferred until March 4, 1996. The requirements imposed by the court were that, in the intervening years, Petitioner was to pay her fine and to pay certain assessments. The court informed Petitioner that the sentencing date could be accelerated and judgment and sentence imposed on her plea of guilty if she unlawfully possessed narcotics, associated with convicted felons, or violated any city, State, or federal laws. I.G. Ex. 2.
8. The undisputed facts fail to establish that Petitioner was convicted within the meaning of section 1128(i)(1) of the Act.
9. The undisputed facts fail to establish that Petitioner was convicted within the meaning of section 1128(i)(2) of the Act.
10. A plea is accepted within the meaning of section 1128(i)(3) of the Act whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter.
11. The Oklahoma court fined Petitioner and imposed certain other conditions upon her based on its acceptance of Petitioner's guilty plea. FFCL 4 - 7.
12. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. FFCL 11.

13. Petitioner's description of how deferred adjudication works in her jurisdiction discloses that this program is precisely the sort that Congress believed should be encompassed by the mandatory exclusion law. Request for hearing; P. Br. at 4 - 9.

14. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act. FFCL 13.

15. The offense of which Petitioner was convicted -- filing fraudulent Medicaid claims -- is related to the delivery of items or services under Medicaid within the meaning of section 1128(a)(1) of the Act.

16. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

17. By letter dated September 21, 1993, the I.G. excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years.

18. The I.G. properly excluded Petitioner for a period of five years as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act. FFCL 2 - 16.

19. I do not have the authority or discretion to reduce the five year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

20. The five-year exclusion imposed and directed by the I.G. does not violate the Double Jeopardy Clause of the United States Constitution.

In Petitioner's letter requesting a hearing, she requested a waiver of the exclusion. During the prehearing conference call on December 10, 1993, the I.G. contended that I did not have jurisdiction over Petitioner's request for a waiver. I agreed with the I.G. and so informed the parties. Order and Schedule for Filing Briefs and Documentary Evidence, dated December 20, 1993.²

² Section 1128(c)(3)(B) of the Act provides that "upon the request of a State, the Secretary may waive the exclusion under subsection (a)(1) in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community. The Secretary's decision whether to waive the

PETITIONER'S ARGUMENT

Petitioner contends that the erroneous bills sent by her office to Medicaid resulted from clerical errors by her employees, rather than any criminality on her part. She pled guilty only because of her fear of the expense and uncertainty of a trial. P. Br. at 3 - 4.

Petitioner's principal argument is legal. She states that the imposition of a deferred sentence in Oklahoma does not constitute a conviction. P. Br. at 5. Rather, a deferred sentence is a discretionary device available to the courts following a guilty plea or verdict, but before judgment of guilt is entered, whereby the court can suspend proceedings until a defendant meets certain conditions imposed by the court. Upon satisfying the conditions imposed by the court, the defendant is discharged without a court judgment of guilty, the verdict or plea of guilty is expunged from the record, and the charge is dismissed. P. Br. at 6. Since deferred adjudication was utilized in her case, Petitioner believes it cannot be said that her plea was accepted -- because the court suspended proceedings before issuing any formal acceptance -- and that Oklahoma law clearly provides that deferred adjudication shall not be deemed a conviction. P. Br. at 5 - 9.

DISCUSSION

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

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question has been convicted of a criminal offense. The term "convicted" is defined at section 1128(i) of the Act. This section establishes four alternative definitions of the term "convicted." An individual or entity need be convicted under only one of the four definitions in section 1128(i) to establish that the individual or entity was convicted of a criminal offense within the meaning of the Act.

exclusion shall not be reviewable." According to William J. Hughes, an I.G. Investigations Analyst, as of January 18, 1994 no such request for a waiver had been made by an appropriate State official. I.G. Ex. 3.

Section 1128(i) of the Act provides that an individual or entity will be convicted of a criminal offense:

- (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.

The I.G. contends that Petitioner was convicted within the meaning of all four definitions. I.G. Br. at 4. Petitioner contends that she was not convicted of a criminal offense within the meaning of the Act.³ I have considered the applicability of the four alternative definitions of the term "convicted". I find that the undisputed facts fail to establish that the definitions of convicted set forth at sections 1128(i)(1) and (i)(2) have been met in this case. However, I find that Petitioner was convicted within the meaning of sections 1128(i)(3) and 1128(i)(4) of the Act. Thus, there is more than sufficient basis for finding that Petitioner was convicted within the meaning of the exclusion law.

Under section 1128(i)(1), an individual or entity is convicted of a criminal offense "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."

³ While Petitioner asserts that she was not convicted within the meaning of the exclusion law, her arguments focus primarily on the applicability of section 1128(i)(3) of the Act.

The document in the underlying criminal proceeding entitled "Sentencing After Previous Plea of Guilty" recites Petitioner's plea of guilty to the criminal indictment and defers sentencing for three years. I.G. Ex. 2. The I.G. points out that, as a condition for deferring sentencing, the court "imposed present duties and obligations on [P]etitioner." In addition, the I.G. points to language in the document advising Petitioner of her appeal rights, which refers to appealing from "this conviction on you[r] plea of guilty." The I.G. contends that the orders issued by the Oklahoma court and the language referring to an appeal from "this conviction" establish that a judgment of conviction was entered against Petitioner within the meaning of section 1128(i)(1). I.G. Br. at 7 - 8. I disagree.

It is true that the document cited by the I.G. imposes a fine and other conditions on Petitioner and that it contains language referring to Petitioner's "conviction." However, I do not find that this establishes that a judgment of conviction was entered against Petitioner, as the I.G. asserts. On the contrary, the document states that, in the event that Petitioner fails to meet the conditions imposed on her, "[t]he sentencing date may be accelerated and judgment(s) and sentence(s) imposed on your Plea(s) of guilty." This language supports the conclusion that not only was the Oklahoma court deferring sentencing, but it also was deferring entry of a judgment of conviction against Petitioner.

Moreover, Petitioner states that the statutory basis for the deferred sentencing procedure employed by the Oklahoma court in this case is found at 22 Oklahoma Statutes § 991c, which provides:

Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the Court may, without entering a judgment of guilt, and with the consent of the defendant, defer further proceedings . . .

This statutory language explicitly provides that an Oklahoma court will defer proceedings "without entering a judgment of guilt." Thus, it appears that the statutory scheme which provides for the deferred sentencing procedure utilized by the Oklahoma court in this case contemplates that the proceedings will be deferred before the court formally enters a judgment against a defendant. In view of the foregoing, I conclude that the Oklahoma court not only deferred sentencing in this case, but it also deferred entry of a judgment of conviction. Since the Oklahoma court withheld judgment of conviction in

this case, I find that Petitioner was not convicted within the meaning of section 1128(i)(1).

Pursuant to section 1128(i)(2), an individual or entity is considered to be convicted of a criminal offense when "there has been a finding of guilt against the individual or entity by a Federal, State, or local court." Although the I.G. made the broad assertion that Petitioner was convicted of a criminal offense under each of the subsections of section 1128(i) of the Act, she did not make any specific arguments regarding the applicability of section 1128(i)(2) to this case. The I.G. does not point to anything in the record of the court proceedings showing that the Oklahoma court made a finding of guilt. Moreover, the I.G. has not pointed to anything in the relevant Oklahoma statute which requires the Oklahoma court to make an explicit finding of guilt before it defers sentencing. Accordingly, I conclude that the I.G. has failed to support her contention that the Oklahoma court made a finding of guilt against Petitioner within the meaning of section 1128(i)(2) of the Act.

Under section 1128(i)(3), an individual or entity is convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." The event described by section 1128(i)(3) as constituting a conviction is the acceptance of a plea. The term "accept" is not specifically defined in section 1128(i)(3). However, it is well settled law that a plea is accepted within the meaning of section 1128(i)(3) whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter. Robert W. Emfinger, R.Ph., DAB CR92 (1990).

In the case at hand, Petitioner admitted committing the offense with which she was charged. The court, acting only because of such admission, fined Petitioner, imposed certain other conditions upon her, and, in essence, assured her of the opportunity to have the charges dismissed after she satisfies those conditions. This pattern of facts indicates that the court "accepted" Petitioner's guilty plea, thus establishing that Petitioner was convicted within the meaning of section 1128(i)(3) of the Act.

Petitioner contends that, under Oklahoma law, the Oklahoma court did not "accept" the plea of guilty, but instead "merely decided to hold the case in abeyance for three years." Petitioner argues that the Oklahoma court "neither accepted no[r] rejected" her guilty plea, but

instead "simply declined to rule on the matter at this time." P. Br. at 6. According to Petitioner, if she does not violate the law within the three-year period, the court will dismiss the case against her and will order that all the records involving the proceedings against her be expunged. Petitioner argues that, since Oklahoma law provides for the automatic dismissal and complete expungement of the record upon successful completion of the probationary period, the Oklahoma law contemplates a "true deferral without acceptance of the guilty plea." P. Br. at 7 - 8.

I disagree with Petitioner's contention that the Oklahoma court's determination to defer entering a formal judgment of guilt meant that the court did not accept Petitioner's guilty plea within the meaning of section 1128(i)(3). Petitioner offered a guilty plea in order to dispose of the criminal charges against her. She offered a guilty plea in exchange for the requirement that she satisfy conditions imposed by the court and the opportunity to have the charges dismissed after she satisfies those conditions. The Oklahoma court determined that Petitioner's guilty plea was an acceptable basis to dispose of criminal charges in the context of that particular case, and it proceeded to impose a fine and impose certain conditions on Petitioner. The statutory definition of acceptance was met when Petitioner offered to plead guilty and the court fined Petitioner and imposed certain other conditions on her based on its acceptance of the guilty plea.

The language of section 1128(i)(3) is plain and without qualifying terms. There is no language in that section which states or suggests that the definition of conviction is qualified or limited by judicial actions taken subsequent to acceptance of the plea. The fact that the Oklahoma court will automatically dismiss the charges against Petitioner upon satisfying the conditions imposed by the court does not derogate from my conclusion that the court accepted Petitioner's guilty plea within the meaning of section 1128(i)(3).

I recognize that, in a case involving a nolo contendere plea before a Utah court, a federal district court refused to find that the plea had been accepted within the meaning of section 1128(i)(3). Travers v. Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992). However, the facts of the present case differ from Travers. The court in Travers based its conclusion that the plea in question was never accepted on the fact that the Utah court expressly took the plea under advisement.

I read narrowly the Travers court's finding regarding the applicability of section 1128(i)(3). I construe Travers to stand for the proposition that a plea is not accepted within the meaning of section 1128(i)(3) in the limited circumstances where a court expressly takes a plea under advisement. In the instant case, the Oklahoma court did not expressly take the plea under advisement. I recognize that the Oklahoma court deferred entering a formal judgment of guilt and deferred sentencing Petitioner, but I do not find that this is tantamount to expressly taking the plea under advisement.

I conclude also that the disposition of Petitioner's criminal case constitutes entry into a deferred adjudication program within the meaning of section 1128(i)(4) of the Act. Therefore, even if Petitioner's guilty plea had not been accepted by the Oklahoma court within the meaning of section 1128(i)(3), Petitioner would be convicted within the meaning of section 1128(i)(4) of the Act. It is noteworthy that although the federal district court in Travers found that Travers was not convicted within the definition of section 1128(i)(3) because the court had not accepted Petitioner's plea of guilty, the court did find that Travers was convicted under section 1128(i)(4). Travers appealed the finding that he had been convicted under section 1128(i)(4), and the court of appeals upheld the district court's finding on this issue. Travers v. Shalala, No. 92-36658, 1994 WL 103086 (9th Cir. March 31, 1994).

Under section 1128(i)(4), an individual or entity is convicted of a criminal offense "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." It is clear from the explicit language of section 1128(i)(4) that Congress intended to require the mandatory exclusion of guilty individuals whose criminal prosecutions were diverted into first offender or deferred adjudication programs. Douglas L. Reece, D.O., DAB CR305 (1994) (decision on remand). Petitioner's description of how deferred adjudication works in her jurisdiction discloses that her program is precisely the sort that Congress believed should be encompassed by the mandatory exclusion law. P. Br. at 4 - 9. The unequivocal provisions of section 1128(i)(4) make Petitioner's involvement in this program an independent basis for regarding her as having been convicted of a criminal offense.

This conclusion is consistent not only with the plain meaning of section 1128(i)(4), but also with congressional intent, as expressed through legislative history. The congressional committee charged with drafting the 1986 amendments to the statute stated:

The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.

These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986),
reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

The committee added:

With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reasons other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

Id. Congress intended to exclude from Medicare and Medicaid programs those who entered into first offender or deferred adjudication programs. More importantly, the legislative history reveals Congress' strong desire to protect the Medicare and Medicaid programs from untrustworthy providers. I find that the arrangement entered into by Petitioner falls squarely within the kind of arrangements which the committee responsible for drafting the law sought to include within the ambit of section 1128(i)(4) of the Act.

Petitioner argues that "[u]nder Oklahoma law, the imposition of a deferred sentence does not constitute a conviction." P. Br. at 5. Congress has defined what the term "convicted" means for purposes of section 1128 of the Act. Section 1128 is a federal statute. It defines a conviction independently from the definitions or interpretations applied by states. It is not relevant that an action might not constitute a conviction within the meaning of State law so long as the action meets the federal definition of conviction.

Congress defined conviction to include a deferred adjudication for purposes of exclusion under section 1128 of the Act. The legislative history of section 1128(i) demonstrates that Congress, being aware that persons who were involved in first offender or deferred adjudication programs under State law were not subject to exclusion, made a reasoned decision to change the law to protect the integrity of the Medicare and Medicaid programs. I find that Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act.

II. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

I find also that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied. It is well-established that financial misconduct directed at the Medicare or Medicaid programs constitutes a program-related offense justifying mandatory exclusion. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute clear program-related misconduct. Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

Petitioner's argument that she did not intend to commit a crime will not be considered here. She could have raised

her alleged lack of criminal intent as a defense in the State court; she cannot relitigate her conviction in these administrative proceedings. The law does not permit me to look behind the fact of conviction. I have no authority to decide whether a conviction was supported by the evidence, whether there was criminal intent, or that the criminal conviction was tainted by legal error. Oscar Klein, M.D., DAB CR253, at 4 - 5 (1993).

Additionally, since the five-year exclusion imposed upon Petitioner is the shortest period of exclusion for her offense permitted by law, an administrative law judge cannot reduce it. Jack W. Greene, DAB CR19, at 12 - 14 (1989).

III. An exclusion pursuant to section 1128 does not violate the Double Jeopardy Clause.

I disagree with Petitioner's argument that her exclusion from the Medicare and Medicaid programs is "both remedial and punitive" and that "following imposition of a \$17,000 fine, levied by the court, constitutes double jeopardy and is violative of the Constitution of the United States." Request for hearing.

An exclusion under section 1128(a)(1) of the Act does not violate the Double Jeopardy Clause of the United States Constitution. Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992); Greene, 731 F. Supp. 838, 839. These cases point out that the purpose of the exclusion is remedial in nature, and therefore, cannot be considered punitive under the analysis of United States v. Halper, 490 U.S. 435 (1989). The legislative history of the exclusion law clearly demonstrates that the intent of Congress was to protect the programs:

[T]he basic purpose of the Medicare and Medicaid Patient and Program Protection Act is to improve the ability of the Secretary and the Inspector General of [HHS] to protect Medicare, Medicaid, [and other social services programs] from fraud and abuse, and to protect the beneficiaries of those programs from incompetent practitioners and from inappropriate or inadequate care.

S. Rep. No. 109, 100th Cong., 1st Sess. 1 - 2 (1987) reprinted in 1987 U.S.C.C.A.N. 682. An appellate panel of the Departmental Appeals Board has held that section 1128(a) of the Act does not contemplate a federal "prosecution" for an offense separately defined under federal law. Thus, an exclusion under the mandatory exclusion provision does not raise the double jeopardy

concerns of successive prosecutions by the same government based on the same conduct. Douglas Schram, R.Ph., DAB 1372, at 15 (1992). Also, the mandatory exclusion here involves a federal action following a State action, where the State action is not sufficient to protect the federal interest.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of her criminal conviction for filing false Medicaid claims.

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge