Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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| In the Case of: | |
| | Date: January 23, 2008 |
| Paul Ojewoye, | |
| Petitioner, | Docket No. C-07-640 |
| | Decision No. CR1729 |
| -v.- | |
| The Inspector General. | |

## DECISION

Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective June 20, 2007, based upon his conviction for a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

### I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter, dated May 31, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act based upon his conviction in the Circuit Court for Baltimore City, Maryland, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. advised him that the exclusion was for the minimum statutory period of five years and was effective 20 days from the date of the letter.

Petitioner timely requested a hearing before an administrative law judge (ALJ) by letter dated August 1, 2007. The case was assigned to me for hearing and decision on August 21, 2007. On September 18, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my order dated September 20, 2007. During the prehearing conference the parties agreed that this case may be resolved upon the documents and briefs and I accepted Petitioner's waiver of an oral hearing.

On October 12, 2007, the I.G. filed its brief (I.G. Brief), with exhibits (I.G. Exs.) 1 through 6. On December 11, 2007, Petitioner filed his response (P. Brief), with one exhibit, marked exhibit 1 (P. Ex. 1).[1] On December 21, 2007, the I.G. filed its reply (I.G. Reply) to Petitioner's response with I.G. Ex. 7. I admit as evidence P. Ex. 1 and I.G. Exs. 1, 2, 3, 5, and 6. Petitioner objects to the admission of I.G. Ex. 4 on grounds that it is inadmissible hearsay and because it includes many facts never proven at trial. P. Brief at 5. The I.G. responded to Petitioner's objection, arguing that hearsay is admissible in this proceeding and that I.G. Ex. 4 is reliable even though it is hearsay. I.G. Reply at 1-2. The I.G. submitted I.G. Ex. 7, a declaration of Jason Weinstock, the former Assistant Attorney General for the State of Maryland that was involved in Petitioner's criminal prosecution. Mr. Weinstock explains in this declaration that I.G. Ex. 4 is a copy of the statement of facts that he prepared and read into the record in Petitioner's criminal proceedings to induce the judge to accept Petitioner's plea.[2]

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[1] My September 20, 2007 Order directed Petitioner to file his response to the I.G.'s brief by November 19, 2007. On November 26, 2007, I directed Petitioner to show cause why his case should not be dismissed because no brief was filed by Petitioner on November 19. Petitioner personally responded to the order to show cause on December 7, 2007, explaining that he did not intend to abandon his case and that he assumed his attorney had filed a response to the I.G.'s brief. On December 11, 2007, Petitioner's attorney filed a response to the I.G.'s brief bearing a date of November 19, 2007, with a cover letter explaining that Petitioner's response brief had not been timely transmitted to me due to clerical error. I conclude that dismissal for abandonment or as a sanction is not appropriate, but proceed to a decision on the merits.

[2] I.G. Ex. 7 filed with the I.G. Reply appears to have been a copy received by the I.G. by facsimile. On January 7, 2008, counsel for the I.G. filed the original declaration marked as I.G. Ex. 7. Both the facsimile and original are identical in content except for the facsimile header and footer information that appears on the copy filed with the I.G. Reply. Both versions of the declaration will remain in the record and shall be treated as I.G. Exs. 4 and 7.

The I.G. is correct that hearsay is admissible in proceedings pursuant to the Administrative Procedures Act (5 U.S.C. Subchapter II), so long as it is authentic and relevant. Although I.G. Ex. 4 is unsigned and undated, the declaration of Mr. Weinstock at I.G. Ex. 7 provides sufficient authentication. Both I.G. Exs. 4 and 7 provide information regarding Petitioner's underlying criminal conviction and they have at least minimal relevance. Accordingly, I.G. Exs. 4 and 7 are admitted. I note, however, that neither exhibit has any real impact upon my decision, because the underlying criminal conviction is not subject to challenge before me. 42 C.F.R. § 1001.2007(d).

## II. Discussion

### A. Findings of Fact

The following findings of fact are based upon the undisputed assertions of fact in the pleadings and the exhibits admitted:

1. Petitioner, the President of Calvary Healthcare, Inc., was indicted by a grand jury in Maryland of one count of felony Medicaid fraud and one count of felony theft. P. Brief at 2; I.G. Ex. 2.

2. On February 23, 2007, Petitioner agreed to a plea bargain pursuant to which he agreed to plead guilty and to pay a fine without going to trial or risking imprisonment. P. Brief at 3.

3. On February 23, 2007, Petitioner pled guilty in the Circuit Court for Baltimore City, Maryland, to the count of Medicaid fraud, which alleged that from about December 10, 2002 through September 28, 2003, Petitioner knowingly defrauded the Maryland Medical Assistance Program (Medicaid) by submitting for payment claims totaling more than $500, falsely representing that Calvary Healthcare, Inc. had provided services to Medicaid recipients when he knew that such services were not provided. I.G. Ex. 2, at 2; I.G. Ex. 3, at 1.

4. Petitioner was convicted pursuant to his plea and he was given one year of unsupervised probation before judgment pursuant to Md. Code Ann., Crim. Pro. § 6-220, and he was ordered to pay restitution of $6000. I.G. Ex. 3; I.G. Ex. 5, at 2.

5. A docket entry dated February 23, 2007, shows that the guilty verdict was stricken and entry of judgment stayed pursuant to Md. Code Ann., Crim. Pro. § 6-220. I.G. Ex. 5; I.G. Ex. 6, at 5-6.

6. The I.G. notified Petitioner by letter dated May 31, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, pursuant to section 1128(a)(1) of the Act.

7. Petitioner timely requested a hearing by letter dated August 1, 2007.

**B. Conclusions of Law**

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. §1320a-7(i)).

3. Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program.

4. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

5. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years and that period is presumptively reasonable.

**C. Issue**

Whether there is a basis for Petitioner's exclusion under section 1128(a)(1) of the Act.

**D. Applicable Law**

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or under any state health care program. Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if aggravating factors justify an exclusion period longer than five years may mitigating factors be considered as a basis for reducing the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and persuasion on affirmative defenses or mitigating factors. I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

## E. Analysis

### 1. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner was the President of Calvary Healthcare, Inc. P. Brief at 2. Petitioner was indicted by a grand jury in Maryland of one count of felony Medicaid fraud and one count of felony theft. I.G. Ex. 2. On February 23, 2007, Petitioner agreed to a plea bargain pursuant to which he agreed to plead guilty and to pay a fine without going to trial or risking imprisonment. P. Brief at 3. On February 23, 2007, Petitioner pled guilty in the Circuit Court for Baltimore City, Maryland, to the count of Medicaid fraud. The count of Medicaid fraud to which Petitioner pled guilty alleged that from about December 10, 2002 through September 28, 2003, Petitioner knowingly defrauded the Maryland Medical Assistance Program (Medicaid) by submitting for payment claims totaling more than $500, falsely representing that Calvary Healthcare, Inc. had provided services to Medicaid recipients when he knew that such services were not provided. I.G. Ex. 2, at 2; I.G. Ex. 3, at 1. Petitioner was convicted pursuant to his plea and he was given one year of unsupervised probation before judgment pursuant to Md. Code Ann., Crim. Pro. § 6-220, and he was ordered to pay restitution of $6000. I.G. Ex. 3; I.G. Ex. 5, at 2. A docket entry dated February 23, 2007, shows that the guilty verdict was stricken and entry of judgment stayed pursuant to Md. Code Ann., Crim. Pro. § 6-220. I.G. Ex. 5; I.G. Ex. 6, at 5-6.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> > (1) Conviction of program-related crimes. – Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

Clearly the statute requires exclusion from participation any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the item or service is or was to be delivered pursuant to title XVIII of the Act (Medicare) or under any state health care program.

Petitioner argues that he was not convicted within the meaning of section 1128(i) of the Act (P. Brief at 4) and that the I.G. has not shown that Petitioner knowingly or willfully committed Medicaid fraud (P. Brief at 5).

Petitioner's argument that he was not convicted within the meaning of the Act is without merit. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. The decision of the United States Court of Appeals for the Ninth Circuit in *Travers v. Shalala*, 20 F.3d 993, 996-99 (9th Cir. 1994) is instructive. The court in *Travers* recognized the important points that it is the Social Security Act, and not the state law, that provides the definition of the term "conviction," and that it is necessary to look at the substance of the proceedings in the criminal court rather than rely upon labels or characterizations used by the state or the parties in those proceedings. The court in *Travers* also defined a "deferred prosecution" as an agreement between the prosecutor and the defendant pursuant to which prosecution of the charges is delayed. The court recognized that a "deferred adjudication" does not involve a deferral of prosecution by the prosecutor. 20 F.3d at 996-97. According to the court, a deferred prosecution would not amount to a conviction under the Act while a deferred adjudication clearly does.

Looking at the substance of what occurred in the instant case, Petitioner clearly received a deferred adjudication rather than a deferred prosecution. The evidence shows that Petitioner entered a plea bargain. The effect of the plea bargain was that the judge in the criminal court applied the Maryland "probation before judgment" statute (Md. Code Ann., Crim. Pro. § 6-220), the guilty verdict against Petitioner was stricken, entry of judgment was stayed pending Petitioner's completion of probation, and Petitioner paid his $6000 fine. I.G. Exs. 3, 5 at 2, and 6 at 5-6. Petitioner himself conceded, in his August 1, 2007 request for hearing, that he had agreed to a plea bargain to avoid psychological and emotional stress attendant to defending the criminal charge. He made essentially the same admission in his brief. P. Brief at 2-3. Based on the foregoing facts, I have no trouble concluding that a "conviction" has occurred within the meaning of section 1128(i)(3) of the Act.

Petitioner's second theory that the I.G. has failed to prove that he intended to or that he knowingly and willfully defrauded Medicaid (P. Brief at 5) is also without merit. Section 1128(a)(1) requires exclusion of one convicted of a criminal offense related to the delivery of an item or service under Medicare or a state Medicaid program. The I.G. need only show that a conviction occurred, that the conviction was related to the delivery of an

item or service, and that the item or service was being delivered pursuant to Medicare or Medicaid. There is no element of intent and the I.G. is not required to establish that the underlying offense was committed knowingly and willfully. Indeed, the Secretary has specifically provided by regulation that the underlying conviction is not reviewable or subject to collateral attack, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d).

Based on the foregoing, I conclude that there is a basis for Petitioner's exclusion under section 1128(a)(1) of the Act.

**2. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.**

Petitioner has not disputed that the minimum period of exclusion pursuant to section 1128(a) is five years as mandated by section 1128(c)(3)(B) if I determine he is subject to mandatory exclusion. I have found there is a basis for his exclusion pursuant to section 1128(a) and the minimum period of exclusion is thus five years.

## III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective June 20, 2007.

/s/
Keith W. Sickendick
Administrative Law Judge