

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
Sabina E. Acquah,)	DATE: July 10, 1997
))	
Petitioner,)	
))	
- v. -)	Docket No. C-97-021
))	Decision No. CR480
The Inspector General.)	
_____)	

DECISION

I conclude that Petitioner, Sabina E. Acquah, is subject to a five-year minimum mandatory period of exclusion from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs and therefore, I affirm the Inspector General's determination.

I. Procedural History

By letter dated August 21, 1996, Sabina E. Acquah, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been decided to exclude Petitioner 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.¹ The I.G.'s rationale was that exclusion, for at least five years, was 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. The I.G. moved for summary disposition.

¹ Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

Because I have determined that there are no facts of 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.

II. 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 the Medicare or Medicaid programs to be excluded from participation in such programs for a period of at least five years.

III. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues in this case are whether Petitioner was convicted of a criminal offense under federal or State law; and if Petitioner was so convicted, whether the conviction relates to the delivery of an item or service under Medicaid.

B. Findings of Fact and Conclusions of Law

1. Maryland's Medicaid program is administered by the Maryland Department of Health and Mental Hygiene ("DHMH"). I.G. Exhibit (Ex.) 5.

2. Chesapeake Health Plan, Inc. (Chesapeake) is a Health Maintenance Organization ("HMO") incorporated in the State of Maryland. I.G. Ex. 10.

3. Pursuant to an HMO contract between Chesapeake and DHMH, Chesapeake enrolls persons eligible for Medicaid. DHMH then pays Chesapeake a monthly fee for each patient served by Chesapeake. Chesapeake is responsible for providing, arranging, and paying for all medical items and services to which enrollees are entitled under the Medicaid State Plan. I.G. Ex. 10.

4. HMOs in Maryland are allowed to recruit new patients. However, HMOs are not provided the names and addresses of Medicaid-eligible families, because disclosing this information is prohibited by Maryland law. I.G. Ex. 5.

5. At all times relevant to this proceeding, Petitioner was the Medicaid Marketing Director employed by Chesapeake. In this position, Petitioner oversaw the HMO's efforts, through its marketing representatives, to enroll Medicaid recipients. I.G. Exs. 3, 4.

6. Chesapeake paid its marketing representatives a commission based on the number of Medicaid recipients they successfully enrolled each month. I.G. Ex. 5.

7. The Medicaid Fraud Control Unit of the Maryland Office of Attorney General found that Petitioner had conspired with Chesapeake marketing representatives to illegally obtain Medicaid "leads" in order to assist them in locating and persuading Medicaid recipients to enroll in Chesapeake. I.G. Exs. 3, 4.

8. On June 13, 1995, a Criminal Indictment was filed by the State Attorney General charging Petitioner with conspiracy to bribe a State official and conspiracy to obtain unlawful access to a government record, from September 1993 through February 1995, in violation of the Annotated Code of Maryland, Article 27, sections 22 and 38, and the State Government Article, section 10-627(a). I.G. Ex. 3.

9. Petitioner entered a plea of not guilty. On December 20, 1995, after a jury trial in the Circuit Court for Baltimore City, at which Petitioner was represented by counsel, the jury returned a verdict of guilty as to Count 2 (conspiracy to obtain unlawful access to a government record).

10. On January 19, 1996, judgment was entered against Petitioner by Judge Hammerman of the Circuit Court for Baltimore City, and Petitioner was ordered to pay a \$1000 fine and costs. I.G. Ex. 6.

11. Petitioner's conviction was upheld by the Maryland Court of Special Appeals.

12. The finding of Petitioner's guilt by the jury, and the entry of a judgment of conviction against Petitioner by Judge Hammerman of the Circuit Court, both satisfy the definition of "conviction" found in section 1128(i) of the Act for purposes of mandatory exclusion. Findings 9, 10.

13. For a conviction to subject an individual or entity to exclusion under section 1128(a)(1) of the Act, there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs. Siegel, D.O., DAB No. 1467, at 5 (1994).

14. There exists a nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicaid.

15. The criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1).

16. Petitioner cannot collaterally attack her criminal conviction in these administrative proceedings.

17. The Secretary is required under section 1128(a)(1) of the Act to exclude Petitioner from participation in Medicare and Medicaid, and to direct the State to exclude her from participation in State health care programs, because of her conviction of a program-related offense.

18. The mandatory minimum period of exclusion for a person convicted of a program-related offense is five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

19. The Secretary has delegated to the I.G. the duty to impose a mandatory exclusion when an individual is convicted of a program-related offense, pursuant to section 1128(a) of the Act.

20. Petitioner is subject to the mandatory minimum exclusion of five years for her conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

22. Petitioner's exclusion from the Medicare and Medicaid programs does not constitute unconstitutional double jeopardy.

IV. Petitioner's arguments

Petitioner contends that, although she was found guilty of conspiracy to obtain unlawful access to a government record, the facts of her case do not establish that she was actively involved in the scheme for which she has been convicted and, also, that she did not have criminal intent.

She further maintains that her offense was not related to the Medicaid program, in that her job responsibilities at Chesapeake Health Plan were not directly related to medical services, nor did she provide medical services to Medicaid recipients. Although she acknowledges that she was Director of Marketing, she contends that she is not responsible for the scheme, as she was not an officer or owner of Chesapeake Health Plan.

Finally, Petitioner contends that it is unconstitutional double jeopardy to subject her to exclusion, as she has already been punished in the criminal matter by having to pay a fine.

V. Discussion

The first requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question must have been convicted of a criminal offense under federal or state law. In the present case, I find that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(i)(1) and (2) of the Act.² In the matter at hand, a jury heard the case presented in the Circuit Court for Baltimore City and found Petitioner guilty. The finding of guilt by the jury establishes, pursuant to section 1128(i)(2) of the Act, that Petitioner was "convicted" for purposes of this exclusion. Further, Judge Hammerman of that Court entered a judgment of conviction against Petitioner. The fact that the Circuit Court judge entered a judgment of conviction against Petitioner also establishes, pursuant to section 1128(i)(1) of the Act that Petitioner was "convicted."

Next, the statute requires that the criminal activity must have been related to the delivery of a health care item or service under the Medicare or Medicaid programs. The determination of whether a conviction is related to the delivery of an item or service under the programs "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." Surabhan Ratanasen, M.D., DAB No. 1138 at 5 (1990) (citing Jack W. Greene, DAB No. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F.Supp. 835 (E.D. Tenn. 1990)). As otherwise stated, "there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs." Jacqueline Q. Cordle-Boggs, DAB CR311 at 6 (1994).

The nexus between Petitioner's offense and the delivery of Medicaid services is evident upon consideration of the scheme in which Petitioner was implicated. Petitioner was the individual at Chesapeake responsible for overseeing the enrollment of persons eligible for Medicaid into the HMO. I.G. Exs. 3, 4. Petitioner participated in an ongoing conspiracy in which Chesapeake representatives sought to use illegally obtained names, addresses, and other confidential information to solicit and attempt to enroll Medicaid recipients into Chesapeake. I.G.

² For a Petitioner to be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, it is only necessary to find that one of the four subsections of section 1128(i) has been satisfied. Here, however, I found that Petitioner's conviction fell within two subsections of that section.

Exs. 3, 4. In turn, Chesapeake billed or would have billed the Medicaid program for each Medicaid recipient so enrolled. I.G. Ex. 10. The prospect of payment from Medicaid was the impetus behind the scheme. Without this connection, Chesapeake would not have compelled its marketing representatives to enroll Medicaid recipients, and the marketing representatives would not have unlawfully obtained the Medicaid "leads." See Asadollah Amrollahifar, Ph.D., DAB CR238 (1992).

Significantly, in other cases, administrative law judges (ALJ) assigned to the Departmental Appeals Board (DAB) have held that selling or buying Medicaid "leads" or conspiring to commit such offense is a program-related offense. In ViNita R. Warren, DAB CR423 (1996), the petitioner was involved in the very same scheme as Petitioner in this case. The petitioner was a Maryland State employee who was convicted of receiving bribes in exchange for disclosing Medicaid "leads" to Chesapeake marketing representative James Donovan. The ALJ found that the offense was program-related, and analogous to numerous DAB decisions upholding exclusions for convictions of receiving bribes or kickbacks for referrals of Medicaid or Medicare business, and he upheld the five-year exclusion.

In Fred R. Spierer, DAB CR359 at 4 (1995), and Chris M. Spierer, DAB CR360 at 4 (1995), the ALJ found that the offenses of conspiracy to commit bribery and conspiracy to commit fraudulent acts, respectively, were program-related. The petitioners were principals of a medical supply company who knew and had shown support for operating with Medicare "leads" illegally obtained by the company's employees. The ALJ in both Spierer cases determined that five-year exclusions pursuant to section 1128(a) were proper, because the offenses were related to the Medicaid program.

The offenses in Fred R. Spierer, Chris M. Spierer, and ViNita R. Warren, are virtually indistinguishable from Petitioner's offense. These cited cases establish that Petitioner's offense is related to the delivery of an item or service under the Medicaid program. The nexus between Petitioner's offense and the Medicaid program clearly exists for purposes of section 1128(a)(1) of the Act and Petitioner's conviction is for an offense related to the delivery of Medicaid items or services.

Petitioner also argues that she did not provide medical services herself to Medicaid recipients, and that she was not an officer or owner of the HMO. These facts are of no consequence. Congress intended the imposition of a mandatory exclusion whenever the Medicare or Medicaid programs are victimized by the offense at issue, whether or not this offense involved actual delivery of care by the convicted individual. Napoleon S. Maminta, M.D., DAB No. 1135 at 12 (1990). The regulations are also clear that program-related offenses include "the performance

of management or administrative services relating to the delivery of items or services under any such programs." 42 C.F.R. § 1001.101.

In this proceeding, Petitioner seeks to attack the criminal conviction further, alleging that the facts do not establish that she participated in the conspiracy and that she also lacked criminal intent. I find that I have no authority to consider such claims. Once it is shown that an appropriate program-related criminal conviction has occurred, exclusion is mandatory under section 1128(a) as a purely derivative action and the Secretary is not permitted to look behind the conviction. Peter J. Edmonson, DAB CR163 (1991), aff'd, DAB No. 1330 (1992). The intent of the individual committing the offense is not relevant under section 1128(a). DeWayne Franzen, DAB CR58 (1989), aff'd, DAB No. 1165 (1990). Moreover, assertions by a petitioner that he or she is actually innocent cannot be addressed in this forum. Edmonson, DAB No. 1330.

Petitioner also contends that her exclusion rises to the level of unconstitutional double jeopardy. On this issue, the impact of the double jeopardy clause on civil and criminal multiple "punishments" was extensively considered in U.S. v. Halper, 490 U.S. 435 (1985). There, the Supreme Court recognized that in a rare instance, a civil penalty may be so extreme and so disproportionate to the government's actual damages and expenses as to constitute prohibited punishment. Id at 447-51. The Halper court specifically recognized that the question of double jeopardy was not dependent solely on whether the penalty was characterized as "civil" or "criminal." Rather, the focus was on the purpose and effect of the penalties on the particular case.

The remedial nature of the mandatory exclusion was examined in Manocchio v. Sullivan, 768 F. Supp. 814 (S.D. Fla. 1991). The Court held that there was sufficient public interest in excluding convicted providers that the exclusion did not violate the double jeopardy clause. Therefore, the Court found that as the provider failed to establish that there was no rational relationship between the nonpunitive interests (of protecting the integrity of the Medicare/Medicaid programs) and the exclusion period, his appeal must be dismissed.

The remedial nature of the exclusion was also considered in Greene v. Sullivan, 731 F.Supp. 838, 840 (E.D. Tenn. 1990). There, as in the instant case, the government sought to protect the Medicare and Medicaid programs by excluding persons convicted of defrauding them. These goals, the Court declared, "are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc." 731 F.Supp. at 840. Thus, the exclusion remedy is more analogous to the revocation of a professional license for

misconduct than it is punitive and there is no double jeopardy. 731 F.Supp. at 840; DeWayne Franzen, DAB No. 1165, at 11-12 (1990).

Clearly, Petitioner here has not established that her exclusion presents one of those rare cases in which the civil penalty is extreme and bears no rational relation to the remedial goals. The primary purpose of this exclusion is not to punish Petitioner, but to protect the Medicare and Medicaid programs, and their beneficiaries and recipients from future misconduct. See Manocchio v. Sullivan, supra.

VI. Conclusion

Petitioner's five-year exclusion is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act, because of her conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

/s/

Joseph K. Riotto
Administrative Law Judge