

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:	)	
Kathleen Ann Kahler,	)	DATE: October 8, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-413
	)	Decision No. CR498
The Inspector General.	)	
_____	)	

DECISION

By letter dated March 26, 1997, Kathleen Ann Kahler, the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health and 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 Services Block Grant and Block Grant to States for Social Services programs.<sup>1</sup> The I.G. explained that the five year exclusion was mandatory under 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 a health care item or service under the Medicare program.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. The parties agreed that this matter would be decided on the basis of the written record without the need for an in-person hearing if no material facts are in dispute and since the issues are legal in nature. I have determined that there are no material and relevant factual issues in dispute. Both parties submitted briefs in this matter. The I.G. submitted six proposed exhibits (I.G. Ex. 1-6). Petitioner did not object to these exhibits, and I admit them into evidence.

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<sup>1</sup> In this decision, I use the term "Medicaid" to refer to these State health care programs.

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

### **I. 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 a health care item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

### **II. Petitioner's Arguments**

Petitioner contends that she is not subject to mandatory exclusion because her offense does not relate to the delivery of a health care item or service under the Medicare program. Specifically she maintains that she did not herself file false claims with Medicare. Petitioner relates that she was employed as a mental health counselor by Senior Counseling Services and that her employer was the entity that filed the fraudulent claims.

Petitioner also maintains that the statute of limitations has passed for bringing an exclusion action against her. She notes that the claims in question were submitted in 1990 and 1991. She asserts that the I.G. can only bring an exclusion action within six years from the time a claim or request for payment is presented and she cites 42 U.S.C. section 1320a-7a, section 1128A(c)(1) of the Act, as authority for her position.

Finally, Petitioner argues in her request for a hearing that she did not know that her guilty plea would trigger an exclusion from the federally-funded health care programs. She asserts that neither the prosecuting attorney nor HHS representatives with whom she had cooperated in the investigation of her former employer informed her that she would be excluded as a result of her guilty plea.

### **III. Findings of Fact and Conclusions of Law**

1. At all times relevant herein, Petitioner was employed by Senior Counseling Services as a mental health counselor who provided psychological counseling and low vision counseling to Medicare patients in nursing homes.

2. Senior Counseling Services was owned by David Redfering.

3. The claims submitted to the Medicare program for Petitioner's services were submitted by David Redfering under the name "Senior Counseling Services" and later under the name of "David L. Redfering and Associates."

4. An Information charging Petitioner with one count of conspiracy to defraud the United States Medicare program was filed by the United States Attorney in the United States District Court, Middle District of Florida, Tampa Division. I.G. Ex. 3.

5. On July 10, 1996, Petitioner pled guilty in the United States District Court, Middle District of Florida, Tampa Division, to Count One of the Information for conspiracy to defraud the United States. I.G. Ex. 4.

6. In her plea agreement, Petitioner admitted that during the period of October 1990 through October 1991 she assisted David Redfering in preparing false documentation in support of Medicare claims submitted by Senior Counseling Services and David L. Redfering and Associates for psychological evaluations and group and individual therapy sessions, although neither Petitioner nor Redfering performed these services. I.G. Ex. 6 at 14.

7. In her plea agreement, Petitioner admitted that during the period October 1990 through October 1991 she also assisted David Redfering in preparing false documentation in support of Medicare claims by Senior Counseling Services and David L. Redfering and Associates for psychological evaluations conducted while no qualified clinical psychologist was present, in violation of Medicare payment rules. I.G. Ex. 6 at 14.

8. In her plea agreement, Petitioner acknowledged that she assisted David Redfering in the preparation of false documentation to support the Medicare claims, including Petitioner's forging patient signatures on psychological assessment and counseling consent forms, backdating file entries, and describing low vision services in terms of psychological counseling in progress notes and patient files. I.G. Ex. 6 at 14.

9. As a result of her July 10, 1996 conviction, Petitioner was sentenced to five years probation, was ordered to pay restitution including \$4,356.48 to Medicare, a fine of \$2000, and a \$50 special assessment. I.G. Ex.4.

10. Section 1128(a)(1) of the Act provides for the mandatory exclusion from Medicare and Medicaid of individuals convicted under federal or state law of a criminal offense related to the delivery of a health care item or service under the Medicare or Medicaid program.

11. Petitioner's criminal conviction for conspiracy to defraud the United States constitutes a conviction within the meaning of section 1128(i)(3) of the Act.

12. Petitioner's criminal conviction for conspiracy to defraud the United States is related to the delivery of a health care item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act.

13. Once an individual has been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, exclusion is mandatory under section 1128(c)(3)(B) of the Act for a minimum of 5 years.

14. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years, as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.

#### **IV. Discussion**

The first statutory requirement for the imposition of mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a criminal offense under federal or state law. The Act provides that an individual will be deemed convicted under any of the following circumstances:

(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.

Section 1128(i)(3) of the Act.

Petitioner does not dispute that she was convicted of a criminal offense. The record reflects that Petitioner pled guilty to one count of conspiracy to defraud the United States and her plea was accepted by the United States District Court, Middle District of Florida, Tampa Division, on July 10, 1996. Therefore, on these facts, section 1128(i)(3) of the Act is satisfied.

Next, it is required under section 1128(a)(1) of the Act that the crime at issue be related to the delivery of a health care item or service under Medicare or Medicaid. Petitioner does not dispute that the services allegedly involved in the fraudulent claims relate to health care items or services within the scope of the Act. She also does not dispute that such services were billed to Medicare and the Information to which she pled guilty reflects this fact. In her defense, Petitioner cites the fact that she was precluded from filing Medicare claims and that her employer was the entity that filed the claims at issue. On these facts, she asserts that the crime for which she was convicted does not relate to the Medicare program as she did not herself file the false claims.

I reject this claim. The record reflects that Petitioner assisted her employer in the submission of false Medicare claims. These claims were falsified to reflect compliance with Medicare rules when such compliance had in fact not occurred as the services were not performed when a qualified clinical psychologist was present. She also assisted her employer in the submission of fraudulent Medicare claims for psychological services she never rendered. In this regard, Petitioner worded claims for low vision visits to read as though she had provided the patients with psychological evaluations and therapy. She also forged the signatures of patients on consent forms indicating that they agreed to psychological treatment and counseling. These consent forms and records were then presented to the Medicare program as supporting documentation in an effort to obtain reimbursement for psychological services never provided to these patients. Petitioner's assistance to her employer enabled him to submit false claims to the Medicare program and resulted in Petitioner's conviction for conspiracy to defraud the United States.

It is well-established that financial misconduct directed at Medicare or Medicaid, in connection with the delivery of items or services under the program, constitutes program-related offense invoking mandatory exclusion. Alan J. Chernick, D.D.S., DAB CR434 (1996). Departmental Appeals Board case law has long held that filing false Medicare or Medicaid claims constitutes program misconduct which warrants exclusion. Paul Karsch, DAB CR454 (1997). I find that the offense which Petitioner was convicted of constitutes criminal fraud related to the delivery of a health care item or service under the Medicare program. Petitioner's fraudulent conduct was instrumental in enabling her employer to submit false Medicare claims.

I find no merit in Petitioner's argument that she should not be excluded, because her employer filed the claims as she was precluded from filing. The Departmental Appeals Board has rejected a similar claim in Robert C. Greenwood, DAB No. 1423 (1993). In that case the Departmental Appeals Board upheld on appeal a mandatory five year exclusion of a home health aide who was employed by providers to which he submitted false time sheets. His employers then filed claims with Medicaid. Although the petitioner contended that there was no evidence to show that he had knowledge that the patient was a Medicaid recipient or that his employer would file a claim with Medicaid for his services, the Departmental Appeals Board found that exclusion was proper. Petitioner's case is even more compelling as she was convicted of conspiring with her employer to defraud the Medicare program.

Petitioner also argues that she should not be subject to an exclusion under section 1128(a)(1) of the Act because she was not informed in the criminal proceeding that she would be excluded from the Medicare and Medicaid programs as a result of her conviction. I reject this argument. It is well-settled that arguments regarding the process leading to a petitioner's criminal conviction are irrelevant for purposes of an exclusion proceeding. Charles W. Wheeler, DAB No. 1123 (1990); Douglas Schram, R.Ph., DAB CR215 (1992) aff'd DAB No. 1372 (1992); Paul Karsch, DAB CR454 (1997). In Schram, the petitioner argued that because he was not given adequate notice concerning the consequences of his plea, his right to due process had been violated. The Departmental Appeals Board rejected this argument, relying on the proposition in U.S. v. Suter, 755 F.2d 523 (7th Cir. 1985) that a defendant does not have to be advised of all of the possible consequences of his plea. Suter, at 525. In essence, Petitioner's argument amounts to a collateral

attack on her conviction, which the DAB has previously held to be an ineffectual argument in the context of an exclusion appeal as the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter Edmondson, DAB No. 1330 (1992).

Finally, Petitioner maintains that the statute of limitations has passed for bringing an exclusion action against her and cites section 1128A(c)(1) of the Act (42 U.S.C. section 1320a-7a) as authority for her position. I find that Petitioner's argument is misplaced. The provision upon which Petitioner relies, otherwise known as the Civil Money Penalty Law (CMPL), provides the I.G. with the authority to impose monetary penalties upon providers who have either directly submitted, or caused to be submitted, claims which are improper or false. Section 1128A of the Act. While it is true that an individual or entity may be excluded under the CMPL as a result of the submission of false or fraudulent claims for reimbursement, pursuant to section 1128A(a) of the Act, the exclusion at issue in this case is predicated upon Petitioner's criminal conviction. Therefore, section 1128A of the Act and the referenced statute of limitations does not apply. As stated in Petitioner's notice of exclusion, Petitioner's exclusion is the direct result of her conviction for conspiracy to defraud the United States related to the Medicare program. She is therefore subject to mandatory exclusion pursuant to section 1128(a)(1) of the Act. No statute of limitations is applicable to this remedial sanction.

#### **V. Conclusion**

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because she has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program. The five year exclusion is therefore sustained.

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**Joseph K. Riotto**  
Administrative Law Judge