

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Arlene Elizabeth Hunter,)	Date: November 19, 1997
Petitioner,)	
- v. -)	Docket No. C-97-324
The Inspector General.)	Decision No. CR505

DECISION

By letter dated March 26, 1997, Arlene Elizabeth Hunter, 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 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.¹ 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 an 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. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. Both parties submitted briefs in this matter. The I.G. submitted four proposed exhibits (I.G. Exs. 1-4). Petitioner did not object to these exhibits and I receive into evidence I.G. Exs. 1-4. Petitioner did not submit any exhibits.

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.

¹ In this decision, I use the term "Medicaid" to refer to the State health care programs enumerated here.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was employed by Senior Counseling Services as a registered nurse providing psychological counseling and "low vision" counseling to Medicare patients in adult congregate living facilities. I.G. Ex. 2 at 13-14.
2. Senior Counseling Services was owned by David Redfering. I.G. Ex. 2 at 13.
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." I.G. Ex. 2 at 13.
4. An Information charging Petitioner with one count of conspiracy to defraud the Medicare program was filed by the United States Attorney in the United States District Court, Middle District of Florida, Tampa Division. I.G. Ex. 1.
5. On July 10, 1996, Petitioner pled guilty in United States District Court, Middle District of Florida, Tampa Division, to Count One of the Information, conspiracy to defraud the United States in violation of 18 U.S.C. § 371. I.G. Exs. 1-3.
6. In her plea agreement, Petitioner admitted that she 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 and group and individual therapy sessions, although neither Petitioner nor David Redfering performed these services. I.G. Ex. 2 at 14-15.
7. In her plea agreement, Petitioner admitted that 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. 2 at 13-14.
8. In her plea agreement, Petitioner acknowledged that she assisted Redfering in the preparation of false documentation to support the Medicare claims, including Petitioner's forging patient signatures on forms consenting to psychological

assessments, backdating file entries, and describing low vision services in terms of psychological counseling in patients' progress notes. I.G. Ex. 2 at 14-15.

9. As a result of her July 10, 1996 conviction, Petitioner was sentenced to five years probation, was ordered to pay restitution of \$943 (including \$871.29 to Medicare), and was fined \$2000. I.G. Ex. 3.

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 an item or service under the Medicare or Medicaid programs.

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. Finding 5.

12. Petitioner's criminal conviction for conspiracy to defraud the United States is related to the delivery of an item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act. Findings 1-9.

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.

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. Findings 1-13.

PETITIONER'S ARGUMENTS

Petitioner now appears to contend that she is not subject to mandatory exclusion because her offense does not relate to the delivery of an item or service under the Medicare program, although during the initial prehearing conference she did not dispute the relationship. Specifically, she maintains that she did not herself file false claims with Medicare. Petitioner relates that she was an employee and that her employer was the entity that filed the fraudulent claims.²

² I note that during the initial prehearing conference in this case, Petitioner did not dispute that she had been convicted of a criminal offense or that her offense was related to the Medicare program. Petitioner also requested briefing on only one issue, that being the I.G.'s authority to exclude her given that the offenses for which she was convicted took place more than six
(continued...)

Petitioner challenges the propriety of her criminal conviction, alleging that she was not culpable and had no intent to defraud Medicare. In this regard, she asserts that she did not know that her employer was submitting false claims to Medicare, and that when she discovered his illegal actions she changed employment. She also maintains that it was accepted practice in medical facilities to backdate Medicare claims and to have medical personnel provide claimed services in the absence of an appropriately licensed provider.

Petitioner maintains that the statute of limitations has passed for bringing an exclusion action against her. She notes that the dates of service for the claims in question were 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 cites 42 U.S.C. § 1320a-7a (Act, section 1128A) as authority for her position.

Petitioner argues in her request for hearing that she did not know that her guilty plea would trigger an exclusion from the Medicare and Medicaid programs. She asserts that neither the prosecuting attorney nor the Department of Health and Human Services representatives with whom she cooperated in the investigation of her former employer informed her that she would be excluded as a result of her guilty plea.

Petitioner contends that her exclusion constitutes a constitutionally impermissible additional punishment. She claims that the effect of such exclusion is to deprive her of her ability to make a living as a nurse.

Finally, Petitioner argues that if her exclusion is upheld, it should begin on July 10, 1996, the date of her criminal conviction, and not 20 days from March 26, 1997, as indicated in the I.G.'s March 26, 1997 notice letter.

²(...continued)

years prior to her exclusion. I also informed Petitioner during the conference that she could brief the issue of whether, if her exclusion is upheld, her exclusion could begin on July 10, 1996, the date of her conviction, instead of the date indicated in the I.G.'s March 26, 1997 notice letter (20 days from March 26, 1997). However, as Petitioner is appearing before me pro se, I am not limiting my decision to these two issues or holding Petitioner to any admissions she made during the initial prehearing conference. Instead, I am addressing all the arguments I now construe Petitioner to be making in her hearing request and in her briefs subsequent to the initial prehearing conference.

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 must have been convicted of a criminal offense under federal or State law. In the case at hand, 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. 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 criminal offense at issue be related to the delivery of an item or service under Medicare or Medicaid. Petitioner does not dispute that the services allegedly involved in the fraudulent claims relate to services within the scope of the Act. She also does not dispute that such services were billed to Medicare, and the criminal 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 Petitioner's argument. 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 had agreed to psychological assessments and counseling. These consent forms and records were then presented to the Medicare program as supporting documentation for the Medicare claims, 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 programs, constitutes a 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); Jack W. Greene, DAB CR19 (1989), aff'd, DAB No. 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). I find that the offense for which Petitioner was convicted constitutes criminal fraud related to the delivery of an 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 she was precluded from filing. The Departmental Appeals Board 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 whom 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 his exclusion was authorized. Petitioner's case is even more compelling, as she was convicted of conspiring with her employer to defraud the Medicare program.

Petitioner maintains that the statute of limitations has passed for bringing an exclusion action against her, and cites 42 U.S.C. § 1320a-7a (Act, section 1128A) as authority for her position. I find that Petitioner's argument is misplaced. The provision upon which Petitioner relies, otherwise known as the Civil Monetary Penalties 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. Act, section 1128A. 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 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, do 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, specifically, 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. Act, section 1128(a).

Petitioner argues that she should not be subject to exclusion under section 1128(a)(1) of the Act because she was not informed in her 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 and Joan K. Todd, DAB No. 1123 (1990); Douglas Schram, R.Ph., DAB No. 1372 (1992); Karsch, DAB CR454. 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. In essence, Petitioner's argument amounts to a collateral attack on her conviction, which the Departmental Appeals Board has previously held to be an ineffectual argument in the context of an exclusion appeal, as the I.G. and the administrative law judge are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Peter J. Edmonson, DAB No. 1330 (1992); Ernest Valle, DAB CR309 (1994).

Petitioner challenges her criminal conviction, alleging that she had no intent to defraud Medicare and that she is not blameworthy. In this regard, she maintains that she did not know that her employer was submitting false claims. Also, she claims that it was accepted practice in medical facilities to backdate claims and for other medical personnel to provide services in the absence of an appropriately licensed provider. I find that I have no authority to consider such claims. Once it is shown that a criminal conviction within the scope of the Act 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. Edmonson, DAB No. 1330. The intent of the individual committing the offense is not relevant. 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 argues that her exclusion constitutes an impermissible additional punishment beyond the punishment imposed upon her in the criminal proceeding. She asserts also that her exclusion has effectively precluded her from making a living as a nurse. I reject this argument. Such argument is a claim that exclusion following a criminal conviction violates the constitutional protection against double jeopardy. An administrative law judge has no authority, however, to rule on the constitutionality of the I.G.'s actions. See Roberta Miller, DAB CR367 (1995). Moreover, the Departmental Appeals Board and federal courts have found that exclusions imposed under section 1128 of the Act are remedial in nature, rather than punitive, and do not violate the double jeopardy provisions of the Constitution. Id. at 6-7; Manocchio v. Kusserow, 961 F.2d 1539, 1541 (11th Cir. 1992); Kahn

v. Inspector General of the U.S. Dept. of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994); Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994). Because the purpose of Petitioner's exclusion is to protect program beneficiaries from future misconduct by a provider who has proven herself to be untrustworthy, and not to punish Petitioner, this exclusion is remedial in nature and not violative of double jeopardy. Karsch, DAB CR454. Consequently, although Petitioner alleges that her exclusion effectively precludes her employment as a nurse, such effect is not impermissible punishment.

Finally, I note that an administrative law judge has no authority to alter the effective date of an exclusion imposed against an individual by the I.G. Shanti Jain, M.D., DAB No. 1398 (1993); Samuel W. Chang, M.D., DAB No. 1198 (1990).

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 she has been convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Petitioner's five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge