

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Biniki Sherrail Dove,

Petitioner

v.

The Inspector General.

Docket No. C-10-919

Decision No. CR2304

Date: January 4, 2011

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Biniki Sherrail Dove, from participating in Medicare and other federally funded health care programs for a period of at least five years.

**I. Background**

The I.G. determined to exclude Petitioner from participating in Medicare and other federally funded health care programs for at least five years, based on his determination that Petitioner had been convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act). Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference at which I ordered the parties to exchange briefs and all proposed exhibits. On October 12, 2010, the I.G. submitted a brief and four proposed exhibits, which are identified as I.G. Ex. 1 – I.G. Ex. 4. Petitioner's deadline for filing her brief and proposed exhibits was November 22, 2010. Neither my office nor the office of the I.G.'s counsel received an exchange from Petitioner. On December 1, 2010, Ms. Debra Sapper, the staff attorney from the Departmental Appeals Board Civil Remedies

Division who is assigned to work with me on this case, called Petitioner and left a message on her phone telling her that her pre-hearing exchange had not been received. Ms. Sapper also e-mailed Petitioner on that same date with the identical message. On December 2, 2010, Petitioner sent an e-mail to Ms. Sapper telling her that she had delivered her pre-hearing exchange to the post office on November 10, 2010.

On December 2, 2010, Ms. Sapper sent an e-mail to Petitioner requesting that she fax her exchange to the Civil Remedies Division by no later than December 6, 2010. On December 7, 2010, Petitioner left a voice mail message on Ms. Sapper's phone assuring her that she'd faxed the exchange and asking that Ms. Sapper confirm its receipt. However, no fax was received by the Civil Remedies Division. On December 8, 2010, Ms. Sapper again called Petitioner and left a message on her phone telling her that the fax had not been received. Ms. Sapper also sent Petitioner a confirming e-mail with the identical message. Petitioner did not reply either to Ms. Sapper's phone message or to the e-mail.

On December 13, 2010, I sent an order to show cause to Petitioner, directing her either to file an exchange by no later than December 22, 2010, or to explain why she had not done so. Petitioner did not respond to the order to show cause. However, on December 14, 2010, Petitioner made two attempts to fax a document, or documents, to Ms. Sapper. The faxes were not received, because Petitioner attempted to fax the documents to Ms. Sapper's direct line rather than to the Civil Remedies Division fax number. Petitioner also sent an e-mail to Ms. Sapper in which she requested to speak with her about the matter.

On December 14, 2010, Ms. Sapper sent an e-mail to Petitioner noting the fax attempts. Ms. Sapper directed Petitioner to send her exchange to the Civil Remedies Division by mail and strongly suggested that she do so immediately rather than wait until the deadline of December 22.

Petitioner never responded to this e-mail. Neither the Civil Remedies Division nor I.G.'s counsel has ever received a pre-hearing exchange from Petitioner.

I have given Petitioner multiple opportunities to file a pre-hearing exchange in this case, and, despite that, Petitioner has not filed an exchange. My pre-hearing order was explicit, and it directed Petitioner to mail an exchange to the Civil Remedies Division. I also sent to Petitioner a copy of the Civil Remedies Division procedures, which detailed exactly how Petitioner was to complete her exchange. On multiple occasions, Ms. Sapper instructed Petitioner to file documents. Petitioner never complied with these instructions and never responded to the order to show cause that I sent to her.

I could dismiss this case based on Petitioner's failure to comply with my initial pre-hearing order and with subsequent instructions. Instead, I am electing to issue a decision

on the merits, based on the unrebutted pre-hearing exchange filed by the I.G. I receive into evidence I.G. Ex. 1 – I.G. Ex. 4.

## **II. Issues, Findings of Fact, and Conclusions of Law**

### **A. Issues**

The issues in this case are whether:

1. Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Act; and
2. An exclusion of at least five years is mandatory.

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

I make the following findings of fact and conclusions of law.

- 1. Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Act.***

Section 1128(a)(1) of the Act mandates the exclusion of any individual who is convicted of a criminal offense that is related to the delivery of an item or service under Medicare or a State funded health care program (Medicaid). The evidence offered by the I.G. proves that Petitioner was convicted of such an offense. Therefore, the I.G. must exclude her.

On October 28, 2009, Petitioner pled guilty in Cumberland County District Court in the State of North Carolina to two misdemeanor allegations of common law forgery and to two misdemeanor allegations of attempted medical assistance provider fraud. I.G. Ex. 2 at 2, 4; I.G. Ex. 3 at 2, 4. These pleas were accepted by the court on that date. *Id.*

Specifically, Petitioner was charged with, and pled guilty to, forging the name of a physician on documents that were filed with the North Carolina Medicaid plan. I.G. Ex. 2 at 1, 3. These forgeries were committed for the purpose of causing false Medicaid benefits payments to be made. I.G. Ex. 3, at 1, 3.

The crimes of which Petitioner was convicted clearly are crimes that are related to the delivery of North Carolina Medicaid items or services. The intended victim of Petitioner's crimes was North Carolina's Medicaid program. The attempted theft would not have been possible, but for the existence of that program and the program's reimbursement of covered items and services. Consequently, Petitioner's convictions are for crimes within the reach of section 1128(a)(1) of the Act.

*2. An exclusion of at least five years is required by law.*

The I.G. excluded Petitioner for at least five years. That is the minimum period that must be imposed against an individual who has been convicted of a crime that is described at section 1128(a)(1) of the Act. Therefore, the exclusion that the I.G. imposed against Petitioner is reasonable as a matter of law.

\_\_\_\_\_  
/s/  
Steven T. Kessel  
Administrative Law Judge