

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	
Mary Katherine Lyons,)	DATE: October 13, 1989
)	
Petitioner,)	
)	
- v. -)	Docket No. C-49
)	
The Inspector General.)	DECISION CR 49
)	

DECISION AND ORDER

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the July 11, 1988 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and Medicaid programs for seven years.¹

Based on the entire record before me, I conclude that there are no material facts at issue, that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128 (a) (1) and 1128 (c) (3) (B) of the Act, and that it is appropriate for Petitioner to be excluded for a period of Seven years.

¹ Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section 1128(h) and, for the sake of brevity, I refer only to it.

APPLICABLE STATUTES AND REGULATIONSI. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a) (1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to" the delivery of an item or service under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128 (a)(1).

While section 1128(a) of the Act provides for a minimum five-year mandatory exclusion for (1) convictions of program-related crimes and (2) convictions relating to patient abuse, section 1128(b) of the Act provides for the permissive exclusion of "individuals and entities" for twelve types of other convictions, infractions, or undesirable behavior, such as convictions relating to fraud, license revocation, or failure to supply payment information.

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to issue an exclusion notice to an individual whenever the I.G. has "conclusive information" that such individual has been "convicted" of a criminal offense "related to" the delivery of a Medicare or Medicaid item or service; such exclusion must begin 15 days from the date on the notice.²

² The I.G.'s notice letter allows an additional five days for receipt by mail.

BACKGROUND³

Shortly after the I.G. issued the Notice in this case and Petitioner requested a hearing before an ALJ, a prehearing conference was held by telephone. After the prehearing conference, the parties agreed that two legal issues should be decided prior to any evidentiary hearing in this case. The parties submitted briefs and documentary evidence in support of their respective positions concerning summary disposition. Neither party objected to any of the proposed exhibits of the other.

On April 3, 1989, I issued a Ruling, wherein I concluded (1) that Petitioner was "convicted," (2) that the offense to which Petitioner pled guilty and was convicted was "related to the delivery of an item or service" under Medicare within the meaning of section 1128(a)(1) of the Act and (3) that the I.G. was required to exclude Petitioner from Medicare and Medicaid for at least five years under the minimum mandatory provisions of section 1128. I then scheduled a hearing on the issue of the appropriate length of exclusion.

The hearing was set for July 27, 1989. However, at a prehearing telephone conference on July 19, 1989, Petitioner withdrew her request for an evidentiary hearing and the parties agreed to submit the case for decision on briefs. Thereafter, they each filed a brief, Petitioner filed additional exhibits, and the record was closed.

³ The citations in this Ruling are as follows:

Petitioner's Memorandum in Support of Motion for Partial Summary Judgment	P. Memo. (page)
Petitioner's Brief	P. Br. (page)
Petitioner's Exhibits	P. Ex. (letter)/(page)
Transcript of Arraignment in Court of Common Pleas, Franklin, Ohio	Tr. (page)
I.G.'s Response to P. Memo	I.G. Resp. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)

ISSUE

1. Whether it is appropriate in this case for Petitioner to be excluded from the Medicare and Medicaid programs for a period of seven years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ⁴

Having considered the entire record, the arguments and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner was employed as a data processing person or claims examiner in the claims department for Nationwide Insurance Co., the Medicare carrier in the State of Ohio for the Department of Health and Human Services (DHHS) during the period from 1982 through 1987.

2. Nationwide processed and paid Medicare claims for DHHS during the period 1982 to 1987.

3. Petitioner used her computer to order approximately \$30,568.04 in checks for Medicare reimbursement by billing the Medicare system for fraudulent claims. I.G. Ex. 12; P. Br. 1,2; Tr. 30.

4. Petitioner caused Medicare checks to be issued to her father-in-law and brother-in-law and delivered to her sister's address. Her sister cashed the checks and split the proceeds with Petitioner. Tr. 30; I.G. Ex. 12/2,3.

5. A field audit revealed Petitioner's wrongful actions. Investigators approached Petitioner and she gave a statement to the auditors and to the police. P. Br. 1,2.

6. Subsequently, Petitioner was charged by way of a bill of information with six counts of theft and forgery. I.G. Ex. 1; Tr. 5.

7. Petitioner pled guilty, on September 14, 1987, to two counts of theft and four counts of forgery. I.G. Ex. 3; Tr. 1 to 37.

⁴ Any part of this Decision and Order preceding the Findings of Fact and Conclusions of law which is obviously a finding of fact or conclusion of law is incorporated herein.

8. At the time of the entry of the guilty pleas, the court sentenced Petitioner to a term of imprisonment. Tr. 36; P. Br. 1,2.
9. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) of the Act.
10. The I.G. properly excluded Petitioner from participation in Medicare, and properly directed her exclusion from Medicaid for a period of at least five years, pursuant to the minimum mandatory exclusion provisions of section 1128 of the Act..
11. Based on the facts in the record in this case, I find and conclude that Petitioner should be excluded for a period of seven years.
12. The material and relevant facts in this case are not contested.
13. The classification of the Petitioner's criminal offense as subject to the authority of 1128(a)(1) is a legal issue.
14. The I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

I. Petitioner's Conviction "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128 of The Act.

Section 1128 of the Act clearly requires the I.G. to exclude from Medicare, for a minimum of five years, any "individual or entity" that has been "convicted of a criminal offense related to the delivery of an item or service" under Medicare or state health care (e.g., Medicaid) programs. The I.G. must also direct states to exclude such individuals from Medicaid for a period which is at least "the same as any period" of Medicare exclusion. 42 U.S.C. 1320a-7(a)(1), (c)(3)(B), and (d)(3)(A); 42 C.F.R. 1002.211. Congressional intent on this matter is clear:

A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . .
Moreover, a mandatory five-year exclusion should

provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2; 1987 U.S. Code Cong. and Admin. News 682, 686.

In this case, the I.G. properly excluded Petitioner from participation in Medicare and Medicaid for at least a five year period because she was "convicted" of a "criminal offense related to the delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) of the Act.

Petitioner argued that section 1128 of the Act does not apply to her because she is not a physician or other type of health care provider. This argument fails because the provisions of section 1128(a)(1) of the Act clearly apply to any "individual or entity" and are not restricted to health care providers. Merriam Webster's Third New International Unabridged Dictionary defines "individual" as "a single human being." Petitioner is unquestionably an "individual" within the meaning of section 1128(a)(1) of the Act.

Next, Petitioner argues that her crimes of theft and forgery involved the processing of claim forms on a computer and that these crimes were not "related to" the "delivery of an item or service" under the Medicare program within the meaning of section 1128(a)(1) of the Act. Petitioner argues that the Act "obviously only applies to cases where a medical provider submits a claim for some type of service or item provided to a patient." P. Br/5. This argument fails because Petitioner admittedly processed fraudulent Medicare claims on her computer to obtain monies from the Medicare program. The fraudulent Medicare claims she processed and the monies she stole "related to" the "delivery of" (or lack thereof) of "an item or service" under the Medicare program. Ms. Lyons' function of processing claims for Nationwide, the Medicare carrier in Ohio, was an essential part of the system of Medicare reimbursement. Section 1128(a)(1) of the Act sweeps within its ambit all crimes "related to the delivery of an item or service", such as the conversion of Medicare or Medicaid funds by Petitioner in this case.⁵

⁵ Even if Petitioner were correct and this case should have been brought by the I.G. under the permissive provisions of section 1128, seven years would be an appropriate period of exclusion for Petitioner under section 1128(b), of the Act.

II. Seven Years Is An Appropriate Length Of Exclusion For Petitioner.

Petitioner argued that the seven year period of exclusion imposed and directed by the I.G. was unreasonable. She contends that five years was the appropriate length of exclusion, based on several factors:

1. She cooperated in the investigation and provided information which could help Medicare carriers such as Nationwide avoid such thefts in the future.
2. She did her best to make restitution, confessing judgment in the \$425,915 civil action brought against her by Nationwide and forfeiting to Nationwide \$7,763.61 which she had in savings.
3. She felt remorse for her actions and expressed them in a letter to the State trial judge and in a "to whom it may concern" letter.
4. The I.G. imposed and directed an exclusion of only five years in the case of a pharmacist convicted of substituting generic drugs for brand name drugs in Medicaid prescriptions and charging for the higher priced brand name drugs. Jack W. Greene v. The Inspector General, DAB Decision No. 1078 (1989).

The I.G. responded by noting that in arriving at the seven-year term of exclusion, he had considered Petitioner's cooperation and efforts to make restitution, along with the other factors which the I.G. is required to consider under 42 C.F.R. 1001.125(b).⁶ The I.G.

⁶ The seven factors are:

- (1) The number and nature of the program violations and related offenses;
- (2) The nature and extent of any adverse impact the violations have had on beneficiaries;
- (3) The amount of the damages incurred by the Medicare, Medicaid, and the Social Services program;
- (4) Whether there are any mitigating circumstances;

(continued...)

argued that Petitioner's cooperation and restitution were so limited that a seven-year exclusion was reasonable. The I.G. contended that at best Petitioner made restitution of only approximately \$25,000, although her total theft was almost half a million dollars (including \$30,568.04 taken from the Medicare program). The remainder of the stolen money was spent on "vacations, cars, jewelry and relatives." Tr. 32; I.G. Br. 3; I.G. Ex. 12. The I.G. alleged that, although Petitioner cooperated with authorities once the theft was discovered, Petitioner did not cease her wrongful activity until it was discovered, nor did she turn herself in prior to the discovery. The I.G. noted that in the pharmacist's case relied on by Petitioner (See Greene, supra.) the amount involved totalled only several thousand dollars and the pharmacist was placed on probation, rather than incarcerated.

The basic facts are not in dispute in this case. The parties supported most of their allegations with documentation in the form of exhibits to which, in effect, they stipulated.⁷

Petitioner does not dispute that the I.G. considered the relevant mitigating circumstances, but disagrees with the I.G.'s conclusion that the appropriate term of exclusion should be seven, rather than five, years. Petitioner declined the opportunity for an oral hearing, although we were willing to do it at the Women's Reformatory in Columbus, if necessary.

⁶ (...continued)

- (5) The length of the sentence imposed by the court;
- (6) Any other facts bearing on the nature and seriousness of the program violations; and
- (7) The previous sanction record of the suspended party under the Medicare and Medicaid programs.

⁷ The I.G.'s allegation that Petitioner continued her wrongful activity until it was discovered in February 1987 does not seem to be supported by the record. Also, the record in this case does not contain documentation of the dollar amount involved in the pharmacist's case. The ALJ's decision in that case, a copy of which was attached to the I.G.'s letter of February 9, 1989, does not mention the dollar amount.

I accept Petitioner's written declarations of remorse (P. Ex. A. B) as sincere and feel sympathy for her current plight. I also applaud her cooperation with authorities and with her former employer. Had it not been for these mitigating factors, ten or more years might have been the appropriate length of exclusion in this case where the nature of the crimes committed strikes at the nerve center of the Medicare system. Given Congressional intent to exclude untrustworthy individuals from participation in Medicare and State health care programs, it is reasonable to conclude that mitigating circumstances should constitute those circumstances which demonstrate trustworthiness. See Leonard N. Schwartz, R. Ph. v. The Inspector General, Civil Remedies Docket No. C-62 (1981) at p. 13-15. None of the circumstances asserted to be mitigating by Petitioner in this case prove that she is an individual who should be trusted to be near Medicare or State health care funds. The circumstances cited by Petitioner essentially demonstrate that she is a relatively cooperative and remorseful individual. While these factors may have had some bearing on the extent to which Petitioner was punished for her crimes, they are not dispositive of the question of whether Petitioner can now or in the near future be trusted not to steal public funds. Thus, given the gravity and circumstances of the offense, the timing and quality of Petitioner's cooperation, restitution, and remorse, I conclude that the intent of Congress in protecting the integrity of the Medicare program is best served by a seven year period of exclusion.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that Petitioner is subject to the minimum mandatory provisions of section 1128 of the Act and that seven years in an appropriate period of exclusion.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge