

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

<u>In the Case of:</u>)	
ViNita R. Warren,)	DATE: June 19, 1996
Petitioner,)	
- v. -)	Docket No. C-96-058
The Inspector General.)	Decision No. CR423
)	

DECISION

By letter dated November 30, 1995,¹ the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services, that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

¹ The notice letter contained an error, and a second letter explaining and correcting the error was mailed to Petitioner on January 19, 1996. I.G. Ex. 3. Although the first paragraph of the notice letter correctly states that the exclusion was the result of Petitioner's conviction of a "criminal offense related to the delivery of an item or service under Medicaid," the third paragraph states that the conviction was for a "criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." The January 19, 1996 letter makes clear that the exclusion is based upon section 1128(a)(1) of the Act and states that Petitioner has been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board (DAB). The I.G. moved for summary disposition.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have granted the I.G.'s motion and decided the case on the basis of the parties' written submissions.²

I find no reason to disturb the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

PETITIONER'S ARGUMENT

In her request for a hearing and during the telephone prehearing conference call on February 5, 1996, Petitioner admitted that she was convicted of a misdemeanor for receiving a bribe for giving out unauthorized information. Petitioner contends that the offense for which she was convicted did not warrant exclusion under section 1128(a)(1) of the Act.

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. Ex. 9.
2. Chesapeake Health Plan Inc. (Chesapeake) is a private HMO (health maintenance organization) incorporated in the State of Maryland. I.G. Exs. 8 - 10.
3. Pursuant to an HMO contract between Chesapeake and DHMH, Chesapeake may enroll people eligible for Medicaid. DHMH will then pay Chesapeake a monthly capitation fee for each enrollee for the services rendered by Chesapeake. In return, Chesapeake is responsible for

² The I.G. submitted a "Memorandum of Law in Support of the I.G.'s Motion for Summary Disposition," proposed findings of facts and conclusions of law, and 15 exhibits. I designate the I.G.'s exhibits as "I.G. Ex." Petitioner did make a submission and Petitioner did not object to any of the documents submitted by the I.G. Thus, I admit I.G. Exs. 1 - 15.

providing, arranging, and paying for all medical items and services to which enrollees are entitled under the Medicaid State plan. I.G. Exs. 8 - 10.

4. HMOs in Maryland are allowed to recruit individuals to increase their business. I.G. Exs. 8 - 10.

5. James Donovan was a marketing representative employed by Chesapeake. I.G. Exs. 9, 10.

6. Chesapeake paid Donovan a commission based on the number of Medicaid recipients he successfully enrolled each month. I.G. Exs. 9, 10.

7. HMOs generally use traditional marketing methods in publicizing their services. The HMOs are not entitled to lists of names or addresses of Medicaid recipients, inasmuch as these are protected by State privacy laws.

8. Petitioner is a social worker who, at all times relevant to this proceeding, was employed by the State of Maryland, Department of Human Resources, as a case worker in the Palmer Park Department of Social Service (DSS) of in Prince George's County. I.G. Exs. 9, 10.

9. As a DSS caseworker, Petitioner determined the eligibility of applicants for Medicaid and other entitlements. I.G. Exs. 9, 10.

10. At DSS, Petitioner had access to a computer data base, which contained information on Medicaid recipients, including their names and addresses, as well as the names and ages of their family members, income, assets, and the family members' Medicaid numbers. I.G. Exs. 9, 10.

11. DSS employees are prohibited by Maryland law from disclosing any information about Medicaid recipients to anyone outside of the DSS offices. I.G. Exs. 6, 7, 9, 10.

12. Petitioner was approached by Mr. Donovan who explained to her that it was his job to enroll Medicaid recipients into Chesapeake and that he could more readily market his services if he knew Medicaid recipients' names and addresses. I.G. Exs. 9, 10.

13. On several occasions between January 1994 and September 1994 Petitioner gave Mr. Donovan computerized lists of the information he sought pertaining to Medicaid recipients and she in turn was paid for providing such information to him. I.G. Ex. 9 - 12.

14. In February 1995, the Medicaid Fraud Control Unit of the State of Maryland began an investigation of the selling of names and addresses of Medicaid recipients to Chesapeake representatives. I.G. Ex. 9.

15. On June 13, 1995, a criminal indictment was filed in the Circuit Court of Baltimore City charging Petitioner with receiving bribes and rewards from January 1994 to September 1994, the purpose and intent of which were to influence her in the performance of her official duties to her employer by inducing her to disclose confidential information on Maryland Medicaid recipients in violation of Article 27, section 22 of the Annotated Code of Maryland. I.G. Exs. 11, 12.

16. Petitioner and the Office of the Attorney General entered into a plea agreement, whereby Petitioner agreed to plead guilty to the criminal information charging her with receiving a reward from persons seeking to influence her in the performance of her official duties. I.G. Ex. 13.

17. The guilty plea was accepted by the judge for the Circuit Court for Baltimore City and the judgment of conviction was entered on August 16, 1995. I.G. Exs. 11, 14.

18. Petitioner was sentenced to serve six months, which sentence was suspended. Petitioner was released on supervised probation for a period of one year, ordered to perform 200 hours of community service, and ordered to pay court costs. I.G. Ex. 14.

19. Petitioner's plea of guilty which was accepted by the court and the entry of the judgment of conviction both satisfy the definition of conviction found in section 1128(i) of the Act for purposes of mandatory exclusion. Findings 17, 18.

20. Petitioner's conviction for improperly disclosing the names of Medicaid recipients to the representative of a Medicaid HMO is related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 19.

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

22. The mandatory minimum period of an exclusion of a person convicted of a program-related offense is five years. Act, section 1128(c)(3)(B).

23. The Secretary has delegated to the I.G. the duty to impose the mandatory exclusion of a person convicted of a program-related offense. 48 Fed. Reg. 21,661 (1983); 42 C.F.R. § 1001.101.

24. Petitioner is subject to a 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. Findings 1 - 23.

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.

DISCUSSION

The law relied upon by the I.G. to exclude Petitioner requires, initially, that the person charged have been convicted of a crime. Section 1128(i) of 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 judgement of conviction has been withheld.

In this case, sections 1128(i)(1) and (3) of the Act are clearly applicable. The Circuit Court of Baltimore City, Maryland accepted the Petitioner's plea of guilty on August 18, 1995 and entered a judgment of conviction against her for receiving a bribe. I.G. Exs. 11, 13 - 15. The fact that Petitioner pled guilty to a crime and the court accepted her plea constitutes a conviction within the meaning of section 1128(i)(3) of the Act. Also, the entry of the judgment of conviction by the court is within the definition of conviction as set forth in section 1128(i)(1) of the Act. The Petitioner was therefore convicted of a criminal offense within the meaning of both sections 1128(i)(1) and (3).

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 program. On this issue, the regulations are clear that program-related offenses include "the performance of management or administrative services relating to the delivery of items or services under any such program." 42 C.F.R. § 1001.101.

An appellate panel upheld an administrative law judge's reasoning that "[t]he determination of whether a conviction is related to the delivery of an item or service under the Medicaid program '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 1138 at 5 (1990) (citing Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990)).

Most relevant to the facts herein are DAB decisions uniformly upholding section 1128(a)(1) exclusions for convictions of receiving kickbacks or bribes for referrals of Medicaid or Medicare business. These cases are comparable to Petitioner's case. Asadollah Amrollahifar, Ph.D., DAB CR238 (1992). See also Niranjana B. Parikh, M.D., et al., DAB 1334 (1992); Arthur V. Brown, M.D., DAB CR226 (1992); John J. Tolentino, M.D., et al., DAB CR180 (1992). Thus, the receipt of such unlawful remuneration is an offense related to the Medicare and Medicaid programs. In Amrollahifar, a psychologist was convicted for receiving money in exchange for the "stickers" of Medicaid recipients. The petitioner in Amrollahifar gave these stickers to a medical supply company who used the stickers to obtain payment from Medicaid for supplies that were unauthorized, unnecessary, and inflated in price. The

administrative law judge held that "the delivery of items under Medicaid played an essential and integral role in petitioner's criminal conduct and conviction" and that "without this connection, petitioner would not have obtained the stickers in question and would not have subsequently sold them to [the medical supply company.]" Amrollahifar, at 4. Similarly, in Petitioner's case, the bribes were offered and received to enable Chesapeake to market its HMO services to Medicaid recipients, whom it might not have identified without Petitioner's improper disclosure.

The acts which led to Petitioner's conviction would likely never have occurred absent her connection to the Medicaid program. Therefore, I conclude that the delivery of HMO items and services under Maryland's Medicaid program played an essential and integral role in Petitioner's criminal conduct, such that her conviction is related to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act.

CONCLUSION

Petitioner's exclusion, for at least five years, 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