

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

_____)	
In the Case of:)	
Joan K. Todd,)	DATE: JUN 8, 1989
)	
Petitioner,)	
)	
- v. -)	Docket No. C-63
)	DECISION CR 29
The Inspector General.)	
_____)	

DECISION AND ORDER

Joan K. Todd, the Petitioner, requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude her from participation in Medicare and to direct that she be excluded from participation in State health care programs (e.g., Medicaid), for a period of five years.^{1/} This Decision and Order resolves this case on the basis of written briefs and a stipulated record.^{2/} I find no merit in the numerous arguments raised by the Petitioner and I hereby deny the Petitioner's motion to

^{1/} For the sake of brevity, I hereafter refer only to Medicaid as constituting "State health care programs" under section 1128 of the Social Security Act.

^{2/} In a preliminary ruling, I granted the Petitioner's request to consolidate her hearing, docketed as No. C-63, with the hearing for Petitioner Charles W. Wheeler, Docket No. C-61. The Petitioner is the mother of Petitioner Wheeler, and the circumstances underlying their convictions, and the I.G.'s action to exclude them were essentially identical. The I.G. had no objection to the consolidation. See December 9, 1988 Prehearing Order and Notice of Hearing Schedule.

As I indicated in my December 9, 1988 Ruling, a separate Decision and Order is being rendered simultaneously in Petitioner Wheeler's case.

dismiss. I conclude that the I.G. was required under federal law to exclude the Petitioner from Medicare, and to direct her exclusion from Medicaid, for five years.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

This case is governed by section 1128 of the Social Security Act (Act), codified at 42 U.S.C. 1320a-7 (West U.S.C.A. Supp., 1988). Section 1128(a) of the Act, headed "Mandatory Exclusion," provides for the exclusion from Medicare, and a directive to the State to exclude from State health care programs, any individual who is "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 that the period of such exclusion shall be for a minimum of five years.^{3/}

The term "convicted" is defined in section 1128(i) to include "when a judgment of conviction has been entered against the physician or individual by a Federal, State, or local court," or when a plea of guilty or nolo contendere has been "accepted by a Federal, State, or local court." (Emphasis added.)

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 other 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. The Act does not prescribe a minimum period of exclusion in the case of a permissive exclusion.

II. The Federal Regulations.

The governing federal regulations (Regulations) are found in 42 C.F.R. Parts 498, 1001, and 1002 (1987). Part 498 governs the procedural aspects of this exclusion and Parts 1001 and 1002 govern the substantive aspects. In accordance with section 498.5(i), a practitioner,

^{3/} This version of section 1128 of the Act was enacted in August 1987. Before August 1987, the Act did not prescribe a minimum period of exclusion.

provider, or supplier who has been excluded from program coverage is "entitled to a hearing before an ALJ (Administrative Law Judge)." Pursuant to section 1001.128, an individual who has been excluded from participation has a right to request a hearing before an ALJ on the issues of whether: (1) he or she was, in fact, convicted; (2) the conviction was related to the delivery of an item or service under Medicare or Medicaid; and (3) the length of the exclusion is reasonable.

Section 1001.123(a) requires the I.G. to send written notice of his determination to exclude an individual or entity when he has "conclusive information" that the individual or entity has been convicted of a crime related to the delivery of an item or service under Medicare or Medicaid.

BACKGROUND

By letter dated October 6, 1988, the I.G. notified the Petitioner that, as a result of her conviction of a criminal offense related to the delivery of an item or service under Medicaid, she would be excluded from participation in Medicare and Medicaid for a mandatory five year period, commencing 20 days from the date of the Notice.^{4/} The I.G.'s basis for the exclusion here was the Petitioner's guilty plea and her conviction in the Circuit Court of Fayette County, West Virginia, of a criminal offense related to the delivery of an item or service under Medicaid.^{5/}

On October 18, 1988, the Petitioner and Petitioner Wheeler timely filed a joint request for hearing on the I.G.'s determination. I held a prehearing telephone conference call on December 7, 1988, at which I determined that the issues raised by the Petitioner's hearing request were primarily legal issues, which could

^{4/} Section 1001.123 of the Regulations provides that the period of exclusion is to begin 15 days from the date on the notice; however, the I.G. allowed 5 days for mailing in this case.

^{5/} Petitioner Charles W. Wheeler received a letter dated September 30, 1988 from the I.G., notifying him of his mandatory five-year exclusion from Medicare and Medicaid because of his guilty plea and conviction in the Circuit Courts of Fayette and Mercer Counties, West Virginia of criminal offenses related to the delivery of an item or service under Medicaid.

be further developed by the parties in written briefing. As reflected in the December 9, 1988 Prehearing Order and Notice of Hearing Schedule, I stated that, if it was determined later that an evidentiary hearing was needed, I would contact the parties to schedule such a proceeding.

EVIDENCE

The material facts in this case are stipulated to and evidenced by State court documents pertaining to the guilty pleas of the Petitioner and her son: the indictments against the Petitioner Wheeler in Fayette County and Mercer County (I.G. Exs. 1 and 3, respectively); the indictment against Petitioner in Fayette County (I.G. Ex. 2); the transcript of the Petitioner's plea, along with Petitioner Wheeler's plea, in Fayette County (P.Ex. A-1); and the signed plea agreement of both Petitioners for the charges in both counties. (P. Ex. A-2).^{6/ 7/} See also, Tape, containing the parties' stipulation to the authenticity of all exhibits.

The Petitioner acknowledges that she pleaded guilty in State court to a misdemeanor of "falsifying accounts by falsely certifying Medicaid cost reports" under State law, under "an Alford plea arrangement," which the

^{6/} The citations to the record in this Decision and Order are noted as follows:

Petitioner's Brief	P. Br. (page)
Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Petitioner's Reply Brief	P. Rep. Br. (page)
Tape of March 10, 1989	Tape
oral argument (by	
telephone conference)	

^{7/} The record does not contain the transcript of the Petitioner Wheeler's plea or sentencing in the Mercer County case.

Petitioner's counsel described as "equivalent to a nolo contendere plea." P. Br.1. 8/

ISSUES 9/10/

1. Whether the Petitioner is subject to the minimum mandatory five-year exclusion provision of section 1128(c)(3)(B) of the Act.
2. Whether the Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and (i) of the Act.
3. Whether the Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.
4. Whether the I.G. failed to comply with the federal Administrative Procedure Act, by (1) not publishing regulations to implement the distinction between the mandatory and permissive exclusion authorities, and (2) relying upon unpublished guidelines/directives in implementing the Act.

8/ The record indicates that the Petitioner actually pleaded guilty to the lesser offense of "attempting to commit the offense of falsifying accounts" P.Ex. A-2.

9/ The Petitioner's brief was highly repetitive, and contained numerous variations of the same issues outlined here. Some arguments raised by the Petitioner are not directly addressed in this Decision and Order because I found them to be either cumulative or irrelevant under the Act and Regulations.

10/ The issues and facts raised in this case are nearly identical to those raised by the Petitioner in the case of Arthur B. Stone, D.P.M., Petitioner, v. The Inspector General, Docket No. C-52, decided by me on May 5, 1989. Counsel for the Petitioner in this case was also the Petitioner's counsel in Stone.

5. Whether the I.G. was prohibited by provisions of federal law (regarding program operating responsibilities) from excluding the Petitioner.

6. Whether there is a need for an evidentiary hearing in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW 11/

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

1. The Petitioner is a resident of the State of West Virginia, and was an officer of incorporated nursing homes in the State. I.G.Ex. 2.
2. On March 2, 1987, a bill of indictment was returned in Fayette County, West Virginia against the Petitioner, charging her with two counts of "falsifying accounts" in submission of Medicaid cost reports to the State Department of Welfare.12/ I.G.Ex. 2.
3. On December 15, 1987, the Petitioner entered into a Plea Agreement whereby she agreed to plead guilty in Fayette County, West Virginia to one count of "attempting to commit the offense of falsifying documents," a misdemeanor. P.Ex. A-2.
4. On February 16, 1988, the Fayette County Circuit Court accepted the Petitioner's plea. P.Ex. A-1.
5. The Petitioner informed the Fayette County Circuit Court that her guilty plea was taken pursuant to Kennedy v. Frazier, 357 S.E.2d 43 (W.Va. 1987) and North Carolina v. Alford, 400 U.S. 25 (1970). P.Ex. A-1/5.
6. At the time the Petitioner entered her guilty plea, she was advised that the guilty plea would result in a judgment of guilt. P.Ex. A-1/25.

11/ Any other part of this Decision and Order which is obviously a finding of fact or conclusion of law is incorporated herein.

12/ The West Virginia State Department of Welfare is now the State Department of Human Services.

7. The offense to which the Petitioner pleaded guilty in Fayette County, West Virginia, is a criminal offense related to the delivery of an item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

8. The Petitioner's guilty plea was entered knowingly and voluntarily. P.Ex.A-1/16, 20.

9. The Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

10. The Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under Medicaid, within the meaning of section 1128(a)(1) of the Act.

11. In accordance with section 1128 of the Act, the Petitioner was properly excluded from participation in Medicare and Medicaid for a period of five years.

12. The I.G. did not violate the federal Administrative Procedure Act, 5 U.S.C. 551 et seq., by not promulgating regulations to distinguish the exclusion authorities in section 1128(a)(1) and 1128(b)(1) of the Act.

13. The I.G. did not rely upon an "unpublished guidance/directive" in classifying the Petitioner as subject to the mandatory exclusion authority of section 1128(a)(1) of the Act.

14. The material and relevant facts in this case are not contested.

15. The classification of the Petitioner's conviction of a criminal offense as subject to the authority of section 1128(a)(1) is a legal issue.

16. There is no need for an evidentiary hearing in this case.

17. The I.G. is not prohibited by federal law or regulations from participation in the exclusion process.

18. The I.G. is entitled to summary disposition in this proceeding.

DISCUSSION

Section 1128(a)(1) of the Act clearly requires the I.G. to exclude individuals and entities from the Medicare program, and to direct their exclusion from the Medicaid program, for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act.

For the reasons expressed in my Decision and Order in the case of Charles W. Wheeler, Petitioner, v. The Inspector General, Docket No. C-61, decided June 8, 1989, I hereby adopt the reasoning set forth therein as being equally applicable to this Petitioner.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that the I.G. properly excluded the Petitioner from the Medicare program, and directed her exclusion from State health care programs, for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge