

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Kathleen M. Casey)	DATE: November 13, 1995
Petitioner,)	
- v. -)	Docket No. C-95-138
The Inspector General.)	Decision No. CR401

DECISION

By letter dated April 14, 1995, Kathleen M. Casey, the Petitioner herein, was notified by the Inspector General of the U.S. Department of Health & Human Services (I.G.), 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 defined 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.

Petitioner requested a review of the I.G.'s action by an administrative law judge (ALJ) of the Departmental Appeals Board (DAB). I conducted a prehearing conference in this case on June 20, 1995, at which time the parties agreed that there were no genuine issues of material fact which need to be resolved by an in-person hearing. Accordingly, I established a schedule for the parties to file briefs and documentary evidence. In her initial brief, the I.G. moved for summary disposition. Petitioner filed a response and the I.G. filed a reply.

Because I have 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 decided the case on the basis of the parties' written submissions.

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.

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

1. As a part of its function, Medicaid administers the personal care attendant program, which provides benefits to eligible permanently or chronically disabled recipients who need assistance in their activities of daily living so that they can remain in the community and out of institutional settings. I.G. Ex. 3.

2. Petitioner was a personal care attendant who received reimbursement from Medicaid for furnishing items or services to two mentally retarded individuals living in her home. P. Ex. 2; I.G. Ex. 1, 3.

3. Petitioner was indicted on May 19, 1994, by the Commonwealth of Massachusetts, on charges of Larceny By False Pretenses (obtaining money from the Massachusetts Department of Public Welfare by making false representations) and Medicaid False Claims (knowingly and willfully causing false statements in applications for payments from Medicaid). I.G. Ex. 1, 2.

4. On November 17, 1994, Petitioner pled guilty in Suffolk Superior Court to two counts of Larceny By False Pretenses and one count of Medicaid False Claims. I.G. Ex. 3, 4, 5.

¹ I admit into evidence Petitioner's Exhibits (P. Ex.) 1 and 2 and I.G. Exhibits (I.G. Ex.) 1 - 8. I reject I.G. Ex. 9, which is a copy of the notice letter informing Petitioner of her exclusion. In my Order of June 22, 1995, I instructed the parties not to file the notice letter as an exhibit.

5. A Massachusetts State court accepted Petitioner's plea and entered judgment against Petitioner, sentencing Petitioner to one year's imprisonment (consisting of seven days actual incarceration with the remaining 358 days to be under supervised probation) and requiring Petitioner to pay \$16,000 restitution. P. Ex. 2; I.G. Ex. 4, 5.

6. Petitioner's plea of guilty and the Massachusetts court's acceptance of that plea constitute a valid conviction for purposes of section 1128(i)(1) and (3) of the Act.

7. The offenses to which Petitioner pled guilty are program-related within the meaning of section 1128(a)(1) of the Act. P. Ex. 2; I.G. Ex. 1 - 7.

8. Exclusion from the Medicare and Medicaid programs pursuant to section 1128(a) is remedial in nature. Mannochio v. Kusserow, 961 F.2d 1539, 1541 (11th Cir. 1992); Kahn v. Inspector General of U.S. Department of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994); Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994); Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990).

9. Petitioner's argument that her conviction was obtained by fraud is a collateral attack on her conviction, and I do not have the authority to consider that defense. Douglas Schram, M.D., DAB 1372 (1992); Sonia M. Gerzounq, M.D., DAB CR286 (1993); Peter J. Edmonson, DAB 1330 (1992).

10. I am without authority to alter the date on which Petitioner's exclusion begins.

11. Petitioner must be excluded from being a provider in the Medicare and Medicaid programs for a five year mandatory period. Act, Section 1128(a)(1); Prabha Prakash, M.D., DAB CR265 (1993); Arthur B. Stone, D.P.M., DAB CR26 (1989); Elsbeth Barnes, DAB CR340 (1994).

PETITIONER'S ARGUMENT

Petitioner contends that her exclusion is punitive rather than remedial. She asserts also that her guilty plea was obtained by fraudulent means and therefore cannot serve as basis for an exclusion under section 1128(a)(1). Further, she maintains that, inasmuch as she ceased work in the mental health field in June 1994, she should be

credited with this time against the five-year exclusion period.

DISCUSSION

The statute under which the I.G. seeks to exclude Petitioner -- section 1128(a)(1) of the Act -- requires, initially, that Petitioner have been convicted of a criminal offense.

Section 1128(i) 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 the case at hand, sections 1128(i)(1) and (3) are obviously applicable. The uncontested facts are that Petitioner pled guilty and the court accepted her plea.

Next, section 1128(a)(1) requires that Petitioner's criminal conviction must be related to the delivery of an item or service under Medicare or Medicaid. A conviction meets this statutory test where there is a nexus or common sense connection between the criminal offense for which the petitioner has been convicted and the delivery of an item or service under Medicare or Medicaid. Carolyn Nagy, DAB CR182 (1992); Berton Siegel, D.O., DAB 1467 (1994).

In this regard, the record reveals that the two offenses to which Petitioner pled guilty (one count of willfully causing false statements or representations to be made in

application for a Medicaid benefit payment and two counts of obtaining money from the Massachusetts Department of Public Welfare by false pretenses) are both program-related. Petitioner's misrepresentations resulted in her being paid by Medicaid for services she did not, in fact, provide.

The factual background of Petitioner's illicit activities involves Petitioner acting as a personal care attendant for two mentally retarded individuals living in her home. I.G. Ex. 1, 3; Findings of Fact and Conclusions of Law (FFCL) 1, 2. Petitioner was charged with administering care to these two individuals in exchange for reimbursement from Medicaid. As part of her function as personal care attendant for these two individuals, Petitioner was to keep records of the services she provided so that Medicaid could reimburse her for those services. I.G. Ex. 3; FFCL 1, 2. However, instead of keeping accurate records, Petitioner made willful and knowing misrepresentations on time sheets, knowing that these misrepresentations would result in Medicaid reimbursing her for services she did not, in fact, provide. Both Petitioner's guilty plea to larceny and her guilty plea to making false statements stem from her making knowing and willful misrepresentations to the Medicaid program. As such, her conviction is program-related within the meaning of section 1128(a)(1).

Additionally, it is well established that convictions for financial crimes, such as the filing of false claims for reimbursement from Medicare or Medicaid, are program related within the meaning of section 1128(a)(1). Jack W. Greene, DAB CR19, aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). In this case, Petitioner's criminal conviction meets this test because it directly caused Medicaid to overpay Petitioner. Moreover, Medicaid was the victim of Petitioner's crime. Criminal convictions that are based on the filing of false claims are program-related within the meaning of section 1128(a)(1) and require that a minimum mandatory five-year exclusion be imposed against the perpetrator. Ian C. Klein, D.P.M., DAB CR177 (1992); Nicholas J. Penna, D.M.D., DAB CR338 (1994).

Petitioner contends that the imposition of a five-year mandatory exclusion against her is punitive rather than remedial. While it is true that a second punishment for the same offense could be violative of the Double Jeopardy Clause of the United States Constitution, such is not the case here. Also, appellate panels of the DAB and several federal courts have considered whether the imposition of an exclusion subsequent to a criminal

punishment for the same offense is constitutional and have held that the exclusion does not violate the Double Jeopardy Clause. Rather, the legislative history of the Act and the language in decisions upholding the exclusion reflect a remedial statutory purpose to enable the Secretary to protect the integrity of federally-funded health care programs. S.Rep. No. 109, 100th Cong, 1st Sess. 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682; Mannochio v. Kusserow, 961 F.2d 1539, 1541 (11th Cir. 1992); Kahn v. Inspector General of U.S. Department of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994); Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994).

Additionally, Petitioner asserts that her conviction was obtained by fraudulent means, alleging that the prosecutor told her that a guilty plea would have no adverse effect on her ability to work in her former profession. Petitioner asserts also that her conviction caused her to cease working in the health field in June 1994, and that, accordingly, she should be credited with this time against the five-year exclusion period. However, these arguments, too, do not avail her, since it is well established that, where the I.G. excludes an individual under the mandatory provisions of the Act, the minimum period of exclusion is fixed by statute and is justified by the conviction alone. Niranjana B. Parikh, M.D., et al., DAB CR171 (1992) at 2; 42 C.F.R. 1001.2007(d). Thus, in the case at hand, where the record shows that Petitioner was convicted of a program related offense, there is nothing left for the I.G. to prove. Petitioner cannot use these administrative proceedings to collaterally attack her prior conviction by arguing that she was induced by fraud to plead to an offense for which she was not really guilty. Douglas Schram, R.Ph., DAB 1372, at 12 - 13 (1992); Sonia M. Geourzoung, M.D., DAB CR286 (1993); Peter J. Edmonson, DAB 1330 (1992).

Finally, I note that I have no authority to alter the effective date of an exclusion directed and imposed by the I.G. where the I.G. has acted within the discretion afforded by the statute and regulations in establishing the effective date of the exclusion. Shanti Jain, M.D., DAB 1398 (1993); Douglas Schram, M.D., DAB 1372 (1992); Fred R. Spierer, DAB CR359 (1995). Petitioner has made no showing that the I.G.'s imposition of an exclusion upon her was unreasonably delayed. In any event, this is not the appropriate forum for a challenge of that type.

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 Medicaid.

/s/

Joseph K. Riotto
Administrative Law Judge