

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Cynthia Merriman,	)	Date: June 11, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-308
	)	Decision No. CR1803
	)	
The Inspector General,	)	
	)	
Respondent.	)	
_____	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Cynthia Michelle Walker, a/k/a Cynthia Michelle Merriman, a/k/a Cynthia Michelle Outerbridge, from participating in Medicare and other federally funded health care programs for a minimum of five years. The exclusion in this case is mandated by Petitioner’s conviction of a crime that is described at section 1128(a)(1) of the Social Security Act.

**I. Background**

Petitioner, a nursing assistant, requested a hearing to challenge the I.G.’s determination to exclude her. The case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I directed the parties to file briefs and proposed exhibits. I advised the parties also that each had the right to request that I receive testimony in person. I told them that I would convene an in-person hearing if I decided that a party sought to offer relevant testimony that did not duplicate something that was stated in a document in evidence.

The I.G. filed a brief and 10 proposed exhibits, which he designated as I.G. Ex. 1 - I.G. Ex. 10. Petitioner, who is pro se, filed a brief. Additionally, she filed two statements, one by her husband and one by her, but contained in the same document. I am designating these two statements as P. Ex. 1. I receive into evidence I.G. Ex. 1 - I.G. Ex. 10, and P. Ex. 1.

The I.G. did not request that I convene an in-person hearing. In her brief Petitioner answered “no” to the question asking her whether she believed an in-person hearing was necessary but “yes” to the question asking her whether she had testimony that she wished to offer in person. She elaborated on this answer by stating:

I wish that I could be there in person to say how much I am sorry for doing what I did and will never do it again in [my] life.

Petitioner’s brief at 3.

I conclude that an in-person hearing is unnecessary. I accept Petitioner’s statement and that of her husband as being true. However, it is irrelevant to my decision. As I discuss below, Petitioner’s conviction of a criminal offense described in section 1128(a)(1) of the Act mandates her exclusion and I am powerless to rescind it based on her assertion of remorse, or on husband’s assertion that she is of good character.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issue**

The issue in this case is whether Petitioner was convicted of a criminal offense described at section 1128(a)(1) of the Act mandating her exclusion from Medicare and federally financed health care programs for a minimum of five years.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

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

The I.G. asserts, and the Petitioner does not dispute, the following facts. On August 4, 2006, Petitioner pled guilty in a Colorado State court to a misdemeanor charge of theft in violation of Colorado State law. I.G. Ex. 7, at 2. The guilty plea related to a five-count

criminal information that had been filed against Petitioner on December 8, 2005. I.G. Ex. 6. The criminal charges against Petitioner were the culmination of an investigation in which it was determined that, during the course of her employment at a nursing facility, Petitioner stole the wallet and credit cards of a Medicare beneficiary who, at the time, was receiving care at the facility. I.G. Ex. 3, at 1; I.G. Ex. 4, at 2. Petitioner subsequently used the resident's stolen credit card to purchase merchandise at a local Wal-Mart store. I.G. Ex. 2, at 2-4.

Section 1128(a)(1) of the Act mandates that the I.G. exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under the Medicare program. The facts that I describe above, on their face, establish that Petitioner was convicted of such a crime and that, consequently, her exclusion is mandated by law. The nexus between the crime and Medicare is evident. The nursing facility resident whose wallet and credit cards were stolen by Petitioner was a Medicare beneficiary and the crime would not have been possible but for the fact that this individual was receiving Medicare items and services (skilled nursing care) at the facility which employed Petitioner.

Petitioner asserts that she is remorseful for her crime and I accept her representation as true. I also accept as true her husband's assertion that Petitioner's crime does not reflect her true character. However, the law mandates an exclusion, without exception, for any individual who is convicted of a crime described at section 1128(a)(1). The law leaves me without authority to rescind the I.G.'s determination based on Petitioner's testimony or that of her husband.

***2. An exclusion of at least five years is mandatory.***

The Act requires that the I.G. exclude for at least five years any individual who is convicted of a crime described in section 1128(a)(1). The exclusion of five years that the I.G. imposed against Petitioner is reasonable as a matter of law inasmuch as it mandated and is for the minimum period.

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/s/  
Steven T. Kessel  
Administrative Law Judge