

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Sandra Dee Finley,)	Date: March 19, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-82
)	Decision No. CR1576
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Sandra Dee Finley, from participating in Medicare and other federally funded health care programs for a period of five years.

I. Background

On September 29, 2006, the I.G. notified Petitioner that she was being excluded. The I.G. asserted that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program (a State Medicaid program) and that, therefore, her exclusion was mandated by section 1128(a)(1) of the Social Security Act (Act).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I established a schedule for the parties to make written submissions including exhibits and briefs. I advised the parties that either of them could request that I hear the case in person and that I would do so if a party established that it had relevant evidence to offer that did not duplicate an exhibit.

The I.G. filed a brief and three exhibits which he designated I.G. Exhibit (Ex.) 1 - I.G. Ex. 3. The I.G. also filed a reply brief. Petitioner filed a brief and no exhibits. Neither party requested that I hear the case in person.¹ Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits. Therefore, I receive I.G. Ex. 1 - I.G. Ex. 3.

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 as is described at section 1128(a)(1) of the Act.

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. I discuss each Finding in detail.

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

Section 1128(a)(1) of the Act mandates exclusion of any individual who is convicted of a crime that is related to the delivery of a Medicare or Medicaid item or service. The evidence in this case establishes that Petitioner was convicted of such a crime.

These are the facts. Petitioner was employed as a certified nursing assistant at a nursing facility in Oklahoma City, Oklahoma. I.G. Ex. 2, at 8. On September 5, 2005, while working at the facility, Petitioner borrowed \$300 from a resident, ostensibly in order to pay for car repairs. *Id.* at 4. Petitioner then failed to repay the borrowed amount. *Id.* The resident whose funds Petitioner took was a Medicaid recipient. I.G. Ex. 3, at 1.

¹ The I.G. inaccurately styled his brief as a "motion for summary affirmance." Summary affirmance or judgment is not at issue here. I decide this case based on the written record without regard to whether the standards for summary judgment are met here. *See* Fed. R. Civ. P. 56(c). My pre-hearing order contemplated that there might be disputed issues of fact even if neither party requested that I hear testimony in person.

Petitioner was charged with, and pled guilty to, the crime of Solicitation by Caretaker, a misdemeanor under Oklahoma law. I.G. Ex. 2, at 1, 4, 6. It is a crime in Oklahoma for a caretaker to accept knowingly a thing of value from a person under his or her care. *Id.* at 6; Solicitation by Caretaker, Okla. Stat. tit. 63, § 1-1950.5(A)(1)(2001).

The elements of Petitioner's crime and the status of her victim establish that her conviction was of a crime related to the delivery of a health care item or service under the Oklahoma Medicaid program. Consequently, exclusion of Petitioner is mandated by section 1128(a)(1). The crime was related to the delivery of a health care item or service because the care giver-patient relationship between Petitioner and her victim was a necessary element of the crime. Petitioner's act of accepting funds from her victim was only a crime but for the fact that the victim was dependant on Petitioner to receive health care items or services. The crime was related to the delivery of Medicaid items or services because the victim was a Medicaid recipient and the services that Petitioner provided to the victim were Medicaid services.

Petitioner argues that her crime was not program-related within the meaning of section 1128(a)(1) because the crime "in no way touches or concerns the healthcare delivery mechanism directly or indirectly and therefore is a non-program related offense." Petitioner's brief at 6. But, in fact, and as I discuss above, the "healthcare delivery mechanism" was a necessary element of Petitioner's crime. As Petitioner concedes, her crime would have "been legal in any other context but for the care giver/patient relationship." *Id.* at 5. That is precisely why the crime is related to the delivery of health care items or services.

Petitioner argues that her crime should not be categorized as one mandating exclusion under section 1128(a)(1), but rather as a crime for which exclusion is permitted, but is not mandatory, pursuant to section 1128(b)(1) of the Act. That latter section authorizes among other things, but does not mandate, the I.G. to exclude any individual who is convicted of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Act § 1128(b)(1)(A)(i). I find this argument to be unpersuasive.

It is true that Petitioner's conviction is for a crime that includes all of the elements of those that are covered by section 1128(b)(1). Petitioner was convicted of a misdemeanor in the nature of breach of fiduciary responsibility that she committed in connection with the delivery of health care items or services. However, the additional element that is present here and, what distinguishes Petitioner's conviction from one which falls within

the reach of section 1128(b)(1), is that Petitioner's conviction was for a crime that related to the delivery of *Medicaid* items or services. The Act is unequivocal. Convictions for program-related crimes such as Petitioner's crime must be dealt with pursuant to the mandatory exclusion requirements of section 1128(a)(1).

2. The five-year exclusion that the I.G. imposed against Petitioner is reasonable as a matter of law.

The Act mandates that any exclusion that is imposed pursuant to section 1128(a)(1) be for a period of at least five years. Act § 1128(c)(3)(B). In this case the I.G. imposed the minimum five-year exclusion. That is reasonable as a matter of law.

/s/

Steven T. Kessel
Administrative Law Judge