

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Randall Wayne Toothaker, D.D.S.
(OI File No.: H-15-42253-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-45

Decision No. CR4536

Date: February 25, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Randall Wayne Toothaker, D.D.S., from participating in Medicare, State Medicaid programs, and other federally financed health care programs for a minimum of five years. Petitioner's conviction of a crime as is defined by section 1128(a)(3) of the Social Security Act (Act) mandates his exclusion. The exclusion is for the minimum period required by law. Act § 1128(c)(3)(B).

I. Background

Petitioner requested a hearing to challenge his exclusion. The I.G. filed a brief supporting his determination along with five exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 5. Petitioner filed a brief in opposition and no supporting exhibits.

Petitioner objected to my receiving into the record I.G. Ex. 2 and I.G. Ex. 3. He challenges I.G. Ex. 2, which is an affidavit supporting a criminal complaint against Petitioner, as inadmissible hearsay, among other objections. He challenges I.G. Ex. 3, a criminal complaint, as irrelevant because it was subsequently superseded. I overrule these objections. I do not receive the exhibits as proof of Petitioner's guilt. That is

established by his subsequent nolo contendere plea and by entry of a judgment of conviction by a United States District Court. The exhibits are relevant as background showing the history of Petitioner's criminal case and also the facts that underlay the criminal complaint that was filed against Petitioner. Consequently, I receive I.G. Ex. 1 – I.G. Ex. 5 into evidence.

The exclusion determination in this case derives from Petitioner's conviction. This hearing is not a forum in which the facts of the case underlying the conviction are litigated. But, facts that explain why Petitioner was charged with a crime are certainly relevant in order to establish the nature of the criminal allegations and ultimately, what underlies the conviction. Here, the criminal charges against Petitioner emanated from allegations – stated in I.G. Ex. 2 – that Petitioner was observed stealing government property, including precious metals, from a Veterans Administration health care facility. Those allegations are highly relevant to establishing the reason for the criminal complaint that was filed against Petitioner and they explain what underlay his subsequent nolo contendere plea. Thus, although I do not find from the affidavit that Petitioner stole government property, I find that the affidavit explains the allegations to which Petitioner subsequently pled guilty and that are the basis for his conviction. As to I.G. Ex. 3, Petitioner has not asserted that it inaccurately states the elements of the crime to which Petitioner subsequently entered his plea.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner was convicted of a crime as is defined by section 1128(a)(3) of the Act.

If I find the I.G. was authorized to exclude Petitioner, I will have to uphold the five-year exclusion because that is the minimum length of exclusion mandated by law. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

B. Findings of Fact and Conclusions of Law

Section 1128(a)(3) of the Act mandates the exclusion of anyone that has been convicted of a criminal offense occurring after the 1996 enactment of the Health Insurance Portability and Accountability Act consisting of a felony 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 or with respect to any act or omission in a health care program operated or financed by any federal, state, or local government agency.

The facts of this case are undisputed. Petitioner was charged with theft of government property, a charge to which he subsequently entered a nolo contendere plea. That plea was based on allegations that he stole dental supplies, including precious metals, that were the property of the Veterans Administration and that were used in a Veterans Administration health care facility (a dental clinic) in Omaha, Nebraska. I.G. Ex. 2. A United States District Court accepted Petitioner's plea and entered a judgment of guilty of theft of government property against him, a felony offense. I.G. Ex. 5.

Thus, Petitioner was convicted of stealing dental supplies – including precious metals – that were intended for use in delivering patient care by the Veterans Administration. That brings his conviction squarely within the meaning of section 1128(a)(3).

Petitioner argues that the I.G. failed to carry his burden of proof in this case because he did not prove that the supplies and precious metals that Petitioner stole were reserved for the benefit of providing care to specific patients at the Veterans Administration facility. He argues that, in order to establish a requisite nexus between the crime and a health care item or service, the I.G. must prove that there were identifiable patients whose care was affected adversely by the theft. As support for this contention Petitioner relies on a 1992 decision by the Departmental Appeals Board, *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992).

The *Dodd* decision is not applicable to the facts of this case. *Dodd* involved an exclusion determination made pursuant to section 1128(a)(1) of the Act and not section 1128(a)(3). Section 1128(a)(1) mandates the exclusion of anyone convicted of a criminal offense related to the delivery of an item or service under Medicare or a State Medicaid program. The section requires a specific nexus between the crime and a Medicare or Medicaid item or service. In *Dodd*, the petitioner, a nurse employed at a nursing facility, was convicted of altering patient records to conceal her conversion of controlled substances to her use. The Board found that the fact that the facility provided care to Medicare beneficiaries and recipients of Medicaid was not sufficient to establish the requisite nexus between the petitioner's crime and these programs because, given the record in the case, the possibility existed that the petitioner had converted drugs and altered records relating to someone who was neither a beneficiary nor a recipient.

Section 1128(a)(3) does not require a specific nexus between the crime and either Medicare or a State Medicaid program. It is a section that applies to crimes committed in connection with items or services delivered under *any* health care program, public or private. It is inarguable that the Veterans Administration is a health care program and that individuals treated in Veterans Administration facilities are beneficiaries of that

program, receiving health care items or services. Those individuals are part of that program and receive health care items or services even if they might pay in part for some services out of their own funds. Consequently, it is unnecessary here to pinpoint the individuals whose care was affected directly by Petitioner's theft.¹

/s/

Steven T. Kessel
Administrative Law Judge

¹ Had section 1128(a)(3) of the Act been in existence in 1992, the petitioner in *Dodd* would have been excludable under that section without any proof that specific Medicare beneficiaries or recipients of Medicaid were the victims of her crime. Skilled nursing facilities are “health care programs” and all residents of those facilities receive health care items or services even if they are not covered by Medicare or a State Medicaid program.