

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Janice F. Fuller,)	Date: January 11, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-606
)	Decision No. CR1554
The Inspector General.)	
_____)	

DECISION

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

I. Background

On June 30, 2006, the I.G. notified Petitioner that she was being excluded, for a period of five years, from participating in Medicare and other federally funded health care programs. The I.G. asserted that Petitioner was being excluded pursuant to the mandatory exclusion requirements of section 1128(a)(1) of the Social Security Act (Act) because she had been convicted of a criminal offense relating to the delivery of Medicare or Medicaid items or services, including the performance of management or administrative services relating to the delivery of Medicare or Medicaid items or services.

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 file exhibits and briefs. Additionally, I advised the parties that either of them could request an in-person hearing. I explained that I would convene a hearing in person if a party requested that I do so and if I decided that a hearing was necessary.

Neither party requested an in-person hearing. The I.G. filed a brief and a reply. Petitioner filed a brief. With his brief the I.G. filed five proposed exhibits (I.G. Ex. 1 - I.G. Ex. 5). Petitioner filed two proposed exhibits, which were designated Exhibit A and Exhibit B. Neither party objected to my receiving the exhibits proposed by the opposing party. Consequently, I receive I.G. Ex. 1 - I.G. Ex. 5. I have redesignated Petitioner's Exhibit A and Exhibit B as P. Ex. 1 and P. Ex. 2, respectively, and I receive them, as well.

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, thereby mandating her exclusion from participating in Medicare and other federally funded health care programs.

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 defined at section 1128(a)(1) of the Act.

These are the relevant facts. Petitioner was employed as the administrator of a nursing home in Muskogee, Oklahoma. Petitioner's Brief in Support of Appeal (P. Br.) at 1. On March 31, 2004, a criminal information was filed against Petitioner in an Oklahoma State court, charging her under Oklahoma law with the felony of Exploitation by Caretaker. I.G. Ex. 2, at 1. The information alleged that between on or about November 6, 2003 and February 16, 2004 Petitioner exploited the financial resources of several nursing home residents by taking money from a trust account for these individuals and purchasing furniture for use in the lobby of the nursing home. *Id. See also* I.G. Ex. 3. Each of these residents was a recipient of care pursuant to Oklahoma's Medicaid program and that program paid for each resident's stay at the nursing home. I.G. Ex. 5. On November 22, 2004, Petitioner entered a plea of no contest to the charge, for which she was sentenced to pay a fine, restitution, and for which she received a deferred sentence. I.G. Ex. 1; I.G. Ex. 4. Petitioner's conviction was subsequently expunged. P. Ex. 1.

Section 1128(a)(1) of the Act mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State Medicaid program, including the performance of management or administrative services relating to the delivery of Medicare or Medicaid items or services. The facts of this case establish that Petitioner was convicted of such an offense. First, it is evident that Petitioner was convicted of a criminal offense. The undisputed facts prove that she was charged under Oklahoma State law with a felony to which she subsequently entered a no contest plea that was accepted by the sentencing court. Sentencing for her crime was deferred. A person is “convicted” of a criminal offense, for purposes of the Act, when that person enters a plea of nolo contendere (no contest) to a criminal charge and that plea is accepted by a court. Act, section 1128(i)(3). The Act additionally defines a conviction to include the entry by an individual into a deferred adjudication program. *Id.*, section 1128(i)(4).

Second, I find that Petitioner’s conviction consisted of a conviction that is related to the delivery of items or services under the Oklahoma State Medicaid program. The residents whose funds Petitioner expropriated unlawfully were all Medicaid recipients. They would not have been at the nursing home but for Medicaid funding of their stays and Petitioner would not have been able to convert the residents’ funds unlawfully but for their presence at the facility. Moreover, the residents’ trust funds were subsidized by Medicaid because Medicaid coverage enabled these residents to set aside small amounts of money for personal expenses that otherwise they would have had to use to pay for their health care.

Petitioner has not disputed the facts of this case nor has she argued that the facts fail to establish a basis for her exclusion. She asserts only that she has been unable to determine whether her possible future employment as a bookkeeper for an agency that provides Medicare-related services would be covered by an exclusion. P. Br. at 2. That is not an argument in opposition to her exclusion. I am not in a position to define what future employment an exclusion will prohibit Petitioner from holding. My authority in this case is limited solely to deciding whether the statutory basis for an exclusion exists.

2. The duration of Petitioner’s exclusion is not at issue because the I.G. determined to impose the minimum exclusion that is mandated by the Act.

The I.G. has no discretion in determining whether to impose an exclusion pursuant to section 1128(a)(1). The Act requires him to exclude an individual who is convicted of a program related crime. Additionally, the Act mandates that any individual who is excluded pursuant to section 1128(a)(1) must be excluded from participating in Medicare

and other federally funded health care programs for at least five years. Act, section 1128(c)(3)(B). In this case the I.G. determined to impose the minimum exclusion and I have no authority to impose an exclusion of a shorter duration.

/s/

Steven T. Kessel
Administrative Law Judge