

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Alice F. Gunn,)	Date: February 4, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-757
)	Decision No. CR1896
The Inspector General.)	
_____)	

DECISION

I uphold the exclusion of Petitioner, Alice F. Gunn, from participation in Medicare, Medicaid, and all federal health care programs for five years. I find a basis for the exclusion; and that the five-year exclusion is the mandatory minimum period as a matter of law.

I. Background

Petitioner, a clerical employee for two dentists, was excluded by the Inspector General (I.G.) pursuant to section 1128(a)(1) of the Social Security Act (Act), because she was convicted of fraudulently obtaining payment from the Kentucky Medical Assistance Program (KMAP), the State of Kentucky Medicaid program, by means of false, or fraudulent claims. Specifically, Petitioner and her co-defendants submitted duplicate claims for services which were performed by one dentist as if the services had been performed by both dentists and billed KMAP for services which were not supported by documentation in the patient file. I.G. Ex. 5, at 2. Section 1128(a)(1) requires the Secretary of Health and Human Services to exclude a person convicted of a criminal offense related to the delivery of an item or service under any State health care program.¹

¹ "State health care program" is defined in section 1128(h) of the Act and includes the Medicaid program (Title XIX).

Petitioner argues that: (1) the I.G. could have treated her conviction as the basis for a permissive exclusion, as opposed to a mandatory exclusion, because the offense for which she was convicted was a misdemeanor; and (2) Petitioner's actions do not warrant exclusion because she was "a mere pawn in the schemes" of her employers, two dentists, for whom she prepared billing reports for the government assistance program at their direction. As I discuss below, these arguments are unavailing.

Petitioner's request for a hearing is dated September 18, 2008, and it stems from the I.G.'s notice letter, dated August 29, 2008, which notified Petitioner that she was excluded and informed her of her right to a hearing. In accordance with my initial order, the parties timely submitted their informal briefs together with their documentary exhibits. Petitioner submitted two exhibits at that time which I mark as Petitioner's Exhibits (P. Exs.) 1 and 2. The I.G. submitted five exhibits, I.G. Exs. 1-5. I thereafter convened a prehearing telephone conference on November 4, 2008, at which the parties agreed that this case may be decided based on the written record without an oral hearing. I established an additional briefing schedule to submit written briefs and any additional documents by December 29, 2008. Petitioner submitted its brief with P. Exs. 1 and 2. These exhibits are identical to the exhibits submitted with the informal briefs. Neither party has objected to the other's exhibits, so I admit I.G. Exs. 1-5 and P. Exs. 1-2.

The essential facts of this case are undisputed. Petitioner was a clerical employee for two dentists. As a part of her duties, she billed the State of Kentucky Medicaid Program, otherwise known as KMAP, for services provided by the dentists. The Grand Jury Indictment originally charged Petitioner with a Class D felony. I.G. Ex. 4. The Indictment indicated that for a period beginning November 1, 1998 through March 31, 2003, Petitioner together with her two employers devised a scheme or entered into an agreement or conspiracy to obtain or aid another in obtaining payment from the KMAP administered by the Cabinet for Health and Family Services by means of any fictitious, false or fraudulent application, claim, report, or document submitted to the Cabinet with a value of \$300 dollars or more, a fraudulent act under section 205.8463(1) of the Kentucky Revised Statutes. I.G. Ex. 4. The Commonwealth Attorney later offered Petitioner a plea agreement to the same crime but at the lesser charge of a Class A misdemeanor in order to obtain Petitioner's testimony against the other co-defendants. I.G. Ex. 5. Petitioner accepted the plea agreement and on February 8, 2008, Petitioner entered a guilty plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to the charge of Medicaid Assistance Program Fraud, but to the lesser charge of a Class A misdemeanor, in violation of section 205.8463(1) of the Kentucky Revised Statutes.² I.G. Exs. 2, 3 and 5;

² Section 205.8463(1) of the Kentucky Revised Statutes provides—

(continued...)

P. Ex. 2 (Judgment and Sentence on Plea of Guilty to Medical Assistance Program Fraud).

II. Issues

- (1) Whether the I.G. had a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs.
- (2) Whether I have the authority to review the length of the period of exclusion.

²(...continued)

No person shall knowingly or wantonly devise a scheme or artifice, or enter into an agreement, combination or conspiracy to obtain or aid another in obtaining payments from any medical assistance program under this chapter [Chapter 205- Public Assistance and Medical Assistance Control of Fraud and Abuse] by means of any fictitious, false, or fraudulent application, claim report, or document submitted to the Cabinet for Health and Family Services, or intentionally engage in conduct which advances the scheme or artifice.

Section 205.8463(5) of the Kentucky Revised Statutes provides that—

Any person who violates subsections (1) and (2) of this section shall be guilty of a Class A misdemeanor unless the sum total of benefits claimed in any application, claim, report or in any combination or aggregation thereof, is valued at three hundred dollars (\$300) or more in which case it shall be a Class D felony.

P. Ex. 1. The indictment and then the amended charge to which Petitioner ultimately plead guilty was by its terms a fraudulent act as set forth in section 205.8463(1) of the Kentucky Revised Statutes.

III. Discussion³

(1) Petitioner’s conviction of Medicaid assistance program fraud under Kentucky state law is an appropriate basis for her exclusion from Medicare, Medicaid, and all other federal health care programs.

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude from participation in any federal health care program, as defined in section 1128B(f) of the Act, any individual convicted of a criminal offense relating to the delivery of a health care item or service. The statute is unambiguous that this is not a discretionary provision-- the exclusion is *mandatory*.

Petitioner argues, however, that her conviction could be the basis for a *permissive* exclusion under section 1128(b)(1)(A)(i) of the Act, because Petitioner was convicted of a misdemeanor offense. Petitioner's Brief at 2. Petitioner disagrees with the I.G.’s construction of the Act that 1128(a)(1) covers both felonies and misdemeanors that relate to program violations and that 1128(b) covers only misdemeanors which relate to non-program offenses. Petitioner reasons that because section 1128(b) includes a specific alternative adjudication of misdemeanors, that “infers discretion upon the part of the Inspector General’s office to employ common sense” and that Congress intended that there could be misdemeanor convictions relating to federal or state health care programs which did not warrant the severe exclusionary rules under section 1128(a)(1). Petitioner’s Brief at 2. Although it is not affirmatively stated in her brief, I construe Petitioner's argument, that her conviction *can be* treated as the basis for a permissive exclusion, as an argument that the I.G. *should have* considered imposing a permissive exclusion, and that, on these grounds, I should reverse the exclusion for lacking a proper basis.

Indeed, Section 1128(b) is permissive. The section heading is "PERMISSIVE EXCLUSION," and 1128(b)(1)(A)(i) does apply to certain misdemeanors, so Petitioner is correct that it affords the I.G. discretion whether to enforce an exclusion in certain circumstances. It is apt, therefore, to contrast section 1128(b)(1)(A)(i) and section 1128(a)(1) as, respectively, *permissive* and *mandatory*. But, as the I.G. discusses in his Reply Brief, the ambiguity arising from the putative applicability of both provisions to misdemeanor convictions for health care fraud, has been resolved. As I discuss below, convictions, including misdemeanors, that fall under the mandatory exclusion provision

³ I set forth my findings of fact and conclusions of law as separately numbered headings.

of section 1128(a)(1) require the I.G. to enforce an exclusion, whether the conviction also fits the permissive exclusion provisions or not.

The I.G. cites *Lorna Fay Gardner*, DAB No. 1733 (2000), wherein an Appellate Panel of the Departmental Appeals Board (Board) explained that the mandatory exclusion provisions (section 1128(a)(1)) apply to all convictions for defrauding programs under title XVIII of the Act, or State health care programs such as Medicaid, including misdemeanor convictions. The mandatory exclusion provisions apply regardless of whether a misdemeanor conviction is accurately described also by the permissive exclusion provisions (section 1128(b)(1)(A)(i)). The Board explained that Congress propounded the mandatory and permissive provisions to distinguish between felony and misdemeanor convictions, only where the fraud is in connection with some health program other than Medicare or any State health care programs such as Medicaid. The distinction, as explained by the Board, is not between the degree of fraud against a federal or State health care program, but the difference between defrauding a government program and defrauding another entity's health care program, such as a private health insurance plan. Additionally, the Board further clarified that the I.G. is "bound" to apply the mandatory exclusion to convictions covered by section 1128(a)(1); he cannot exercise discretion between the mandatory and permissive exclusion provisions if a conviction falls under 1128(a)(1).

Petitioner also contends that while the Judgment against Petitioner states that her conviction is for Medical Assistance Program Fraud, the statute, Kentucky Revised Statutes, section 205.8463 is entitled only "Fraudulent Acts--Penalties" and the Judgement of conviction does not specify what subsection of the statute Petitioner was convicted under. I find Petitioner's arguments disingenuous. First, Chapter 205 of the Kentucky Revised Statutes pertains to Public Assistance and Medical Assistance Control of Fraud and Abuse. Second, the original indictment specifies that Petitioner is being charged under section 205.8463(1) and the later amended charge was to a Class A misdemeanor for the same offense. I.G. Exs. 4, 2, and 5 (Commonwealth's Offer on Plea of Guilty from KRS.205.8463(1) Class D Felony to KRS 205.8463(1), Class A Misdemeanor); P.Ex. 1.

I conclude that, for all of these reasons, Petitioner's argument that her conviction should have been treated under section 1128(b)(1)(A)(i) as a permissive exclusion is unavailing. I find, therefore, that Petitioner's conviction provides a basis for the Secretary of Health and Human Services to exclude her pursuant to section 1128(a)(1) of the Act.

(2) Petitioners' exclusion for a period of 5 years is the mandatory minimum period as a matter of law.

Petitioner essentially contends that the equities of her situation argue against a mandatory five-year exclusion. However, once a basis for a mandatory exclusion exists, I do not have the authority to determine a lesser length of exclusion than the minimum mandatory period.

An exclusion under section 1128(a)(1) of the Act must be for a minimum mandatory period of five years. As set forth in section 1128(c)(3)(B) of the Act:

Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years

Specified aggravating factors can serve as a basis for lengthening the period of exclusion. 42 C.F.R. § 1001.102(b). And, if aggravating factors justify an exclusion longer than five years, specified mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). But, when the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For the reasons discussed above, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, and I uphold the five-year exclusion.

/s/

José A. Anglada
Administrative Law Judge