

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
Shelia Mauney,)	DATE: Jul 3 1989
Petitioner,)	
- v. -)	Docket No. C-79
The Inspector General.)	DECISION CR 31

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

The Inspector General (the I.G.) notified Petitioner on September 30, 1988, that she was being excluded from participation in Medicare and any State health care programs for a period of five years.¹ The I.G. told Petitioner that her exclusions were due to her conviction of a criminal offense related to the delivery of an item or service under the Medicare program. Petitioner was advised that the law required five year minimum exclusions from participation in Medicare and State health care programs for individuals convicted of program-related offenses. The I.G. told Petitioner that, because of the circumstances of her case, she was being excluded for the minimum period required by law.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I conducted a prehearing conference on March 11, 1989, at which the I.G. stated that he intended to move for summary disposition. I issued a prehearing Order on April 19, 1989, which established a schedule for filing the motion and responding to it, and which also provided for oral argument on the motion. The I.G. timely filed a motion for summary disposition. By letter dated May 30, 1989, Petitioner's counsel advised me that Petitioner made no response to the motion.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. 1320a-7(h), to include any State Plan approved under Title XIX of the Act (Medicaid).

I have considered the arguments contained in the I.G.'s motion for summary disposition, the undisputed material facts, and applicable law and regulations. I conclude that the exclusions imposed and directed by the I.G. are mandatory. Therefore, I am deciding this case in favor of the I.G.

ISSUES

The issue in this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare program, so as to require mandatory exclusions from participation in the Medicare and State health care programs under section 1128(a)(1) of the Social Security Act.

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: Section 1128(a)(1) of the Social Security Act, 42 U.S.C. 1320a-7(a)(1), requires the Secretary to exclude from participation in the Medicare program, and to direct the exclusion from participation in any State health care programs, of any individual or entity "convicted of a criminal offense related to the delivery of an item or service" under Medicare or any State health care program. "Conviction" is defined at 42 U.S.C. 1320a-7(i) to include those circumstances when a party pleads guilty to a criminal charge. The law provides at 42 U.S.C. 1320a-7(c)(3)(B), that for those excluded under section 1320a-7(a), the minimum exclusion period shall be at least five years.

2. Regulations Governing Suspension, Exclusion, or Termination of Practitioners, Providers, Suppliers of Services, and Other Individuals: The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662, May 13, 1983. Regulations governing suspension and exclusion of individuals pursuant to section 1128 and this delegation are contained in 42 C.F.R. Part 1001. Section 1001.123(a) provides that when the I.G. has conclusive information that an individual has been convicted of a program-related crime, he shall give that individual written notice that he is being suspended (excluded) from participation. Section 1001.125(b) establishes criteria for the I.G. to use in determining the appropriate length of exclusions in those cases where the I.G. may exercise discretion.

Section 1001.128 provides that an individual excluded based on conviction of a program-related offense may request a hearing before an administrative law judge on the issues of whether: (1)

he or she was in fact, convicted; (2) the conviction was related to his or her participation in the Medicare, Medicaid, or social services program; and (3) whether the length of the exclusion is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a respiratory therapist. I.G. Ex. 2/18.²
2. On May 25, 1988, Petitioner was convicted under 18 U.S.C. 1001 of the criminal offense of filing false statements. I.G. Ex. 1.
3. At the hearing in which Petitioner entered her guilty plea, Petitioner admitted making a false representation concerning an arterial blood gas study. I.G. Ex. 2/19.
4. The purpose of the false representation was to convince the Health Care Financing Administration to make reimbursements under the Medicare program. I.G. Ex. 2/20.
5. There are no disputed issues of material fact in this case; therefore, summary disposition is appropriate. See F.R.C.P 56.
6. The offense which Petitioner pleaded guilty to is a criminal offense related to the delivery of an item or service under the Medicare program. 42 U.S.C. 1320a-7(a)(1).
7. Petitioner's guilty plea is a conviction as defined by 42 U.S.C. 1320a-7(i).
8. The minimum mandatory exclusion period is five years for a person who has been excluded based on conviction of a criminal offense related to the delivery of an item or service under Medicare.
9. The I.G. excluded Petitioner from participation in the Medicare program, and directed that Petitioner be excluded from participation in State health care programs, for five years, based on Petitioner's conviction of a criminal offense related to the delivery of an item or service under the Medicare program. The exclusions are mandatory and for the minimum period of time

² The I.G.'s exhibits will be cited as follows:

I.G.'s Exhibit

I.G. Ex. (number)/(page)

required by law. 42 U.S.C. 1320a-7(a)(1) and (c)(3)(B).

ANALYSIS

The I.G. bases his motion for summary disposition on Petitioner's conviction of a federal criminal offense of making false statements, and the provisions of 42 U.S.C. 1320a-7(a)(1), which mandate five year exclusions from participation in the Medicare and State health care programs for persons convicted of criminal offenses related to the delivery of an item or service under the Medicare or Medicaid programs. The I.G. asserts that Petitioner was convicted of an offense "related to" the delivery of an item or service under the Medicare program; therefore, Petitioner's exclusions were mandatory. Petitioner does not challenge the I.G.'s representation of the facts.

Summary disposition is appropriate in an exclusion case where there are no disputed issues of material fact and where the undisputed facts demonstrate that one party is entitled to judgment as a matter of law. Howard B. Reife, D.P.M. v. The Inspector General, Docket No. C-64, decided April 28, 1989; Michael I. Sabbagh, M.D. v. The Inspector General, Docket No. C-59, decided February 22, 1989; Jack W. Greene v. The Inspector General, Docket No. C-56, decided January 31, 1989; See F.R.C.P. 56.

The issue which I must resolve in deciding the I.G.'s motion for summary disposition is whether Petitioner was convicted of an offense which falls within the ambit of 42 U.S.C. 1320a-7(a)(1). I must make certain factual conclusions in order to decide this issue. First, I must decide whether Petitioner was "convicted" of an offense within the meaning of 42 U.S.C. 1320a-7(i). Petitioner does not dispute her guilty plea is a "conviction" within the meaning of the law. Second, I must decide the nature of the offense to which Petitioner pleaded guilty. Again, there is no dispute as to this issue. The I.G. has offered as an exhibit the record of Petitioner's conviction, and Petitioner has not challenged the authenticity or truthfulness of the document.

Therefore, the only question remaining for me to decide is the legal question of how to characterize Petitioner's conviction under the exclusion law. As there are no disputed issues of material fact, summary disposition is appropriate in this case.

In the hearing conducted on Petitioner's plea to the criminal charge against her, Petitioner admitted that she falsified the result of an arterial blood gas study. The purpose of this falsehood was to unlawfully obtain Medicare reimbursement. I conclude from this that Petitioner's offense was related to the

delivery of an item or service under the Medicare program. But for Petitioner's falsification, it would have been impossible to claim or to obtain Medicare reimbursement for a purported service.

My conclusion does not depend on determining whether the falsification was an element of a successful attempt to obtain Medicare reimbursement. The exclusion law does not distinguish between convictions related to attempted unlawful reimbursement claims and convictions related to successful unlawful reimbursement claims. The phrase "related to the delivery of an item or service," contained in 42 U.S.C. 1320a-7(a)(1), pertains to any offense related to the physical delivery of services or to the process by which payment is made for such services.

I therefore conclude that this case involves a conviction of a criminal offense related to the delivery of an item or service under the Medicare program and is governed by the mandatory exclusion provisions of 42 U.S.C. 1320a-7(a)(1).

CONCLUSION

Based on the undisputed material facts, the law, and regulations, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge