

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Brenda J. Motley,	)	DATE: March 21, 1996
Petitioner,	)	
- v. -	)	Docket No. C-95-157
The Inspector General.	)	Decision No. CR414
_____	)	

DECISION

By letter dated June 16, 1995, Brenda J. Motley, the Petitioner herein, was notified by the Inspector General (I.G.), of the United States Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.<sup>1</sup> The I.G. asserted that an exclusion of at least five years is mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action. On August 21, 1995, I held a prehearing conference in this case. During the conference, the parties agreed to proceed by filing briefs supported by documentary evidence.

Thereafter, the I.G. filed a brief and eight exhibits. I identify these exhibits as I.G. Ex. 1 through 8. Petitioner filed a response brief. The I.G. filed a reply. Since Petitioner has not objected to the exhibits

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<sup>1</sup> Unless the context indicates otherwise, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

offered by the I.G., I admit I.G. Ex. 1 through 8 into evidence.

I have considered the parties' arguments, supporting exhibits, and the applicable law. I conclude that there are no material factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). I conclude also that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

#### APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. During the period relevant herein, Petitioner was employed as a Lead Community Living Specialist at Tresco, Inc. (Tresco). I.G. Ex. 1.
2. Tresco is a Medicaid provider of "Developmental Disabilities (DD) Home and Community-Based Waiver Services," including supervised living, assisted living, supported living, day habilitation, individual and group supported employment, personal and social support, behavior therapy, behavior implementation, and personal care. As part of its program, Tresco provides oversight and management of funds belonging to Medicaid recipients. I.G. Ex. 8; Petitioner's Response Brief at 5.
3. As part of her duties as a Lead Community Living Specialist, Petitioner was responsible for the funds belonging to disabled Medicaid recipients assigned to her. Petitioner's Response Brief at 5.
4. Based on results of an investigation conducted by the Medicaid Fraud Division of the New Mexico Office of the Attorney General, the Attorney General filed a criminal complaint on November 2, 1995 in the Magistrate Court, Dona Ana County, New Mexico charging Petitioner with the felony offense of "Exploitation of a Resident's Property

in excess of two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2500)" (exploitation of a resident's property). The complaint alleges that Petitioner, while employed as a Lead Community Living Specialist for Tresco, knowingly and intentionally took at least \$300 belonging to J.M.,<sup>2</sup> a disabled individual to whom Tresco provided services, and converted J.M.'s money to her own use. I.G. Ex. 1, I.G. Ex. 2.

5. On December 1, 1994, Petitioner entered into a plea agreement with the State of New Mexico in which she agreed to plead guilty to the misdemeanor offense "attempt to commit felony," by attempting to commit the offense of exploitation of a resident's property. I.G. Ex. 3.

6. On December 1, 1994, the State Attorney General entered a Nolle Prosequi to the charge of exploitation of a resident's property and filed a criminal information charging that Petitioner "attempted to commit a felony," by attempting to commit the offense of exploitation of a resident's property. The information alleges that Petitioner, while employed as a Lead Community Specialist for Tresco, knowingly and intentionally attempted to take at least \$300 belonging to J.M., a disabled individual to whom Tresco provided services, and attempted to convert J.M.'s money to her own use. I.G. Ex. 4, I.G. Ex. 5.

7. Pursuant to the plea agreement, on December 1, 1994, Petitioner pled guilty to attempting to commit the offense of exploitation of a resident's property. Based on its acceptance of Petitioner's plea, the court imposed a suspended sentence, ordered her to pay restitution, and required her to pay a fine or to perform community service. P. Ex. 6.

8. At the time of the offense for which Petitioner was convicted, J.M. was a Medicaid recipient. Petitioner's Brief at 2; see I.G. Ex. 7.

9. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662.

10. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a conviction within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

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<sup>2</sup> I do not disclose the name of this individual, so as to respect his privacy.

11. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCLs 1 - 8.

12. A defendant in a criminal proceeding does not have to be advised of all the possible consequences which may flow from a guilty plea, such as temporarily being barred from receiving government reimbursement for professional services.

13 The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

14. Neither the I.G. nor an administrative law judge has the authority to reduce a five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

#### DISCUSSION

There are no disputed material facts in this case. The record establishes that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. For this reason, Petitioner's five-year exclusion is required as a matter of law.

The first requirement that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(1) of the Act is that Petitioner must have been convicted of a criminal offense. In this case, it is undisputed that Petitioner was convicted of a criminal offense within the meaning of the applicable provision of section 1128 of the Act.

Section 1128(i) of the Act defines the term "convicted of a criminal offense" to include those circumstances in which a plea of guilty by an individual has been accepted by a federal, State, or local court. Act, section 1128(i)(3). In the case at hand, the undisputed facts establish that Petitioner pled guilty to attempting to commit the offense of exploitation of a resident's property. The court's acceptance of that plea is demonstrated by the fact that it imposed a suspended sentence, ordered Petitioner to pay restitution, and required Petitioner to pay a fine or to perform community service. FFCL 7. Therefore, I conclude that Petitioner

was convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

I further conclude that the second requirement of section 1128(a)(1) -- that the criminal offense leading to the conviction must be related to the delivery of an item or service under Medicare or Medicaid -- has also been met. Petitioner disputes this, arguing in effect that the criminal offense which formed the basis for her conviction was not related to the delivery of an item or service under Medicaid because funds were not stolen directly from the Medicaid program. Instead, Petitioner contends that the underlying criminal offense involves the "alleged misuse of private funds." Petitioner's Response Brief at 4.

Relevant case precedent establishes that section 1128(a)(1) encompasses far more than just the theft of Medicare and Medicaid funds or frauds directed against the programs. For example, in Jerry L. Edmonson, DAB CR59 (1989), the petitioner, who was a nursing home administrator, was convicted of the offense of misapplying funds that he had held in a fiduciary capacity for a Medicaid recipient. The administrative law judge in Edmonson found that the protection of Medicaid recipients' funds is an integral element of the Medicaid services delivered by nursing facilities. Since the petitioner in Edmonson had been convicted of a criminal offense affecting an integral element of Medicaid services, the administrative law judge reasoned that the petitioner's offense was related to the delivery of Medicaid services within the meaning of section 1128(a)(1) of the Act.

In the case at hand, the record establishes that Petitioner's employer, Tresco, provided Medicaid services to individuals with developmental disabilities. The essential elements of Petitioner's criminal offense, which was admitted by Petitioner when she pled guilty, are that Petitioner, in the course of performing her duties as a Lead Community Specialist, knowingly attempted to take money belonging to J.M., a disabled person to whom Tresco provided services, and attempted to convert J.M.'s money to her own use.

Petitioner admits that at the time of the criminal offense, J.M. was a Medicaid recipient. In addition, Petitioner does not dispute that one of the services Tresco provided to Medicaid recipients was the oversight and management of their personal funds. Petitioner does not dispute that as part of her duties as a Lead Community Living Specialist, she was responsible for the

personal funds of disabled Medicaid recipients assigned to her.

I conclude that, in the present case, as in Edmonson, the protection of personal funds belonging to Medicaid recipients is an integral element of the Medicaid services delivered by Tresco. As a Lead Community Living Specialist employed by Tresco, Petitioner had a duty, as part of the services she provided, to protect those funds. Petitioner's criminal acts interfered with J.M.'s expectation that he could depend on Tresco to protect his personal funds. I conclude that Petitioner's criminal offense related to the delivery of Medicaid services provided by Tresco. In this case, as in Edmonson, Petitioner's criminal offense had a direct impact on Medicaid's integrity and it justifies an exclusion under section 1128(a)(1) of the Act. More recently, I reached this same conclusion in Roberta E. Miller, DAB CR367 (1995).

Petitioner attempts to minimize her culpability by arguing that she was only an employee of Tresco. Instead, Petitioner attempts to shift the blame for her misconduct to her employer, Tresco. Petitioner argues that she was punished for "inept supervision" and that she was forced "to suffer the consequences for [Tresco's] failure to provide safeguards" for protecting funds belonging to Medicaid recipients. Petitioner argues also that her misconduct involved bookkeeping errors, rather than the actual conversion of funds. Petitioner's Response Brief at 4 - 6. These arguments are essentially an attempt to collaterally attack her conviction on the basis that she was innocent of any wrongdoing. It is well settled that a hearing before an administrative law judge to challenge the basis of an exclusion may not be used to collaterally attack a State criminal conviction. Richard G. Philips, D.P.M., DAB CR133 (1991). The mandatory exclusion in this case arises from the fact of the conviction, not its actual validity. It is the fact of the conviction which triggers the exclusion. Petitioner has recourse in the court system to rectify errors; they will not be considered here.

Petitioner suggests that the I.G. could have proceeded against her under the permissive exclusion portion of section 1128(b) rather than the mandatory exclusion law. However, it is well established that when a mandatory exclusion is appropriate, it is irrelevant that a petitioner's conduct might also satisfy the permissive exclusion provisions of section 1128(b). Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992).

In addition, Petitioner challenges the exclusion on the grounds that she entered a guilty plea based on assurances by the office of the State Attorney General that her plea to a misdemeanor offense would not affect her employment. This argument is essentially the same as an argument made by a petitioner in the Schram case. In rejecting this argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985) for the proposition that a defendant in a criminal proceeding does not have to be advised of all the possible consequences which may flow from a guilty plea, including temporarily being barred from receiving government reimbursement for professional services. Schram, DAB CR215, at 6.

#### CONCLUSION

Based on the law and the undisputed material facts in this case, I conclude that the I.G. properly excluded Petitioner from Medicare and Medicaid pursuant to section 1128(a)(1) of the Act. I further conclude that the five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act. Neither the I.G. nor an administrative law judge is authorized to reduce a five-year mandatory minimum exclusion.

The five-year exclusion is therefore sustained.

/s/

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Joseph K. Riotto  
Administrative Law Judge