

Department of Health and Human Service

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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| In the Case of:        | ) |                         |
|                        | ) |                         |
| Naomi Ruth Jennings,   | ) | Date: November 12, 2009 |
|                        | ) |                         |
| Petitioner,            | ) |                         |
|                        | ) | Docket No. C-09-530     |
| v.                     | ) | Decision No. CR2027     |
|                        | ) |                         |
| The Inspector General. | ) |                         |
|                        | ) |                         |
| _____                  | ) |                         |

**DECISION**

Petitioner, Naomi Ruth Jennings, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1)), effective June 18, 2009. Petitioner’s exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

**I. Background**

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated May 29, 2009, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum of five years, pursuant to section 1128(a)(1) of the Act. The I.G. advised Petitioner that the 1128(a)(1) exclusion was based on her conviction in the Circuit Court of Cook County, Illinois, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated June 17, 2009. The case was assigned to me on June 26, 2009, for hearing and decision. On July 29, 2009, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated July 30, 2009. During the prehearing conference, Petitioner waived an oral hearing

and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. A briefing schedule was established for the submission of documents and briefs.

The I.G. filed his brief on August 28, 2009 (I.G. Brief), with I.G. exhibits (I.G. Ex.) 1 through 5. On September 25, 2009, Petitioner filed her brief (P. Brief). Petitioner did not file any exhibits with her brief. On October 13, 2009, the I.G. filed a reply brief (I.G. Reply). No objections have been made to any of the offered exhibits and I.G. exhibits 1 through 5 are admitted as evidence.

## **II. Discussion**

### **A. Findings of Fact**

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. On March 28, 2009, in the Circuit Court of Cook County, Illinois, Petitioner was found guilty of two counts of Vendor Fraud, in violation of Illinois Compiled Statutes, Chapter 305, section 5/8A-3(a), and one count of Theft in violation of Illinois Compiled Statutes, Chapter 720, section 5/16-1(a)(1). I.G. Ex. 3, 4.
2. Petitioner was sentenced by the Circuit Court of Cook County, Illinois to 36 months probation and ordered to pay restitution in the amount of \$25,000 to the Illinois Department of Healthcare and Family Services<sup>1</sup>. I.G. Ex. 5.
3. Petitioner does not deny that the charges to which she was found guilty arose from her work as an administrator of Youth Empire Services and her filing of claims for reimbursement to the state Medicaid program for Illinois. P. Brief at 1-3; I.G. Ex. 2.
4. The I.G. notified Petitioner by letter dated May 29, 2009, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, based on the authority set out in section 1128(a)(1) of the Act. I.G. Ex. 1.

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<sup>1</sup> The Illinois Department of Healthcare and Family Services administers the Illinois Medicaid program. I.G. Ex. 2, at 1.

5. Petitioner requested a hearing by letter dated June 17, 2009.

### **B. Conclusions of Law**

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Petitioner was "convicted" within the meaning of section 1128(i) of the Act.
3. Petitioner was convicted of a criminal offense related to the delivery of an item or service under a state health care program within the meaning of section 1128(a)(1) of the Act.
4. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.
5. There is a "nexus" or "common sense connection" between the crime of which Petitioner was convicted and the delivery of a health care item or service, i.e., Petitioner used her not-for-profit corporation to submit false claims to the Illinois Medicaid program and received payment for those false claims.
6. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years, and that period is presumptively reasonable. *See also* 42 C.F.R. § 1001.102(a).
7. Petitioner's exclusion began on June 18, 2009, the twentieth day after the May 29, 2009 I.G. notice of exclusion. 42 C.F.R. § 1001.2002(b).

### **C. Issues**

The issues in this case are:

Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, or all other federal health care programs; and

Whether the length of the proposed period of exclusion is unreasonable.

### **D. Applicable Law**

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (Secretary) is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101(a).

A “conviction” for purposes of exclusion pursuant to section 1128(a)(1) occurs when: (1) a judgment of conviction is entered by a federal, state, or local court, whether or not an appeal is pending or expungement has been ordered; (2) there is a finding of guilt by a federal, state, or local court; (3) a plea of guilty or no contest is accepted by a federal, state, or local court; or (4) the offender enters a first offender, deferred adjudication, or similar program that involves withholding of a judgment of conviction. Act § 1128(i)(1) and (4) (42 U.S.C. § 1320a-7(i)(1) - (4)).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c).

## **E. Analysis**

### **1. There is a basis for Petitioner’s exclusion pursuant to 1128(a)(1) of the Act.**

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner’s mandatory exclusion. The statute provides:

(a) **MANDATORY EXCLUSION.** — The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) **Conviction of program-related crimes.** — Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

In her request for hearing, Petitioner challenges the I.G.'s exclusion determination, raising what I construe as three arguments or defenses: (1) her convictions were not related to the delivery of items or services provided under a federal health program; (2) that she was the subject of prejudice due to the 15-month delay between her conviction and the I.G.'s notice of exclusion; and (3) a defense of good faith claiming that she was just the "idea person" who relied on others for the operational details. Request for Hearing. In her brief, Petitioner advances two theories: (1) her argument of prejudice due to delay in imposition of the exclusion; and (2) her good faith defense. P. Brief at 2-3. Although Petitioner does not renew her initial argument that her conviction was not related to the delivery of items or services provided under a federal or state health program, that argument will be addressed in this decision as Petitioner did raise it in her request for hearing.

**a. Petitioner was convicted of an offense within the meaning of the Act.**

The evidence shows, and Petitioner does not deny, that she was convicted of criminal offenses including two counts of Vendor Fraud and one-count of Theft. Petitioner was found guilty of the offenses and sentenced to probation and to make restitution.

The following undisputed facts are taken from the arraignment order; the three-count grand jury indictment; the Court's sentencing order; and the declaration of the Assistant Attorney General, Medicaid Fraud Control Bureau at the Illinois Attorney General's Office. I.G. Ex. 4, at 3-5; I.G. Ex. 5; I.G. Ex. 2; P. Brief at 1.

Petitioner was chief executive officer of a non-for-profit corporation, Youth Empire Service (YES), from 1994 through 2002. Through use of Alternate Payee Agreements, Petitioner billed the Illinois state Medicaid program for psychiatric services provided by physicians to wards of the Illinois Department of Children and Family Services. I.G. Ex. 4, at 3-5; I.G. Ex. 2. In October 2004, the Grand Jury sitting for the Circuit Court of Cook County, indicted Petitioner with two counts of Vendor Fraud in violation of Illinois Compiled Statutes, Chapter 305, section 5/8A-3(a) and one count of Theft in violation of Illinois Compiled Statutes, Chapter 720, section 5/16-1(a)(1). I.G. Ex. 4, at 3-5. Petitioner's bench trial commenced on December 6, 2007 and on March 28, 2009 the state court entered a finding of guilty against Petitioner. I.G. Ex. 3, at 4. On June 6, 2008, Petitioner was sentenced to a 36-month term of probation and required to pay \$25,000 in restitution to the Illinois Department of Healthcare and Family Services. I.G. Ex. 3, at 4, 5.

The Act defines "conviction" to include those circumstances "when there has been a finding of guilt against the individual . . . by a . . . State . . . court." Act

§ 1128(i)(2); 42 C.F.R. § 1001.2. Here, the fact of Petitioner's conviction is conclusively established by the court records and Petitioner's admission that she was convicted. The Court's finding of guilty and the entries of judgment satisfy the definition of "conviction" as set out at section 1128(i)(1) and (2) of the Act. Therefore, Petitioner was convicted of an offense within the meaning of the Act.

**b. Petitioner's offenses were related to the delivery of health care services under a state health care program.**

Petitioner was convicted of Vendor Fraud and Theft for submitting fraudulent invoices for psychiatric services under Alternative Pay Agreements to the Illinois Department of Healthcare and Family Services. I.G. Ex. 2; I.G. Ex. 5. Petitioner was ordered by the state court to pay restitution to the Illinois Department of Healthcare and Family Services, the agency that administers the Illinois Medicaid program.

The statutes Petitioner was convicted of violating, Illinois Compiled Statutes, Chapter 305, section 5/8A-3(a) and Chapter 720, section 5/16-1(a)(1) do not on their face reveal a specific link to the Illinois Medicaid program. However, the factual recitations in the grand jury indictment leave no doubt that Petitioner's crimes arose from conduct that was obviously related the Medicaid program as required for exclusion pursuant to section 1128(a)(1) of the Act. The grand jury indictment, Count I alleging Vendor Fraud, states that Petitioner made:

false statements and representations . . . to obtain payments under the Public Aid Code in amounts greater than that which [Petitioner] and Youth Empire Service were entitled to, caused false billing invoices to be submitted to the Illinois Department of Public Aid, and based on said false billing invoices caused the Illinois Department of Public Aid to authorize payments to Youth Empire Service in a greater amount than that to which [Petitioner] and/or Youth Empire Service were entitled, . . . .

I.G. Ex. 4, at 3. The grand jury indictment, Count II alleging Vendor Fraud, explicitly describes how Petitioner:

on behalf of herself and Youth Empire Service willfully, by means of false statements and representations, to wit: that psychiatric services were provided by Dr. Michael Fernando, and to obtain payments under the Public Aid Code in amounts greater than that which the defendant and Youth Empire were entitled to, cause false billing invoices to be submitted to the Illinois Department of Public Aid, and based on said false

billing invoices caused the Illinois Department of Public Aid to authorize payments to Youth Empire Service, . . . .

I.G. Ex. 4, at 4. Further, Petitioner’s conviction of Count III, which alleged Theft, is based on the criminal conduct outlined in the Count I and Count II of the indictment. I.G. Ex. 4, at 5. The sentencing order of the court shows that Petitioner was ordered to pay restitution in the amount of \$25,000 to the Illinois Department of Healthcare and Family Service, which administers the Illinois Medicaid Program. I.G. Ex. 5, at 2. Based on the facts, I have no difficulty finding a nexus or common-sense connection between Petitioner’s criminal conduct and the Illinois Medicaid program. Therefore, Petitioner’s offense is related to the delivery of health care service under a state health care program.

The elements for a mandatory exclusion pursuant to section 1128(a)(1) of the Act are: (1) conviction of a criminal offense, misdemeanor or felony; and (2) the criminal offense must have been related to the delivery of an item or service under Medicare or any state health care program. I find that the evidence in this case satisfies both elements for a mandatory exclusion pursuant to 1128(a)(1) of the Act. Accordingly, I conclude that there is a basis for Petitioner’s exclusion pursuant to section 1128(a)(1) of the Act. Petitioner asserts that I may consider facts beyond the fact of conviction in deciding whether the mandatory five-year exclusion must be imposed. P. Brief at 1. I am not persuaded. The plain language of section 1128(a) of the Act clearly mandates that the Secretary exclude individuals and entities convicted as described in subparagraphs (1) through (4) of that section. I have no greater authority than the Secretary under the Act and conclude I am bound to uphold an exclusion when the elements of section 1128(a)(1) are satisfied. Similarly, I have no authority to lessen the mandatory minimum period of exclusion specified by the Act.

**c. Petitioner’s good faith argument is a prohibited collateral attack on her underlying conviction.**

**d. I have no jurisdiction to review Petitioner’s claim of prejudice due to delay in the effectuation of her exclusion.**

Petitioner argues before me that: (1) she relied in good faith upon others for the operations of the not-for-profit corporation; and (2) that she has suffered prejudice because the I.G. did not exclude her for 15 months after her conviction and sentencing. P. Brief at 2.

Petitioner assertion – that she was the “idea person” and that she relied in good faith upon other individuals to ensure that the regulations were being followed – is an impermissible collateral attack on her state court conviction. Collateral attack on the underlying state court conviction is specifically precluded by regulation. 42 C.F.R. § 1001.2007(d), *see, e.g., Lyle Kai, R.Ph., DAB No. 1979 (2005); Susan Malady, R.N., DAB No. 1816 (2002).*

To the extent that Petitioner intends for me to consider her good faith reliance on others to mitigate the five-year period of exclusion, the argument is without merit. P. Brief at 1. Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a bases for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). No aggravating factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years. Though the period of exclusion may be extended beyond five years, there is simply no authority for me to reduce the period of exclusion to less than five years.

Petitioner also argues that she was prejudiced because the I.G. did not exclude her for 15 months after her conviction and sentencing. The specific prejudice alleged arose according to Petitioner, because if she had known she would be excluded she would have acted sooner to sell her business. Although Petitioner acknowledges that the Act does not establish a time-limit by which the I.G. must make its determination regarding an individual's exclusion, she asks that I consider the prejudice she has suffered due to the 15-month delay. P. Brief at 2.

I do not have the authority to review the timeliness of the I.G.'s imposition of the exclusion. Furthermore, Petitioner is correct that the Act or regulations set no time-limit for an I.G. exclusion action. Appellate panels of the Departmental Appeals Board have consistently held that the statute and regulations give an ALJ no authority to adjust the beginning date of exclusion. *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005); *Douglas Schram, R.Ph.*, DAB No. 1372, at 11 (1992); *David D. DeFries*, DAB No. 1317, at 6 (1992).

**2. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.**

**3. Exclusion for five years is not unreasonable in this case.**

Section 1128(c)(3)(B) of the Act mandates that exclusions under section 1128(a) of the Act be for a minimum period of five years. Accordingly there is no issue of whether or not exclusion for five years is unreasonable, as it is reasonable as a matter of law.



