

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Sarah J. Merlau,  
(OI File No.: H-17-40975-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-859

Decision No. CR4982

Date: December 12, 2017

**DECISION**

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

**I. Background**

The I.G. filed a brief, a reply brief, and three exhibits that are identified as I.G. Exhibit (Ex.) 1-I.G. Ex. 3 in support of his exclusion determination. Petitioner filed a brief and four exhibits that are identified as P. Ex. 1-P. Ex. 4 in opposition. Neither party offered witness testimony. I receive the parties' exhibits into the record.

**II. Issue, Findings of Fact and Conclusions of Law**

**A. Issue**

The issue is whether the law requires the I.G. to exclude Petitioner for a minimum of five years.

## B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act). This section mandates exclusion of any individual who is convicted of a criminal offense related to an item or service under Medicare or a State Medicaid program. The minimum mandatory period of exclusion – that which the I.G. imposed here – is five years. Act, § 1128(c)(3)(B).

The I.G. predicates his exclusion determination on the following facts. On September 15, 2016, Petitioner was charged with a felony under New York State law for falsifying business records. I.G. Ex. 1 at 1-2. The records that underlay the complaint were timesheets that Petitioner reviewed and verified for State Medicaid reimbursement for services allegedly provided to Petitioner's daughter, a New York Medicaid recipient. *Id.*

On October 31, 2016, Petitioner pleaded guilty to a reduced charge of disorderly conduct in violation of New York penal law. I.G. Ex. 2; I.G. Ex. 3. The reduced charge was predicated on the facts cited in the original criminal charge against Petitioner, falsification of timesheets seeking Medicaid reimbursement for services allegedly provided to Petitioner's daughter. I.G. Ex. 3 at 4.

These facts establish the criteria for exclusion pursuant to section 1128(a)(1). Petitioner was convicted of a criminal offense as is established by her plea to a disorderly conduct charge. The crime to which Petitioner pled guilty consists of filing false documents in support of Medicaid reimbursement claims. That plainly falls within the reach of section 1128(a)(1). The essence of Petitioner's conviction is that she sought to obtain reimbursement from Medicaid through the submission of falsified records.

Petitioner offers three arguments in opposition to the I.G.'s case. First, Petitioner contends that she was not convicted of a crime, contending that a disorderly conduct conviction is not a crime under New York State law. She characterizes her guilty plea as being to a "non-criminal violation of disorderly conduct." Petitioner's brief at 4, 6-7. Petitioner in effect argues that her plea was to a "violation" and not to a "crime."

Petitioner's distinction is not meaningful under either New York or federal law. Disorderly conduct violations are categorized as offenses under section 240.20 of New York Penal Law. They are a subdivision of a broader statute that encompasses all sorts of crimes including felonies. That offenses may be the lowest level of crimes in New York does not mean that they are not crimes. In fact, Petitioner was sentenced, based on her guilty plea, to a one-year conditional discharge and to pay a fine. I.G. Ex. 3 at 5. Her sentence plainly was punitive and not remedial in nature, consistent with Petitioner's conviction of a criminal offense. *See In re W.*, 312 N.Y.S.2d 544, 546 (1970), *aff'd sub nom. W. v. D.*, 28 N.Y.2d (589) (1971).

Furthermore, Petitioner's conviction is for a criminal offense within the meaning of federal law and that is what controls in this case. Section 1128(a)(1) sweeps into its reach any offense that is in the nature of a crime relating to the delivery of a Medicare item or service. Here, the facts underlying Petitioner's conviction establish that Petitioner was charged essentially with defrauding New York's Medicaid program by submitting false records to that program for purposes of reimbursement. That the charge was reduced to the lowest level of crime under New York law does not obscure the core facts that were the basis for the original charge against Petitioner and her eventual plea.

Second, Petitioner argues that she did not plead guilty to the specific allegations of the felony charge against her but to some undefined offense. Petitioner effectively asserts that there is no nexus between what she pled guilty to and the original felony charge against her. I disagree. Petitioner's plea clearly was a product of a bargain that she made with prosecuting authorities in New York. The offense to which she pled guilty was not, however, pulled from thin air. The allegations of falsification of records for purposes of submitting Medicaid claims underlie the offense to which Petitioner entered her plea even as they underlie the original felony charge.

Third, Petitioner asserts that she is not guilty of any crime as alleged in the original felony charge. She contends that the facts alleged in the felony charge against her, even if true, do not support a conviction of the offense of which she was charged. In sum, Petitioner contends that she is not guilty of the charge that ultimately led to her guilty plea to a disorderly persons offense.

This assertion is a collateral attack on the allegation that Petitioner falsified records. However, and Petitioner's argument notwithstanding, the exclusion determination in this case – and the statutory requirement that Petitioner be excluded – does not depend on litigation of the facts of the charge originally filed against Petitioner. Here, the exclusion requirement derives from Petitioner's *conviction* of a criminal offense related to the delivery of Medicaid items or services. A collateral attack on that conviction or an assertion that Petitioner isn't guilty of the offense of which she was charged and pled to is impermissible given the derivative basis for the exclusion determination. 42 C.F.R. § 1001.2007(d).

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge