

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Debra J. Jena, L.P.N.,)	Date: October 28, 1997
Petitioner,)	
- v. -)	Docket No. C-97-320
The Inspector General.)	Decision No. CR502

DECISION

By letter dated February 24, 1997, Debra J. Jena, L.P.N., the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health and 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 Services Block Grant and Block Grants to States for Social Services programs.¹ The I.G. explained that the five-year exclusion was 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 a health care item or service under the Medicaid program.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the applicable law and the parties' written submissions in lieu of an in-person hearing.

Both parties submitted briefs in this matter (I.G. Br. and P. Br.). The I.G. submitted seven proposed exhibits (I.G. Ex. 1-7). Petitioner did not object to these exhibits. I hereby receive into evidence I.G. Ex. 1-7. The I.G. also submitted a reply brief (I.G. Reply).

¹ Unless the context indicates otherwise, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

I grant the I.G.'s motion for summary disposition. I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs 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 a health care item or service under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

PETITIONER'S ARGUMENTS

Petitioner contends that she is not subject to mandatory exclusion because her offense does not relate to the delivery of a health care item or service under the Medicaid program. Specifically, she maintains that she did not herself file false claims with the appropriate State agency and had no knowledge that such claims involved the Medicaid or Medicare programs. Petitioner relates that she was employed as a nurse practitioner by Memorial Home Health Care. She asserts that she was never informed by her employer of the identity of the ultimate payer for the clients that she served. She simply provided her time cards to her employer, Memorial Home Health Care, who then submitted the claims to the appropriate State agency. She asserts also that she was never directly reimbursed by the State Medicaid agency and never provided her time cards directly to such agency. She notes that she received all reimbursements and pay checks from Memorial Home Health Care who paid her at the rate of \$16.50 an hour and that Memorial Home Health Care in turn submitted claims to Medicaid for her services at the rate of \$27.34 an hour.

Petitioner also contends that the I.G. acted improperly in having her exclusion begin almost two years after the date of her criminal conviction. Petitioner contends that such exclusion should have begun from the date of her conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a practical nurse licensed to practice in the State of Indiana and was employed in that capacity by Memorial Home Health Care.

2. On July 11, 1995, the State of Indiana filed an information charging Petitioner with Count I, conspiracy to commit Medicaid fraud (a class D felony), by accepting payment for nursing services which she did not provide through submission of a falsified time card in furtherance of an agreement between Petitioner, Rhonda Cravens (the patient's mother), and Coleen Haney (a co-worker) to knowingly obtain payments of approximately

\$18,926.07 from the Medicaid program by means of false written statements. I.G. Ex 2.

3. The July 11, 1995 information was based on a July 18, 1994 investigative report prepared by the Medicaid Fraud Control Unit of the Indiana State Attorney General's office. This report alleged that between August 1993 and May 1994, Petitioner, identified as an employee of Memorial Home Health Care, falsified her time cards so that the Indiana Medicaid program was billed for nursing that Petitioner never provided to a Medicaid recipient, Kristen Cravens, a four-year old child. This report further alleged that, when the State Medicaid agency reimbursed Petitioner based on her falsified claims, she shared a portion of the money with Rhonda Cravens, the child's mother. I.G. Ex 1.

4. On October 17, 1995, the State of Indiana filed an information charging Petitioner with Count II, conspiracy to commit conversion (a class A misdemeanor), by accepting payments from the State Medicaid program from August 1993 until May 1994 for nursing services which she did not perform by submitting falsified time cards in furtherance of an agreement between herself, Rhonda Cravens, and Coleen Haney. I.G. Ex. 3.

5. On October 18, 1995, Petitioner was convicted, based on her plea of guilty, for conspiracy to commit conversion, Count II of the October 17, 1995 information. I.G. Ex. 4 and 5.

6. As a result of her conviction, Petitioner was sentenced to one year in prison. Petitioner's sentence was suspended. Petitioner was placed on probation for one year and assessed court costs. I.G. Ex. 5.

7. Section 1128(a)(1) of the Act provides for the mandatory exclusion from Medicare and Medicaid of individuals convicted under Federal or State law of a criminal offense related to the delivery of a health care item or service under the Medicare or Medicaid program.

8. Petitioner was convicted of a criminal offense within the meaning of sections 1128(i)(1) and (3) of the Act.

9. Petitioner's conviction for conspiracy to commit conversion is related to the delivery of a health care item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

10. Once an individual has been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, exclusion is mandatory under section 1128(c)(3)(B) of the Act for a period of at least five years.

11. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years, as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.

DISCUSSION

The first statutory requirement for the imposition of mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a criminal offense. In the case at hand, Petitioner does not contest that she was convicted of a criminal offense. A judgment of conviction was entered in Petitioner's case and she was sentenced by the State court. Petitioner was thus convicted within the meaning of section 1128(i)(1) of the Act. The record reflects that this judgment was based upon the court's acceptance of Petitioner's guilty plea within the scope of section 1128(i)(3) of the Act.²

Next, it is required by section 1128(a)(1) of the Act that the crime at issue be related to the delivery of an item or service under Medicare or Medicaid. Petitioner does not dispute that the services involved related to her skills as a nurse. She also does not dispute that such services were billed to Medicaid and the criminal information in her case discloses this fact. In her defense, Petitioner instead argues that because there was no evidence that she knew that the patient was a Medicaid recipient or that her employers would be submitting claims to Medicaid based on her false time sheets, there is no evidence that her conviction was related to the delivery of health care items or

² For Petitioner to be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, it is necessary to find that one of the four subsections of section 1128(i) has been satisfied. Here, however, I find that Petitioner's conviction fell within two subsections.

Section 1128(i) of the Act states in part:

(i) CONVICTED DEFINED.-For purposes of subsection (a) and (b), an individual or entity is considered to have been 'convicted' of a criminal offense-

(1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged; . . .

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; . . .

services under Medicaid. I reject this argument as the Departmental Appeals Board (DAB) has rejected an identical argument in Robert C. Greenwood, DAB No. 1423 (1993). In that case the DAB upheld on appeal a mandatory five-year exclusion of a home health aide who was employed by providers to which he submitted false time sheets. His employers then filed claims with Medicaid. Although the petitioner in Greenwood contended that there was no evidence to show that he had knowledge that the patient was a Medicaid recipient or that his employer would file a claim with Medicaid for his services, the DAB found that exclusion was proper. The DAB found that section 1128(a)(1) of the Act "does not require any knowledge on the part of a petitioner of the relationship between the offense and the program; rather the language requires only that the factual relationship between the offense and the program exist." Greenwood, at 5.

I find no meaningful distinctions between the facts of Greenwood and Petitioner's case. Petitioner's argument that she "was never informed by her employer" (P. Br. at 4) that the patient was a Medicaid recipient is irrelevant for purposes of mandatory exclusion under section 1128(a)(1) of the Act. The only pertinent fact in this case - that Petitioner sought financial remuneration to which she was not legally entitled and which subsequently resulted in false claims being submitted to Medicaid - is verified by her guilty plea and the State court's acceptance of that plea. Under Greenwood, whether Petitioner knew that the ultimate payer was Medicaid has no bearing on the fact that she committed an offense against the Medicaid program.

In her brief, Petitioner also asserts that her exclusion should be back-dated to October 18, 1995, the date of her conviction for conspiracy to commit conversion. I find no merit in this claim. It is clear that an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Section 1128(c)(1); 42 C.F.R. § 1001.2002. This means that the exclusion must take effect 20 days after the February 24, 1997, exclusion letter and not 20 days after Petitioner's conviction. Although Petitioner asserts that her exclusion should be retroactive, an Administrative Law Judge (ALJ) is without authority to change the effective date of an exclusion. Stanley Karpo, D.P.M., DAB CR356 (1995); Chander Kachoria, R.Ph., DAB CR220 (1992), aff'd, DAB No. 1380 (1993); Laurence Wynn, M.D., DAB CR344 (1994); Samuel W. Chang, M.D., DAB No. 1198 (1990); Douglas Edmund Foster, L.P.N., DAB CR495 (1997). Similarly the I.G. has no authority to make exclusions retroactive. All exclusions are to take place on or after the effective date of the exclusions, (section 1128(c)(2) of the Act), and neither the ALJ nor the I.G. can move the effective date of the exclusion back to Petitioner's original October 18, 1995 date of conviction. Foster, at 5. In Kachoria, supra, there was a three year delay between the date of the I.G.'s initial investigation and the date when the petitioner

received the exclusion notification from the I.G. The petitioner argued that his rights were violated by the length of time between the conviction and the exclusion letter. An appellate panel of the DAB ruled, however, that neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual is convicted. Kachoria, DAB No. 1380, at 10 (1993). Consequently I find that the time which has elapsed between Petitioner's conviction and the receipt of the exclusion letter from the I.G. does not violate Petitioner's due process rights.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because she has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge