Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Roberta E. Miller,	)	DATE: April 4, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-006
	)	Decision No. CR367
The Inspector General.	)	
	)	

DECISION

By letter dated September 18, 1994, Roberta E. Miller, 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 Petitioner 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.[1] The I.G. asserted that an exclusion of at least five years was mandated by 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. The parties moved for disposition on the written record.

Because I have determined that there are no facts of decisional significance that are genuinely in dispute, and because I have determined that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

I find no reason to disturb the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

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[1] I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

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

1. During the period relevant to this case, Petitioner was administrator of the Alvin Convalescent Center, a Medicaid certified nursing facility. I.G. Ex. 4, 5.[2]

2. Petitioner's responsibilities as administrator of the Alvin Convalescent Center included maintaining trust fund accounts on behalf of Medicaid patients. I.G. Ex. 4, 5.

3. On November 22, 1991, Petitioner was charged, in a Texas county court, with the criminal offense of altering patient trust fund records with intent to defraud. I.G. Ex. 1, 4, 5.

4. Specifically, Petitioner was alleged to have made false entries on patients' records to make it appear that some patients, including at least several Medicaid patients, had received funds when they had not, or that funds had been spent on a patient's behalf when, in fact, those funds had not been so spent. I.G. Ex. 1, 4 - 10.

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[2] Petitioner submitted four exhibits (labelled A through D) in conjunction with her brief. I have remarked these exhibits as Petitioner's exhibits (P. Ex.) 1 through 4 and I have admitted them. The I.G. submitted 14 exhibits in conjunction with her brief. I have admitted I.G. exhibits (I.G. Ex.) 1 through 13 into evidence. I reject I.G. Ex. 14 as duplicative. I.G. Ex. 14 is Petitioner's September 18, 1994 notice of exclusion, which document is present already in the record of this case. The I.G. submitted also an exhibit (I.G. Ex. 15) with her reply brief. In my Order of December 7, 1994, I established a schedule for the parties to submit briefs and exhibits by December 16, 1994. However, counsel for the I.G. did not submit I.G. Ex. 15 until sometime in March 1995, and it was not received by this office until March 16, 1995. As counsel for the I.G. did not request permission to file this exhibit late (by almost three months), I reject I.G. Ex. 15 as untimely.

5. Petitioner entered a plea of nolo contendere to the charge of altering patient trust fund records with intent to defraud. I.G. Ex. 1 - 3.

6. The court accepted Petitioner's plea of nolo contendere, but withheld making a finding of guilt against Petitioner pursuant to a deferred adjudication program. Instead, the court placed Petitioner on probation for six months and fined her $200. I.G. Ex. 2, 3.

7. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. Findings 1 - 6.[3]

8. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act. Findings 1 - 6.

9. A nursing facility administrator's protection of funds held in trust for Medicaid recipients who are patients at that facility is an integral element of the administrator's delivery of health care services to those patients under Medicaid.

10. Petitioner's conviction of a criminal offense was based upon her alteration, with the intent to defraud, of the records of patients in the Alvin Convalescent Center, including several Medicaid patients. I.G. Ex. 1 - 13; Findings 1 - 9.

11. Petitioner's conviction of a criminal offense is related to the delivery of items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act. I.G. Ex. 1 - 13; Findings 1 - 10.

12. 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. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. §§ 1001.101, 1001.102.

13. Petitioner was properly excluded 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. Findings 1 - 12.

PETITIONER'S POSITION

Petitioner maintains that, under Texas law, she was not found guilty nor convicted of any criminal offense. Also, she denies any connection between her actions and the delivery of items or services under Medicare or Medicaid.

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[3] I cite to my Findings of Fact and Conclusions of Law as "Finding(s) (number)."

Moreover, Petitioner asserts that I should treat neither her plea of nolo contendere or the court's deferral of adjudication in her criminal case as a conviction under the Act. Section 1128(i)(3),(4). Petitioner asserts that if I were to find either her plea of nolo contendere or the deferred adjudication to be a conviction within the meaning of section 1128(i) of the Act, such finding would circumvent the State's reasons for enacting laws permitting nolo contendere pleas and deferred adjudications.

Petitioner contends that the State's reason for permitting nolo contendere pleas is to promote the disposition of criminal cases by compromise. Petitioner contends further that nolo contendere pleas create a significant incentive for a defendant to terminate litigation. This is because, by pleading nolo contendere, a defendant does not have to admit guilt, which admission might compromise a defendant's position in other legal proceedings.

Additionally, Petitioner contends that section 1128(i) of the Act is unconstitutional as applied to her case under the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner contends that section 1128(i) is unconstitutional based on the disparate impact the exclusion proceeding will have upon her, as opposed to other persons who plead nolo contendere.

DISCUSSION

Section 1128(a)(1) of the Act, under which the I.G. seeks Petitioner's exclusion, contains two requirements. It requires that an individual: (1) be convicted of a criminal offense, and (2) that the conviction be related to the delivery of an item or service under Medicare or Medicaid.

Section 1128(i) of the Act provides that, for purposes of sections 1128(a) and 1128(b) of the Act, an individual will be deemed 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;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

In the case at hand, I have found that Petitioner has been convicted of a criminal offense under both sections 1128(i)(3) and 1128(i)(4) of the Act. Regarding section 1128(i)(3), the evidence demonstrates that Petitioner entered a nolo contendere plea and the court expressly accepted it. A plea of nolo contendere falls within the meaning of section 1128(i)(3) whenever a party offers such a plea and a court agrees to accept it as an element of an arrangement to dispose of a pending criminal matter. Douglas L. Reece, D.O., DAB CR305 (1994).

Regarding section 1128(i)(4), the language of the statute is plain and encompasses situations where an individual or entity has entered into a first offender, deferred adjudication, or other arrangement where judgment of conviction has been withheld. The fact that, in this case, the court withheld making a finding of guilt against Petitioner and instead imposed a period of probation - rather than immediately declaring her to be guilty - is precisely the situation contemplated by this section of the Act. By the very terms of Petitioner's plea of nolo contendere, the court withheld making a final finding of guilt against Petitioner. Instead, the court placed Petitioner on probation and reserved the right to reinstate the conviction in the event Petitioner failed to fulfill the terms of her probation. Prior decisions of administrative law judges at the Departmental Appeals Board have held that such a deferred adjudication does not bar mandatory exclusion under section 1128(a)(1) of the Act. Douglas L. Reece, D.O., DAB CR305 (1994); James F. Allen, M.D.F.P., DAB CR71 (1990). Thus, I have found that, under the plain meaning of section 1128(i)(4) of the Act, Petitioner has been convicted of a criminal offense.

Petitioner argues, however, that I should disregard section 1128(i) of the Act and not consider her to have been convicted of a criminal offense within the meaning of the Act. Petitioner supports her argument by asserting that once her probationary period has elapsed, Texas law would regard her as having committed no offense, implying that she should not be considered to have been convicted of a criminal offense. While I do not question the validity of Petitioner's interpretation of Texas law, such interpretation is irrelevant here, because "what constitutes a conviction under the Medicaid Act . . . is determined by federal law, not State law." Travers v. Shalala, 20 F.3d 993, 996 (1994); see United States v. Brebner, 951 F.2d 1017, 1021 (1991).

Turning to the second requirement of section 1128(a)(1) of the Act, I have found that Petitioner's conviction of the alteration of patient trust fund records with intent to defraud relates to the delivery of items or services under Medicaid. In this regard, it has been held that the protection of funds held in trust for Medicaid recipients is an integral element of the services delivered to Medicaid recipients by nursing facilities. Jerry Edmonson, DAB CR59 (1989); Gary Gregory, DAB CR274 (1993). The petitioner in Edmonson was a nursing home administrator who had been convicted of misapplying funds that he 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 the delivery 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 facts which led to Petitioner's plea of nolo contendere involved her alteration of patients' trust fund records with the intent to defraud. By altering these trust fund records, Petitioner misappropriated the funds of Medicaid recipients. Findings 1 - 10. As was stated in Edmonson, the protection of such funds is an integral element of the Medicaid services delivered by a nursing facility such as Alvin Convalescent Center. As administrator of the Alvin Convalescent Center, Petitioner had a duty, as part of the services she provided as administrator, to protect those funds. Accordingly, I found above that Petitioner's conviction for this criminal offense was program-related within the meaning of section 1128(a)(1) of the Act.

Petitioner contends that the I.G.'s attempt to classify her nolo contendere plea or deferred adjudication as a conviction mandating a five-year exclusion under section 1128(a)(1) violates her Constitutional rights. I construe one of Petitioner's contentions regarding the Constitutionality of her exclusion to be that her exclusion violates the Constitutional prohibition against double jeopardy. However, my delegation of authority to hear and decide exclusion cases brought pursuant to section 1128 does not include the authority to rule on the Constitutionality of either federal statutes or the I.G.'s actions. Thus, I have no authority to rule on the Constitutionality of any action the I.G. has taken against Petitioner. 42 C.F.R. § 1005.4(c)(1), (4). However, when an exclusion is imposed pursuant to section 1128 of the Act, the primary purpose of that exclusion is to protect Medicare and Medicaid from future misconduct by a provider who has been shown to be untrustworthy. Francis Shaenboen, R.Ph., DAB CR97 (1990), aff'd DAB 1249 (1991). District courts have specifically found that exclusions imposed

under section 1128 of the Act are remedial in nature, rather than punitive, and do not violate the double jeopardy provisions of the Constitution. Manocchio v. Sullivan, 768 F. Supp. 814 (S.D. Fla. 1991). Additionally, it has been held that double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a State conviction. Abbate v. United States, 359 U.S. 187 (1959).

Additionally, Petitioner argues that her exclusion circumvents Texas' reasons for allowing defendants to plead nolo contendere, and, thus, violates her right to due process and equal protection under the Constitution. Again, I note that I do not have the authority to rule on the Constitutionality of federal statutes or any action the I.G. might take against Petitioner. Furthermore, the exclusion imposed and directed against Petitioner by the I.G. was done under the authority of federal law. What constitutes a conviction under Texas law or what Texas' motivations were in enacting a law allowing nolo contendere pleas is irrelevant to my determination here, because federal law is controlling. Travers v. Shalala, 20 F.3d 993, 996 (1994) (citations omitted); Larry M. Edwards, M.D., DAB CR278 (1993); Carlos Zamora, M.D., DAB 1104 (1990); Douglas L. Reece, D.O., DAB CR305 (1994).

Petitioner argues also that the I.G. may not exclude her because Petitioner was not aware that her nolo contendere plea could serve as a basis for the I.G. to exclude her. This argument is without merit. A similar argument was made by the petitioner in the case of Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992) and rejected by me. In rejecting petitioner's argument, I cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985), and noted that the court had held that a defendant in a criminal proceeding does not have to be advised of all possible consequences which may flow from his plea, which consequences may include, as is the case here, temporarily being barred from receipt of government reimbursement for professional services.

Lastly, neither the evidence submitted by Petitioner regarding her completion of probation without further incident or the statements regarding Petitioner's good character prepared by persons acquainted with her are relevant to any of the issues before me.[4] Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate a five-year exclusion for the conviction of a program-related offense. Therefore, although Petitioner's successful completion of probation and the statements attesting to her good character may be factors that reflect positively upon her, I have no authority to consider them as bases for reducing the five-year exclusion imposed and directed against her by the I.G.

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[4] These statements can be found at P. Ex. 1 - 4.

CONCLUSION

Petitioner's conviction of a program-related offense mandates that she be excluded from Medicare and Medicaid for the mandatory minimum five-year period.

/s/

Joseph K. Riotto
Administrative Law Judge