Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Carolyn C. Nagy,	)	DATE: March 11, 1992
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-350
	)	Decision No. CR182
The Inspector General.	)	
	)	

DECISION

On January 23, 1991, the Inspector General (I.G.) advised Petitioner that she was being excluded from participation in the Medicare and State health care programs for five years, as a result of her conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.[1] Exclusions after such a conviction are made mandatory by section 1128(a)(1) of the Social Security Act (Act). Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion shall not be less than five years.

Based on the record before me, I conclude that summary disposition is appropriate on the issue of whether the I.G. has the authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act, that Petitioner is subject to the federal minimum mandatory provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum of five years is mandated by federal law.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally financed health care programs, including Medicaid. I use the term "Medicaid" to represent all State health care programs from which Petitioner was excluded.

BACKGROUND

By letter dated February 11, 1991, Petitioner requested a hearing to contest the I.G.'s January 23, 1991 notice letter (Notice) excluding Petitioner from participation in the Medicare and State health care programs (such as Medicaid) for a period of five years. The case was assigned to me for hearing and decision.

During a March 19, 1991 prehearing conference, Petitioner stated that she was not represented by counsel and that she had no plans to retain counsel for this proceeding. During that conference, counsel for the I.G. indicated that he would file a motion for summary disposition. Thereafter, the I.G. filed a motion for summary disposition on all issues, accompanied by a supporting brief and six exhibits. Petitioner filed a handwritten letter in which she expressed the view that her exclusion was unfairly punitive, and I accepted this document as Petitioner's response to the I.G.'s motion for summary disposition.

On July 10, 1991, I issued a Ruling in which I admitted into evidence the six exhibits submitted by the I.G. in support of his motion for summary disposition (I.G. Exs. 1-6). I also concluded that, even if I accept as true all the facts asserted by the I.G., the I.G. was not entitled to summary disposition in this case. I therefore gave the I.G. the opportunity to file an amendment to his motion for summary disposition supported by additional evidence. The I.G. subsequently filed an amended motion for summary disposition accompanied by a supporting brief and two additional exhibits. Petitioner did not respond to the I.G.'s amended motion.

On November 15, 1991, I issued a second Ruling in which I admitted into evidence the two additional exhibits submitted by the I.G. in support of his amended motion for summary disposition (I.G. Exs. 7 and 8). I also concluded that even if I accepted as true the additional facts asserted by the I.G. in his amended motion, these facts did not justify summary disposition in favor of the I.G. Because it appeared that the I.G. was in a position to supply those undisputed facts necessary to establish a basis for summary disposition, I allowed the I.G. another opportunity to renew his motion.

The I.G. subsequently renewed his motion for summary disposition, and he submitted a brief and an additional exhibit in support of this motion. This exhibit was

accompanied by the requisite declaration, and Petitioner has not contested the authenticity or the truth of the contents of this exhibit. I am admitting this exhibit into evidence at this time as I.G. Ex. 9.

Petitioner responded by submitting a handwritten letter in which she asserted that she did not harm any patient under her care. Attached to her letter was a Consent Agreement Regarding Probationary Status of License issued by the Maine State Board of Nursing.

By letter dated February 4, 1992, I notified the parties that the Secretary of the Department of Health and Human Services (the Secretary) promulgated new regulations affecting exclusion cases. I noted that the regulations were effective on publication on January 29, 1992, and I supplied Petitioner with a copy of the regulations since she is appearing pro se in this proceeding. I also gave the parties the opportunity to submit comments on the issue of what, if any, effect these regulations might have on the outcome of this case.

ISSUES

The issues in this case are:

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

2. Whether Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid Program within the meaning of section 1128(a)(1) of the Act.

3. Whether Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. Petitioner was employed as a licensed practical nurse at the Colonial Acres Nursing Home on November 6, 1989. I.G. Ex. 4, I.G. Ex. 5.

2. On November 6, 1989, Petitioner admitted to the Director of Nursing at Colonial Acres Nursing Home that she slit open capsules containing the drug Darvon, that she removed the Darvon from the capsules, and that she substituted it with another substance. I.G. Ex. 8.

3. The stolen drugs were intended to be administered to Eula Neal. I.G. Ex. 8.

4. Eula Neal was a Medicaid recipient on November 6, 1989, and her inpatient stay at Colonial Acres Nursing Home was covered by the Maine Medicaid program at the time Petitioner stole the drugs intended for Ms. Neal. I.G. Ex. 9, I.G. Ex. 7.

5. Pursuant to an Information dated January 31, 1990, Petitioner was charged with the offense of "stealing drugs". I.G. Ex. 5.

6. On January 31, 1990, Petitioner entered a plea of guilty to the offense of "stealing drugs". I.G. Ex. 6.

7. On January 31, 1990, the Superior Court in Penobscot County, Maine, adjudged Petitioner guilty of the offense of "stealing drugs" and entered a judgment of conviction against Petitioner. I.G. Ex. 6.

8. Petitioner was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act.

9. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

10. The Secretary of the United States Department of Health and Human Services delegated to the I.G. the authority to determine, impose, and direct exclusions

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[2] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

11. On January 23, 1991, the I.G. notified Petitioner of his determination to exclude her for five years pursuant to section 1128 of the Act.

12. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, as required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

13. Neither the I.G. nor the Administrative Law Judge has the discretion or authority to reduce the five year minimum exclusion mandated by section 1128(c)(3)(B) of the Act.

14. There are no disputed material facts in this case, and the I.G. is entitled to summary disposition.

DISCUSSION

I. Petitioner Was "Convicted" Of A Criminal Offense As A Matter Of Federal Law.

Section 1128(a)(1) of the Act mandates an exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is that Petitioner was convicted of a criminal offense.

Neither party to this case disagrees that Petitioner was convicted of a criminal offense within the meaning of the Act. Section 1128(i)(3) 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. The undisputed facts establish that pursuant to an Information dated January 31, 1990, Petitioner was charged with the offense "stealing drugs". I.G. Ex. 5. On that same day, Petitioner entered a plea of guilty to that offense. Based on that plea, the Superior Court in Penobscot County, Maine, adjudged Petitioner guilty of

the offense charged and entered a judgment of conviction against Petitioner. I.G. Ex. 6.

Although Petitioner does not deny that she was convicted of a criminal offense, she pointed out at the prehearing conference that she did not have a jury trial. See March 27, 1991, Prehearing Order. As I stated in my July 10, 1991 Ruling, the fact that Petitioner was not convicted after a trial on the merits is not material to the issue of whether she was "convicted" of a criminal offense within the meaning of sections 1128(i) and 1128(a)(1) of the Act. It is not Petitioner's guilt that has to be determined, but rather the fact of her conviction. Baron L. Curtis, DAB CR122 (1991). It is undisputed that Petitioner pled guilty to the criminal offense of stealing drugs and that the Superior Court in Penobscot County, Maine, accepted that plea. I therefore conclude that Petitioner was "convicted" within the meaning of sections 1128(i) and 1128(a)(1) of the Act.

II. Petitioner Was Convicted Of A Criminal Offense "Related To The Delivery Of An Item Or Service" Under The Medicaid Program.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the criminal offense which formed the basis for the conviction was "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

The name of the criminal offense which formed the basis of Petitioner's conviction was "stealing drugs." I.G. Ex. 5. This offense does not mention Medicare, Medicaid, or any health care program, and on its face there is no indication that it is related to the delivery or an item or service under Medicare or Medicaid. However, it is consistent with congressional intent to admit extrinsic evidence concerning the facts upon which the conviction was predicated in order to determine whether the statutory criteria of section 1128(a)(1) have been satisfied. In construing the language "related to the delivery of an item or service", I stated in H. G. Blankenship, DAB CR42 (1989):

> The test of whether a "conviction" is "related to" Medicaid must be a common sense determination based on all relevant facts as determined by the finder of fact, not merely a narrow examination of the

> language within the four corners of the final judgment and order of the criminal trial court.

DAB CR42 at 11. The question before me is whether Petitioner's criminal offense is related to the delivery of an item or service under Medicare or Medicaid, not whether Petitioner was convicted under a criminal statute expressly criminalizing fraud against Medicare or Medicaid. As I stated in Blankenship:

> [M]y task is to examine all relevant conduct to determine if there is a relationship between the judgment of conviction and the Medicaid program. Had Congress intended a different result, it would have used the phrase "conviction for" or conviction "restricted to" instead of "related to". An examination of whether a conviction is "related to" Medicaid necessarily involves an inquiry into Petitioner's conduct.

DAB CR42 at 11. In this case, the I.G. submitted exhibit evidence showing that on January 31, 1990, a criminal Information was filed in the Superior Court in Penobscot County, Maine, charging Petitioner with the offense of "stealing drugs." The Information alleged that the offense occurred on November 6, 1989. In describing the underlying offense, the Information alleged that Petitioner obtained "unauthorized control" over a drug which was the property of Colonial Acres Nursing Home. I.G. Ex. 5. Other evidence submitted by the I.G. established that at the time of the offense, Petitioner was employed as a licensed practical nurse at Colonial Acres Nursing Home. I.G. Ex. 4. In addition, the I.G. submitted a document establishing that Colonial Acres Nursing Home was a Medicaid provider in the State of Maine. I.G. Ex. 2.

The I.G. contended that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. In making this assertion, the I.G. relied heavily on the fact that Petitioner's conviction was based on actions committed in conjunction with her duties as a licensed practical nurse at a facility participating in the Maine Medicaid program. The I.G. argued that the requisite relationship between Petitioner's criminal offense and the delivery of a Medicaid item or service may be found in the fact that Petitioner was convicted of unlawfully stealing drugs intended for patients at a nursing home participating in Medicaid program.

In my July 10, 1992, Ruling, I found that these undisputed facts were insufficient to establish the requisite nexus between Petitioner's criminal offense and the delivery of a Medicaid item or service. The fact that Petitioner has been convicted of a crime committed in the course of her employment at a participating Medicaid facility does not prove that the criminal offense relates to the delivery of an item or service under Medicaid. The undisputed facts contained in the record at the time I issued my July 10, 1992 Ruling did not establish that any Medicaid items or services were involved with the offense. I pointed out that it is within the realm of reasonable possibility that the theft of drugs by Petitioner had no impact on the Medicaid program and I noted that an example of this would be the situation where the stolen drugs were intended for a patient who was not a Medicaid recipient.[3]

The I.G. subsequently filed an amended motion for summary disposition in which he submitted additional exhibit evidence in support of additional undisputed facts. A signed statement made by the Director of Nursing for Colonial Acres Nursing Home on November 8, 1989 described the circumstances surrounding the underlying offense in greater detail. According to this statement, on November 5, 1989, members of the nursing staff at Colonial Acres Nursing Home discovered that capsules containing the drug propoxyphene (Darvon), which had been prescribed to four different patients, had been slit at the bottom. The Director of Nursing opened one of the slit capsules, tasted the white substance contained in it, and found it to be tasteless. She then opened a capsule which had not been slit, and it had a bitter taste. On the morning of November 6, 1989, the Director of Nursing discovered that six additional capsules of Darvon prescribed for one of the patients, Eula Neal, was slit at the bottom. Petitioner, who had been on duty as a nurse during the

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[3] The I.G. also relied on a report completed by a special investigator for the Maine Medicaid Fraud Control Unit, which states that Petitioner's criminal offense resulted in a "nominal" dollar impact on the Medicaid program, to support his assertion that Petitioner's offense was program-related. I.G. Ex. 4. In my July 10, 1991 Ruling, I found that this statement alone, without a more complete description of the impact Petitioner's offense had on Medicaid, is insufficient to establish that Petitioner's criminal offense affected the Medicaid program.

previous night shift, was confronted with the evidence that day and she admitted that she had stolen the drugs for back pain. I.G. Ex. 8.

The I.G. also submitted a statement, dated July 22, 1991, by an investigator with the Office of the Attorney General, which indicated that Eula Neal is a Medicaid recipient. The statement indicated that Eula Neal had been a resident of the Colonial Acres Nursing Home since August 1, 1988, and that she had been on Medicaid since then. I.G. Ex. 7.

It is apparent from the exhibits submitted by the I.G. that Petitioner pled guilty to committing the criminal offense of stealing the drug Darvon on November 6, 1989. It also apparent that the name of the patient who was supposed to receive the drug which was stolen on November 6, 1989 is Eula Neal. In addition, it is undisputed that Eula Neal was a Medicaid recipient at the time the criminal offense occurred. On November 15, 1991, I issued another Ruling, in which I found that these facts were not sufficient to demonstrate the required relationship between Petitioner's crime and the delivery of a Medicaid item or service.

In my November 15, 1991 Ruling, I stated that for the I.G. to prevail, it may be necessary for the I.G. to prove that the crime to which Petitioner pled guilty to committing involved a Medicare beneficiary or Medicaid recipient. However, proving that status alone will not in and of itself be sufficient to prove that the offense fell within section 1128(a)(1). The I.G. must still prove that there were Medicare or Medicaid items or services from which Petitioner's crime emanated. In this case, it is undisputed that the affected patient, Eula Neal, was eligible for Medicaid. However, the facts as adduced by the I.G. do not establish that Eula Neal was actually receiving Medicare or Medicaid items or services which were related to Petitioner's criminal offense.

The I.G. subsequently renewed his motion for summary disposition and attached to that motion additional exhibit evidence including a Maine Medical Assistance Program (Medicaid) Remittance Statement. This statement indicated that Colonial Acres Nursing Home had billed the Maine Medicaid program in the amount of $1,692.39 for Eula Neal's stay during the period from November 1, 1989 to November 30, 1989, and that Medicaid allowed coverage in that amount. This Statement also showed that $415.92 of this amount was paid for by sources other than

Medicaid and that Medicaid actually paid Colonial Acres Nursing Home $1,276.47 for Eula Neal's stay during this period, which included the November 6, 1989 date on which the criminal offense occurred. I.G. Ex. 9. Since the offense which formed the basis of Petitioner's conviction occurred on November 6, 1989, this evidence establishes that the offense occurred during the course of Eula Neal's inpatient stay at the nursing home, which was paid for by Medicaid.

Upon reviewing the I.G.'s evidence submitted subsequent to my November 15, 1991 Ruling, I find that the I.G. has brought forward sufficient evidence to establish that Petitioner's criminal offense was related to the delivery of health care item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act.

The Act does not define what it means to be "related to" the delivery of an item or service under Medicare or Medicaid. However, case law has consistently held that a criminal offense falls within the reach of section 1128(a)(1) of the Act where the delivery of an item or service is an element in the chain of events giving rise to the offense. For example, in Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990), an appellate panel of the Departmental Appeals Board held that a conviction for submission of a false Medicaid claim met the statutory test established by section 1128(a)(1) of the Act. In reaching this conclusion, the appellate panel reasoned that:

> the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

DAB 1078 at 7. Under this analysis, the appellate panel reasoned that but for the delivery of the Medicaid item or service, a false bill for the item or service would not have been submitted. Since the delivery of the item or service is an element in the chain of events giving rise to the offense of false billing, the billing offense is "related to" the delivery of the Medicaid item or service.

Although the facts of the present case are not on all fours with the facts of Greene, the rationale used by the appellate panel in deciding that case applies here. The petitioner in Greene was convicted of submitting false

Medicaid claims, while in this case Petitioner was convicted of stealing drugs. However, in both cases, the delivery of a Medicaid item or service is an element in the chain of events giving rise to the criminal offense. In this case, the undisputed facts establish that the stolen drug was provided during the course of an inpatient stay which was covered by Medicaid. While the record does not establish that the stolen drug itself was a Medicare item or service, I find that the record establishes that Eula Neal's inpatient stay at the time the drug was stolen was a Medicaid item or service. The administration of necessary medication is a direct consequence of Eula Neal's stay in the nursing home. But for Eula Neal's stay in the nursing home, the stolen drug would not have been prescribed to her. The stolen drug which formed the basis of Petitioner's conviction was provided during the course of an inpatient stay which was a Medicaid item or service. Since Petitioner's nursing home stay is an element in the chain of events giving rise to the offense of the theft of drugs, it satisfies the rationale enunciated by Greene. The common material element in Greene and in this case is that the criminal offenses arose from the delivery of an identifiable Medicaid item or service. In this case, the identifiable Medicaid item or service was Eula Neal's inpatient stay.

A Board appellate panel also has held that a conviction of a criminal offense meets the statutory requirements of section 1128(a)(1) of the Act where the unlawful conduct can be shown to affect an identifiable Medicare or Medicaid item or service or to affect reimbursement for such an item or service. DeWayne Franzen, DAB 1165 (1990). In this case, the identifiable Medicaid item or service, Eula Neal's inpatient stay, was affected by the theft of a drug intended for her during the course of that stay. It is reasonable to infer that the stolen drug was supposed to be administered to Eula Neal because she had a medical need for it. Petitioner's theft of this drug made it impossible to deliver a necessary medication as directed. In addition, the evidence of record shows that not only did Petitioner steal the drug, but she substituted a non-palliative substance for the stolen drug. This meant that Eula Neal would be provided a substance that was not consistent with the prescribing physician's orders. Petitioner's actions caused her to breach her duty to administer drugs as prescribed to a Medicaid recipient under her care during the course of the recipient's stay in the nursing home.

Petitioner contends that the evidence fails to establish that her offense resulted in any actual harm to a Medicaid recipient. While it is true that there is no evidence that Petitioner's criminal offense resulted in actual harm to Eula Neal, this does not derogate from the conclusion that the offense was "related to" the delivery of an item or service under the Medicaid program. Medication is prescribed to patients for medical reasons, and the failure to administer medication as prescribed places the health and safety of a patient in jeopardy. Petitioner's actions interfered with Eula Neal's expectation that she would receive competent, dependable, medical care during the course of her Medicaid-covered stay at the nursing home. Petitioner's offenses affected the delivery of an identifiable Medicaid item or service, even though no actual harm to a Medicaid recipient has been demonstrated.

In view of the foregoing, I conclude that Petitioner's crime is a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act. This result fits squarely within the rationale for both the Greene and Franzen cases.

III. A Five Year Exclusion Is Required In This Case.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years, when such individuals have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs, within the meaning of section 1128(a)(1) of the Act.

Since Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum of five years. Neither the I.G. nor the Administrative Law Judge has discretion to reduce the mandatory minimum five year period of exclusion. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).[4]

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[4] In any event, the withholding of medication from a nursing home patient is a serious and alarming offense warranting a lengthy exclusion.

IV. Summary Disposition Is Appropriate In This Case.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of her exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare, and to direct her exclusion from Medicaid, for five years was mandated by law. Therefore, I sustain the five-year exclusion imposed and directed against Petitioner.

/s/

Charles E. Stratton
Administrative Law Judge