Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Thelma Walley,	)	DATE: June 9, 1992
	)	
Petitioner,	)	
	)	Docket No. C-409
- v. -	)	Decision No. CR207
	)	
The Inspector General.	)	
	)	

DECISION

On June 14, 1991 the Inspector General (I.G.) notified Petitioner that she was being excluded from Medicare and from any State health care program for a period of five years.[1] The I.G. stated that Petitioner was being excluded as a result of her conviction of a criminal offense related to the delivery of an item or service under the Texas Medicaid program. Petitioner was advised that the exclusion of an individual convicted of such an offense was mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years. The I.G. informed Petitioner that she was being excluded for the minimum period mandated by law.

Petitioner timely requested a hearing. The I.G. moved for summary disposition, and Petitioner opposed the motion. On December 10, 1991, I issued a Ruling denying the I.G.'s motion. I concluded that the I.G. had failed to adduce undisputed material facts sufficient to prove that Petitioner had been convicted of an offense within the meaning of section 1128(a)(1) of the Act.

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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" hereafter to represent all State health care programs from which Petitioner was excluded.

On January 9, 1992, the I.G. renewed his motion for summary disposition. This motion was again opposed by Petitioner. On February 21, 1992, I held a prehearing conference by telephone and I advised the parties that I was denying the I.G.'s renewed motion for summary disposition, because there remained disputed issues of material fact which had not been resolved by the I.G.'s submissions. At that time, the I.G. requested an evidentiary hearing in order to offer evidence to prove that Petitioner had been convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I set a hearing for May 19, 1992 in Dallas, Texas. Order and Notice of Hearing, February 24, 1992.

On March 27, 1992, the I.G. again renewed his motion for summary disposition. Petitioner opposed this renewed motion, as she had opposed the first two motions, on the ground that the I.G. failed to adduce undisputed material facts which proved that Petitioner had been convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I concluded, as I had with the I.G.'s first two motions, that the I.G. had failed to prove a statutory basis to exclude Petitioner, and I denied the I.G.'s renewed motion for summary disposition.

On April 28, 1992, the I.G. filed additional documents concerning this case, effectively moving a fourth time for summary disposition. Petitioner again opposed the I.G.'s motion. After reviewing the I.G.'s April 28 submission and Petitioner's opposition, I concluded that there no longer remained disputed issues of material fact in this case and I advised the parties that I would issue a decision without conducting the in person evidentiary hearing which had been requested by the I.G.

Based on the undisputed material facts, the law, and the parties' arguments, I conclude that Petitioner was convicted of a criminal offense, within the meaning of section 1128(a)(1) of the Act. I find that the exclusion imposed and directed against Petitioner by the I.G. was mandated by law. Therefore, I enter summary disposition in favor of the I.G., sustaining the I.G.'s exclusion determination.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program, within the meaning of section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a licensed vocational nurse who was working at the Stanford Convalescent Center in Fort Worth, Texas, in August 1990. I.G. Ex. 1, Att. 2.[2]

2. On September 11, 1990, Petitioner was charged in a Texas court with two counts of the criminal offense of unlawfully destroying tangible property belonging to other individuals. I.G. Ex. 1, Att. 3, 4.

3. In each count, Petitioner was charged with having unlawfully destroyed one tablet of the drug Klonopin, on August 22, 1990. I.G. Ex. 1, Att. 3, 4.

4. The individuals whose medications Petitioner was charged with having destroyed were named Nancy Dayton and Frances Moore. I.G. Ex. 1, Att. 3, 4.

5. On September 21, 1990, Petitioner pled nolo contendere to both of the criminal charges which had been filed against her. I.G. Ex. 1, Att. 5, 6.

6. On September 21, 1990, a Texas court found Petitioner guilty of both of the criminal charges which had been

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[2] The I.G. filed an affidavit by a program analyst, William Hughes (Hughes), in support of his first motion for summary disposition. That affidavit had seven attachments. For purposes of the record, I am designating this Hughes affidavit and the seven attachments as I.G. Exhibit 1. I refer to it and to any of its attachments as follows: "I.G. Ex. 1, Att. (number)." On April 28, 1992, the I.G. filed two additional affidavits. These consist of an affidavit of Sharon E. Thompson (Thompson) and a second Hughes affidavit. For purposes of the record, I am designating the Thompson affidavit as I.G. Exhibit 2, and I refer to it as "I.G. Ex. 2." I am designating the second Hughes affidavit as I.G. Exhibit 3. The two attachments to the second affidavit are numbered attachments 8 and 9. Therefore, I refer to I.G. Exhibit 3 and to any of its attachments as "I.G. Ex. 3, Att. (number)." Finally, the I.G. also filed, on April 28, 1992, a document entitled "Contract to Provide Intermediate Care Services Under the Texas Medical Assistance Program." I am designating this document as I.G. Exhibit 4, and I refer to it as "I.G. Ex. 4." I am admitting I.G. Ex. 1 - 4 into evidence at this time. Petitioner filed three exhibits. I refer to these documents as "P. Ex. (number)." I am admitting P. Ex. 1 - 3 into evidence at this time.

filed against her, based on her nolo contendere pleas to those charges. I.G. Ex. 1, Att. 5, 6.

7. Nancy Dayton and Frances Moore were patients at the Stanford Convalescent Center on August 22, 1990. I.G. Ex. 3, Att. 8, 9; I.G. Ex. 4.

8. On August 22, 1990, Nancy Dayton and Frances Moore were receiving items or services which were reimbursed by the Texas Medicaid program. I.G. Ex. 3, Att. 8, 9; I.G. Ex. 4.

9. Petitioner was convicted of a criminal offense. Findings 5, 6; Social Security Act, section 1128(i).

10. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 8; Social Security Act, section 1128(a)(1).

11. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

12. There are no disputed issues of material fact in this case and summary disposition is appropriate.

13. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

14. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 10; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

The issue which is central to this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program, within the meaning of section 1128(a)(1) of the Act. Based on the facts adduced by the I.G., which have not been meaningfully challenged by Petitioner, I conclude that the I.G. has proven that Petitioner was convicted of a program-related offense, within the meaning of section 1128(a)(1). Therefore, the

exclusion imposed and directed by the I.G., which was for the minimum period required for individuals whose convictions fall within section 1128(a)(1), was mandated by law.

The facts which neither side disputes are that Petitioner was working as a nurse at the Stanford Convalescent Center, a health care facility in Fort Worth, Texas. Based on an investigation conducted by the Texas Attorney General's Office, Petitioner was charged with two criminal offenses. She was alleged to have unlawfully destroyed medication belonging to two individuals, identified in the criminal complaints as Nancy Dayton and Frances Moore. On September 21, 1990, Petitioner entered a plea of nolo contendere in a Texas court to each of the charges. The court found Petitioner guilty of both offenses with which she was charged, based on her nolo contendere pleas.

A threshold issue in this case is whether Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Petitioner contends that she made her nolo contendere pleas premised on assurances that there would be no additional actions taken against her beyond the criminal penalties which would result from her pleas and the Texas court's adjudication of her case. From this, Petitioner asserts that the disposition of her case in Texas does not constitute a conviction of a criminal offense, within the meaning of the Act. Petitioner apparently contends that the I.G. is now estopped from treating the adjudication as a conviction in light of the representations which were ostensibly made to Petitioner by Texas officials in order to induce her to make nolo contendere pleas.

I find that Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(3) of the Act. That section defines a "conviction" to include a court's acceptance of a party's plea of nolo contendere. Petitioner's nolo contendere pleas were accepted by the Texas court. The Act does not exclude from its definition of a "conviction" in section 1128(i)(3) estoppel arising from statements which may have been made to a party in order to induce that party to offer a nolo contendere plea.

In his original motion for summary disposition, the I.G. contended that the undisputed facts which I have recited supra in this Analysis supported his contention that summary disposition should be entered in his favor. The I.G. premised this contention on his theory that Petitioner was convicted of a criminal offense which was

"related to" the delivery of an item or service under Medicaid because she was convicted of a crime which occurred in the course of her employment by a provider which receives reimbursement from Medicaid for items or services. I concluded that this theory did not comport with the requirements of the Act. I reaffirm my conclusion here.

The argument which the I.G. made in his initial motion for summary disposition is identical to that which he made in Catherine Dodd, DAB CR184 (1992) (Dodd). In Dodd, I found this argument to be unsupported by the Act. I concluded in my Ruling on the I.G.'s initial motion in this case, and in Dodd, that section 1128(a)(1) cannot legitimately be interpreted as loosely as the I.G. advocates. Section 1128(a)(1) specifically requires that, as a basis for an exclusion, a party must be convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. The fact that an individual commits a crime during the course of his or her employment by a facility which receives Medicare or Medicaid reimbursement is not in and of itself sufficient to meet the statutory test, because such a conviction would not necessarily relate to the delivery of a Medicare or Medicaid item or service.

The I.G.'s theory, expressed in his initial motion for summary disposition, is so broad as to make any criminal offense committed on the premises of a facility which receives Medicare or Medicaid reimbursement a program-related criminal offense within the meaning of section 1128(a)(1). As I observed in Dodd, the logical extension of the I.G.'s theory would be that an individual would be found to have committed an offense related to the delivery of an item or service under Medicare or Medicaid if he were convicted of a simple battery of a coworker on the premises of a facility which receives Medicare or Medicaid reimbursement. Dodd at 8. This analysis departs from the plain meaning of the Act. Furthermore, it would make section 1128(a)(1) so broad in its application as to render virtually meaningless the remainder of sections 1128(a) and (b). Id.

The Act does not define the term "criminal offense related to the delivery of an item or service." However, a criminal offense has been held to meet the statutory test where the delivery of an item or service is an element in the chain of events giving rise to the offense. Jack W. Greene, DAB 1078 (1989) (Greene), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990); Larry W. Dabbs, R.Ph. et al., DAB CR151 (1991) (Dabbs); Dodd. A criminal offense has also been

held to meet the statutory test 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) (Franzen); Danny E. Harris, R.Ph., DAB CR166 (1991) (Harris). Finally, a criminal offense has been held to meet the statutory test where either Medicare or a Medicaid program is the victim of the crime. Napoleon S. Maminta, M.D., DAB 1135 (1990) (Maminta).

In Dodd, I held that the requisite relationship could be proven under the Greene test by showing that the criminal offense at issue involved a patient or patients who were receiving Medicare or Medicaid items or services at the time of the offense. Similar to that which is at issue in this case, the offense in Dodd involved a conviction for an unlawful conversion of patients' medications by a nurse employed at a health care facility where the patients were hospitalized. I found that the I.G. could meet his burden of proof under section 1128(a)(1) by proving that: (1) the patients who were involved in the offense were Medicare beneficiaries or Medicaid recipients; and (2) that these patients were receiving some Medicare or Medicaid items or services (such as coverage for their stays in the facility) at the time that the petitioner committed her offense. I held that, under those circumstances, I could conclude that the delivery of an item or service under Medicare or Medicaid would be an element in the chain of events giving rise to the petitioner's offense.[3]

I also denied the I.G.'s initial motion for summary disposition in this case because the I.G. failed to prove that Petitioner's conviction related to the delivery of an item or service under Medicare. I relied on the holdings of Greene, Dabbs, Franzen, Harris, and Maminta. The I.G. subsequently attempted to adduce evidence which would satisfy the Greene test. I now conclude that the test has been satisfied by the undisputed material facts contained in the most recent exhibits offered by the I.G. (I.G. Ex. 3, Att. 8, 9; I.G. Ex. 4). For that reason, I now enter summary disposition in favor of the I.G.

I conclude that the additional exhibits offered by the I.G. prove two facts, necessary to meet the Greene test, which had not previously been adduced by the I.G. First,

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[3] In Dodd, I held that the I.G. failed to prove the requisite nexus to satisfy the test set forth in section 1128(a)(1). Therefore, I entered summary disposition in favor of the petitioner.

the two patients whose medications were unlawfully destroyed by Petitioner, Nancy Dayton and Frances Moore, were eligible to receive Medicaid-covered items or services at the time of the offenses. Second, these two individuals were receiving Medicaid-covered items or services at the time of the offenses.[4] Both Ms. Dayton and Ms. Moore's stays at the Stanford Convalescent Center on August 22, 1990, the date of Petitioner's offenses, were covered by Medicaid. I.G. Ex. 3, Att. 8, 9. The medications which Petitioner unlawfully destroyed emanated from these covered stays. But for these patients' hospitalization at the Stanford Convalescent Center on August 22, 1990, Petitioner would not have been in a position to destroy their medications. Therefore, Petitioner's conviction for unlawful destruction of medications related to the delivery of Medicaid items or services -- Ms. Dayton and Ms. Moore's Medicaid-covered stays -- thereby satisfying the Greene test and proving the requisite relationship under section 1128(a)(1) of the Act.[5]

Petitioner contends that there remain disputed issues of material fact in this case, which precludes the entry of summary disposition in favor of the I.G. He asserts that Sharon Thompson, the affiant who executed I.G. Ex. 2, is not the custodian of the records which consist of Attachments 8 and 9. Therefore, according to Petitioner, the I.G. has failed to prove that Attachments 8 and 9 are authentic and that the facts contained in these documents are true.

I do not agree with these arguments. Ms. Thompson's affidavit establishes that Attachments 8 and 9 are excerpts from an automated data filing system which is maintained by the Texas Department of Human Services (TDHS). These exhibits plainly are business records kept in the ordinary course of business by TDHS. They are excerpted from data used by TDHS to determine Medicaid

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[4] It would not be sufficient for the I.G. simply to prove that the individuals were eligible for benefits. The Act requires that the offense be related to the delivery of an item or service under Medicare or Medicaid.

[5] The I.G. proved that Petitioner's convictions of both offenses related to the delivery of a Medicaid item or service. The I.G. would have met the statutory test under section 1128(a)(1) had he proved that either conviction was for an offense which was related to the delivery of a Medicaid item or service.

recipients' eligibility and Medicaid payment history. I am satisfied from Ms. Thompson's affidavit that Attachments 8 and 9 are what Ms. Thompson represents them to be. Petitioner has not raised a meaningful contention that the attachments do not contain accurate data routinely generated by TDHS in the ordinary course of business. Therefore, the facts asserted by Ms. Thompson in her affidavit and supported by Attachments 8 and 9 are not in dispute.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The five-year exclusion which the I.G. imposed and directed against Petitioner was mandated by law. I enter summary disposition in favor of the I.G., sustaining the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge