Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
	DATE: March 18, 1993
Thelma Walley,	
Petitioner,	Docket No. C-93-012
	Decision No. CR255
- v. -	
The Inspector General.	

DECISION ON REMAND

I issue this decision on remand pursuant to a decision by an appellate panel of the Departmental Appeals Board which affirmed in part my original decision in this case, and which reversed and remanded to me the balance of my original decision for new findings of fact and conclusions of law. I held in my original decision that Petitioner had been convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act (Act). Thelma Walley, DAB CR207 (1992). I held further that she had been convicted of an offense related to the delivery of items or services under the Texas Medicaid program within the meaning of section 1128(a)(1) of the Act. Id. I concluded, therefore, that the five-year exclusion which the Inspector General (I.G.) imposed and directed against Petitioner from participating in the Medicare and Medicaid programs was mandated by law.

The appellate panel affirmed my finding that Petitioner had been convicted of a criminal offense. However, it reversed my finding that Petitioner had been convicted of a program-related offense within the meaning of section 1128(a)(1) of the Act. Thelma Walley, DAB 1367 (1992). It held that this finding was not supported by substantial evidence. It vacated my conclusion that Petitioner's exclusion was mandated by law and it remanded the case to me for additional findings as to the issue of whether Petitioner was convicted of a program-related offense. Id. at 1 - 2, 10 - 13.

On January 19, 1993, I conducted an in-person hearing in Dallas, Texas. Both parties filed post-hearing briefs. I have carefully considered the evidence in this case, including the testimony and the exhibit which I admitted at the January 19, 1993 hearing. Also, I have considered applicable law. Finally, I have considered the parties' arguments. I conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program, and I sustain the five-year exclusion which the I.G. imposed and directed against Petitioner pursuant to section 1128(a)(1) of the Act.

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

A. Findings that were not excepted to by Petitioner or which were affirmed by the appellate panel

In my original decision, I made 14 Findings of Fact and Conclusions of Law (Findings). Petitioner did not file exceptions to my Findings 1 - 7, 11, and 13. She filed exceptions to my Findings 8 - 10, 12, and 14. The appellate panel affirmed my Finding 9, and vacated my Findings 8, 10, 12, and 14. For purposes of clarity and as a convenience to the parties, I set out here my original Findings 1 -7, 9, 11, and 13:

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.[1]

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[1] In my original decision, I noted that I had admitted into evidence four I.G. exhibits which I had designated I.G. Ex. 1 through 4. I noted that some of these exhibits had attachments which I referred to by attachment number. I noted also that I had admitted into evidence three Petitioner exhibits which I had designated P. Ex. 1 through 3. DAB CR207 at 3, n.2. All of these exhibits remain in evidence. At the January 19, 1993 hearing, I admitted into evidence an additional I.G. exhibit which I marked as I.G. Ex. 5.

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 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.

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

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).

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).

B. Findings vacated by the appellate panel which are not relied on in this decision

The Findings which I made in my original decision which were vacated by the appellate panel are as follows:

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.

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).

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

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).

C. New Findings made on remand

I make the following Findings on remand which substitute for Findings vacated by the appellate panel:[2]

15. On August 22, 1990, Nancy Dayton and Frances Moore were recipients of items or services that were reimbursed by the Texas Medicaid program. I.G. Ex. 3, Att. 8; Tr. at 30 - 36.[3]

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[2] I have elected to number these new Findings beginning with Finding 15. That is for the convenience of the parties and to avoid any confusion with Findings that I previously made. Two of my new Findings (Findings 20 and 21) have the identical text to two Findings which were vacated by the appellate panel (Findings 10 and 14). These Findings are, however, supported by evidence which was not before me at the time I issued my original decision in the case, and that evidence is cited in these Findings, either directly, or by reference to other Findings which cite the new evidence.

[3] During the hearing which I held on January 19, 1993, counsel for the I.G. referred to certain exhibits in evidence as "I.G. Exhibit 3, Attachment 1," and "I.G. Exhibit 3, Attachment 2." See Tr. at 27 - 28, 30. In fact, the exhibit which counsel for the I.G. referred to as "I.G. Exhibit 3, Attachment 1" is in evidence as I.G. Ex. 3, Att. 8. The exhibit which counsel for the I.G. referred to as "I.G. Exhibit 3, Attachment 2" is in evidence as I.G. Ex. 3, Att. 9. My reference to these exhibits in my Findings is therefore to the exhibits as they appear in the record of this case and not to the manner in which they were cited by counsel for the I.G. at the January 19, 1993 hearing.

16. Items or services which the Texas Medicaid program reimbursed for Nancy Dayton and Frances Moore included stays in the Stanford Convalescent Center. I.G. Ex. 3, Att. 8; I.G. Ex. 3, Att. 9; Tr. at 30 - 36.

17. The Texas Medicaid program reimbursed the Stanford Convalescent Center for stays by Nancy Dayton and Frances Moore which included stays on August 22, 1990. I.G. Ex. 3, Att. 8; I.G. Ex. 3, Att. 9; Tr. at 32 - 36, 38 - 40.

18. The tablets of Klonopin that Petitioner destroyed that belonged to Nancy Dayton and Frances Moore were intended to be dispensed to Ms. Dayton and Ms. Moore during their Medicaid-reimbursed stays at the Stanford Convalescent Center. Findings 1 -7, 15 - 17.

19. The tablets of Klonopin that Petitioner destroyed that belonged to Nancy Dayton and Frances Moore were intended to be dispensed pursuant to prescriptions that were reimbursed by the Texas Medicaid program. I.G. Ex. 5, pp. 1 - 2; Tr. at 42 - 52.

20. 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 - 7, 9, 15 - 19; Social Security Act, section 1128(a)(1).

21. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 7, 9, 11, 13, 15 - 20; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

This case has its genesis in Petitioner's conviction of the crime of destroying tablets of the drug Klonopin, belonging to two individuals, Ms. Nancy Dayton and Ms. Frances Moore. The facts of this case, which I found previously and which were not disputed, are that Petitioner was working as a licensed vocational nurse at the Stanford Convalescent Center, a facility in Fort Worth, Texas. Ms. Dayton and Ms. Moore were patients at the facility. On August 22, 1990, Petitioner committed the criminal offense of destroying Klonopin tablets belonging to Ms. Dayton and Ms. Moore.

The sole issue now before me is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program.[4] I must sustain the five-year exclusion which the I.G. imposed against Petitioner if I find that the preponderance of the evidence shows that Petitioner was convicted of such an offense. Social Security Act, sections 1128(a)(1), (c)(3)(B). In its decision, the appellate panel identified two suggested ways in which the I.G. could satisfy his burden of proving that Petitioner was convicted of an offense within the meaning of section 1128(a)(1) of the Act. The appellate panel found that the requisite nexus would exist if the I.G. proved that the individual drugs destroyed by Petitioner were items reimbursed by Medicaid. DAB 1367 at 9. The appellate panel found also that the requisite nexus would exist if the I.G. proved that the nursing facility services received by Ms. Dayton or Ms. Moore on August 22, 1990, which would necessarily include the responsibility for the administration and safekeeping of the drugs, were covered services reimbursed by Medicaid. Id.

At the January 19, 1993 hearing, the I.G. offered evidence to establish both theories of proof identified by the appellate panel in its decision. The I.G. proved, as a necessary element of both of these theories, that Ms. Dayton and Ms. Moore were recipients of items or services that were reimbursed by the Texas Medicaid Program. Finding 15. The I.G. proved that the Klonopin tablets belonging to Ms. Dayton and Ms. Moore which Petitioner destroyed were items reimbursed by Medicaid. Finding 19. The I.G. proved also that stays by Ms. Dayton and Ms. Moore at the Stanford Convalescent Center, including stays on the date of August 22, 1990, were reimbursed by Medicaid. Findings 16 - 17.

At the January 19, 1993 hearing, I received into evidence a document which I identified as I.G. Ex. 5, which proves that both Ms. Dayton and Ms. Moore had received Medicaid-reimbursed prescriptions for Klonopin. Ms. Dayton's Medicaid-reimbursed prescription for Klonopin was filled on August 15, 1990, seven days before Petitioner committed the criminal offense of destroying a Klonopin

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[4] Section 1128(a)(1) requires that a party be convicted of a criminal offense related to the delivery of an item or service under Medicare or under a State health care program. The I.G. does not contend that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare.

tablet belonging to Ms. Dayton. I.G. Ex. 5, p. 1; Tr. at 49 - 50. Ms. Moore's Medicaid-reimbursed prescription for Klonopin was filled on August 14, 1990, eight days before Petitioner committed the criminal offense of destroying a Klonopin tablet belonging to Ms. Moore. I.G. Ex. 5, p. 2; Tr. at 51. Both the prescriptions of Klonopin to Ms. Dayton and to Ms. Moore were for quantities of Klonopin sufficient to include the pills that were intended to be dispensed to Ms. Dayton and to Ms. Moore on August 22, 1990. I.G. Ex. 5, pp. 1 - 2; Tr. at 49 - 51.

The inference which I draw from this evidence is that the Klonopin prescriptions issued to Ms. Dayton on August 15, 1990, and to Ms. Moore on August 14, 1990, included the pills that Petitioner destroyed. Thus, Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, in that she was convicted of destroying pills that were purchased by the Texas Medicaid program.

Petitioner argues that I should not have received into evidence I.G. Ex. 5, contending that the document is inadmissible hearsay. She argues that the witness whom the I.G. called to explain the exhibit, Sharon Thompson, is not qualified to explain it. Therefore, according to Petitioner, her explanation is not credible. Finally, Petitioner asserts that I cannot infer reasonably from the evidence of record that the Klonopin pills destroyed by Petitioner were pills that were paid for by the Texas Medicaid program.

The document, I.G. Ex. 5, contains hearsay. It consists of a record of data maintained by the Texas Department of Human Services. As I ruled at the January 19, 1993 hearing, I routinely admit into evidence documents or statements which contain hearsay. The fact that evidence consists of or contains hearsay will not serve as an automatic basis to exclude that evidence from admission in hearings which I conduct pursuant to sections 205(b) and 1128 of the Act. See Richardson v. Perales, 402 U.S. 389, 410 (1971). Furthermore, regulations which apply to the conduct of administrative hearings under section 1128 of the Act do not direct that evidence be excluded automatically because it consists of or contains hearsay. 42 C.F.R. § 1005.17(b) (1992).

On the other hand, I may exclude -- or, at the least, not draw inferences from -- evidence which is of questionable probative value. The critical question concerning I.G. Ex 5 is not whether it is hearsay, but whether it constitutes reliable proof of the necessary elements of

the I.G.'s theory. Put simply, the issue is whether I.G. Ex. 5 proves that Ms. Dayton and Ms. Moore received prescriptions of Klonopin on August 14 and 15, 1990, in amounts sufficient to include the pills which were to be dispensed on August 22, 1990, which were paid for, at least in part, by the Texas Medicaid program.

I.G. Ex. 5 does not contain a legend which explains the data entries in the exhibit. I cannot conclude solely from the exhibit itself that it proves that which the I.G. contends it proves. Nor can I conclude from the face of the exhibit that the data contained in the exhibit is accurate. The exhibit and its contents were explained at the January 19, 1993 hearing by a witness, Ms. Sharon Thompson. I can conclude only that I.G. Ex. 5 is what the I.G. purports it to be, and is reliable, by accepting as credible Ms. Thompson's testimony.

Ms. Thompson testified that for ten years she has been supervisor of the sanctions unit of the Texas Department of Human Services. Tr. at 21. She testified that her unit conducts investigations and makes determinations as to whether providers should be sanctioned by the Texas Department of Human Services. Id. Ms. Thompson testified that she had approximately 22 years of experience in matters involving the Medicaid program. Tr. at 22. Ms. Thompson testified that I.G. Ex. 5 was a routine business record of the Texas Department of Human Services and is representative of a type of document that she and her staff have had access to for years in the performance of their duties. Tr. at 44. She was able to identify and explain each relevant category of data in I.G. Ex. 5, based on her experience with the Texas Medicaid program and on her familiarity with the type of document that I.G. Ex. 5 represents. Tr. at 45 - 52.

I am satisfied from Ms. Thompson's testimony that she has the experience and knowledge to interpret and explain I.G. Ex. 5, and to attest that it is a reliable record of that which she purported it to be. In reaching this conclusion, I recognize that Ms. Thompson did not make the data entries which comprise the exhibit, nor is she the employee of the Texas Department of Health who is the custodian of the data which comprises I.G. Ex. 5. She cannot testify with absolute certainty that the data was accurately transcribed into the Texas Department of Health's records system. But Ms. Thompson's testimony assures me that I.G. Ex. 5 is an excerpt of the Texas Department of Health's ordinary business records, maintained as a matter of routine. I am satisfied from Ms. Thompson's testimony that it is more probable than not that I.G. Ex. 5 contains what she attested to and

that it is an accurate record of data collected by the Texas Department of Health.[5] Thus the preponderance of the evidence supports the I.G.'s contention.

The I.G. had previously offered an affidavit executed by Ms. Thompson, along with other exhibits, to support his motions for summary disposition in this case. I.G. Ex. 2. In reversing and remanding my original decision, the appellate panel held that Ms. Thompson's affidavit (and the affidavit of another individual, William Hughes) did not suffice to explain entries in another exhibit relied on by the I.G., I.G. Ex. 3, Att. 8.[6] The appellate panel observed that the affidavit of Ms. Thompson did not explain the entries in I.G. Ex. 3, Att. 8, but instead made "conclusory statements that Dayton's and Moore's stays at the facility were 'Medicaid stays.'" DAB 1367 at 11. The difference between Ms. Thompson's testimony and her affidavit is that, in her testimony, she explained why, based on her experience with the Texas Medicaid program, she would be in a position to know what the entries in I.G. Ex. 3, Att. 8, and I.G. Ex. 5 meant. Also, she gave explanations of the entries in I.G. Ex. 3, Att. 8 and I.G. Ex. 5.

I infer that the pills Petitioner destroyed, belonging to Ms. Dayton and Ms. Moore, were dispensed from Klonopin prescriptions paid for by the Texas Medicaid program. It is possible that the pills which Petitioner destroyed were from some source other than Medicaid-reimbursed prescriptions. There is no way to exclude definitively that possibility from the evidence in this case. But it

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[5] The I.G. did not offer testimony by an employee of the Texas Department of Health responsible for creating or maintaining records such as I.G. Ex. 5. Arguably, such an employee might be in a better position than Ms. Thompson to vouch for the contents of I.G. Ex. 5. On the other hand, Ms. Thompson's experience is such that she is very familiar with documents such as I.G. Ex. 5. Furthermore, it is unlikely that another employee could state with any assurance that the specific data entries in I.G. Ex. 5 are accurate, inasmuch as these entries are based on records obtained by the Texas Medicaid program from external sources. See Tr. at 42.

[6] Three paragraphs later in this Decision, I discuss I.G. Ex. 3, Att. 8 and my rationale for accepting it as proof that Ms. Dayton's and Ms. Moore's stays at the Stanford Convalescent Center, including stays on August 22, 1990, were reimbursed by the Texas Medicaid program.

is more likely than not that Medicaid paid for the pills which Petitioner destroyed. Medicaid paid for prescriptions for Klonopin to Ms. Dayton and Ms. Moore only days prior to Petitioner destroying Klonopin pills belonging to these two individuals. Medicaid paid for sufficient quantities of Klonopin in prescriptions issued to Ms. Dayton and Ms. Moore to include that which was to be administered to Ms. Dayton and Ms. Moore on August 22, 1990. Given that, it would not be logical for Ms. Dayton or Ms. Moore to obtain Klonopin from some other source not compensated for by the Texas Medicaid program. That greatly reduces the possibility, if it does not eliminate it altogether, that the Klonopin destroyed by Petitioner came from some source other than Medicaid-reimbursed prescriptions. Therefore, I conclude that the preponderance of the evidence in this case establishes that the Klonopin destroyed by Petitioner had been paid for by the Texas Medicaid program.

The I.G.'s proof that Petitioner destroyed Klonopin pills that were purchased by the Texas Medicaid program is sufficient to establish that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. At the January 19, 1993 hearing, the I.G. proved also that the nursing home stays of Ms. Dayton and Ms. Moore, including stays on August 22, 1990, were reimbursed by Medicaid. This constitutes an independent basis for establishing that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

I had previously admitted into evidence a document, I.G. Ex. 3, Att. 8, which is a printout of information generated by the Texas Medicaid program. Petitioner objected to my receiving that exhibit on the ground that it contained hearsay. I overruled that objection in my original decision. In reversing and remanding my original decision, the appellate panel did not find error in my admitting into evidence I.G. Ex. 3, Att. 8. Rather, it concluded that the exhibit did not on its face, or as explained by Ms. Thompson's and Mr. Hughes' affidavits, establish that Ms. Dayton's and Ms. Moore's stays at the Stanford Convalescent Center, including stays on August 22, 1990, were reimbursed by Medicaid. DAB 1367 at 10 - 11.

Ms. Thompson testified about I.G. Ex. 3, Att. 8, at the January 19, 1993 hearing. I am satisfied, based on her testimony, that the exhibit proves that Ms. Dayton's and Ms. Moore's stays at the Stanford Convalescent Center on August 22, 1990 were reimbursed by the Texas Medicaid program. Ms. Thompson testified that I.G. Ex. 3, Att. 8,

proves that the Texas Medicaid program made payments to the Stanford Convalescent Center for stays by both Ms. Dayton and Ms. Moore. I.G. Ex. 3, Att. 8, pp. 1 - 2; Tr. at 31 - 36. The stay reimbursed on behalf of Ms. Dayton covered the 153-day period from May 1, 1990 through September 30, 1990. I.G. Ex. 3, Att. 8, p. 1; Tr. at 32 - 33. The stay reimbursed on behalf of Ms. Moore covered the 90-day period from July 3, 1990 through September 30, 1990. I.G. Ex. 3, Att. 8, p. 2; Tr. at 35 - 36. Ms. Thompson testified persuasively that I.G. Ex. 3, Att. 8, proves that the stays at the Stanford Convalescent Center by Ms. Dayton and Ms. Moore which were reimbursed by the Texas Medicaid program included August 22, 1990. That is established by the column headed "TPD" (total days paid for by Medicaid) on each page of the exhibit. I.G. Ex. 3, Att. 8, pp. 1 - 2; Tr. at 32, 35. It shows that the days paid for by Medicaid for Ms. Dayton and Ms. Moore equalled the total number of days including the beginning and ending dates of Ms. Dayton's and Ms. Moore's stays and all dates in between. Id. Therefore, Ms. Dayton's and Ms. Moore's stays would have included August 22, 1990, because that date falls within the period covered by the beginning and end date of these recipients' stays.

Petitioner's objections to the sufficiency of evidence relating to the question of whether Ms. Dayton's and Ms. Moore's stays at the Stanford Convalescent Center on August 22, 1990 were reimbursed by Medicaid are of the same character as are her objections concerning proof that Petitioner destroyed drugs paid for by Medicaid. She objected to my receiving I.G. Ex. 3, Att. 8, into evidence, and I overruled that objection for the same reason that I overruled Petitioner's objection to my receiving I.G. Ex. 5. Petitioner also questioned Ms. Thompson's qualifications to attest to the meaning and accuracy of I.G. Ex. 3, Att. 8. I find Ms. Thompson qualified to explain this exhibit and to vouch for its accuracy based on her experience with the Texas Medicaid program and her testimony that, by virtue of her experience, she is extremely familiar with the kinds of information utilized by Medicaid and the systems utilized by the Texas Department of Health to collect and analyze data. Tr. at 32 - 33.

Petitioner argues that neither I.G. Ex. 8, Att. 3, nor Ms. Thompson's testimony provide proof that either Ms. Dayton or Ms. Moore were actually on the premises of the Stanford Convalescent Center on August 22, 1990. She reasons that it is possible that either or both of these individuals could have been excused on a pass on the date in question. While it is certainly possible that Ms.

Dayton or Ms. Moore might not have been physically present at the Stanford Convalescent Center on August 22, 1990, there is no evidence to suggest that either of these individuals were absent. The evidence proves, to the contrary, that Medicaid reimbursed the facility for these individuals' stays there on August 22, 1990. I find that the preponderance of the evidence is that the two individuals were present at the facility on August 22, 1990.

Moreover, a finding that either of these individuals was present is not an essential element of my decision. What is important is that Petitioner destroyed Klonopin that was to be issued to Ms. Dayton and Ms. Moore on August 22, 1990. That medication was to have been issued ancillary to Medicaid-reimbursed stays which included August 22, 1990. Petitioner would not have been in a position to destroy the medication belonging to Ms. Dayton and Ms. Moore except for the fact that these individuals were receiving Medicaid-reimbursed stays at the Stanford Convalescent Center on August 22, 1990. Therefore, the physical presence of Ms. Dayton or Ms. Moore at the moment that Petitioner committed her crime is not a necessary element of my conclusion that Petitioner committed a criminal offense related to the delivery of an item or service under Medicaid.

CONCLUSION

Based on the evidence 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. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge