Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
	DATE: May 7, 1993
Ifeoma Afeonyi,	
Petitioner,	Docket No. C-93-025
	Decision No. CR262
- v. -	
The Inspector General.	

DECISION

By letter dated October 22, 1992, Ifeoma Afeonyi, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare program and from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the 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, and the I.G. moved for summary disposition.

Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the case on the basis of written submissions in lieu of an in-person hearing.

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 an item or service under Medicare or Medicaid to be excluded from participation in such programs, for a period of at least five years.

ARGUMENT

Petitioner did not submit a brief or evidence. She merely stated that although she did not dispute that she had been convicted, her "position is that her conviction did not relate to her delivery of an item or service under Medicare or any state health care program." She further contended that statutory exclusion was not applicable to her inasmuch as she was not a health-care practitioner.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

1. In 1986, Petitioner, who is licensed as a pharmacist in her native country, but not in the United States, opened a medical clinic in Chicago as a business venture. I.G. Ex. 1.

2. Petitioner arranged for the rental of medical offices and the hiring of a physician to work there. I.G. Ex. 1.

3. Petitioner subsequently entered into an understanding with Bio-Scientific Lab (BSL) covering the period 1986 - 1987 which arranged for BSL to pay the salaries of Petitioner's staff, provide certain supplies, and pay her a monthly rental for two rooms that BSL could use to collect specimens from the clinic's patients. In return for this, Petitioner agreed to use BSL for all the clinic's lab work. I.G. Ex. 1.

---

[1] The I.G. submitted a brief and exhibits in support of the motion for summary disposition. Petitioner set forth her position in her original letter of appeal, but submitted no further evidence or argument. All of the I.G.'s submissions were received into evidence; they are referred to as I.G. Ex. (number).

4. In September of 1988, a Cook County Grand Jury indicted Petitioner for three offenses: Conspiracy, Offering And Paying Kickbacks, and Receiving Kickbacks; i.e., for entering into a scheme whereby unlawful kickbacks were paid to her for causing patients, who were Public Aid and Medicaid recipients, to have laboratory work done by BSL, a Medicaid provider, which work was paid for by public medical assistance funds. I.G. Ex. 2.

5. On September 5, 1991, Petitioner was found guilty on all counts, following a bench trial. I.G. Ex. 6.

6. On October 17, 1991, Petitioner was sentenced to a 15-month period of probation and fined $5,000 (suspended on successful completion of probation). I.G. Ex. 3.

7. The Secretary of Health and Human Services delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

8. On October 22, 1992, Petitioner was notified by the I.G. that it had been decided to exclude her for a period of five years from participation in the Medicare and Medicaid programs because of her conviction of a criminal offense related to the delivery of an item or service under Medicaid.

9. Petitioner's criminal conviction was based upon acts which rose directly out of the delivery of services under Medicaid and, therefore, satisfies the statutory "relatedness" test for mandatory exclusion.

10. Petitioner may be excluded from the programs based upon her criminal conviction even though she is not a health-care practitioner, but, rather, occupies the role of an owner or manager.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual in question must have been convicted of a criminal offense. In the case at hand, Petitioner was tried before a judge, found guilty, and penalized. Section 1128(i)(2) of the Act controls this situation. It provides that ". . . when there has been a finding of guilt against an individual . . . by a court," such person is considered to have been convicted of a criminal offense.

Next, it is required by section 1128(a)(1) that Petitioner's offense be related to the delivery of an item or service under Medicaid or Medicare. For the following reasons, I find that the criminal activity for which she was convicted meets this criterion.

The evidence relating to the State proceeding shows that the grand jurors indicted Petitioner for the crimes of conspiracy, offering and paying kickbacks, and receiving kickbacks, by planning and participating in a criminal enterprise in which she arranged -- in return for kickbacks -- for patients of her clinic to have laboratory work done by BSL, which work ultimately was paid for by Medicaid. She was tried before a judge who found her guilty on all counts. Thus, the State proceedings show that the criminal offenses of which Petitioner was convicted arose directly out of the delivery of services under Medicaid. I.G. Ex. 1, 2, 6

As to Petitioner's suggestion that the exclusion mandated by section 1128(a) is inapplicable to her since she was not a health-care practitioner, her argument is contrary to congressional intent. Specifically, in 1980, when Congress was working on section 1128, it declared that it intended to exclude not only "physicians and other practitioners convicted of program-related crimes," but also other persons "such as administrators of health care institutions" who were similarly convicted. 1980 U.S.C.C.A.N. 5526, 5572. This policy is reflected also in the HHS regulations which implement mandatory exclusion under section 1128(a). The regulations provide, inter alia, that the requirement of a relationship between a criminal conviction and the delivery of items or services under Medicare/Medicaid can be satisfied by criminality in ". . . the performance of management or administrative services . . . ."

Thus, I find that Petitioner, as owner of the clinic, falls within the class of persons the law was intended to deter and is not immune to exclusion.

CONCLUSION

Section 1128(a)(1) of the Act requires that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of her conviction of a program-related criminal offense. The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge