Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Mary Ann Jimenez,	DATE: February 18, 1994
Petitioner,	Docket No. C-93-017
- v. -	Decision No. CR304
The Inspector General.	

DECISION

On October 15, 1992, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.[1] The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Social Security Act (Act), based on her conviction of a criminal offense related to the delivery of an item or service under Medicaid. The I.G. advised Petitioner further that, in cases of exclusions imposed pursuant to section 1128(a)(1) of the Act, section 1128(c)(3)(B) of the Act requires a minimum five-year exclusion. By letter of November 11, 1992, Petitioner requested a hearing.

This case was assigned originally to Administrative Law Judge Edward D. Steinman. Judge Steinman set a telephone prehearing conference in this case for December 28, 1992. However, at Petitioner's request, Judge Steinman continued the conference while Petitioner appealed her conviction in State court. During a telephone prehearing conference held on April 29, 1993, Petitioner informed Judge Steinman that her conviction was final. The I.G.

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

then requested that Judge Steinman hear the case via an exchange of briefs in lieu of an in-person hearing. Petitioner indicated that there might be factual issues in the case which would necessitate an in-person hearing. However, Petitioner agreed to the I.G.'s request in order to expedite a resolution of her case. In granting the I.G.'s request, Judge Steinman stated that he would rule on whether disputed facts existed after consideration of the parties' briefs. Both parties timely filed briefs in accordance with Judge Steinman's Order of May 3, 1993.

On July 26, 1993, this case was reassigned to me for hearing and decision. I held a telephone prehearing conference in the case on October 1, 1993. During the conference, Petitioner notified me that her brief constituted a cross-motion for summary disposition. I then informed the parties that my consideration of the evidence and arguments they submitted had convinced me that there was insufficient evidence in the record to grant either party's motion for summary disposition. I inquired of the parties whether they believed that an in-person hearing was thus necessary. Both parties agreed that the case should be heard via a supplemental exchange of written briefs and documentary evidence in lieu of an in-person hearing.

I then held the parties' cross-motions in abeyance and set a schedule for their supplemental submissions. I directed the parties to consider in their supplemental briefing whether I could sustain an exclusion against Petitioner under section 1128(a)(2) of the Act where the I.G. had relied only on section 1128(a)(1) of the Act as the basis for Petitioner's exclusion. See my October 4, 1993 Prehearing Order And Schedule For Filing Supplemental Motions For Summary Disposition. Both parties timely filed their supplemental briefs. The I.G. also filed a motion to supplement the October 15, 1992 notice of exclusion to include section 1128(a)(2) as a separate and independent basis for excluding Petitioner for five years. Petitioner's section 1128(a)(2) exclusion was to begin 20 days after the date on which I granted the I.G.'s motion. I.G. Supp. Br. 3 - 4.[2] I am

---

[2] The parties have submitted extensive argument. I refer to their submissions as: I.G.'s Motion For Summary Disposition And Memorandum In Support Of The I.G.'s Motion for Summary Disposition (I.G. Br. (page)); Petitioner's Motion In Opposition Of Summary Disposition And Memorandum In Opposition Of Summary Disposition (P. Br. (page)); I.G. Reply Brief (I.G. R. Br. (page));

(continued...)

denying the I.G.'s motion to supplement the notice of exclusion in the manner requested in her motion.

I have carefully considered the exhibits filed by the I.G. and Petitioner.[3] I have considered also the parties' arguments and the relevant law and regulations. I conclude that the I.G. is authorized to exclude Petitioner pursuant to sections 1128(a)(1) and 1128(a)(2) of the Act. I conclude further that, pursuant to sections 1128(a)(1), 1128(a)(2) and 1128(c)(3)(B) of the Act, the I.G. is required to exclude Petitioner for a minimum period of five years.

ISSUES

The issues in this case are whether:

1. Petitioner was convicted of a criminal offense;

2. Petitioner's conviction relates to the delivery of an item or service under Medicare or Medicaid;

---

[2] (...continued)
I.G.'s Supplemental Motion For Summary Disposition (I.G. Supp. Br. (page)); Petitioner's Supplemental Brief (P. Supp. Br. (page)); and the I.G.'s Response To Petitioner's Supplemental Motion For Summary Disposition (I.G. R. Supp. Br. (page)).

[3] The I.G. submitted 12 exhibits. I refer to the I.G.'s exhibits as I.G. Ex(s). (number) at (page). The I.G. withdrew I.G. Exs. 7 and 9. Petitioner objected to I.G. Ex. 2 at 19 - 24 and I.G. Ex. 4 at paragraph 9 (P. Br. 2 - 3). I am denying Petitioner's objections. With regard to Petitioner's objection to I.G. Ex. 2 at 19 - 24, which relates to the conviction of other individuals who operated or worked at the Clinic, I find this evidence to be relevant here as the regulations at 42 C.F.R. § 1005.17(g) specify that evidence of acts other than those at issue in a case are admissible to show motive, opportunity, intent, knowledge, preparation identity, lack of mistake, or existence of a scheme. I find the information provided in I.G. Ex. 4, at paragraph 9, to be relevant here, as discussed infra. Therefore, I admit into evidence I.G. Exs. 1, 2, 3, 4, 5, 6, 8, 10, 11, and 12. Petitioner submitted three exhibits. I refer to Petitioner's exhibits as P. Ex(s). (number) at (page). I admit into evidence P. Exs. 1, 2, and 3.

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

4. I have the authority to consider the relationship between Petitioner's conviction and section 1128(a)(2) of the Act, where section 1128(a)(2) was not referenced in the I.G.'s October 15, 1992 notice of exclusion;

5. I should permit the I.G. to supplement the October 15, 1992 notice of exclusion to include section 1128(a)(2) as a separate and independent basis for Petitioner's five-year exclusion; and

6. Section 1128(a)(2) of the Act exists as a separate and independent basis for the five-year exclusion the I.G. imposed and directed on October 15, 1992.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY STIPULATION OF THE PARTIES[4]

1. Beginning in September 1988, Petitioner, a registered nurse, was employed at the Indochinese Medical Clinic (Clinic) in Modesto, California. I.G. Br. 3, 4; P. Br. 3.

2. On October 11, 1988, a patient, MM,[5] was treated at the Clinic under Petitioner's direction. I.G. Br. 4; P. Br. 3.

3. Petitioner previously had treated MM at the Clinic on October 3, 1988. I.G. Br. 4; P. Br. 3.

4. On October 11, 1988, Petitioner directed that a co-worker inject MM with penicillin. I.G. Br. 4; P. Br. 3.

---

[4] At P. Br. 3, Petitioner stated specifically that she did not contest the I.G.'s findings of fact and conclusions of law as set forth at I.G. Br. 3 - 7, numbered paragraphs 1 - 7, 9 - 13, and 18 - 24. I am not adopting these findings in their entirety. Instead, I am including only those stipulated findings I find relevant to my Decision. Moreover, I am conforming those findings to the style and format of my Decision.

[5] To protect this patient's privacy, I will refer to the patient by her initials only.

5. On October 11, 1988, MM presented her Medi-Cal card to Clinic personnel in connection with her treatment. I.G. Br. 4; P. Br. 3.

6. The Clinic's records indicate that MM was insured by Medi-Cal. I.G. Br. 4; P. Br. 3.

7. Petitioner was not licensed to treat MM as she did at the Clinic on October 11, 1988. I.G. Br. 4; P. Br. 3.

8. Petitioner's co-worker was not licensed to inject MM with penicillin, as Petitioner instructed him to do on October 11, 1988. I.G. Br. 4 - 5; P. Br. 3.

9. The Stanislaus County Superior Court (State court) found Petitioner guilty, after a jury trial, of a misdemeanor -- practicing medicine without a certificate -- in connection with MM's treatment at the Clinic on October 11, 1988. I.G. Br. 5; P. Br. 3; I.G. Exs. 2 at 18, 3 at 2 - 3, 10 at 10, 11.

10. On June 19, 1990, Petitioner was sentenced to 30 days in jail, which sentence was suspended. Instead, Petitioner was placed on two years' probation conditioned on her not engaging in any health care service for which a certificate or license is required without being authorized to perform such service. Also, Petitioner was fined $750 plus penalty assessment. I.G. Br. 6; P. Br. 3.

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(a)(1) of the Act. 48 Fed. Reg. 21,662 (1983). I.G. Br. 7; P. Br. 3.

OTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

12. Medi-Cal (California's Medicaid program) is a State health care program as defined by section 1128(a)(1) of the Act.

13. MM was insured by Medi-Cal when she was treated by Petitioner. I.G. Exs. 4 at 2 - 3, 5 at 2, 6; Finding 6.

14. The I.G. offered no proof that a bill was submitted to Medi-Cal for Petitioner's services to MM on October 11, 1988. See, P. Br. 4; I.G. R. Br. 8.

15. Under section 1128(a)(1) of the Act, a conviction is related to the delivery of an item or service under Medicare or Medicaid where there exists a common sense

relationship between the criminal offense that has resulted in the conviction and the delivery of an item or service under Medicare or Medicaid. Thelma Walley, DAB 1367, at 9 (1992); Boris Lipovsky, M.D., DAB 1363 (1992); see also Jack W. Greene, DAB 1078 (1989), aff'd 731 F. Supp. 835 and 838 (E.D. Tenn. 1990).

16. For a conviction to form the basis for an individual's or entity's exclusion under section 1128(a)(1) of the Act, that individual or entity need not have been convicted of a criminal offense involving the submission of fraudulent claims to Medicare or Medicaid. See Finding 15.

17. Petitioner's employers and co-workers at the Clinic were convicted of various charges relating to crimes committed against Medi-Cal during the period from January to November 1988. I.G. Exs. 2, 10; P. Ex. 3; I.G. Br. 5 - 6; P. Br. 2.

18. From January to November 1988, the Clinic was accepting patients covered by Medi-Cal, and physicians' Medi-Cal provider numbers were used illegally by Petitioner's employers and co-workers at the Clinic to perpetrate financial fraud against Medi-Cal. I.G. Exs. 2, 3 at 3; I.G. Br. 5 - 6; P. Br. 2; Finding 17.

19. Petitioner was acquitted of charges that she conspired with others in unlawfully examining, diagnosing, and treating patients on October 3, October 18, and November 8, 1988. I.G. Exs. 10 at 5 - 6, 11; P. Ex. 3 at 2.

20. Petitioner was convicted of having committed an offense in connection with her delivery of health care services to MM on October 11, 1988. Findings 9, 19.

21. The specific count of the Information on which Petitioner's conviction was based stated that, on October 11, 1988, Petitioner diagnosed, treated, and prescribed for MM's physical condition without Petitioner's having a valid certificate and authorization to practice medicine. I.G. Ex. 2 at 14, 3 at 2, 10 at 10, 11.

22. Petitioner's acquittal of charges that she conspired with others to unlawfully examine, diagnose and treat patients on October 3, October 18, and November 8, 1988, does not establish that her conviction for treating MM on October 11, 1988 was unrelated to the delivery of services under Medicaid. Findings 19, 20, 21.

23. The medical condition for which MM sought treatment at the Clinic on October 11, 1988 related to syphilis. I.G. Ex. 5.

24. There is no evidence that the Clinic asked MM to pay for the services rendered by Petitioner on October 11, 1988.

25. There is no evidence that MM ever paid for the medical services provided by Petitioner on October 11, 1988.

26. 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 4 - 9, 15, 16, 18, 20 - 25.

27. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act. Findings 11, 26.

28. The I.G. is required to exclude Petitioner for a minimum period of five years. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

29. Petitioner's conviction also relates to patient abuse or neglect in connection with the delivery of a health care item or service. Findings 1 - 9; section 1128(a)(2) of the Act.

30. It would be inequitable to Petitioner, and it would not serve the interest of judicial economy, to grant the I.G.'s motion to supplement the October 15, 1992 notice excluding Petitioner in the manner proposed by the I.G. See I.G. Supp. Br. 3 - 5; I.G. Ex. 12.

31. I have the authority to consider section 1128(a)(2) of the Act as a basis for the five-year exclusion already directed and imposed against Petitioner by the I.G., even though the I.G. did not identify it as a basis for Petitioner's exclusion in the I.G.'s October 15, 1992 notice of exclusion. 42 C.F.R. §§ 1001.2007(a)(1), 1005.15(f)(1), 1005.4(b).

32. The five-year exclusion that commenced 20 days after the I.G.'s issuance of the October 15, 1992 notice of exclusion is mandatory also under section 1128(a)(2) of the Act. Findings 29, 31; section 1128(c)(3)(B) of the Act.

DISCUSSION

I. THE I.G. PROPERLY IMPOSED AND DIRECTED A FIVE-YEAR EXCLUSION PURSUANT TO SECTION 1128(a)(1) OF THE ACT.

I am deciding this case pursuant to the parties' cross-motions for summary judgment because there exists no genuine issue of material fact under section 1128(a)(1) of the Act, and the only matter to be adjudicated is the legal significance of certain stipulated or undisputed facts.

As I explain below, central to Petitioner's position (that her conviction is not related to the delivery of an item or service under Medicaid) is the absence of any evidence that Medicaid was billed for the services upon which Petitioner's conviction was based. See Finding 14. Central to the I.G.'s position (that Petitioner's conviction is related to the delivery of a service under Medicaid) are the stipulations and uncontradicted evidence establishing that Petitioner was convicted of having delivered health care services to a patient who was, in fact, insured by Medi-Cal and who had presented her Medi-Cal card in connection with the medical treatment unlawfully provided by Petitioner. The I.G. asserts that Petitioner's services were provided during a period of time when the Clinic employing Petitioner was accepting Medi-Cal patients and Petitioner's employers and co-workers at the Clinic were committing various financial crimes against Medi-Cal. See Findings 1 - 10, 18.[6]

The parties' legal opinions differ as to what facts are necessary to prove that Petitioner's conviction is program-related under section 1128(a)(1) of the Act. Each party believes that, as a matter of law, no significance can be given to the stipulated or uncontroverted facts relied upon by the other party on the program-relatedness issue.

For the reasons that follow, I find that Petitioner's motion for summary judgment must be denied as a matter of law. The I.G. has established a prima facie case against

---

[6] The record of the criminal proceedings does not state specifically that the individuals convicted of the specified crimes against Medi-Cal were Petitioner's employers and co-workers at the Clinic. However, the I.G. has so described them, and Petitioner does not dispute the I.G.'s description. I.G. Br. 5 - 6; P. Br. 2.

Petitioner under section 1128(a)(1) of the Act by satisfying each statutory element of section 1128(a)(1) using facts that are either uncontroverted, clear from the record, or not reasonably subject to differing interpretations. Petitioner has failed to dispute the I.G.'s prima facie case with evidence showing that any genuine issue of material fact remains. I therefore find that the I.G. is entitled to summary judgment in her favor under section 1128(a)(1) of the Act.

A. A conviction involving fraudulent billing of Medicare or Medicaid is not a prerequisite to Petitioner's exclusion under section 1128(a)(1) of the Act.

In order for the I.G. to establish a basis for a minimum mandatory five-year exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act, the I.G. must prove first that an excluded person has been convicted of a criminal offense, and, second, that the criminal offense relates to the delivery of an item or service under Medicare or Medicaid. Here, Petitioner does not contest that she was convicted of a criminal offense. However, Petitioner does contest whether her conviction relates to the delivery of an item or service under the Medicaid program. P. Br. 6.

Petitioner argues that the patient she treated on October 11, 1988, MM, was not a recipient of Medicaid services because, even though the patient was eligible for Medi-Cal covered services and had submitted her Medi-Cal card to the Clinic in connection with her treatment, there is no evidence showing that Medi-Cal was billed for those services. P. Br. 4, 6 - 9; P. Supp. Br. 2 - 5. Petitioner contends that, for her conviction to relate to the delivery of services under Medicaid, the I.G. must submit evidence proving the submission of a bill or a claim for services under Medicaid. Id..

I disagree. Billing to the programs may be evidence that a conviction is program-related. However, the absence of a bill does not establish as a matter of law that the conviction is unrelated to the programs.

As the cases cited by Petitioner hold, if the evidence underlying the conviction proves that a fraudulent bill or claim for services has been submitted to Medicare or Medicaid, the I.G. may impose an exclusion under section 1128(a)(1) of the Act. The decisions cited by Petitioner -- H. Gene Blankenship, DAB CR42 (1989); David D. DeFries, D.C., DAB CR156 (1991), aff'd DAB 1317 (1992);

Michael I. Sabbagh, M.D., DAB CR20 (1989); DeWayne Franzen, DAB CR58 (1989), aff'd DAB 1165 (1990); Carolyn C. Nagy, DAB CR182 (1992); and Greene -- all involve fact situations where there was evidence of billing. However, nothing in the language of these decisions suggests that an exclusion may not be imposed under section 1128(a)(1) of the Act unless reimbursement has been sought from Medicare or Medicaid. Other criminal acts may be related to (e.g., arise from, impact upon, or result in) the delivery of items or services under these programs.

B. There exists a common sense nexus between the acts underlying Petitioner's conviction and the delivery of services under Medicaid.

Departmental Appeals Board administrative law judge and appellate panel decisions have held that if there is a "common sense connection" between an offense and the delivery of an item or service under Medicare or Medicaid, then exclusion under section 1128(a)(1) is proper. Walley, DAB 1367, at 9. Thus, for a conviction to be "related to" section 1128(a)(1), Departmental Appeals Board precedent suggests that there must be some nexus between the delivery of an item or service under the programs and the offense. Id.. Moreover, this determination is not made merely on "a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court." Blankenship, DAB CR42, at 11. While committing an offense against a Medicaid patient is not per se grounds for imposing an exclusion under section 1128(a)(1), such grounds exist when the offense was committed against a Medicaid patient in the course of delivering services to that patient under Medicaid. Jerry L. Edmonson, DAB CR59, at 8 (1989) (upholding an exclusion under section 1128(a)(1) based on a nursing home administrator's conviction for having misapplied funds of a Medicaid recipient-patient that had been held in trust as a condition of the facility's participation in Medicaid).

The stipulated facts relating to Petitioner's conviction are that Petitioner, a registered nurse working in a medical clinic, was convicted of practicing medicine without a certificate when she treated patient MM on October 11, 1988. MM had presented her Medi-Cal card to the Clinic in connection with the treatment she received that day. Petitioner unlawfully provided diagnosis, treatment, and prescription for MM's medical condition, in addition to having directed another unlicensed employee of the Clinic to give MM an injection of penicillin. Findings 1 - 8. Petitioner was then

prosecuted and convicted for having provided medical services to this particular patient on October 11, 1988 without having been licensed or authorized to do so under State law. Findings 9, 10.

On the face of these undisputed facts alone, there exists a common sense connection between the delivery of services under the Medicaid program and Petitioner's conviction. Petitioner's presentation of her Medi-Cal card on October 11, 1988 was, in the words of the parties' stipulation, "in connection with her treatment" on October 11, 1988. I.G. Br. 4; P. Br. 3. After treatment was provided by Petitioner to MM in the foregoing context, the mere absence of a Medi-Cal reimbursement claim for Petitioner's illegal services to MM does not materially alter the common sense nexus between Petitioner's conviction and the program.

There is no evidence to suggest (and Petitioner has not alleged) that if MM had not presented her Medi-Cal card in connection with her treatment on October 11, 1988, Petitioner would have delivered the health care services upon which her conviction was based. In cross-moving for summary judgment in her favor, Petitioner has presented no evidence or argument to suggest that she provided services to MM for reasons unrelated to MM's status under Medi-Cal or MM's presentation of her Medi-Cal card at the Clinic. There is no indication in the record that MM was ever told by Petitioner or the Clinic that no Medi-Cal covered services would be delivered to her, that the Clinic would not accept Medi-Cal patients, or that MM could not receive medical services on presentation of her Medi-Cal card. There is also no evidence or allegation that the Clinic rejected MM's Medi-Cal card on October 11, 1988 or that MM may have presented the card for reasons that were unrelated to her seeking the delivery of services under Medi-Cal.

According to Petitioner's notes, MM sought treatment at the Clinic for symptoms of syphilis, and, on October 11, 1988, MM was given an injection of penicillin on Petitioner's authorization. Findings 4, 23; I.G. Ex. 5. In opposing the I.G.'s motion for summary judgment and in support of her own cross-motion, Petitioner has introduced nothing to suggest that Medi-Cal might not have covered the services necessitated by MM's medical condition on October 11, 1988, had such services been rendered by a properly licensed health care professional at a clinic that was using Medi-Cal provider numbers legally. Petitioner has never alleged that the services sought by MM on October 11, 1988 were not covered under the Medi-Cal program.

I am aware (from my examination of the evidence regarding the convictions of Petitioner's employers and co-workers) of the possibility that the Clinic and its employees may not have been authorized to provide Medi-Cal covered services to MM. See, I.G. Ex. 2; P. Ex. 3. As discussed below, MM did not receive the quality of medical services to which she was entitled under Medi-Cal. It appears highly unlikely that Medi-Cal would have authorized or paid for Petitioner's delivery of services if those services contravened State law. However, the program-relatedness of a conviction does not turn on whether the services at issue were legal or appropriate under Medi-Cal, or whether they were delivered by authorized program providers. Therefore, these factors are not of sufficient legal significance to support Petitioner's position.

The convictions of Petitioner's employers and co-workers for Medicaid fraud committed during January to November 1988 establish that the Clinic was accepting Medi-Cal patients and illegally using physicians' Medi-Cal provider numbers when Petitioner provided the treatment to MM on October 11, 1988. See, I.G. Ex. 2; P. Ex. 3 at 1; Findings 17, 18.[7] These Medicaid fraud convictions are consistent with the common sense connection between Petitioner's own conviction and the delivery of services under the program. The facts disclosed by the others' convictions supply a logical explanation for why MM was able to present her Medi-Cal card and secure treatment on October 11, 1988 from Petitioner, an employee of the Clinic. Petitioner has not offered a different explanation or attempted to prove that the treatment provided to MM had no relationship to MM's status under Medi-Cal or to MM's presentation of her Medi-Cal card. The evidence before me does not raise any inference that is simultaneously favorable to Petitioner on the program-relatedness issue and consistent with the other undisputed material facts of record.

---

[7] Petitioner objects to the I.G.'s introduction of evidence relating to the conviction of other individuals who operated or worked at the Clinic. P. Br. 2, 12. However, the regulations at 42 C.F.R. § 1005.17(g) specify in relevant part:

> Evidence of ... acts others than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.

In addition, Petitioner has not disputed the I.G.'s evidence regarding Petitioner's awareness of MM's Medi-Cal status. Petitioner signed and annotated a Clinic form that showed MM's insurer as "Medical." I.G. Ex. 5 at 2. Petitioner has not attempted to prove or argue that the Clinic dealt with MM as a private-pay patient even though MM had presented her Medi-Cal card in connection with her treatment on October 11, 1988. There is, for example, no evidence concerning any bill from the Clinic to MM for the treatment provided by Petitioner. Nor has Petitioner introduced any evidence of payments either made by or owed by MM to the Clinic for her October 11, 1988 visit. There is, likewise, no evidence that the Clinic waived any fees that might have been owed by MM for services provided by Petitioner.

Petitioner acknowledges that presentment of a Medi-Cal card by an individual proves that an individual is eligible for Medi-Cal benefits. P. Supp. Br. 3. Here, I find that Petitioner's delivery of the services sought by the card-holder at no apparent cost to the card-holder is also consistent with the I.G.'s prima facie showing of program-relatedness under section 1128(a)(1) of the Act. Because the I.G. is not required to prove the program-relatedness of Petitioner's conviction beyond a reasonable doubt, the prima facie case of program-relatedness is not created, as suggested by Petitioner, only at the moment the provider seeks reimbursement from the program. Id.. Petitioner's reliance on the absence of a bill to Medi-Cal fails to rebut the I.G.'s prima facie showing of program-relatedness.

C. The acts underlying Petitioner's conviction also impacted on Medicaid and one of its recipients.

Petitioner is aware that the program-relatedness required by section 1128(a)(1) of the Act may be satisfied also by proof of "some impact on the Medicaid program." P. Br. 6. However, Petitioner argues that the program was not harmed by her practice of medicine without a license. P. Supp. Br. 4. In Petitioner's view, absent billing her services to Medi-Cal, her treatment of MM would have had no impact on the program. P. Br. 6 - 7. I disagree, finding the requisite impact or harm present in this case.

Medicare and Medicaid were enacted to enable their beneficiaries and recipients to receive health care items or services of the types and quality specified by the programs. See generally sections 1811 and 1901 of the Act. Federal law entitles all Medicaid recipients to

receive items or services that "shall not be less in amount, duration, or scope than the medical assistance" each participating State has made available to those who are not receiving Medicaid benefits. Section 1902(a)(10)(B)(ii) of the Act. Here, the State of California, which participates in the Medicaid program, proscribed nurses like Petitioner from providing the medical services that formed the basis for Petitioner's conviction. Findings 9, 12.

Under Medicaid, reimbursement to service providers exists to further the health delivery goals of the program. The health and well-being of Medicaid recipients is a central concern of the program. The billing process is neither the essence of the program nor an end in itself. Therefore, I find unreasonable Petitioner's argument that, without participation in the program's billing process, Petitioner's unlawful treatment of MM had no impact on Medicaid.

Given Medicaid's requirements and the purpose for which Medicaid exists, Petitioner's unlawful treatment of MM on October 11, 1988 has already impacted upon Medicaid by derogating its goals and the right of its recipients to quality health care under the program. The harmful effects of Petitioner's actions are not minimized or eradicated by the absence of a bill to Medi-Cal. Under section 1128(a)(1) of the Act, it is not necessary for Petitioner or anyone else to compound the harm Petitioner has already caused Medicaid by claiming payment from the program for services to MM that were illegal, substandard as a matter of law, and therefore non-reimbursable ab initio.

D. Neither Petitioner's acquittal nor any of her other arguments removes her conviction from the purview of section 1128(a)(1) of the Act.

Petitioner was acquitted of having conspired with others at the Clinic in examining, diagnosing, and treating patients, without the requisite license, on October 3, 1988, October 18, 1988, and November 8, 1988. Finding 19. Petitioner was never acquitted of any charge relating to her treatment of MM on October 11, 1988. Finding 20.[8] There is no overlap between her conviction

[8] Count I of the original Indictment against Petitioner and four co-defendants contains only a single mention of "October 11, 1988" and the patient MM. I.G.

(continued...)

for having treated MM on October 11, 1988 without a license and her acquittal of the charge of conspiring with others to treat unnamed patients on other days without proper licensure. I therefore reject Petitioner's argument that "[t]he only reasonable interpretation of these acquittals is to show that Ms. Jimenez was exonerated of all program-related offenses." P. Br. 10.

I further reject Petitioner's argument that the I.G. has not proven that Petitioner's conviction was program-related because the I.G. relied on "unsubstantiated hearsay for which the Petitioner was acquitted." P. Br. 11. Petitioner has not introduced a transcript of the criminal proceedings or other evidence demonstrating that the I.G. is using "unsubstantiated hearsay" or that such hearsay resulted in any acquittal. It is well settled that hearsay is not per se inadmissible in administrative proceedings. Petitioner has not objected to the admission of I.G. Ex. 1, containing the State's investigative reports. P. Br. 2. The record fails to show that the State's investigative reports are either unreliable or immaterial to the underlying question of whether Petitioner's conviction is related to the delivery of services under Medicaid.

The State's investigative reports contain information material to several factual contentions raised by Petitioner. For example, the investigative reports contradict Petitioner's allegation that the State decided to arrest and prosecute her merely because she happened to have been an employee of the Clinic at the time of her co-workers' arrests pursuant to the State's sting operation. P. Hearing Request at 2; I.G. Ex. 1. Also, contrary to Petitioner's allegations to me, Petitioner was not hired by the Clinic well after the State's Bureau of Medicaid Fraud had concluded its investigation of the practices taking place at the Clinic. Instead, the record indicates that Petitioner was hired by the Clinic

---

[8] (...continued)
Ex. 2 at 9 ("Overt Act No. 22"). The elements of the offense alleged in "Overt Act No. 22" do not reflect any allegation of Medicaid fraud. Moreover, "Overt Act No. 22" alleged an offense by Lee Daoun, who had a separate trial, and the jury instructions applicable to the charges against Petitioner made no mention of MM or October 11, 1988 under Count I. I.G. Ex. 10; see also I.G. Ex. 3 at 2. Therefore, I conclude that Petitioner was not acquitted of any charge relating to her treatment of MM on October 11, 1988.

during the State's investigation of Medi-Cal fraud, that information regarding Petitioner's treatment of Medi-Cal patients (including MM) was gathered during the investigation, and that the acts resulting in Petitioner's conviction were discovered during the State's investigation. See I.G. Ex. 1 at 87.

The State's investigative report also fails to support Petitioner's contention that "this case does not involve government intervention preventing the actual billing." P. Br. 8 - 9. For example, the State had among its informants the individual who was asked by the Clinic to prepare its Medi-Cal claims forms. I.G. Ex. 1 at 85 - 86. On November 16, 1988, the informant preparing the Clinic's Medi-Cal billings alerted the State that the Clinic had delivered to her approximately 800 claims to be billed under Dr. EC's[9] Medi-Cal provider number for the period from October through November 3, 1988. I.G. Ex. 1 at 104. The parties' evidence does not disclose whether the informant then prepared or submitted such claims to Medi-Cal during the State's investigation. However, Dr. EC, the physician identified in MM's Clinic file and whose provider number was to have been used for the submission of these claims, had been notified by the State during October 1988 that his license to practice medicine had been suspended, and Dr. EC found another physician to "cover" the Clinic thereafter. I.G. Ex. 1 at 92, 113; I.G. Ex. 5 at 1. According to one of the State's informants, it was customary for the Clinic to get rid of all existing patient files every few months and start new files on the same patients when the Clinic changed doctors. I.G. Ex. 1 at 105 - 106. On November 22, 1988, all the cabinets at the Clinic that contained old patients' files were empty. Id.. By December 8, 1988, the State's investigators were serving search warrants, arresting suspects, and taking a formal statement from Dr. EC. I.G. Ex. 1 at 113 - 16.

Contrary to Petitioner's argument that government intervention had nothing to do with the absence of Medi-Cal billing for Petitioner's treatment of MM on October 11, 1988, the chronology of events reflected in the State's investigative reports indicates that government intervention in the Medi-Cal fraud investigation, as well as in the suspension of Dr. EC's license, may have

---

[9] To protect this physician's privacy, I will use his initials only.

I note that Dr. EC was identified in the Clinic's records as the physician in MM's case. I.G. Ex. 5 at 1.

contributed significantly to the absence of any Medi-Cal billing for MM's treatment. The records of the State's investigation also convince me that the absence of a Medi-Cal reimbursement claim for the services Petitioner provided MM on October 11, 1988 does not prove, as Petitioner alleges, that these services were not delivered under Medicaid. See P. Br. 9.

E. Excluding Petitioner under section 1128(a)(1) is consistent with the remedial purpose of the Act.

In upholding the five-year exclusion imposed and directed by the I.G. under section 1128(a)(1) of the Act, I note that the law has two purposes. While one purpose of section 1128 of the Act is to protect Medicare and Medicaid from fraud and abuse, a second, equally important purpose of the Act is to "protect the beneficiaries of those programs from incompetent practitioners and from inappropriate or inadequate care." S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987); See 57 Fed. Reg. 3298 (1992). Thus, excluding Petitioner on the facts of this case is consistent with the remedial purpose of the Act.

In addition, limiting exclusions under section 1128(a)(1) of the Act to those situations involving only billing offenses sends the wrong message to health care providers, i.e., that health care providers are at liberty to subject Medicare beneficiaries and Medicaid recipients to whatever illegal, harmful, or substandard medical services they wish so long as, by the time of the exclusion proceedings, Medicare or Medicaid has not received a bill for such services. Such an outcome would frustrate the federal interest in safeguarding the health and safety of those individuals for whose benefit section 1128 was enacted. Whether or not services provided to beneficiaries or recipients are charged to the programs, Medicare beneficiaries and Medicaid recipients who seek services by use of their program cards should not be put at the mercy of any unscrupulous, careless, or irresponsible health care practitioner who, for whatever reason, provides illegal, harmful, or substandard treatment to them. Moreover, even such "free" substandard, harmful, or illegal medical services are likely to have a significant fiscal impact on the programs when the program beneficiaries or recipients require treatment for resultant complications or overlooked ailments.

II. PETITIONER IS SUBJECT TO A CONCURRENT FIVE-YEAR EXCLUSION AS MANDATED BY SECTION 1128(a)(2) OF THE ACT.

I also affirm the five-year exclusion imposed and directed by the I.G. on the independent and alterative basis of section 1128(a)(2) of the Act. As explained below, summary disposition on this issue is appropriate given the undisputed material facts of record, the legal conclusions resulting from these undisputed facts, Petitioner's receipt of timely notice concerning the issue, and the absence of any meritorious objection to my deciding the issue in the present proceedings. In addition, I find that deciding the issue under the parties' pending cross-motions for summary judgment serves the interest of judicial economy and helps ensure that, in the future, Petitioner will not be subjected to an inequitable lengthening of her exclusion under section 1128(a)(2) of the Act.

A. Petitioner's conviction is related to the abuse or neglect of a patient in connection with the delivery of a health care item or service.

The extent of my foregoing discussions, as well as the parties' very considerable efforts in arguing their respective views on program-relatedness, reflect the burden of applying section 1128(a)(1) of the Act to a set of facts that fit squarely within the ambit of section 1128(a)(2) of the Act. The latter provision of the statute mandates a minimum exclusion period of no less than five years also. However, under section 1128(a)(2) of the Act, an exclusion is based on any conviction relating to patient abuse or neglect. Sections 1128(a)(2)[10] and 1128(c)(3)(B) of the Act.

Section 1128(a)(2) of the Act does not require that a health care item or service be delivered under Medicare or Medicaid, and, as explained in the regulations,

> The conviction need not relate to a patient who is a program beneficiary.

---

[10] "Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

42 C.F.R. § 1001.101(b). For an individual or entity to be subject to an exclusion under section 1128(a)(2), that individual or entity need only have been convicted of a criminal offense related to the abuse or neglect of patients in connection with the delivery of a health care item or service. Id..

Here, I find that in lieu of or in addition to having relied on section 1128(a)(1) of the Act in the original notice of exclusion, the I.G. could have imposed and directed a five-year exclusion against Petitioner under section 1128(a)(2) of the Act. As a matter of law, Petitioner's conviction for practicing medicine on a patient without a license satisfies the requirements of the Act.

A patient need not receive pommeling or undergo torture to be found "abused" or "neglected." Here, it is undisputed that Petitioner, an R.N., made a diagnosis, delivered a health care service, prescribed medication, and directed that a co-worker administer medication that was not ordered by a physician or any other professional responsible for treating MM's medical condition under State law. Findings 2 - 9, 21. Petitioner endangered MM's life and health by treating MM without the medical training, qualifications, or experience deemed necessary by the State. Petitioner also caused another unlicensed and unqualified employee of the Clinic to endanger MM's life and health by injecting MM with penicillin. Findings 4, 8. In short, on October 11, 1988, Petitioner abused or neglected the health and safety of patient MM, and, therefore, her conviction for treating MM on that date is related to patient abuse or neglect.

On October 1, 1993, I asked the parties to brief the issue of whether I might sustain the exclusion against Petitioner based on section 1128(a)(2) of the Act where the I.G. relied only on section 1128(a)(1) of the Act in her notice of exclusion.

Petitioner argued that I lack the authority to decide the case under section 1128(a)(2) and, also, that her conviction is not related to patient abuse or neglect. P. Supp. Br. 5 - 6. Thereafter, Petitioner waived her right to submit a supplemental reply brief to present additional arguments.

The I.G. found no specific regulation on the issue of my authority to apply section 1128(a)(2) as a basis for Petitioner's exclusion where section 1128(a)(2) was not identified in the I.G.'s notice of exclusion as a basis for Petitioner's exclusion. The I.G. has moved to

supplement the notice of exclusion. Even though Petitioner has not formally objected to the I.G.'s motion, I construe her argument against my considering section 1128(a)(2) of the Act as an objection to the I.G.'s motion.

B. I am denying the I.G.'s motion to supplement the notice of exclusion as proposed in I.G. Ex. 12.

The I.G. proposes to supplement her notice of exclusion in a manner that is unclear.

The I.G. provided an undated copy of her proposed supplemental notice of exclusion as an exhibit (I.G. Ex. 12) and asked in her motion that the minimum five-year exclusion mandated by section 1128(a)(2) of the Act take effect 20 days after I grant the motion to supplement. I.G. Supp. Br. 4 at n. 5. However, the language of the I.G.'s proposed supplemental notice suggests that the new exclusion will be coterminous with the exclusion the I.G. had imposed earlier under section 1128(a)(1) of the Act. I.G. Ex. 12 at 1.[11] As grounds for imposing the amended exclusion, the I.G.'s proposed notice cites the same conviction as the one identified in the I.G.'s October 15, 1992 notice of exclusion.

Petitioner has already been under an exclusion since November 1992. The issuance of the I.G.'s October 15, 1992 notice of exclusion caused Petitioner's exclusion to commence 20 days after the date of that letter. It is not clear why, if the new exclusion is to be coterminous with the existing one, the I.G. is also seeking leave to have the new exclusion take effect 20 days after I grant the I.G.'s motion. I am concerned that my granting the I.G.'s motion may in fact lengthen Petitioner's exclusion period beyond what is stated in the I.G.'s October 15, 1992 notice of exclusion and the I.G.'s proposed amended notice.

Even though I find it appropriate to consider the present case under section 1128(a)(2) of the Act, my granting the I.G.'s motion may create too many collateral issues of law. Such issues may include, for example, whether to treat the period of time between November 1992 and a new effective date for the proposed exclusion as a legal

---

[11] This exclusion, which becomes effective 20 days from the date of this letter, will run concurrently with your existing exclusion under section 1128(a)(1) of the Act, and be coterminous with it. I.G. Ex. 12 at 1.

nullity or as a de facto lengthening of the minimum five-year exclusion as specified by the Act. The record suggests no basis for increasing the minimum exclusion period of five years pursuant to any "aggravating" factor enumerated in the regulations. 42 C.F.R. § 1001.102(b). Moreover, however one characterizes the period between November 1992 and the present, the I.G.'s supplemental notice cannot effectively restore to Petitioner the time between November 1992 and the present.

The ambiguities inherent in the I.G.'s motion and proposed notice may produce results that are not equitable to Petitioner and that are not likely to advance the interest of judicial economy. I am therefore denying the I.G.'s motion.

C. I have the authority to find that the five-year exclusion imposed and directed by the I.G. is sustainable under section 1128(a)(2) of the Act.

Petitioner argues that I am precluded by the regulations at 42 C.F.R. § 1005.4(c) from considering the applicability of section 1128(a)(2) in the present case. P. Supp. Br. 5 - 6. This regulation states,

> The ALJ does not have authority to - (5) Review the exercise of discretion by the OIG to exclude an individual or entity under section 1128(b) of the Act, or determine the scope or effect of the exclusion.

42 C.F.R. § 1005.4(c)(5) (emphasis added). This regulation is inapposite, for it refers to the I.G.'s discretion to impose or not impose the permissive exclusions identified in section 1128(b) of the Act. The regulation does not speak to the mandatory exclusions directed by section 1128(a)(1) and (2) of the Act, which the Secretary and her delegates have no discretion to waive.

I have the authority to consider the mandatory provisions of section 1128(a)(2) in deciding the legal validity of the five-year exclusion the I.G. directed and imposed against Petitioner under section 1128(a)(1) of the Act. The issue in this case is not limited to the four corners of the I.G.'s notice of exclusion. I have jurisdiction to decide the broader question of,

> whether:

> (i) The basis for the imposition of the sanction exists ....

42 C.F.R. § 1001.2007(a)(1)(emphasis added). Upon proper notice to the parties, "[a] hearing under this part is not limited to specific items and information set forth in the notice letter to the petitioner...." 42 C.F.R. § 1005.15(f)(1). Also, I have the authority to regulate the course of the hearing and consider other matters that may be expeditious to the disposition of the proceedings. 42 C.F.R. § 1005.4(b).

Here, the I.G.'s motion to supplement her notice to Petitioner reflects the I.G.'s determination that section 1128(a)(2) of the Act should be used as an additional and independent basis for imposing an exclusion against Petitioner. The I.G.'s motion provided notice of the issue to Petitioner. I, too, have given the parties the opportunity to brief whether the present exclusion is sustainable under section 1128(a)(2) of the Act.

Moreover, the nature of Petitioner's conviction and its relationship to the elements of section 1128(a)(2) are clear from the undisputed facts before me. There is no legal or factual support for Petitioner's conclusive statement that her conviction is unrelated to patient abuse or neglect. P. Supp. Br. 6. She incorrectly suggests that patients may not be considered abused or neglected unless they have been physically assaulted, beaten, slapped, shoved, or otherwise brutalized. Id.. I find this interpretation to be facially illogical and contrary to the intent of Congress in enacting section 1128(a)(2), i.e., the protection of the health and safety of program beneficiaries and recipients.

At this time, not adjudicating the issue of whether Petitioner's conviction forms an alternate basis for her five-year exclusion would generate unnecessary proceedings in the future and could cause Petitioner irreparable injury. Petitioner has been excluded since November, 1992. If I limited my decision to section 1128(a)(1), and if Petitioner were to prevail on her position that she is not subject to an exclusion under that section of the Act, Petitioner will have suffered the effects of the section 1128(a)(1) exclusion until the date it is overturned, and the I.G. must again impose and direct an exclusion of not less than five more years against her under section 1128(a)(2) of the Act. Petitioner should not be subjected to the possibility of undergoing a second mandatory exclusion arising from the same conviction.

In addition, section 1128(a) exists for the protection of Medicare and Medicaid and their beneficiaries and recipients. In the adjudicative process, administrative law judges must help ensure that section 1128 of the Act is applied properly. Thus, when, as here, the basis for mandatory exclusion as set forth in the I.G.'s original notice is clearly under-inclusive, and the I.G. has moved to augment the basis for the exclusion, I have the authority to apply another mandatory provision of section 1128(a) to safeguard the interests of the programs and those served by the programs, to expedite a resolution of all potential issues of record, and to minimize the risk of unreasonable consequences to Petitioner.

For all of the foregoing reasons, I conclude that both sections 1128(a)(1) and (a)(2) of the Act constitute proper alternative and independent bases for the five-year exclusion imposed and directed by the I.G. in the October 15, 1992 notice letter.

CONCLUSION

Under section 1128(a)(1) of the Act and, alternatively, under section 1128(a)(2) of the Act, I affirm the five-year exclusion imposed and directed against Petitioner by the I.G.. Said exclusion took effect 20 days after the I.G.'s October 15, 1992 notice letter and the mandatory period of exclusion, under either section of the Act, will not end until five years from the date the exclusion first took effect.

/s/

Mimi Hwang Leahy
Administrative Law Judge