Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sandra Lee,	DATE: February 25, 1994
Petitioner,	Docket No. C-93-115
- v. -	Decision No. CR306
The Inspector General.	

DECISION

By letter dated June 4, 1992, the Inspector General ("I.G.") of the U.S. Department of Health & Human Services ("HHS"), attempted to notify Sandra Lee, the Petitioner herein, that it had been decided to exclude her for a period of five years from participation in the Medicare program and the State health care programs which are encompassed by section 1128(h) of the Social Security Act ("Act") and referred to as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by 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. The letter was returned to the I.G. as undeliverable.

By letter dated June 28, 1993, Petitioner requested review of the I.G.'s action by an administrative law judge of HHS's Departmental Appeals Board ("DAB"). On September 17, 1993, I conducted a telephone prehearing conference in this case. At the prehearing conference, the I.G. admitted that Petitioner had not previously received the June 4, 1992 notice letter. Therefore, the I.G. did not contend that Petitioner's request for a hearing was untimely. See Prehearing Order and Schedule for Filing Motions for Summary Disposition, dated September 20, 1993. The I.G. moved for summary disposition on the merits of the case.

Since I find that there are no facts of decisional significance genuinely in dispute,[1] and the only matters to be decided are the legal implications of the undisputed facts, I have granted the I.G.'s motion and decided the case on the basis of the parties' written submissions.

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.

PETITIONER'S ARGUMENT

Petitioner contends: (1) that the evidence against her in the prior criminal proceedings was biased and perjured, and that she is innocent of any intentional wrongdoing; (2) that she had not been fully and accurately advised as to the consequences of pleading no contest; (3) that her son was very ill at the time her company was being investigated, making it impossible for her to concentrate on presenting an adequate defense during the Florida investigation or initiating an appeal to the Secretary; and (4) that mitigating evidence and circumstances are present in her case. Letter of June 28, 1993 from Kathleen Reynolds, Esq., to the DAB; see also Petitioner's Motion for Summary Disposition.

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[1] Although Petitioner argued that numerous disputed issues of fact exist, I find that they related to matters exclusively within the purview of the State court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was an administrator and part owner of Sunshine Home Health Services, Inc. ("Sunshine"), of Florida. I.G. Ex. 8[2]; see I.G. Ex. 1[3].

2. The Florida Office of the Auditor General, Medicaid Fraud Control Unit ("MFCU") conducted an investigation of the Medicaid claims filed by Sunshine. I.G. Ex. 8; see I.G. Ex. 1.

3. Petitioner was charged by criminal information with a second degree felony of Grand Theft for submitting Medicaid claims for services which were not authorized by the attending physician in the case and was charged by criminal information with a third degree felony of Medicaid fraud for filing Medicaid claims for services which were not rendered as stated on the claim. I.G. Ex. 8; see I.G. Ex. 2.

4. For both counts, as specified in the preceding paragraph, Petitioner filed or caused to be filed, a claim for Medicaid reimbursement. Each claim was paid by Medicaid and caused a Medicaid overpayment. I.G. Ex. 8

5. On November 6, 1991, in Florida Circuit Court, Leon County, Petitioner pled nolo contendere to Medicaid Fraud. I.G. Ex. 8; see I.G. Ex. 3.

6. The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida accepted Petitioner's nolo plea, entered an "Order Withholding Adjudication of Guilt

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[2] The I.G. and the Petitioner entered into a separate stipulation in which they agreed to certain undisputed facts and agreed also to the genuineness of certain documents. This stipulation is entered in the record as I.G. Ex. 8.

[3] The I.G. submitted eight exhibits. I cite the I.G.'s exhibits as "I.G. Ex. (number) at (page)." Petitioner submitted four exhibits. The I.G. contested the relevancy of Petitioner's exhibits to her appeal of her exclusion. I admit into evidence I.G. Ex. 1-8 and P. Ex. 1-4. I find, however, that P. Ex. 1-4 are entitled to little weight because they appear to address circumstances relating to Petitioner's underlying criminal conviction.

and Placing Defendant on Probation," and put her on supervised probation for a period of three years. On December 18, 1991, the Court also entered a "Restitution Order," which ordered Petitioner to pay $3328 restitution to the Florida Medicaid program. I.G. Ex. 8; see I.G. Ex. 3, 4.

7. By letter dated February 6, 1992, Petitioner was notified by the Office of Investigations ("OI") of HHS that, as a result of her criminal conviction, the I.G was preparing to exclude her from the Medicare and Medicaid programs. I.G. Ex. 8; see I.G. Ex. 5.

8. The letter of February 6, 1992 informed Petitioner that formal notification of any action taken would be sent to her, as would information about her appeal rights. I.G. Ex. 5.

9. By letter dated April 13, 1992, Petitioner responded to the February 6, 1992 OI letter. I.G. Ex. 8; see I.G. Ex. 6.

10. By letter dated June 4, 1992, the Director, Health Care Administrative Sanctions, OI, attempted to advise Petitioner of her exclusion from Medicare and any State health care program as defined by § 1128(h) of the Act, due to her conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. The letter was returned to OI as undeliverable to Petitioner. I.G. Ex. 8; see I.G. Ex. 7.

11. There is no evidence that Petitioner received the June 4, 1992 notice of her exclusion prior to these proceedings. Finding 10.

12. By letter dated June 28, 1993, Petitioner appealed her exclusion. I.G. Ex. 8.

13. Petitioner's nolo plea, and the Florida court's acceptance thereof, mean that she is considered to have been "convicted" of a criminal offense for purposes of the mandatory exclusion law, within the meaning of section 1128(i)(3). Findings 5-6; Social Security Act, section 1128(i)(3).

14. Pursuant to the November 6, 1991 "Order Withholding Adjudication of Guilt and Placing Defendant on Probation", an entry of a formal finding of guilt against Petitioner was deferred. This was a deferred adjudication constituting a "conviction" within the meaning of § 1128(i)(4). Finding 6; I.G. Ex. 3; Social Security Act, section 1128(i)(4).

15. The criminal behavior that Petitioner pled to involved financial misconduct, specifically, stealing from the Medicaid program, which clearly affected the program's capacity to deliver medical items or services, and, thus, mandated exclusion. Findings 3-5; Social Security Act, section 1128(a)(1).

16. Because Petitioner's criminal conviction related to the delivery of health care items or services under Medicaid, within the meaning of section 1128(a)(1) of the Act, the I.G. must exclude her for a period of at least five years. Findings 3-6, 13-14; Social Security Act, sections 1128(a)(1), 1128(c)(3)(B).

17. Under section 1128(a)(1), the fact that a relevant conviction has occurred mandates exclusion. The Secretary of HHS ("Secretary") is not permitted to look behind the conviction.

18. Petitioner may not utilize the Secretary's administrative proceedings to collaterally attack her criminal conviction by seeking to show that she did not do the act charged, that there was no criminal intent, or that the conviction was tainted by legal error.

19. The administrative law judge is not authorized to reduce the length of a mandatory five-year period of exclusion.

20. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for five years, as required by section 1128(c)(3)(B) of the Act.

DISCUSSION

The regulations, at 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), require that Petitioner file her request for a hearing within 60 days after receipt of notice of the exclusion. In the present case, the parties stipulated that "[t]he [June 4, 1992] letter was returned to the Office of Investigations as undeliverable to [Petitioner]." I.G. Ex. 8, at 2. There is no evidence that Petitioner received the I.G.'s notice letter prior to these proceedings. The I.G. did not contend that Petitioner's request for a hearing was untimely. Accordingly, I am disposing of this case on the merits.

The section of the Act under which the I.G. seeks Petitioner's exclusion, 1128(a)(1), contains two requirements. It requires that an individual (1) be

convicted of a criminal offense, and (2) that such conviction be related to the delivery of an item or service under Medicare or Medicaid.

In the case at hand, Petitioner pled nolo contendere and the Florida court accepted her plea and imposed a substantial sentence. Section 1128(i) of the Act expressly states that when an individual enters a nolo plea, and the court accepts the plea, such individual is considered to have been "convicted" of a criminal offense for purposes of the mandatory exclusion law. Section 1128(i)(3) of the Act.

I note that the State judge's Order was entitled "Order Withholding Adjudication of Guilt and Placing Defendant on Probation." This implies, as is the practice in many State "first offender" programs, that formal adjudication of Petitioner's guilt might never be entered on the record -- or it might later be totally expunged -- if she complies with the terms of her probation and otherwise manifests good behavior. However, under section 1128(i) of the Act, an individual will continue to be regarded as having been "convicted" regardless of whether his criminal record is expunged or whether entry of a formal finding of guilt is deferred. Sections 1128(i)(1) and (4) of the Act. I conclude that the State judge's Order was a deferred adjudication within the meaning of § 1128(i)(4). Thus, I find that Petitioner was "convicted" within the meaning of both sections 1128(i)(3) and (4).

Next, it is required by section 1128(a)(1) that Petitioner's criminal offense be related to the delivery of an item or service under Medicaid or Medicare. It is well-established in case precedent that financial crime directed at these programs, such as filing false Medicare or Medicaid claims, clearly affects their capacity to deliver medical items or services and, thus, constitutes clear program-related misconduct mandating exclusion. Jack W. Greene, DAB CR19, aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). In the present case, the record is sufficient to establish that the criminal behavior that Petitioner pled to involved financial misconduct, specifically, stealing from the Medicaid program. Petitioner's conviction, therefore, satisfies the statutory requirement of program-relatedness.

As noted previously, Petitioner argues, in essence, that she had been incriminated by false evidence given by her enemies, that she never had any intent to commit any wrongdoing, and that she was not guilty of the crimes

with which she had been charged. These arguments, however, are misplaced.

First, it is settled law that the mere fact that a person was convicted of a relevant criminal offense suffices to justify excluding him; criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1). DeWayne Franzen, DAB 1165 (1990).

Next, it must be emphasized that once it is shown that a program-related criminal conviction has occurred, exclusion for at least five years is mandatory under Sections 1128(a)(1) and 1128(c)(3)(B) as a purely derivative action. Thus, not only have our cases held that the intent of the individual committing the offense is not relevant, they hold also that we will not consider assertions that an individual is actually innocent, that his criminal conviction was unfair, or that the five-year mandatory exclusion specified in 1128(c)(3)(B) should be modified because of mitigating circumstances. See, e.g., Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992); DeWayne Franzen, DAB 1165 (1990); Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991); Peter J. Edmonson, DAB 1330 (1992).

In sum, section 1128(a)(1) does not permit the Secretary to look beyond the fact of Petitioner's conviction of a program-related criminal offense. Petitioner may not utilize the Secretary's administrative proceedings to collaterally attack her criminal conviction by seeking to show that she did not do the act charged, that there was no criminal intent, or that the conviction was tainted by legal error. Petitioner may have recourse in the courts to rectify these problems; this appeal is not a vehicle for such matters. Janet Wallace, L.P.N., DAB 1326, at 15 (1992); Richard G. Philips, D.P.M., DAB CR133, at 5-6 (1991); Peter J. Edmonson, DAB 1330, at 5 (1992). If, for example, the Petitioner herein felt that she lacked the state of mind required by law for conviction of a crime, she could have presented this argument to a judge or jury. She cannot re-litigate the criminal case here.

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of her criminal conviction for theft from the Medicaid program. This conviction is clearly related to the program's ability to deliver medical items or services. Neither the I.G. nor an administrative law

judge is authorized to reduce the five-year mandatory minimum period of exclusion. Greene, DAB CR19, at 12-14 (1989).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge