Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Teri L. Gregory,	)	DATE: October 3, 1994
Petitioner,	)	
- v. -	)	Docket No. C-93-080 Decision No. CR336
The Inspector General.	)	

DECISION

By letter dated May 10, 1993 (Notice), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Teri L. Gregory (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 as a result of her conviction of a criminal offense related to the delivery of an item or service under the Medicare and Medicaid programs, within the meaning of section 1128(a)(1) of the Social Security Act (Act). The I.G. advised Petitioner that exclusions of individuals convicted of program-related offenses are mandated by section 1128(a)(1) of the Act. The I.G. further advised Petitioner that section 1128(c)(3)(B) of the Act requires a five-year minimum period of exclusion.

Petitioner timely requested a hearing, and the case was assigned to me for hearing and decision. Based on the record before me, I conclude that Petitioner is subject to the mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act, and that Petitioner's exclusion for a minimum of five years is mandated by law.

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

PROCEDURAL BACKGROUND

During a September 7, 1993 prehearing conference, the parties agreed to proceed in this case by submitting written arguments supported by documentary evidence. Thereafter, the I.G. filed a brief, proposed findings of fact and conclusions of law, and four exhibits. Petitioner responded with a brief, proposed findings of fact and conclusions of law, and one exhibit.

Petitioner subsequently requested leave to amend her proposed findings of fact and conclusions of law. In the absence of objection from the I.G., I allowed Petitioner to amend her proposed findings of fact and conclusions of law. The I.G. filed a reply.

On March 22, 1994, I issued a Ruling in which I admitted into evidence the four exhibits submitted by the I.G. (I.G. Ex. 1 - 4) and the one exhibit submitted by Petitioner (P. Ex. 1). In addition, I concluded that neither party had convinced me to grant a judgment in their favor. I gave the I.G. an opportunity to further develop the record and Petitioner an opportunity to respond.

Thereafter, the I.G. filed a brief and three exhibits. These exhibits consisted of written statements signed by three individuals. In her responding brief, Petitioner argued that the three written statements offered by the I.G. were legally deficient because they were not sworn under penalty of perjury.

The I.G. replied by obtaining identical statements from the three individuals, which were sworn under penalty of perjury, and moved to substitute them for the previously submitted unsworn statements. Petitioner opposed the I.G.'s motion to substitute on the grounds that the substituted exhibits were untimely.

While Petitioner did not explicitly object to the written statements initially submitted by the I.G. on the grounds that the statements are not credible, her concern that the statements were not sworn under penalty of perjury implicitly raised questions about their credibility. In view of this, I offered Petitioner the opportunity to test the credibility of these statements by exercising her right to subpoena the declarants and to confront them at an in-person hearing. By telephone on July 25, 1994, counsel for Petitioner declined the offer for an in-person hearing and stated that Petitioner wished to proceed on the basis of a written record.

I subsequently issued a Ruling in which I granted the I.G.'s motion to substitute on the grounds that Petitioner had not demonstrated that allowing the I.G. to substitute the sworn statements for the previously submitted unsworn statements would prejudice her right to due process in this proceeding. I therefore admitted into evidence I.G. Ex. 5 - 7, which accompanied Petitioner's motion to substitute.

ISSUE

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

Uncontested FFCLs

The following are FFCLs to which Petitioner either admitted or specifically declined to contest in her Amended Proposed Findings of Fact and Conclusions of Law:

1. Petitioner worked as a certified nurse's aide at Sunny Knoll Care Center, Rockwell City, Calhoun County, Iowa, on March 11, 12, and 13, 1992. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

2. B.D., a 93-year-old individual diagnosed with senile dementia/Alzheimer type, was a resident of Sunny Knoll Care Center on March 11, 12, and 13, 1992, and a Medicaid recipient.[2] Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 2.

3. Petitioner was responsible for providing care to B.D. on March 11, 12, and 13, 1992. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 2.

4. On August 13, 1992, Petitioner was charged with the crime of theft in the fifth degree by taking control or possession of a wedding ring belonging to B.D. and appropriating it to her own use in violation of 1992 Code of Iowa, Section 714.2(5). Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

5. On August 24, 1992, Petitioner appeared in the District Court of Iowa in and for Calhoun County, and pled guilty to

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[2] I do not disclose the name of this individual, so as to respect her privacy.

the crime of theft in the fifth degree. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

6. On March 11, 12, and 13, 1992, B.D. was receiving items or services which were reimbursed by the Iowa Medicaid program. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 2.

7. Petitioner was convicted of a criminal offense. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

8. The Secretary of DHHS delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

9. On May 10, 1993, the I.G. notified Petitioner of her determination to exclude Petitioner for a period of five years, as required by law. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

10. Neither the I.G. nor an administrative law judge has the discretion or authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1.

Other FFCLs

11. The offense which formed the basis of Petitioner's conviction was committed sometime during the period from March 11 through March 13, 1992. I.G. Ex. 2, 3; P. Ex. 1.

12. The court's acceptance of Petitioner's guilty plea is demonstrated by the fact that, on August 24, 1992, it ordered Petitioner to pay a $50 fine, a $15 surcharge, and $25 in costs. I.G. Ex. 2.

13. The nurse's aide services Petitioner delivered to B.D. during the period from March 11 through March 13, 1992, were covered services reimbursed by Medicaid. FFCLs 1 - 3, 6; I.G. Ex. 1, 4- 7.

14. At the time that Petitioner committed the offense for which she was convicted, she was engaged in the performance of duties which were a part of the Medicaid-covered nurse's aide services she provided directly to B.D. P. Ex. 1; FFCLs 1 - 13.

15. Petitioner was convicted of a criminal offense related to the delivery of a service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCLs 1 - 14.

16. Petitioner may not utilize this administrative proceeding to collaterally attack her criminal conviction by seeking to show that there was no criminal intent.

17. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCLs 1 - 16.

DISCUSSION

The Act mandates exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Act, section 1128(a)(1).

The Act further requires that in the case of an exclusion imposed and directed pursuant to section 1128(a)(1), the minimum term of such exclusion "shall be not less than five years." Act, section 1128(c)(3)(B).

The I.G. asserts that Petitioner was convicted of a criminal offense that falls within the meaning of section 1128(a)(1) of the Act. The I.G. asserts therefore that Petitioner's exclusion was mandatory, and that Petitioner must be excluded for at least five years pursuant to section 1128(c)(3)(B).

In order for imposition of a five-year exclusion to be proper in this case, the following two statutory criteria have to be met: (1) Petitioner must be convicted of a criminal offense; and (2) the criminal offense must be related to the delivery of an item or service under Medicare or Medicaid.

I. Petitioner was convicted of a criminal offense.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under sections 1128(a)(1) and 1128(c)(3)(B) of the Act is that Petitioner must have been convicted of a criminal offense. In this case, it is undisputed that Petitioner was convicted of a criminal offense within the

meaning of the applicable provisions of section 1128 of the Act.

Section 1128(i) of the Act defines when a person has been convicted for purposes of an exclusion. That provision defines the term "convicted" of a criminal offense to include those circumstances "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court; . . ." Act, section 1128(i)(3).

In the case at hand, the record establishes that the State of Iowa charged Petitioner with the offense of committing theft in the fifth degree. FFCL 4. Petitioner appeared in the District Court of Iowa in and for Calhoun County and pled guilty to the charged offense. FFCL 5. The court's acceptance of that plea is demonstrated by the fact that, on August 24, 1992, it ordered Petitioner to pay a $50 fine, a $15 surcharge, and $25 in costs. FFCL 12. Petitioner admits that she was convicted of a criminal offense. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 1; FFCL 7. In view of the foregoing, I conclude that the undisputed facts establish that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

II. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under sections 1128(a)(1) and 1128(c)(3)(B) is that the criminal offense in question must be "program-related," i.e., related to the delivery of an item or service under Medicare or Medicaid. Throughout this proceeding, Petitioner has consistently maintained the position that the criminal offense for which she was convicted was not related to the delivery of an item or service under Medicare or Medicaid.

The name of the criminal offense which formed the basis of Petitioner's conviction is theft in the fifth degree. This offense does not mention Medicare, Medicaid, or any other State health care program, and on its face, there is no indication that it is related to the delivery of an item or service under Medicare or Medicaid. However, it is consistent with congressional intent for me to examine the facts underlying Petitioner's conviction in order to determine whether the statutory criteria of section 1128(a)(1) have been satisfied. In construing the language "related to the delivery of an item or service," the

administrative law judge stated in the case of H. Gene Blankenship:

> The test of whether a 'conviction' is 'related to' Medicaid must be a common sense determination based on all relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court.

DAB CR42, at 11 (1989). Thus, the question before me here is whether Petitioner's criminal offense is related to the delivery of an item or service under Medicare or Medicaid, not whether Petitioner was convicted under a criminal statute expressly criminalizing fraud against Medicare or Medicaid.

A. At the time I issued my March 22, 1994 Ruling, the record was insufficient to establish that Petitioner's criminal offense was program-related.

In this case, the I.G. submitted with her initial motion for summary disposition a statement of proposed findings of fact and conclusions of law. Petitioner responded by either admitting or explicitly declining to contest the following facts alleged by the I.G. Petitioner worked as a certified nurses's aide at Sunny Knoll Care Center, Rockwell City, Calhoun County, Iowa, on March 11, 12 and 13, 1992. B.D., a 93-year-old individual diagnosed with senile dementia/Alzheimer type, was a resident of Sunny Knoll Care Center on March 11, 12, and 13, 1992, and a Medicaid recipient. Petitioner was responsible for providing care to B.D. on March 11, 12, and 13, 1992. On August 13, 1992, Petitioner was charged with the crime of theft in the fifth degree by taking control or possession of a wedding ring belonging to B.D. and appropriating it to her own use in violation of 1992 Code of Iowa, Section 714.2(5). On August 24, 1992, Petitioner appeared in the District Court of Iowa in and for Calhoun County, and pled guilty to the crime of theft in the fifth degree. On March 11, 12, and 13, 1992, B.D. was receiving items or services which were reimbursed by the Iowa Medicaid program. Petitioner was convicted of a criminal offense. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraphs 1 and 2.

In addition, it is apparent from the court documents submitted by the I.G. that the complaint to which Petitioner pled guilty alleged that the offense occurred "on or about" March 11, 1992. I.G. Ex. 2, 3. In her affidavit, Petitioner asserts that she "found" B.D.'s ring on March 12, 1992, and that she "forgot" to return it that

day and the following day. P. Ex. 1. Thus, it is undisputed that the offense occurred some time during the period from March 11 through March 13, 1992.

In my March 22, 1994 Ruling, I found that the record before me at that time was insufficient to establish the requisite nexus between Petitioner's criminal offense and the delivery of a Medicaid item or service. I reaffirm my conclusion here.

The Act does not define what constitutes "related to the delivery of an item or service" under Medicare or Medicaid. However, case law precedent has recognized that the plain wording of the statute requires some "nexus" or "common sense connection" between the offense of which a petitioner was convicted and the delivery of an item or service under a covered program. Berton Siegel, D.O., DAB 1467 (1994). In drafting section 1128(a)(1), Congress required that a person be excluded when convicted of an offense related to the delivery of items or services under Medicare or Medicaid. Therefore, the plain meaning of the statute requires finding a nexus between a criminal offense and the delivery of a specifically identifiable item or service under one or more covered programs.

The record before me at the time that I issued my March 22, 1994 Ruling failed to show such a nexus. The uncontested facts established merely that the victim of the offense was a Medicaid recipient and that she was receiving items or services which were reimbursed by the Iowa Medicaid program on the date that the crime occurred. The uncontested facts did not establish the specific items or services which were reimbursed by the Iowa Medicaid program on the date in question. The I.G. must show that there exists some specifically identified item or service which relates to Petitioner's offense. Absent such a showing, it is not possible to determine whether the requisite nexus between the Medicaid items or services and the criminal offense is present.

In my Ruling I found that the requisite nexus would exist if the I.G. established that the nurse's aide services delivered to B.D. by Petitioner during the period from March 11 through March 13, 1992 were covered services under Medicaid. I reaffirm my conclusion here.

In Thelma Walley, DAB 1367 (1992), the petitioner was convicted of the criminal offense of unlawfully destroying tangible property belonging to other individuals. The petitioner in Walley was a nurse who committed the criminal offense of destroying medication belonging to patients at the facility where she worked. In its decision, an

appellate panel of the Departmental Appeals Board discussed ways in which the I.G. could satisfy the requirement to prove that the petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. The appellate panel stated that the requisite nexus would exist if the I.G. proved that the nursing facility services received by these patients on the date of the criminal offense, which services would necessarily include the responsibility for the administration and safekeeping of the medication, were covered services reimbursed by Medicaid.

Although the facts of the present case are not on all fours with the facts of Walley, the rationale used by the appellate panel in deciding that case can be applied here. The common material element in both Walley and this case is that, in both cases, the criminal offense involved a violation of standards of professional care.

In Walley, the appellate panel found that the duties of a nurse included the responsibility for the administration and safekeeping of medication. The expectation that a nurse will carry out this duty responsibly is an integral element of the services a nurse delivers. In Walley, the petitioner's criminal acts interfered with the delivery of her nursing services. Therefore, the appellate panel concluded that, if the I.G. proved that the nursing services delivered by the petitioner were covered by Medicaid, then the I.G. would satisfy the burden of proving that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid.

In this case, Petitioner, a nurse's aide, was convicted of stealing personal property of a patient under her care during the course of the patient's stay at the facility where Petitioner worked. The duties of a nurse's aide include the general care of the aide's patients. Theft of personal belongings violates professional standards of care expected of a nurse's aide. The expectation that Petitioner would not steal personal property from patients under her care was an integral element of the nurse's aide services she provided to her patients. Petitioner's criminal offense interfered with B.D.'s expectation that she could depend on Petitioner to deliver her nurse's aide services consistent with professional standards of care. Therefore, the I.G. had to prove that the nurse's aide services delivered by Petitioner in this case were covered by Medicaid in order to satisfy the requirement that Petitioner be 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.

In my Ruling, I found that the I.G. had not established that B.D.'s nurse's aide services were covered by Medicaid during the relevant period. I stated that although the I.G. asserted in briefs that Sunny Knoll Care Center was reimbursed by the Iowa Medicaid program for the nurse's aide services rendered by Petitioner to B.D. during the period from March 11 through 13, 1992, this assertion was not supported by the record before me at that time. I noted that this assertion was not included in the I.G.'s proposed findings of facts and conclusions of law and therefore Petitioner had not either admitted this assertion or explicitly declined to contest it. In addition, while the I.G. cited I.G. Ex. 4 to support this assertion, I found that this document was insufficient to establish that the nurse's aide services Petitioner rendered to B.D. on the date of the offense were covered by Medicaid, as the I.G. contended.

I.G. Ex. 4 is a copy of a payment summary for B.D. covering the period from March 1, 1992 through March 31, 1992. While the payment summary appears to be a business record of the Iowa Department of Human Services, it does not indicate that it is a payment summary for Medicaid reimbursement. The payment summary indicates that payments were made for items or services for the period March 1, 1992 through March 31, 1992, but it does not conclusively show the nature of items or services being reimbursed. The payment summary refers to "Intermediate Care Billing Claim", but it does not define what this term means. The payment summary does not establish that the items or services being reimbursed included the nurse's aide services delivered by Petitioner. Nowhere in the payment summary or elsewhere in the record are the various codes defined.[3] The evidence is insufficient to show whether the payment summary was in fact a Medicaid payment summary or whether the nurse's aide services Petitioner rendered to

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[3] In Thelma Walley, the appellate panel found similar deficiencies with regard to payment statements provided by the I.G. to support the assertion that the petitioner in that case was convicted of a criminal offense related to the delivery of an item or service under Medicaid. Thelma Walley, DAB 1367, at 10 - 11. The appellate panel stated that the payment statements were deficient for the additional reason that they did not conclusively show whether the payments covered items or services rendered on the day the offense was committed. In this case, however, the payment summary explicitly indicated that the payment covered services rendered on each of the 31 days during the period from March 1, 1992 through March 31, 1992.

B.D. on the date of the offense were covered by Medicaid, as the I.G. contends.

B. The I.G. brought forward sufficient evidence subsequent to my March 22, 1994 Ruling to establish that Petitioner's criminal offense is related to the delivery of a service under Medicaid.

Subsequent to my March 22, 1994 Ruling, the I.G. filed a brief and additional documentary evidence. I have examined those exhibits, and I now conclude that the I.G. has brought forward sufficient evidence to establish that Petitioner's criminal offense was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

I.G. Ex. 5 is the declaration of Joyce Welch, a Systems Support Worker III with the Iowa Department of Human Services. Ms. Welch identifies I.G. Ex. 4 as a copy of Form AA-4163-0, a form she uses to exchange information with nursing facilities on a monthly basis regarding the number of days of care provided to Medicaid-eligible patients. She states further that I.G. Ex. 4 is a copy of the Form AA-4163-0 submitted by the Sunny Knoll Care Center for the month of March 1992 for Medicaid patient B.D. Finally, Ms. Welch states that, based on the information contained in the form, Medicaid paid $908.24 to Sunny Knoll Care Center for 31 days of care provided to B.D. during the month of March 1992.

I.G. Ex. 6 is the declaration of Kathleen Kellen, Institutional Program Manager with the Iowa Department of Human Services, Bureau of Institutional and Community-Based Services. Ms. Kellen states that the Bureau of Institutional and Community-Based Services is responsible for the administration of the Iowa Medicaid program as it relates to participation of nursing facilities, including the establishment of facility per diem rates. Ms. Kellen states that, in March 1992, nurse's aide salaries were allowable costs for purposes of Medicaid per diem rate calculation.

Ms. Kellen's assertion is corroborated by an excerpt from the Iowa Department of Human Services Medicaid Provider Manual for Nursing Facilities, attached to her declaration, which states:

> A facility's per diem rate is intended to cover all normal costs of operating a nursing care facility. Included are fixed operating costs, building and medical equipment, salaries, disposable supplies, and all services provided to residents.

According to Ms. Kellen, the general policies and procedures described in the attachment were in effect in March 1992.

I.G. Ex. 7 is the declaration of Daniel T. Myers, the Chief Financial Officer of the Boyle Company, Inc., which owns the Sunny Knoll Care Center. Mr. Myers states that one of his employment duties is to prepare the Financial and Statistical Reports (cost reports) required by the Iowa Department of Human Services for nursing facilities certified to participate in Medicaid. The information contained in Schedule C of the cost report is used by the State to compute the per diem rate which will be paid the facility to cover the expenses of its Medicaid-eligible patients.

Attached to the affidavit of Mr. Myers is a copy of the cover sheet and Schedule C of the cost report he prepared for the Sunny Knoll Care Center for the period from January 1, 1992 through June 30, 1992. According to his affidavit, the amount listed on Line 42 of the attached Schedule C represents the total amount paid by Sunny Knoll Care Center for nurse's aide compensation during that period. Mr. Myers stated that wages paid to Petitioner for her nurse's aide services performed during the period from March 11 through 13, 1992 were included in Schedule C, Line 42 of the cost report and were used by the Iowa Department of Human Services to compute the per diem rate for services to Medicaid-eligible patients.

I am satisfied that the record now shows that the nurse's aide services Petitioner delivered to B.D. during the period from March 11 through 13, 1992 were covered services reimbursed by Medicaid. Ms. Welch, the declarant in I.G. Ex. 5, is an employee of the Iowa Department of Human Services, with an expertise in matters relating to Medicaid reimbursement. Her declaration conclusively establishes that I.G. Ex. 4 is a payment summary for Medicaid reimbursement. Her declaration establishes also that I.G. Ex. 4 shows that the Iowa Medicaid program paid $908.24 to Sunny Knoll Care Center for 31 days of care provided to patient B.D. during the month of March 1992.

I.G. Ex. 6 and I.G. Ex. 7 contain persuasive evidence as to how the $908.24 figure was calculated and what services it covered. Ms. Kellen, a State Medicaid program official, stated in her declaration that nurse's aide salaries are allowable costs for purposes of Medicaid per diem rate calculation. This evidence is persuasive because Ms. Kellen has expertise in establishing facility per diem rates and her declaration is corroborated by excerpts from a Medicaid program manual. Mr. Myers, the Chief Financial

Officer of the company that owns Sunny Knoll Care Center, provided persuasive evidence showing that the nurse's aide services delivered by Petitioner during the period from March 11 through 13, 1992 were used to calculate the per diem rate charged to Medicaid.

Petitioner has not raised a meaningful doubt that the information provided in I.G. Ex. 5 - 7 is unreliable or erroneous. The I.G. has satisfied me that the nurse's aide services received by B.D. during the relevant period were services covered by Medicaid and, thus, the offenses were related to the delivery of an item or service under Medicaid.

Petitioner argues that I.G. Ex. 4 is merely the bill submitted by Sunny Knoll Care Center for services provided to B.D. She argues that the I.G. has not shown that her nurse's aide services were "under" Medicaid because the I.G. has not proven that Medicaid paid for any of the billed services. Petitioner's argument is without merit.

Petitioner admitted in her statement of facts that on March 11, 12, and 13, 1992, B.D. was receiving items or services which were reimbursed by the Iowa Medicaid program. The declaration submitted by Joyce Welch establishes that I.G. Ex. 4 is the form used by the Iowa Medicaid program to ascertain the number of days of care which are provided to Medicaid-eligible patients. Ms. Welch attests that, based on the information contained in I.G. Ex 4, Medicaid paid Sunny Knoll Care Center for the care provided to B.D. during the relevant period. Petitioner has not brought forward any evidence to rebut this assertion. In the absence of evidence showing that Medicaid rejected Sunny Knoll's claim for services and refused to pay for the billed services, I find that the preponderance of the evidence establishes that the nurse's aide services were covered services which were reimbursed by Medicaid.

Petitioner argues that she should not be subject to an exclusion under section 1128(a)(1) because she did not intend to engage in criminal activity. In a declaration submitted by Petitioner, she avers that she found B.D.'s ring in a box of vinyl gloves. She states that just after she returned from her break on the morning of March 12, 1992, she was filling her cart with supplies such as sheets, gown, gloves, pads, and pillows. When she stuck her hand in the box to grab some gloves, B.D.'s ring fell out. Petitioner states that she put the ring in her pocket, fully intending to take it to the nurse's station so that it could be returned to its owner. According to Petitioner, she forgot about the ring until she went home. That night, she found the ring in her pocket and put it on

her finger to remind herself to turn it in the next day. When she returned to work the next day, she did not think about the ring and again forgot to turn it in at the nurse's station. Petitioner states that she did not intend to steal the ring, but that she pled guilty to the charge of theft because it would take too many resources to fight the charge. P. Ex. 1.

Petitioner's argument is without merit. Even assuming that Petitioner's assertion that she did not intend to steal B.D.'s ring is true, it is not relevant to the issue of whether the I.G. has the authority to exclude her in this case. Section 1128(a)(1) does not require that the individual must intend to commit a criminal offense for an exclusion to be proper. It merely requires that the individual's acts cause the individual to be convicted of an offense and that the offense be related to the delivery of an item or service under Medicaid. The underlying conduct behind the conviction, except for the limited purpose of establishing the "related to" requirement of the statute, is not relevant in considering whether the I.G. had authority to exclude an individual pursuant to section 1128(a)(1). The conviction, and not the underlying conduct, is the triggering event which requires the I.G. to impose and direct an exclusion. It is well settled that proof that an appropriate criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is called for under section 1128(a)(1); the intent or state of mind of the individual committing the crime is not relevant. DeWayne Franzen, DAB 1165 (1990).

Petitioner argues also that her criminal offense was not related to the delivery of an item or service under Medicaid because she "was in the hallway and not providing services to any individual patient at the time she discovered the ring." Petitioner's Response to the I.G.'s Motion for Summary Disposition at p. 3. Petitioner points out also that evidence adduced by the I.G. fails to establish that she provided any nurse's aide services directly to B.D. on March 12, 1992, the date on which Petitioner states that the criminal offense occurred. Petitioner's Memorandum in Support of Resistance to the I.G.'s Renewed Motion for Summary Disposition at pp. 1 - 2.

Petitioner appears to be arguing that the statutory requirement that the criminal offense must "relate" to the delivery of a Medicaid item or service encompasses only those situations where there is direct interaction between the convicted individual and the recipient of a Medicaid item or service at the time that the offense occurred. I disagree.

The language of the statute does not support the theory that, to be excluded under section 1128(a)(1), the convicted individual must have had direct interaction with the recipient of a Medicaid item or service at the time that the offense occurred. The phrase "related to" is broad language and suggests that Congress required only a minimal nexus between the offense and the delivery of an item or service as a prerequisite to meeting the statutory test. Congress' use of the phrase "related to" indicates that section 1128(a)(1) must be read as covering more than those instances where a criminal offense is committed at the time that the convicted individual is in direct contact with the Medicaid recipient. Indeed, the implementing regulation at 42 C.F.R. § 1001.101(a) supports this conclusion. That regulation interprets an offense related to the delivery of a Medicaid item or service as "including the performance of management or administrative services relating to the delivery of items or services" under Medicaid.

The record contains an investigative report of the Iowa Medicaid Fraud Control Bureau which states that Petitioner worked as a certified nurse's aide at Sunny Knoll Care Center on March 11, 12, and 13, 1992. In addition, the investigative report specifically states that Petitioner provided care to B.D. on March 11 and March 13, 1992. I.G. Ex. 1. While this report does not specifically state that Petitioner had direct interaction with B.D. on March 12, 1992, in her statement of facts Petitioner specifically declined to contest that she was responsible for providing care to B.D. on that date. Petitioner's Amended Proposed Findings of Fact and Conclusions of Law, paragraph 2.

For purposes of this decision, I accept as true Petitioner's assertion that she found B.D.'s ring in a box of vinyl gloves while she was filling her cart with supplies. This does not, however, derogate from my conclusion that Petitioner's offense was related to the delivery of a Medicaid service. A finding that Petitioner was in direct contact with a Medicaid recipient at the time that the offense occurred is not an essential element of my decision. What is important is that, at the time of the offense, Petitioner was engaged in the performance of duties which were part of the Medicaid-covered nurse's aide services she provided directly to B.D. Filling a cart with supplies is part of the complex of duties which Petitioner was required to perform in the course of delivering nurse's aide services to B.D. The fact that Petitioner was not engaged in direct interaction with B.D. at the time she committed the criminal offense does not insulate Petitioner from the reach of section 1128(a)(1) of the Act.

The impact of Petitioner's theft on the delivery of Medicaid services is not tangential or ephemeral. The purpose of the exclusion law is to protect Medicare beneficiaries and Medicaid recipients from "incompetent practitioners and from inappropriate or inadequate care." S. Rep. 109, 100th Cong., 1st Sess. 2 (1987); reprinted in 1987 U.S.C.C.A.N. 682. The relationship between caregivers and patients is inherently a dependency relationship. In this case, B.D. was a 93-year-old individual diagnosed with senile dementia/Alzheimer type. She depended on her caregivers to provide the care that she needed, free from the threat of being victimized by crimes against her. Petitioner was convicted of perpetrating a crime against B.D. in the course of providing her nurse's aide services. Petitioner's offense involved conduct which had a direct effect on the quality of the Medicaid services which she delivered and it encompassed the "inappropriate" care which the exclusion law was intended to protect against. Under these circumstances, Petitioner's argument (that the theft of which she was convicted was unrelated to the delivery of her nurse's aide services because it occurred while she was filling her cart rather than while she was interacting with B.D.) is without merit.

III. A five-year exclusion is required in this case.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from Medicare and Medicaid for a minimum period of five years, when such individuals have been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid, within the meaning of section 1128(a)(1) of the Act.

Since Petitioner was convicted of a criminal offense and it was related to the delivery of an item or service under Medicaid, within the meaning of sections 1128(a)(1) and (i) of the Act, the I.G. was required by section 1128(c)(3)(B) of the Act to exclude Petitioner for a minimum of five years. Neither the I.G. nor an administrative law judge has discretion to reduce the mandatory minimum five-year period of exclusion.

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/

Joseph K. Riotto
Administrative Law Judge