Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Elsbeth Barnes,	DATE: November 1, 1994
Petitioner,	
- v. -	Docket No. C-94-329 Decision No. CR340
The Inspector General.	

DECISION

By letter dated February 8, 1994, Elsbeth Barnes, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] 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 Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare.

Petitioner filed a timely request for review of the I.G.'s action. The I.G. moved for summary disposition.

I have determined that there is no dispute as to any material fact. For the reasons explained below, I have concluded that, even if the facts alleged by Petitioner are accepted as true, the I.G. would nevertheless be entitled to judgment as a matter of law. Therefore, I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing.

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[1] I use the term "Medicaid" hereafter to represent all programs other than Medicare from which Petitioner was excluded.

I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)[2]

1. During the period relevant to this case, Petitioner was a licensed practical nurse.

2. Petitioner contracted with Metro Home Health Agency to perform health care services for home-bound individuals who were qualified to receive benefits under Medicare. I.G. Br. at 2; I.G. Ex. 3 at 3.

3. On June 25, 1992, Petitioner was indicted by a grand jury of the United States District Court for the Eastern District of Louisiana. I.G. Ex. 1.

4. The indictment charged Petitioner with seven counts of making false and fictitious statements in violation of 18 U.S.C. § 1001 by "knowingly and willfully mak[ing] false, fraudulent, and fictitious material statements and representations . . . so as to fraudulently obtain Medicare payments . . . . " I.G. Br. at 1; I.G. Ex. 1; I.G. Ex. 5 at 2.

5. Petitioner signed a Judgment and Probation/Commitment Order pleading guilty to count one of the indictment "knowingly and willfully . . . forg[ing] the signature of Dr. Joseph Allain on Health and Human Services form

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[2] The I.G. submitted four exhibits and an attachment which I have marked as a fifth exhibit. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) at (page)." I admit into evidence I.G. Exs. 1 - 5. Petitioner offered one exhibit which I cite as P. Ex. 1. I admit P. Ex. 1 into evidence. I cite the I.G.'s brief for summary disposition as "I.G. Br. at (page)." I cite Petitioner's response as "P. Br. at (page)." I cite the I.G.'s Reply as "I.G. R. Br. at (page)."

HCFA 485, and falsif[ying] medical information regarding [a particular patient], so as to fraudulently obtain Medicare payments." I.G. Br. at 3; I.G. Ex 4.

6. In consideration of Petitioner's plea, the Office of the United States Attorney for the Eastern District of Louisiana dismissed the remaining counts of the indictment. I.G. Ex. 4 at 1.

7. Petitioner was sentenced to three years of probation and was ordered to make restitution to the Department of Health and Human Services in the amount of $1100. I.G. Br. at 3; I.G. Ex 2.

8. A plea is accepted within the meaning of section 1128(i)(3) of the Act whenever a party offers a plea and a court consents to receive it as an element of an arrangement to dispose of a pending criminal matter. Section 1128(i)(3) of the Act.

9. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(3) of the Act. FFCL 5-8.

10. The offense of which Petitioner was convicted -- forging the signature of a medical doctor on a HCFA form 485 and falsifying medical information regarding a particular patient -- is related to the delivery of items or services under Medicare within the meaning of section 1128(a)(1) of the Act. FFCL 1-9.

11. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

12. The. I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act. FFCL 1-11.

13. Petitioner alleges in an affidavit that, as part of her plea agreement, I.G. Special Agent William W. Root and Assistant U.S. Attorney (AUSA) Mary Jude Darrow, who participated in negotiating her plea agreement, promised not to refer her name to the I.G. for exclusion. P. Ex. 1. Petitioner interpreted the statements of Special Agent Root and AUSA Darrow to mean that she would not be excluded from the Medicare program if she pled guilty. P. Ex. 1. Even if Special Agent Root and AUSA Darrow made the statements alleged by Petitioner, the I.G. would not be estopped from excluding Petitioner.

14. Even if Petitioner believed that her plea agreement included a promise by the I.G. not to exclude her, that belief would not have been reasonable. Section 1128(a)(1) on its face makes a five-year exclusion mandatory after conviction of a crime related to the delivery of an item or service under Medicare or Medicaid.

17. For the purposes of this decision and to resolve the summary disposition issue, I accept as proven that Special Agent Root and AUSA Darrow promised Petitioner that she would not be excluded from Medicare and Medicaid. Even so, Petitioner's affidavit does not create a dispute on an issue of material fact because the I.G. was required by law to exclude her for at least five years.

18. The I.G. is entitled to summary disposition.

PETITIONER'S ARGUMENT

Petitioner does not deny that she was convicted on the basis of her guilty plea, within the meaning of section 1128(i) of the Act, to knowingly and willfully forging the signature of a medical doctor and falsifying medical information pertaining to a certain patient. Petitioner does not deny either that, due to her criminal offense, the home health care agency that Petitioner worked for received unallowable reimbursements from Medicare.

Petitioner argues that her conviction for violating 18 U.S.C. § 1001 does not relate to the "delivery of an item or service" under Medicare, Medicaid, or any other State health care program, within the meaning of section 1128(a)(1). Request for Hearing, dated April 6, 1994. Petitioner contends also that she should not be excluded from Medicare since she pled guilty based on a "different set of circumstances than those for which she was indicted." I.G. Ex. 3 at 1.

Further, Petitioner argues, in essence, that the I.G. should be estopped from excluding her because she alleges that the plea agreement which she entered into with the U.S. Attorney's Office "barred the Department of Health and Human Services from proceeding with exclusion" under section 1128(a)(1). P. Br. at 3. Petitioner alleges that during plea negotiations both a representative from the Inspector General's office, Special Agent William R. Root, and AUSA Mary Jude Darrow made statements which led her to believe that she would not be excluded from Medicare if she pled guilty to count one of the

indictment. Petitioner contends also that since the I.G. contests her assertion that Special Agent Root and AUSA Darrow agreed not to forward her name to the I.G. for purposes of exclusion, there is a material fact in dispute and a hearing is, therefore, necessary.

DISCUSSION

I. Petitioner was properly excluded under section 1128(a)(1) of the Act.

An individual or entity must be excluded from participation in Medicare and Medicaid pursuant to section 1128(a)(1) where two elements are present: (1) the individual or entity has been "convicted" of a criminal offense, within the meaning of section 1128(i); and (2) the conviction is related to the delivery of an item or service under Medicare or Medicaid. In the present case, Petitioner admits that she was convicted within the meaning of section 1128(i)(3) of the Act. She disputes, however, that her conviction was related to the delivery of an item or service under Medicare. I find that Petitioner's conviction was related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act.

The Act does not define what constitutes a conviction related to the delivery of an item or service under Medicare or Medicaid. However, administrative law judges and appellate panels of the Departmental Appeals Board have held that a conviction meets the statutory requirement if there is some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under Medicare or Medicaid. Carolyn Nagy, DAB CR182 (1992); Berton Siegel, D.O., DAB 1467 (1994). Here, Petitioner was convicted of "knowingly and willfully mak(ing) false, fraudulent, and fictitious materials statements and representations . . . so as to fraudulently obtain Medicare payments . . . ." I.G. Ex. 1. Petitioner's conviction arose from her forgery of a medical doctor's signature on a Health Care Financing Administration form (HCFA form 485) which certified that a particular patient was eligible for Medicare-funded home health care services. As a result of this certification, Petitioner and the home health care agency for which she worked received Medicare reimbursement, even though the medical doctor whose name was on the certification form did not certify the patient for home health care services and did not authorize anyone to sign his name to the form.

Since the purpose and result of Petitioner's action was to defraud the Medicare program, I find that there exists a nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicare. The Medicare program would not have paid for the home health care services Petitioner provided if she had not forged the doctor's signature on the HCFA form 485. The facts in this case are similar to those in the case of Ricardo Santos, DAB CR165 (1991). In Santos, the petitioner was convicted of forging a doctor's name on prescriptions that were given to undercover agents from the California Bureau of Medi-Cal Fraud posing as Medi-Cal (Medicaid) recipients. The cost of their medical treatment, as well as their prescriptions, would have been billed to the Medicaid program had the Medi-Cal agents not seized the subsequent billing for evidentiary purposes. Here, as in Santos, Petitioner's forgery was necessary for the receipt of Medicare reimbursement, since neither Petitioner nor the home health care agency for which she worked would have received reimbursement for her services without a doctor's signature. Petitioner's criminal offense, therefore, was directly linked to the delivery of a service under Medicare.

It is irrelevant that the criminal statute pursuant to which Petitioner was convicted made no reference to Medicare fraud, since the mandatory exclusion provisions of section 1128 are not limited to situations where a medical provider or other entity is convicted under a statute expressly criminalizing fraud against a federal or State health care program. H. Gene Blankenship, DAB CR42 (1989). It is well-established that financial misconduct directed at Medicare and Medicaid, in connection with the delivery of items or services under the programs, constitutes a program-related offense invoking mandatory exclusion. Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Petitioner's offense involved financial misconduct and is similar to the offense of filing false Medicare claims, because, in each instance, the program is asked to make improper payments. Moreover, Petitioner's offense was program-related because Medicare was the victim of the offense. Ian Klein, DAB CR177 (1992). For these reasons, Petitioner's conviction was related to the delivery of an item or service under Medicare.

Petitioner's argument that she pled guilty based on a different set of circumstances than those for which she was indicted is also without any merit. Petitioner signed the Judgment and Probation/Commitment Order which

stated that "the court adjudged the defendant guilty as charged. . . " (I.G. Ex. 3). Thus, Petitioner cannot reasonably argue that the facts to which she pled guilty were different than those for which she was charged.

On the basis of the above analysis, pursuant to sections 1128(a)(1) and 1128(c)(3)(B), the I.G. was required to exclude Petitioner for a period of not less than five years.

II. The I.G. was required to exclude Petitioner notwithstanding any oral promise to the contrary Petitioner may have received.

As I have stated already, exclusion is mandated by section 1128(a)(1) of the Act for any individual convicted of an offense described in that section. The I.G. has no discretion to decline to exclude an individual convicted of such an offense. Prabha Prakash, M.D., DAB CR265 (1993); Arthur B. Stone, D.P.M., DAB CR26 (1989). For this reason, even if government representatives had promised Petitioner she would not be excluded, the I.G. would not be bound by such a promise.

Petitioner argues, in essence, that the I.G. is estopped from excluding her because of promises allegedly made to her during her plea negotiations. To make out a claim of estoppel, Petitioner must prove that she reasonably relied on promises made to her detriment by government representatives. Petitioner's reliance on the promises allegedly made by Special Agent Root and AUSA Darrow is misplaced, because: (1) Petitioner has not alleged that these individuals promised her she would not be excluded; and (2) even if they had, such a promise would be contrary to law.

First, it is not at all clear that either Special Agent Root or AUSA Darrow promised Petitioner that she would not be excluded. Petitioner alleges that these individuals promised her they "would [not] forward her name to DHHS for purposes of exclusion from the medicare program." P. Ex. 1. Both Special Agent Root and AUSA Darrow deny having made such promises. I.G. Reply Br.; I.G. Exs. 5, 6. However, even if they had done so, a promise not to refer Petitioner's name for exclusion is not equivalent to a promise that Petitioner would not be excluded. Thus, Petitioner's interpretation of these statements as a promise not to exclude her is unreasonable.

Second, even if Special Agent Root or AUSA Darrow had explicitly promised Petitioner that she would not be excluded as a result of her guilty plea, her reliance on such a promise is immaterial. This is so because those who deal with the government are expected to know the law and cannot be found reasonably to have relied on advice of a government agent that is contrary to federal law or regulation. Heckler v. Community Health Services, 467 U.S. 51, 60-63 (1984). Because exclusion is mandatory after a conviction of a criminal offense related to the delivery of an item or service under Medicare, any advice to the contrary from government agents would be contrary to law. Therefore, Petitioner's reliance on any such representation would be unreasonable.

Petitioner relies on Stern v. Shalala, 14 F.3d 148 (2d Cir. 1994) for the proposition that a plea agreement may preclude HHS from seeking to impose an administrative sanction. In Stern, the HHS sought a civil money penalty against Dr. Stern after his conviction, pursuant to a plea agreement, for submitting fraudulent Medicare claims. The plea agreement specified also that "Claims of the Medicare program will be detrimental in a separate civil proceeding and will not be part of the restitution ordered by the Court." Stern at 149. Dr. Stern argued that he reasonably understood such claims to be actual losses alleged by Medicare, totalling no more than $190,000. The court found that Dr. Stern's interpretation of this agreement, together with statements made by the AUSA involved in the case, established that the collection of a civil money penalty was barred by the plea agreement.

Stern, however, is inapplicable for two reasons. First, as previously stated, Dr. Stern argued that, by the terms of his written plea agreement, the government had agreed not to seek the sanctions at issue. By contrast, Petitioner here relies on oral promises allegedly made to her, but not included in her written plea agreement. Second, Dr. Stern challenged HHS' imposition of a civil monetary penalty against him pursuant to section 1128A of the Act. Such penalties, unlike exclusions pursuant to section 1128(a)(1), are not mandatory under the statute. Thus, an agreement not to seek civil money penalties would not, on its face, be contrary to federal law.

Petitioner's estoppel argument must fail, because she could not reasonably have relied on any promise that she would not be excluded from participation in the Medicare and Medicaid programs if she pled guilty to a criminal offense related to the delivery of an item or service

under Medicare. Petitioner's reliance could not have been reasonable, since any such promise would have been contrary to law. This of course does not preclude Petitioner's right to seek relief in another forum, where perhaps she may seek leave to withdraw her guilty plea.

III. The I.G. is entitled to prevail as a matter of law.

Petitioner has opposed the I.G.'s motion for summary disposition and requests an in-person hearing to present evidence to substantiate her claim that government agents promised her that she would not be excluded from the Medicare and Medicaid programs as a result of her guilty plea. However, I need not proceed to an in-person hearing. For the reasons stated above, the I.G. would be entitled to prevail as a matter of law regardless of any promises made by Special Agent Root and AUSA Darrow. Thus, for the purposes of this Decision and to resolve this summary disposition issue, I accept as proven that Special Agent Root and AUSA Darrow promised Petitioner that she would not be excluded from the Medicare and Medicaid programs. Accordingly, I find that there is no material fact in dispute, and the I.G. is entitled to summary disposition.

CONCLUSION

Because Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare, the I.G. was required to exclude Petitioner from participation in the Medicare and Medicaid programs for no less than five years, pursuant to sections 1128(a)(1) and 1128(c)(3)(B). Therefore, I uphold the five-year exclusion.

/s/

Joseph K. Riotto
Administrative Law Judge