Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Edith Buseman, L.P.N., and	)	
Hilda's Heritage Home, Inc.,	)	Date: February 6, 1998
	)	
Petitioners,	)	
	)	
v.	)	Docket No. C-97-493
	)	Decision No. CR515
The Inspector General.	)	
	)	

DECISION

I decide that the five-year exclusion imposed and directed against Petitioner, Edith Buseman, L.P.N., from participating as a provider in Medicare and other federally financed health care programs, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act. Consequently, the five-year exclusion imposed and directed against Hilda's Heritage Home, Inc. is authorized, pursuant to section 1128(b)(8) of the Act.

PROCEDURAL HISTORY

By letter dated July 21, 1997, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner Buseman that, as a result of her conviction of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, she was being excluded pursuant to section 1128(a)(2) of the Social Security Act (Act) for the minimum mandatory five-year period from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1]

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[1] Unless otherwise indicated, hereafter I refer to all state health care programs from which Petitioner has been excluded as "Medicaid."

By letter dated August 8, 1997, Petitioner filed her request for hearing "regarding your [I.G.] file number 6-97-40248-9" and asserted that since "she was granted a full and unconditional pardon by Governor William Janklow of the state of South Dakota," there is "no conviction" on which the I.G. can base an exclusion.

By letter dated August 20, 1997, the I.G., referencing her File No. 6-97-40248-9, notified Hilda's Heritage Home, Inc., in care of Edith Buseman, L.P.N., that, due to the company's association with Edith Buseman, who has been "sanctioned or convicted and has a direct or indirect ownership or control interest or who serves as an officer director, agent or managing employee of your company," the company was being excluded pursuant to section 1128(b)(8) of the Act for five years from participation in Medicare and Medicaid.

The parties anticipated my reviewing these two matters together;[2] Petitioner does not dispute that the I.G. had the authority to impose and direct an exclusion against Hilda's Heritage Home, Inc. pursuant to section 1128(b)(8) of the Act, if the I.G. had the authority to impose and direct an exclusion against Petitioner Buseman pursuant to section 1128(a)(2) of the Act.

The record consists of the following submissions: Petitioner's Opening Brief (P. Br.), the I. G.'s Reply Brief in Support of Motion for Summary Disposition (I.G. Br.), Petitioner's Response to Respondent's Brief (P. R. Br.), and the I. G.'s Reply to Petitioner's Response (I.G. R. Br.). Petitioner attached one exhibit (P. Ex. 1), and the I.G. attached seven exhibits (I.G. Ex. 1-7). Neither party objected to the other party's exhibits, and

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[2] Although the I.G.'s exclusion notice to Hilda's Heritage Home, Inc. was issued after Petitioner Buseman's hearing request was filed, and no separate hearing request was filed on behalf of Hilda's Heritage Home, Inc., Petitioner's hearing request refers to the I.G.'s File No. 6-97-40248-9. The same File No. is indicated in the later exclusion notice to the related entity, Hilda's Heritage, Home, Inc. Petitioner's briefing presumes that her request for hearing encompassed both herself and Hilda's Heritage Home, Inc. She stated, "[a]s pointed out in Respondent's Brief, . . . the sole issue in this case is whether the Inspector General has authority to exclude Petitioner's [sic] and her company." P. R. Br. at 1. The I.G. had stated, "Petitioner and Hilda's requested review of the five year exclusions by letter dated August 8, 1997." I.G. Br. at 2.

I admit these exhibits into evidence. No facts of decisional significance are in dispute and, consequently, there is no need for an in-person hearing.

Based on evidence of record and the law, in light of the parties' arguments, I conclude that the five-year exclusion which the I.G. imposed and directed against Petitioner, Edith Buseman, L.P.N., is mandated by section 1128(a)(2) and 1128(c)(3)(B) of the Act. As a consequence, the I.G. had the authority to impose and direct a five-year exclusion against Hilda's Heritage Home, Inc., pursuant to section 1128(b)(8) of the Act.

ISSUE

The issue is whether Petitioner shall be excluded pursuant to section 1128(a)(2) of the Act due to her conviction of a criminal offense as defined in section 1128(i) of the Act, given the subsequent grant by the Governor of a full and complete pardon of the offense.

APPLICABLE LAW

Section 1128(a) of the Act authorizes the Secretary to exclude individuals and entities from eligibility to receive payment for services under Medicare or Medicaid. Section 1128(a)(2) of the Act directs the Secretary to exclude 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. Section 1128(a)(2) of the Act; 42 U.S.C. § 1320a-7(a)(2).

Individuals excluded under section 1128(a), based on their convictions of certain types of crimes, are statutorily required to be excluded for not less than five years. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1320a-7(c)(3)(B).

Section 1128(b) of the Act permits the Secretary to exclude individuals and entities from eligibility to receive payment for services under Medicare or Medicaid. Specifically, section 1128(b)(8) provides:

> ENTITIES CONTROLLED BY A SANCTIONED INDIVIDUAL.-Any entity with respect to which the Secretary determines that a person-
>
> > (A)(i) who has a direct or indirect ownership or control interest of 5 per cent or more in the entity or with an ownership or control

> interest (as defined in section 1124(a)(3)) in that entity, or
>
> (ii) who is an officer, director, agent, or managing employee (as defined in section 1126(b)) of that entity-
>
> (B)(i) who has been convicted of any offense described in subsection (a) or in paragraph (1), (2), or (3) of this subsection; . . . or
>
> (iii) who has been excluded from participation under a program under title XVIII or under a State health care program.

42 U.S.C. § 1320a-7(b)(8).

Exclusions under section 1128(b) of the Act are permissive and, generally, entities excluded under this section will be excluded for the same period as that of the individual whose relationship with the entity is the basis for the exclusion. 42 C.F.R. § 1001.1001(b)(1).

Section 1128(i) of the Act specifically defines conviction for purposes of the Act and states:

> CONVICTED DEFINED.- For purposes of subsections (a) and (b), an individual or entity is considered to have been "convicted" of a criminal offense-
>
> (1) when a judgment of conviction has been entered against the individual or entity by a federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication or other arrangement or program where judgment of conviction has been withheld.

42 U.S.C. § 1320a-7(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 6, 1997, Petitioner, an L.P.N. (licensed practical nurse), pled guilty in the State of South Dakota to Simple Assault, a misdemeanor which occurred on September 8, 1996, in violation of SDCL 22-18-1(2). I.G. Ex. 2, 6.

2. Petitioner's plea contained the admission that she had recklessly caused bodily injury to G.S. G.S. was a patient who was a resident of Hilda's Heritage Home, Inc. I.G. Ex. 2, 3, 5, 6.

3. On February 6, 1997, a judgment of conviction was entered, and Petitioner was sentenced to pay a fine in the amount of $1,000.00 and costs in the amount of $26.50, and to serve 365 days in jail.[3] I.G. Ex. 2.

4. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. 42 U.S.C. § 1320a-7(i).

5. The evidence proves and Petitioner does not contest that her misdemeanor Simple Assault conviction relates to neglect or abuse of patients in connection with the delivery of a health care item or service. I.G. Ex. 3, 5. Section 1128(a)(2) of the Act; 42 U.S.C. § 1320a-7(a)(2). 42 C.F.R. § 1001.101(b).

6. Concerning said offense, on April 15, 1997, Petitioner was granted a full and complete pardon by the Governor of the State of South Dakota. P. Ex. 1.

7. The Governor's pardon was accompanied by the sealing of all official records relating to the offense. P. Ex. 1.

8. Under South Dakota law, the effect of the sealing of all official records relating to the offense is "to restore such person, in the contemplation of the law, to the status the person occupied before arrest, indictment or information." SDCL 24-14-11. P. Ex. 1. P. Br. at 2.

9. The Governor's pardon granted to Petitioner does not change the fact that she has been convicted of a criminal offense within the meaning of section 1128(i) of the Act. 42 U.S.C. § 1320a-7(i).

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[3] The entire jail sentence and half the fine were suspended on specified terms and conditions.

10. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

11. The I.G. has not sought to lengthen the period of exclusion by use of any of the aggravating factors specified by regulation. 42 C.F.R. § 1001.102(b).

12. Thus, no mitigating factors can be considered. 42 C.F.R. § 1001.102(c).

13. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

14. The I.G. properly excluded Petitioner for five years from participating in Medicare and directed that she be excluded for five years from participating in Medicaid, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act. 42 U.S.C. §§ 1320a-7(a)(2), 1320a-7(c)(3)(B).

15. Petitioner was a co-owner and manager of Hilda's Heritage Home, Inc., an assisted living center with 26 Medicaid-authorized beds, on or about September 8, 1996.

16. The I.G. properly excluded Hilda's Heritage Home, Inc., a business in which Petitioner had both ownership and managerial interests, for five years from participating in Medicare and directed that it be excluded for five years from participating in Medicaid, pursuant to section 1128(b)(8) of the Act. 42 U.S.C. §§ 1320a-7(b)(8). I.G. Ex. 3, 5. I.G. Br. at 1, 16-17.

DISCUSSION

The I.G. excluded Petitioner from participating in Medicare and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Act.

Section 1128(a)(2) of the Act states:

> Sec. 1128 (a) Mandatory Exclusion.-The Secretary shall exclude the following individuals and entities from participation in any program under title XVIII and shall direct that the following individuals and

> entities be excluded from participation in any State health care program (as defined in subsection (h)):
>
> > (2) [a]ny 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 U.S.C. § 1320a-7(a)(2).

Petitioner has been convicted of a criminal offense, as defined at section 1128(i)(1) of the Act:

> An individual or entity has been convicted of a criminal offense--
>
> > (1) when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

42 U.S.C. § 1320a-7(i)(1).[4]

> The Governor's pardon granted to Petitioner does not change the fact that she has been convicted of a criminal offense within the meaning of section 1128(i) of the Act.

Subsequent to Petitioner's conviction, she was granted a full and complete pardon by the Governor of the State of South Dakota on April 15, 1997. P. Ex. 1. The Governor's pardon was accompanied by the sealing of all official records relating to the offense. P. Ex. 1. Under South Dakota law, the effect of the sealing of all official records relating to the offense is "to restore such person, in the contemplation of the law, to the status the person occupied before arrest, indictment or information." SDCL 24-14-11. P. Ex. 1. P. Br. at 2.

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[4] Two other subsections of the statute, §1128(i)(2) and (i)(3), also show that Petitioner has been convicted of a criminal offense within the meaning of the Act. HCFA Br. at 6-7. I discuss only §1128(i)(1), because it is the subsection that most specifically applies here.

Petitioner argues that her position is comparable to that of a person who is granted a deferred prosecution, where the prosecutor agrees to delay prosecuting charges (P. Br. at 5-6). Petitioner suggests that "deference to the executive branch on a deferred prosecution also requires deference to the executive branch on the issuance of a pardon and its effect." P. Br. at 6. I disagree. In Petitioner's case, a judgment of conviction was entered, which is not at all comparable to the case of a person who is not even prosecuted.

Petitioner's position is also not comparable to that of a person whose conviction has been overturned on appeal, which is the only situation of which I am aware, where, despite an actual conviction of a criminal offense, there is no longer a conviction within the meaning of section 1128(i) of the Act. I agree with the I.G., that the full and complete pardon of the offense granted by the Governor is not akin to a conviction being vacated on appeal. I.G. Br. at 10-12, esp. 11.

Petitioner argues that deference to the executive branch is required on the issuance of a pardon and its effect. P. Br. at 6. I disagree. No distinction between executive branch action and judicial branch action is contemplated by the statute, and there is no authority to justify such a distinction. Although Petitioner attempts to show authority for her position through Travers v. Shalala, 20 F.3d 993 (9th Cir. 1994); Travers does not support her argument. Travers holds: "What constitutes a 'conviction' under the Medicaid Act, however, is determined by federal law, not state law." Travers at 996. Travers thus counters Petitioner's argument that comity requires giving full effect to the pardon. See also Yavacone v. Bolger, 645 F. 2d 1028, 1034 (DC Cir. 1981). I.G. Br. at 9.

Any speculation that the Governor's pardon may have resulted from a finding that Petitioner was not guilty of the offense, is merely a collateral attack on the conviction, which is ineffective to alter an exclusion. The regulations provide that--

> When the exclusion is based on the existence of a conviction, . . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds. . .

42 C.F.R. § 1001.2007(d).

An appellate panel of the Departmental Appeals Board discussed the reasoning behind this rule, with regard to a mandatory exclusion taken under section 1128(a)(2) of the Act, in the case of Peter J. Edmonson, DAB No. 1330 (1992). In Edmonson, the appellate panel held:

> It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

Id. at 4. See also Anthony Accaputo, Jr., DAB No. 1416 (1993).

Petitioner's position is fully addressed by the language of the statute itself, defining "convicted of a criminal offense." The statute provides, in pertinent part:

> An individual or entity has been convicted of a criminal offense when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court, regardless of whether . . . the judgment of conviction or other record relating to criminal conduct has been expunged;

section 1128(i)(1) of the Act.

The regulatory definition of "convicted" echoes the statutory language:

> Convicted means that--
>
> (a) A judgment of conviction has been entered against an individual or entity by a Federal, State, or local court, regardless of whether:
>
> (2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

42 C.F.R. § 1001.2(a)(2)

The Governor's pardon, accompanied by the sealing of all official records relating to the offense, puts Petitioner in the same position as one whose "judgment of conviction or other record relating to criminal conduct has been

expunged." The pardon has no effect on the exclusion, because Congressional intent that it should have no effect, is so clear.

The legislative history reveals Congress' strong desire to protect the Medicare and Medicaid programs from untrustworthy providers. The congressional committee charged with drafting the 1986 amendments to the statute stated:

> The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.
>
> These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2nd Sess. 75, reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

The committee added:

> With respect to convictions that are "expunged," the Committee intends to include all instances of conviction which are removed from the criminal

> record of an individual for any reasons other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

Id.

Consequently, despite the Governor's pardon, Petitioner remains convicted of a criminal offense, within the meaning of section 1128(i) of the Act.

CONCLUSION

A five-year exclusion is required as a matter of law as a result of Petitioner's misdemeanor Simple Assault conviction, despite the Governor's pardon. Consequently, the I.G. properly excluded Petitioner for five years from participating in Medicare and directed that she be excluded for five years from participating in Medicaid, pursuant to section 1128(a)(2) of the Act. The five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act.

Derivative of Petitioner's five-year exclusion, is Hilda's Heritage Home, Inc.'s five-year exclusion. The I.G. properly excluded Hilda's Heritage Home, Inc. for five years from participating in Medicare and directed that it be excluded for five years from participating in Medicaid, pursuant to section 1128(b)(8) of the Act.

/s/

Jill S. Clifton

Administrative Law Judge