

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Penny Martin,)	Date: April 16, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-071
)	Decision No. CR529
The Inspector General.)	
)	

DECISION

By letter dated September 16, 1997, the Inspector General (I.G.), U.S. Department of Health and Human Services (H.H.S.), notified Penny Martin, the Petitioner herein, that she was being excluded for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grant to States for Social Services programs.¹ The I.G. explained that an exclusion of at least five years was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense in connection with the delivery of a health care item or service under the Medicaid program.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. Both parties submitted briefs in this matter. The I.G. submitted five proposed exhibits (I.G. Exs. 1-5). Petitioner did not object to these exhibits. Petitioner submitted thirteen proposed exhibits. I have numbered these exhibits one through thirteen (P. Exs. 1-13). The I.G. did not object to these exhibits. I accept I.G. exhibits 1-5 and Petitioner's exhibits 1-13 into evidence.

¹ In this decision, I use the term "Medicaid" to refer to these State health care programs.

I grant the I.G.'s motion for summary disposition. 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 a health care 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 ARGUMENTS

Petitioner contends that the I.G. acted improperly in having her exclusion begin almost two years after the date of her guilty plea. She asserts that she pled guilty to mail fraud on October 13, 1994 and that her original sentencing date was set for January 12, 1995, but that such date was continued twelve times until April 8, 1997 at the request of the government so that Petitioner could continue her cooperation with the government and testify against others before the federal grand jury and at trial. She therefore asserts that the exclusion imposed by the I.G. must be retroactive to the October 13, 1994 date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was employed as the Director of Speech Therapy by Universal Rehabilitation Services, Inc. (Universal). I.G. Ex 3.
2. In her capacity as Director, Petitioner was responsible for supervision of speech therapists employed by Universal and reviewed the documentation submitted to Medicare for speech therapy services rendered to Universal's patients. I.G. Ex. 3.
3. A criminal information was filed in the United States District Court for the Eastern District of Pennsylvania alleging that Petitioner engaged in a scheme to defraud Medicare and charging her with one count of mail fraud in violation of 18 U.S.C. section 1341 and one count of aiding and abetting in violation of 18 U.S.C. section 2. I.G. Ex. 3.
4. In particular, this information alleged that Petitioner altered the documents generated by a speech therapist employed by Universal in order to substantiate a patient condition and treatment which was covered and reimbursable by Medicare when in fact such treatment was not reimbursable by Medicare.
5. On April 8, 1997, the court accepted Petitioner's guilty plea to one count of mail fraud in violation of 18 U.S.C. section 1341. I.G. Exs. 1 and 2.

6. Petitioner was sentenced to 24 months probation and was ordered to pay restitution in the amount of \$44,129.99. I.G. Ex. 1.

7. On September 16, 1997, the I.G. notified Petitioner that she was being excluded from Medicare and Medicaid for a period of five years pursuant to section 1128(a)(1) of the Act.

8. Petitioner's criminal conviction constitutes a conviction within the meaning of section 1128(i)(3) of the Act.

9. Petitioner was convicted for mail fraud arising out of a scheme of falsifying speech therapy documents in order to fraudulently obtain Medicare reimbursement. This is a criminal offense related to the delivery of a health care item or service under the Medicare and Medicaid programs within the meaning of section 1128(a)(1) of the Act.

10. Once an individual has been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, exclusion is mandatory under section 1128(c)(3)(B) of the Act.

11. The Secretary has delegated to the I.G. the duty to determine and impose exclusions pursuant to section 1128(a) of the Act.

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.

DISCUSSION

The first statutory requirement for the imposition of mandatory exclusion, pursuant to section 1128(a)(1) of the Act, is that the individual or entity in question be convicted of a criminal offense under federal or State law. The record reflects that a judgment of conviction was entered in Petitioner's case and she was sentenced by the United States District Court for the Eastern District of Pennsylvania. This judgment was based upon the court's acceptance of Petitioner's guilty plea on April 8, 1997. Petitioner was thus convicted within the meaning of section 1128(i)(3) of the Act.

Next, it is required under section 1128(a)(1) of the Act that the crime at issue be related to the delivery of a health care item or service under the Medicare and Medicaid programs. The record establishes that Petitioner, in pleading guilty to the mail fraud as charged in the Criminal Information, admitted to falsely filing, or causing to be filed, claims against Medicare that charged for health care items or services. The filing of fraudulent Medicare and Medicaid claims consistently has been

held to constitute clear program-related misconduct invoking mandatory exclusion. Alan J. Chernick, D.D.S., DAB CR434 (1996) (I.G.'s five year mandatory exclusion of dentist who was convicted in state court of filing false claims upheld); see also Barbara Johnson, D.D.S., DAB CR78 (1990) (I.G.'s five year mandatory exclusion of dentist convicted of filing false claims upheld).

To determine if an offense is program-related, an administrative law judge (ALJ) must analyze the facts and circumstances underlying the conviction to determine whether a nexus or common sense connection links the offense for which a petitioner has been convicted and the delivery of an health care item or service under a covered program. Berton Siegel, D.O., DAB No. 1467 (1994). In Petitioner's case, a sufficient nexus links the facts underlying her crime with the delivery of health care items or services under Medicare, because the falsified claims leading to Petitioner's conviction resulted in the receipt of fraudulent Medicare reimbursement. In Rosaly Saba Khalil, M.D., DAB CR353 (1995), the ALJ found that a criminal offense stemming from the fraudulent receipt of reimbursement checks from Medicaid provided a sufficient nexus between the offense and the delivery of health care items or services under Medicaid. Additionally, the ALJ in Khalil held that a nexus may exist "despite the fact that Petitioner may not have provided items or services to Medicaid recipients personally or made reimbursement claims for those items or services." Id. at 8. In the present case, the nexus between Petitioner's offenses and the delivery of health care items or services is firmly established by her guilty plea to mail fraud as charged in the Criminal Information.

In her statement, Petitioner asserts that it is unfair that her exclusion did not commence at the date of her guilty plea. Her criminal case was continued 12 times at the request of the government until April 8, 1997, when the court accepted her plea and sentenced her. While I sympathize with Petitioner, the applicable law is clear. It is well-established that exclusions are remedial in nature and not punitive. Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir.1992). The I.G. has the discretion to determine when to impose an exclusion. Lawrence Wynn, DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. See Chander Kachoria, DAB No. 1380 (1993). The only requirement on the I.G. is that an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Section 1128(c)(1); 42 C.F.R. § 1001.2002. This means that the exclusion must take effect 20 days after the August 14, 1997, exclusion letter. Although Petitioner maintains that her exclusion should be retroactive to her guilty plea, an ALJ is without authority to change the effective date of an exclusion. Stanley Karpo, D.P.M., CR356 (1995); Chander Kachoria, supra; Lawrence Wynn, M.D., CR344 (1994); Christino Enriquez, M.D., CR119 (1991); Samuel W. Chang, M.D., DAB No. 1198

(1990). Similarly, the I.G. has no authority to make exclusions retroactive and neither the ALJ nor the I.G. can move the effective date of the exclusion back to the date of Petitioner's guilty plea. See Karpo, at 12. In Chander Kachoria, supra, there was a three year delay between the date of the I.G. initial investigation and the date when the petitioner received the exclusion notification from the I.G. The petitioner argued that his rights were violated by the length of time between the conviction and the exclusion letter. The ALJ ruled, however, that neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual is convicted.

I therefore find that the time which has elapsed between Petitioner's guilty plea and the receipt of the exclusion letter does not violate her due process rights.²

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because she has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The five year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge

² The I.G. may lengthen the period of exclusion beyond five years if any aggravating factors as specified in 42 C.F.R. 1001.102(b) are present. If any such factors are present, justifying an exclusion longer than five years, the I.G. may consider certain mitigating factors as a basis for reducing the period of exclusion to no less than five years. One such factor is that the individual's cooperation with federal and State officials resulted in others being convicted or excluded from Medicare and Medicaid. 42 C.F.R. 1001.102(c)(3). Correspondence dated August 19, 1997 from the Regional Inspector General for Investigations, H.H.S., (I.G. Ex. 4) concerning Petitioner's case, states that "[a]lthough there are 2 aggravating circumstances, we are only recommending a 5 year exclusion since the sentencing was delayed for 2 years and her substantial assistance in other cases."