

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Pamela Davis,  
(OI File No. H-16-41665-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-80

Decision No. CR4800

Date: February 28, 2017

**DECISION**

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Pamela Davis (Ms. Davis or Petitioner) from participation in Medicare, Medicaid, and all other federal health care programs for the mandatory minimum period of five years based on her criminal conviction of an offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner sought review of the exclusion. For the reasons stated below, I affirm the I.G.'s exclusion determination.

**I. Background and Procedural History**

By letter dated September 30, 2016, the I.G. notified Ms. Davis that she was being excluded, effective 20 days from the date of the letter, from participation in Medicare, Medicaid, and all federal health programs under section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for the minimum statutory period of five years. The I.G. stated that he was taking this action based on Ms. Davis's conviction in the Superior Court of the State of Delaware In and For New Castle County (state court) of a

criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program. I.G. Exhibit (Ex.) 1.

On November 2, 2016, Petitioner timely requested a hearing before an administrative law judge. In her initial request for hearing, Petitioner asked for her exclusion to “be reduced from 5 years to 2 years.” Thereafter, on November 15, 2016, Petitioner filed an amended hearing request asking for the exclusion to be lifted.

On November 21, 2016, I held a pre-hearing telephone conference, the substance of which is summarized in my November 22, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.8. Among other things, I directed the parties to file short-form briefs, Order ¶ 7.b, and a copy of the short-form brief for Petitioner was enclosed with the Order.

In accordance with the Order, the I.G. filed a brief (I.G. Br.) and seven exhibits (I.G. Exs. 1-7). Petitioner filed two documents that she labeled as exhibits; exhibit 1 is a completed version of the short-form brief enclosed with the Order and exhibit 2 is a single sheet of paper that contains additional arguments supplementing the completed short-form brief. For clarity of the record, I will refer to these documents as Petitioner’s exhibits (P. Exs.) 1-2. The I.G. filed a reply brief (I.G. Reply).

The parties agree that this case does not require an in-person hearing. I.G. Br. at 5; P. Ex. 1 at 2. I therefore decide this case based on the written record.

## **II. Issue**

Whether the I.G. had a basis to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years pursuant to section 1128(a)(1) of the Act. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.2007(a)(1)-(2).

## **III. Jurisdiction**

I have jurisdiction to adjudicate this case. Act, section 1128(f)(1) (42 U.S.C. § 1320a-7(f)(1)); 42 C.F.R. § 1005.2.

## **IV. Findings of Fact, Conclusions of Law, and Analysis**

My findings of fact and conclusions of law are set forth in italics and bold font.

Neither party objected to any of the proposed exhibits; therefore, I admit them all into the record. 42 C.F.R. § 1005.8(c); Order ¶ 8; Civil Remedies Division Procedures § 14(e).

The I.G. excluded Ms. Davis based on section 1128(a)(1) of the Act. I.G. Ex. 1. The statute provides:

(a) Mandatory exclusion.

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) Conviction of program-related crimes

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 any State health care program.

Thus, the elements the I.G. must prove in order for me to sustain Ms. Davis's exclusion pursuant to section 1128(a)(1) are: (1) Petitioner was convicted of a criminal offense, and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a state health care program. The standard of proof is a preponderance of the evidence, 42 C.F.R. §§ 1001.2007(c), 1005.15(d); Order ¶ 6.a, which means that a fact is proven if the evidence shows that it is more likely than not that the fact is true.

***A. Petitioner pled guilty to one count of health care fraud, and the state court accepted the plea, sentenced Petitioner to eight years of incarceration suspended in favor of one year of supervised probation, and ordered Petitioner to pay \$11,500 in restitution to the Delaware Division of Medicaid & Medical Assistance (DMMA) and to pay a \$10,000 fine with surcharges and fees.***

Ms. Davis was a self-employed licensed clinical social worker.<sup>1</sup> She contracted with the Delaware Medicaid Administrative Program (DMAP) and Delaware Physicians Care, Inc., to provide counseling services to Delaware Medicaid recipients. I.G. Ex. 7 at 3. DMAP is the state agency that administers Delaware's Medicaid program, and Delaware Physicians Care, Inc., is a managed care organization that contracts with DMAP to pay for services provided to Delaware Medicaid recipients. I.G. Ex. 7 at 3. On July 7, 2015, a warrant for Ms. Davis's arrest was issued. I.G. Ex. 7 at 1. The warrant was based on a

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<sup>1</sup> Ms. Davis's license expired January 31, 2017. I.G. Ex. 2.

sworn criminal complaint alleging, among other things, that Ms. Davis “engage[d] in a pattern of submitting 160 fraudulent health care claims to Delaware Physicians Care, Inc.” I.G. Ex. 7 at 2. The complaint elaborated that Ms. Davis “submit[ted] and was[ ]compensated for 160 visits of service that never took place during a time period of January 2013 through May 2015.” I.G. Ex. 7 at 2.

On September 14, 2015, a grand jury issued an indictment charging Ms. Davis with, among other things, one class B felony count of health care fraud, in violation of 11 Del. C. 913A(c)(3). I.G. Ex. 3 at 1. Under this count, the indictment alleged that Ms. Davis “engage[d] in a pattern of presenting or causing to be presented fraudulent health care claims to a health care benefit program in the amount of \$50,000 to \$100,000.” I.G. Ex. 3 at 1.

On May 12, 2016, Ms. Davis signed a plea agreement<sup>2</sup> in which she agreed to plead guilty to a reduced class D felony count of health care fraud in violation of 11 Del. C. 913A(c)(2)(b). I.G. Ex. 4. As part of the plea agreement, Ms. Davis agreed to pay \$11,500 in restitution to DMMA and a \$10,000 fine. On May 17, 2016, the state court accepted Ms. Davis’s guilty plea, adjudged her guilty, and sentenced her to an eight-year term of incarceration suspended in favor of a one-year term of probation. I.G. Ex. 5 at 1. The court also ordered Petitioner to pay \$11,500 in restitution to DMMA and to pay a \$10,000 fine with all surcharges and fees. I.G. Ex. 5.

***B. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.***

To establish a basis for exclusion pursuant to section 1128(a)(1) of the Act, the I.G. must demonstrate that Petitioner was “convicted of a criminal offense.” An individual is considered “convicted” when a judgment of conviction has been entered by a federal, state, or local court, or a plea of guilty or no contest has been accepted in a federal, state, or local court. Act, section 1128(i) (42 U.S.C. § 1320a-7(i)(1), (3)). As previously discussed, Petitioner pled guilty to violating 11 Del. C. 913A(c)(2)(b), and the state court accepted her plea and issued a judgment of conviction. I.G. Exs. 4, 5. Moreover, Petitioner concedes in her completed short-form brief that she was convicted of a criminal offense. P. Ex. 1 at 1. Based on these facts, I conclude that Ms. Davis was “convicted” of a criminal offense within the meaning of section 1128(i).

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<sup>2</sup> Ms. Davis dated her signature “5-12-88” on the plea agreement form, which must be an error and may be a result of her defense counsel also dating his signature on the agreement the same way. I.G. Ex. 4. The pre-printed date below the prosecutor’s signature is “5/12/2016,” and the Sentence Order issued by the Superior Court listed May 12, 2016, as the effective date of sentence. I.G. Exs. 4; 5 at 1.

***C. Petitioner’s criminal conviction for health care fraud is an offense related to the delivery of an item or service under a state health care program (i.e., Medicaid).***

An individual must be excluded from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act, section 1128(a)(1); 42 C.F.R. § 1001.101(a). A state health care program includes a state’s Medicaid program. 42 C.F.R. § 1001.2 (definition of *State health care program*). The term “related to” simply means that there must be a nexus or common sense connection between the underlying offense and the program. See *Quayum v. U.S. Dep’t of Health & Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); see also *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase “relating to” in another part of section 1320a-7 as “deliberately expansive words,” “the ordinary meaning of [which] is a broad one” and one that is not subject to “crabbed and formalistic interpretation”) (internal quotation marks omitted). Where an individual is convicted of a crime, “proof that any sentence based on that conviction included the payment of restitution to a protected program creates a rebuttable presumption of a nexus or common-sense connection between the conviction and the delivery of an item or service under [that] program.” *Johnnelle Johnson Bing*, DAB CR1938 at 6 (2009) (citing *Alexander Nepomuceno Jamias*, DAB CR1480 (2006)), *aff’d*, *Johnnelle Johnson Bing*, DAB No. 2251 (2009).

The I.G.’s evidence strongly supports the conclusion that Petitioner’s conviction was “related to” the delivery of an item or service under a state health care program. In support of the arrest warrant for Ms. Davis, the investigating officer submitted an affidavit describing how Ms. Davis submitted fraudulent claims to Delaware Physicians Care, Inc., requesting payment for services to Delaware Medicaid recipients that were not provided as claimed. I.G. Ex. 7 at 2-6. Moreover, although Petitioner’s plea agreement does not contain specific admissions of the behavior underlying her guilty plea, Petitioner agreed to pay restitution to DMMA—the state Medicaid program, see 29 Del. C. § 793—and the state court ordered her to pay this restitution as part of her sentence. I.G. Exs. 4; 5 at 1. At a minimum, therefore, the I.G.’s evidence raises a presumption that Petitioner’s conviction was “related to” the delivery of an item or service under a state health care program. *Johnnelle Johnson Bing*, DAB CR1938 at 6.

Although Petitioner concedes that she was convicted of a criminal offense, she denies that her conviction requires the I.G. to exclude her. P. Ex. 1 at 1-2. She also refuses to concede that she defrauded the Delaware Medicaid program, stating that she has “given more than \$11,500 in charity (the amount I’m *accused taking from Medicaid* [sic]).” P. Ex. 2 (emphasis added). She further implies that she decided to plead guilty to health care fraud not because she defrauded Medicaid, but in an effort to protect her clients’ confidentiality. P. Ex. 2.

To the extent Petitioner is arguing that she is not guilty of the offense for which she was convicted, this amounts to an impermissible collateral attack on her conviction. The applicable regulations are clear that I may not review the merits of the conviction that underlies Petitioner's exclusion: "The basis for the underlying conviction . . . is not reviewable, and the individual . . . may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). In other words, I may not consider evidence or argument intended to prove that Petitioner did not engage in the conduct for which she was convicted.

As Petitioner has submitted no other evidence, I conclude that she has not rebutted the presumption, raised by the state court's order that she pay restitution to DMMA, that her conviction was "related to" the delivery of an item or service under the Delaware Medicaid program. I therefore conclude that Petitioner's criminal conviction for health care fraud is an offense "related to the delivery of an item or service . . . under [a] state health care program" within the meaning of section 1128(a)(1) of the Act. Moreover, I would reach this same conclusion in the absence of any presumptions, as I further conclude that the I.G. has shown by a preponderance of the evidence that Petitioner was convicted of defrauding Delaware's Medicaid program. Convictions for filing false Medicaid claims are convictions for criminal offenses "related to the delivery of an item or service" under a state health care program. *See, e.g., Clemenceau Theophilus Acquaye*, DAB No. 2745 at 5 (2016).

***D. Petitioner must be excluded for the statutory minimum period of five years under section 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)).***

Because I have concluded that a basis exists to exclude Petitioner under section 1128(a)(1) of the Act, Petitioner must be excluded for a minimum period of five years. Act, section 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Despite this statutory requirement, Petitioner requests that I "pardon [her] from this sanction . . . if it is at all possible and within [my] authority to do so." P. Ex. 2. In support of her request, she asserts that she (1) has overcome a variety of difficult life situations, (2) avoided legal trouble for over 28 years prior to her conviction for health care fraud, (3) donates to charity, and (4) has volunteered to speak about her experiences to other professionals in Delaware. P. Ex. 2.

I do not have the authority to refuse to follow federal statutes or regulations. 42 C.F.R. § 1005.4(c)(1). The federal statute and regulations applicable in this case mandate a five-year minimum period of exclusion for any individual who has been convicted of a criminal offense related to the delivery of an item or service under a state health care program. Act, section 1128(a)(1), (c)(3)(B) (42 U.S.C. § 1320a-7(a)(1), (c)(3)(B)); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Therefore, notwithstanding Petitioner's

asserted good behavior, it is not within my authority to relieve Petitioner from her mandatory five-year minimum period of exclusion from participation in any federal health care program.

## **V. Conclusion**

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the mandatory five-year minimum period as required by section 1128(a)(1) and (c)(3)(B) of the Act (42 U.S.C. § 1320a-7(a)(1), (c)(3)(B)).

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Leslie A. Weyn  
Administrative Law Judge