

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	DATE: February 21, 1990
Catherine Parent-Geffert,)	
)	
Petitioner,)	Docket No. C-158
)	
- v. -)	DECISION CR 68
)	
The Inspector General.)	
)	

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On September 7, 1989, the Inspector General (the I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs.¹ The I.G. told Petitioner that she was being excluded as a result of her conviction in a Wisconsin court of a criminal offense related to the delivery of an item or service under the Medicare program. Petitioner was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(1) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years.

Petitioner timely requested a hearing as to the exclusion, and the case was assigned to me for a hearing and a decision. In her hearing request, the Petitioner asserted that she had not been convicted of a criminal offense related to the delivery of an item or service under the Medicare program within the meaning of section

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

1128(a)(1) of the Social Security Act. She argued that she had not been "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Petitioner also asserted that section 1128 of the Social Security Act only required or directed exclusions of individuals convicted of offenses relating to health care services which are financed in whole or in part by a government agency. She contended that the offense of which she was convicted did not relate to government-financed health care services. Finally, Petitioner argued that the I.G. had unlawfully applied the exclusion law retroactively in her case.

The I.G. moved for summary disposition of the case. Petitioner responded to the motion and also moved for summary disposition. Neither party requested oral argument. Petitioner conceded in her brief in support of her motion for summary disposition that the only issue not resolved against her by the arguments and authorities cited by the I.G. was the issue of whether or not she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare program, within the meaning of section 1128(a)(1) of the Social Security Act.

I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. I conclude that the exclusions imposed and directed by the I.G. are mandated by section 1128(a)(1) of the Social Security Act. Therefore, I am deciding this case in favor of the I.G.

ISSUE

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On May 27, 1988, Petitioner was charged under Wisconsin law with criminal offenses, consisting of two counts of falsely representing that she was licensed in Wisconsin to practice psychology. I.G. Ex. 1.²

2. The criminal complaint against Petitioner contained the statement of an employee of Blue Cross and Blue Shield of Wisconsin (Blue Cross) that Petitioner: had applied for a provider number as a licensed psychologist for insurance payments for psychological services rendered to persons covered by Blue Cross policies; had represented to Blue Cross that she was a licensed psychologist; and had filed claims with Blue Cross between December 27, 1985 and October 13, 1986 wherein she represented that she had provided psychological services. I.G. Ex. 1.

3. The criminal complaint against Petitioner also contained the statement of an employee of Wisconsin Physicians Services, Medicare Part B, that Petitioner: had applied for a provider number with Wisconsin Physicians services, representing herself to be a psychologist licensed in Wisconsin; and had filed claim forms with Wisconsin Physician Services between September 30, 1985 and March 4, 1986 wherein she represented that she had provided psychological services. I.G. Ex. 1.

² The parties' exhibits and memoranda will be referred to as follows:

I.G.'s Exhibit

I.G. Ex.

Memorandum in Support of
Respondent's Motion for
Summary Disposition

I.G.'s Brief

Memorandum in Support of
Petitioner's Motion for
Summary Disposition

P.'s Brief

Reply to Petitioner's
Motion for Summary
Disposition

I.G.'s Reply Brief

4. The criminal complaint against Petitioner also contained the statement of an employee of the Wisconsin Department of Regulation and Licensing that Petitioner was not and had never been a licensed psychologist in Wisconsin. I.G. Ex. 1.

5. The allegations in the criminal complaint against Petitioner were in part based on evidence that Petitioner had applied for a Medicare provider number in Wisconsin, representing that she was a psychologist licensed to practice in Wisconsin. I.G. Ex. 5.

6. The allegations in the criminal complaint against Petitioner were in part based on evidence that Petitioner had filed Medicare reimbursement claims for psychological services in Wisconsin. I.G. Ex. 7.

7. Petitioner pleaded no contest to both counts of the complaint. I.G. Ex. 4.

8. Petitioner was convicted of criminal offenses related to the delivery of an item or service under the Medicare program. Findings 1-7.

9. Petitioner was convicted of criminal offenses within the meaning of section 1128(a)(1) of the Social Security Act. Findings 1-8; Social Security Act, section 1128(a)(1).

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

11. On September 7, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act.

12. The exclusion imposed and directed against Petitioner by the I.G. was for five years, the minimum period required by law for exclusions imposed and directed pursuant to section 1128(a)(1) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).

13. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Finding 9; Social Security Act, sections 1128(a)(1); 1128(c)(3)(B).

ANALYSIS

Petitioner pleaded guilty in a Wisconsin court to the criminal offense of falsely representing that she was licensed to practice psychology. The I.G. excluded Petitioner from participating in Medicare, and directed that Petitioner be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Social Security Act. This section mandates the exclusion from participating in Medicare and Medicaid of individuals who are:

(C)onvicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Petitioner no longer disputes that she was convicted of a criminal offense within the meaning of section 1128. The undisputed facts establish that Petitioner pleaded no contest to a criminal offense and that the Court accepted Petitioner's plea and sentenced Petitioner. The exclusion law defines the term "convicted of a criminal offense" to include the circumstance where an individual enters a nolo contendere plea to a criminal charge. Social Security Act, section 1128(i)(3).

What remains at issue is whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1). Petitioner argues that this issue may only be resolved by determining whether her judgment of criminal conviction proves facts which establish that the offense of which she was convicted related to the delivery of an item or service under the Medicare program. That in turn, according to Petitioner, may only be resolved by examining the record of her criminal case. P.'s Brief at 5.

Petitioner contends that the documents in her criminal case do not establish that her conviction resulted from misrepresentations to Medicare. She argues that neither her plea nor the complaint against her establish that the conduct which resulted in her conviction related to the delivery of an item or service under the Medicare program. Petitioner argues that the complaint does not specifically or impliedly refer to the delivery of an

item or service under the Medicare program. Moreover, according to Petitioner, there are no facts alleged in the criminal complaint which would allow the reasonable inference that the conduct which led to issuance of the complaint related to the delivery of an item or service under the Medicare program.

The I.G. argues that facts sufficient to establish that Petitioner was convicted of an offense as described in section 1128(a)(1) are contained in the criminal complaint filed against Petitioner. The I.G. argues further that, to the extent language in the complaint is vague, that language is clarified by an affidavit and exhibits which the I.G. submitted in connection with his motion (I.G. Ex. 5, 6 and 7). I.G.'s Reply Brief at 2.

Petitioner does not dispute the truth or accuracy of the affidavit or the exhibits. However, Petitioner contends that they are irrelevant because there is nothing in the documentation of the criminal case against Petitioner which suggests that they served as the basis for Petitioner's no contest plea or for the court's entry of a judgment of conviction against Petitioner. P.'s brief at 6, note.

I conclude that the criminal complaint against Petitioner contains facts sufficient to establish that her no contest plea was to a criminal offense related to Petitioner's misrepresentations to the Medicare program. The criminal complaint was based in part on the statement of an employee of Wisconsin Physicians Services, Medicare Part B, that Petitioner had applied for a provider number, representing that she was a licensed psychologist, and that she had submitted claims forms to Wisconsin Physicians Services. I.G. Ex. 1. This statement does not precisely articulate that the provider number applied for by Petitioner was to be used in connection with Medicare claims, or that the claims subsequently submitted by Petitioner were Medicare claims.

However, it is reasonable to infer from the context of the statement and from its contents that Petitioner applied for a Medicare provider number representing herself to be a licensed psychologist and submitted Medicare claims for psychological services. As noted, the declarant is an employee of Wisconsin Physicians Services, Medicare Part B. She asserts that the Petitioner's provider number application contains representations by Petitioner to Wisconsin Physicians

Services. She also asserts that the claims she refers to are claims from Petitioner to Wisconsin Physicians Services.

Therefore, there are no ambiguities in the complaint which would preclude a finding that the offense charged involved a criminal misrepresentation to Medicare. However, to the extent any statements in the complaint are arguably ambiguous, the I.G. has submitted exhibits which clarify those statements.

As noted above, the I.G. submitted an affidavit by the individual whose allegations concerning Petitioner's representations to Wisconsin Physicians Services were included in the criminal complaint. I.G. Ex. 5. The I.G. also submitted a copy of a Medicare reimbursement claim submitted by Petitioner to Wisconsin Physicians Services during the period when, according to the complaint, Petitioner had made such reimbursement claims. I.G. Ex. 7.

Limited extrinsic evidence may be admitted to establish that the complaint relates to the delivery of items or services under Medicare or Medicaid. Blankenship v. the Inspector General, Docket No. C-67 (1989); Thomas M. Cook v. the Inspector General, Docket No. C-106 (1989).

In Blankenship, petitioner was convicted of the criminal offense of misrepresenting the origin of drugs. Judge Stratton admitted testimony of state and federal agents which established that the drugs were purchased with Medicaid eligibility cards. Thus, the conviction related to the delivery of an item or services under Medicaid within the meaning of section 1128(a)(1) of the Act. In Cook, petitioner was convicted of the criminal offense of reckless conduct. I admitted limited extrinsic evidence which established the identity of the individual against whom the conduct was perpetrated and the nature of the relationship between petitioner and that individual. The evidence established that the offense constituted reckless conduct by a nursing home administrator against a patient in a nursing home. That, in turn, established that the offense related to the neglect or abuse of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

Here, the limited additional evidence that the I.G. offered consists of exhibits which establish that Petitioner applied for a Medicare provider number as a

psychologist and subsequently filed Medicare reimbursement claims for psychological services under that number. The exhibits are relevant because they explain and resolve arguably ambiguous statements in the criminal complaint which was filed against Petitioner.

As noted above, while Petitioner disputes the relevance of the I.G.'s supplemental evidence, she does not dispute its truthfulness. There are no disputed material facts in this case. Therefore, the case may be disposed of by motion for summary disposition.

The criminal conviction in this case was for an offense relating to the delivery of an item or service under the Medicare program, within the meaning of section 1128(a)(1) of the Social Security Act. Petitioner made fraudulent representations to Medicare concerning her licensure as a psychologist, in order to induce Medicare to reimburse her for claims for psychological services. The false representations were a necessary prerequisite for Petitioner obtaining reimbursement for the services she claimed to have provided. Therefore, they, and the offense of which Petitioner was convicted, were "related" to the delivery of an item or service under Medicare. I conclude that the I.G. was required to impose and direct an exclusion against Petitioner, pursuant to section 1128(a)(1) of the Social Security Act.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusion was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

Steven T. Kessel
Administrative Law Judge