

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Barbara Johnson, D.D.S.,)	Date: May 11, 1990
Petitioner,)	
- v. -)	Docket No. C-181
The Inspector General.)	DECISION CR 78

DECISION

This case is governed by section 1128 of the Social Security Act (Act). Petitioner filed a timely request for a hearing before an Administrative Law Judge (ALJ) to contest the October 24, 1989 notice of determination (Notice) issued by the Inspector General (I.G.) which excluded Petitioner from participating in the Medicare and Medicaid programs for five years.¹

The I.G. filed a motion for summary disposition, and a brief and five exhibits in support thereof.² Petitioner

¹ Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program (Title XVIII of the Act) and requires the I.G. to direct States to exclude those same individuals and entities for the same period of time from "any State health care program" as defined in section 1128(h). The Medicaid program (Title XIX of the Act) is one of three types of State health care programs defined in Section 1128(h) and, for the sake of brevity, I refer only to it.

² The citations to the record in this Decision and Order are designated as follows:

I.G.'s Brief I.G. Br. (page)

I.G.'s Exhibit I.G. Ex. (number)

did not file a response in opposition to the I.G.'s motion for summary disposition.

Based on the entire record before me, I conclude that: (1) summary disposition is appropriate in this case; (2) Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act; and (3) Petitioner's exclusion for a minimum period of five years is mandated by law.

ADMISSIONS

1. Petitioner admitted that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act (Act) is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to" the delivery of an item or service under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services

under the Medicare, Medicaid, or the social services program.³

ISSUES

1. Whether the criminal offense for which Petitioner was convicted "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act.
2. Whether Petitioner is subject to the minimum mandatory five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.
3. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴

Having considered the entire record, and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:

1. At all times relevant to this case, Petitioner was a practicing dentist.
2. In April 1988, Petitioner was charged with 23 counts of Medicaid Provider Fraud, in violation of District of Columbia (D.C.) Code, Section 3-702(b)(3). I.G. Ex. 5.
3. It is a violation of D.C. Code Section 3-702(b)(3) to, with intent to defraud, by means of false claim, obtain and attempt to obtain, payment from the District of Columbia as a District of Columbia Medicaid provider, for an item or service that a provider knows and has reason to know was not provided as claimed." I.G. Ex. 5.

³ The I.G.'s Notice allows an additional five days for receipt.

⁴ Any part of this Decision and Order preceding the Findings of Fact and Conclusions of Law which is obviously a finding of fact or conclusion of law is incorporated herein.

4. In December 1988, Petitioner was found guilty, by jury, of 12 counts of Medicaid Provider Fraud. I.G. Ex. 4.
5. Petitioner was sentenced to 18 months probation and ordered to pay: (1) \$100.00 fine; and (2) \$1,140.00 restitution. I.G. Ex. 4.
5. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Findings 2, 3.
6. Petitioner's conviction relates to Petitioner's commission of a fraud against the Medicaid program. Findings 2 - 4.
7. Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act. Findings 2 - 5.
8. As required by section 1128 of the Act, the I.G. properly excluded Petitioner from participation in Medicare, and properly directed her exclusion from Medicaid, for a period of five years. Social Security Act, section 1128(a)(1); Findings 4, 5.
9. The material and relevant facts in this case are not contested.
10. The I.G. is entitled to summary disposition in this proceeding. Finding 7.

DISCUSSION

I. Petitioner was "Convicted" of a Criminal Offense as a Matter of Federal Law.

Petitioner was convicted of 12 counts of Medicaid Provider Fraud. Section 1128(i) of the Act provides that an individual has been "convicted" of a criminal offense when:

- (1) 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) there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
- (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) 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.

I find and conclude that Petitioner was "convicted" within the meaning of section 1128(a)(1) and (i)(2) of the Act.

II. Petitioner's Conviction "Related to the Delivery of an Item or Service" Within The Meaning of Section 1128 of The Act.

Although Petitioner admits, and I find and conclude, that Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act, Petitioner argues that she should not be excluded because her conviction does not relate to her delivery of an item or service under the Medicaid program.

Section 1128(a)(1) of the Act requires the I.G. to exclude persons who have been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. The key determining factor is whether the criminal offense for which Petitioner was convicted is related to the delivery of an item or service under the Medicaid program, not whether Petitioner personally committed the offense for which she was convicted.

Petitioner's conviction for falsely obtaining and attempting to obtain reimbursement from the Medicaid program for services which she knew and had reason to know were not provided as claimed, is specifically the type of criminal offense which the mandatory provisions of the Act seek to redress.

I find and conclude that Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

III. A Minimum Mandatory Five Year Exclusion Was Required In This Case.

Section 1128(a)(1) of the Act clearly requires the I.G. to exclude individuals and entities from the Medicare program, and direct their exclusion from the Medicaid program, for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs within the meaning of section 1128(a)(1) of the Act. Congressional intent on this matter is clear:

A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . . Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

Since Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Act, the I.G. was required to exclude Petitioner for a minimum of five years.⁵

IV. Summary Disposition is Appropriate in this Case.

I conclude, as a matter of law, that Petitioner was properly excluded and that the length of her exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. The I.G. is entitled to summary disposition as a matter of law.

⁵ Since I have found and concluded that the mandatory exclusion provisions of section 1128(a)(1) apply in this case, I need not address the issue, raised by the Petitioner, of whether I should make a de novo determination to reclassify the Petitioner's criminal offense as subject to the permissive authority under section 1128(b) of the Act.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare program, and directed her exclusion from the Medicaid program, for the minimum mandatory period of five years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge