

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Jane B. Oliver,	)	DATE: August 15, 1991
Petitioner,	)	
- v. -	)	Docket No. C-369
The Inspector General.	)	Decision No. CR149

DECISION

On March 27, 1991, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in Medicare and any State health care program for a period of five years.<sup>1</sup> The I.G. told Petitioner that she was being excluded as a result of her conviction of a criminal offense related to the delivery of an item or service under Medicare. 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 (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. The I.G. informed Petitioner that she was being excluded for the minimum mandatory period of five years.

Petitioner timely requested a hearing and the case was assigned to me for a hearing and a decision. The I.G. moved for summary disposition. Petitioner was afforded the opportunity to respond to the motion. Petitioner advised me that she was not filing a response.

I have considered the arguments made by the I.G. in his motion as well as those made by Petitioner in her hearing

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<sup>1</sup> "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

request. I have also considered the undisputed material facts of this case and applicable law. I conclude that the five-year exclusion imposed and directed by the I.G. against Petitioner is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

#### ISSUES

The issues in this case are whether Petitioner:

1. was convicted of a criminal offense, within the meaning of section 1128(a)(1) of the Act; and

2. may prove that mitigating circumstances exist either to show that the I.G. did not have authority to impose and direct an exclusion against her or that the five-year exclusion which was imposed and directed is unreasonable.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In August 1989, Petitioner was indicted in the United States District Court for the District of South Carolina. I.G. Ex. B.<sup>2</sup>

2. The indictment charged that Petitioner knowingly and willfully made and caused to be made false statements and representations of material facts in applications for payments for medical services rendered by a participating physician under Part B of the Medicare program. I.G. Ex. B/3.

3. On March 20, 1990, Petitioner was charged in a criminal information which superseded the indictment (superseding information) with five counts of making and causing to be made false statements and representations of material facts in applications for payments for medical services rendered by a participating physician under Part B of the Medicare program. I.G. Ex. A.

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<sup>2</sup> The I.G. attached four exhibits to his motion, which he designated as Exhibits "A" through "D." I refer to the I.G.'s exhibits as "I.G. Ex. (letter designation)/(page)." Petitioner has not disputed either the authenticity of these exhibits or the I.G.'s recitation of the material facts in support of his motion. I accept the I.G.'s representation of material facts as undisputed. For purposes of creating a record in this case, I admit the I.G.'s exhibits "A" through "D" into evidence.

4. On June 1, 1990, Petitioner pled guilty to the five counts of the superseding information. I.G. Ex. D.
5. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Findings 1-4; Social Security Act, section 1128(a)(1).
6. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).
7. On March 27, 1991, the I.G. excluded Petitioner from participating in Medicare and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.
8. There are no disputed issues of material fact in this case and summary disposition is appropriate. Findings 1-4.
9. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).
10. Petitioner may not collaterally attack her criminal conviction in this proceeding. Social Security Act, section 1128(a)(1).
11. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 5, 9; Social Security Act, section 1128(a)(1).

#### ANALYSIS

There are no disputed material facts in this case. The undisputed facts are that on June 1, 1990, Petitioner pled guilty to the federal crime of making and causing to be made false statements and representations in claims for Medicare reimbursement. The I.G. imposed and directed a five-year exclusion against Petitioner in March 1991, pursuant to section 1128(a)(1) of the Act.

1. Petitioner was convicted of a criminal offense, within the meaning of section 1128(a)(1) of the Act.

Section 1128(a)(1) of the Act requires the Secretary (or his delegate, the I.G.) to exclude from participation in Medicare, and to direct the exclusion from participation in Medicaid, of:

[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Petitioner's conviction for making false statements and representations in Medicare reimbursement claims constitutes a conviction of a criminal offense, within the meaning of section 1128(a)(1). The offense consists of knowingly filing false Medicare claims. It is a settled matter that conviction for presentation of false Medicare or Medicaid claims is a conviction of an offense related to the delivery of an item or service under Medicare or Medicaid. Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990); Michael Travers, M.D., DAB App. 1237 (1991). As the appellate panel held in Greene:

[S]ubmission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of an item or service, to bring the "item" within the purview of the program.

Id. at 7. The Departmental Appeals Board has also held that a conviction of a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the victim of the offense is the Medicare or Medicaid program. Napoleon S. Maminta, M.D., DAB App. 1135 (1990). That was plainly the case here.

2. Petitioner may not prove that mitigating circumstances exist either to show that the I.G. did not have authority to impose and direct an exclusion against her or that the five-year exclusion which was imposed and directed is unreasonable.

Although Petitioner did not file a response to the I.G.'s motion for summary disposition, she did file a detailed statement in her request for a hearing. In that statement, Petitioner argued that her conduct resulting in a criminal conviction could in some respect be explained by extenuating circumstances. Petitioner did not specifically aver either that the I.G. lacked authority to impose and direct an exclusion, or that the

exclusion imposed and directed against Petitioner was unreasonable, due to extenuating circumstances. I infer from her request that she may have intended to make these arguments.

I accept Petitioner's assertions as true for purposes of deciding the I.G.'s motion for summary disposition. However, they provide no basis for me to find that the I.G. was without authority to exclude Petitioner or to reduce the length of the five-year exclusion imposed and directed against Petitioner by the I.G.

It is settled that a party may not challenge the I.G.'s authority to impose and direct an exclusion under section 1128 by asserting that he or she is not really guilty of the offense of which that party stands convicted. The conviction, and not the underlying conduct, is the triggering event which mandates the Secretary to impose and direct an exclusion. The law does not require the Secretary to look behind the conviction to determine whether it is valid. It is not relevant to the issue of the I.G.'s authority that the criminal conviction may have been defective or that the petitioner subsequently contends that he or she is not actually guilty of the offense of which the petitioner was convicted. Andy E. Bailey, C.T., DAB Civ. Rem. C-110 (1989), aff'd DAB App. 1131 (1990); see John W. Foderick, M.D., DAB App. 1125 (1990).

The Act provides that the Secretary must impose and direct an exclusion of at least five years against an individual convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B). The law directs an exclusion of at least five years in such cases regardless of the presence of extenuating circumstances. The exclusion imposed and directed against Petitioner is for the five-year minimum period. Therefore, I may not consider Petitioner's claim of extenuating circumstances as a legitimate basis to modify the exclusion imposed and directed against her by the I.G.

## CONCLUSION

Based on the undisputed material facts and the law, I conclude that the five-year exclusion from participating in Medicare and Medicaid imposed and directed against Petitioner by the I.G. was mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Therefore, I enter summary disposition in favor of the I.G., sustaining the five-year exclusion.

/s/

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Steven T. Kessel  
Administrative Law Judge