

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: May 11, 1992
Jeanne Hebert,	)	
	)	
Petitioner,	)	Docket No. C-92-012
	)	Decision No. CR195
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated August 20, 1991, Jeanne Hebert, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that, pursuant to section 1128(a)(1) of the Social Security Act (the Act), she would be excluded for a period of five years from participation in the Medicare program and from participation in the State health care programs which are defined in section 1128(h) of the Act (referred to in this Decision as Medicaid), based upon her conviction of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge. The I.G. moved for summary disposition of the case. Inasmuch as there are no material facts in dispute, I conclude that there is no need for oral testimony or the confrontation of witnesses and that summary disposition is appropriate. I further conclude that, under the facts of this case, a five-year exclusion is mandatory, and, accordingly, summary disposition is entered in favor of the I.G.

Applicable Law

Sections 1128(a)(1) and (c) of the Act (codified at 42 U.S.C. 1320a-7 (a)(1) and (c) (1988)) make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service

under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

Section 1128(i)(1) of the Act provides that an individual is deemed to have been convicted of a criminal offense "when 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."

#### Findings of Fact and Conclusions of Law<sup>1</sup>

1. During the period relevant to this case, Petitioner was director of nursing at the Evangeline Home Health Agency. I.G. Br. 10.
2. On March 28, 1991, Petitioner pled guilty in the Nineteenth Judicial District Court, East Baton Rouge, Louisiana, to the misdemeanor charge of criminal conspiracy to commit theft valued at less than \$100.00 (altering records to support fraudulent Medicaid claims). I.G. Ex. 1 & 2.
3. Petitioner was given a twelve-month suspended sentence of unsupervised probation. She was also obliged to pay \$1,000 of the state's costs. I.G. Ex. 1 & 2.
4. Following satisfaction of the terms of her probation, the court set aside Petitioner's conviction pursuant to Article 894(B) of the Louisiana Code of Criminal Procedure. I.G. Ex. 5.
5. Article 894(B) of the Louisiana Code of Criminal Procedure provides that a conviction set aside pursuant to such article has ". . . the same effect as an acquittal. . . ."
6. The Secretary of HHS delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

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<sup>1</sup> The exhibits and briefs submitted by the I.G. and Petitioner are referred to herein as "I.G. Ex. (number)," "P. Ex. (number)," "I.G. Br. (page)," P. Br. (page), and I.G. Reply (page). They are all admitted into evidence.

7. By letter dated August 20, 1991, Petitioner was notified by the I.G. that she would be excluded for five years from participation in the Medicare and Medicaid programs, based upon her conviction of a criminal offense related to the delivery of an item or service under Medicaid, pursuant to section 1128(a)(1) of the Act. I.G. Ex. 6.

8. For purposes of the Act, an individual will be regarded to have been convicted where a judgment of conviction has been entered by a competent court, regardless of whether such judgment of conviction or criminal record has been expunged.

9. A criminal conviction based upon billing Medicaid for services not rendered is sufficiently related to the delivery of an item or service under Medicare or Medicaid to justify application of the mandatory exclusion provisions of section 1128(a)(1).

#### Argument

Petitioner admits that she pled guilty to the misdemeanor charge of criminal conspiracy to commit theft valued at less than \$100.00. P. Br. Petitioner also admits that the criminal offense relates to the delivery of a health care item or service, within the meaning of section 1128(a)(1) of the Act. P. Br. However, Petitioner contends that her conviction was set aside and, therefore, cannot be used as the basis of this action against her. She asserts that Article 894(B) of the Louisiana Code of Criminal Procedure provides that if the term of a suspended sentence is completed, any special conditions of probation are satisfied, and a defendant has had no further criminal convictions or charges, the court which imposed the original sentence may set aside such conviction. According to Petitioner, when a court sets aside a conviction in this manner, it has the same effect as an acquittal. Petitioner submitted a copy of a court record showing that her conviction was set aside under Article 894(B).

#### Discussion

Section 1128(a)(1) of the Act, under which the I.G. seeks Petitioner's exclusion, contains two requirements. It requires that an individual (1) be convicted of a criminal offense, and (2) that such conviction be related to the delivery of an item or service under Medicare or Medicaid.

In the present case, although Petitioner's conviction may have been nullified for purposes of Louisiana law, that conviction remains a basis for an exclusion under section 1128(a)(1) of the Act. Section 1128(i)(1) of the Act, quoted supra, expressly provides that an individual will be regarded as having been convicted, for purposes of the Act, where a judgment of conviction has been entered by a competent court, regardless of whether such conviction or criminal record has been expunged (as distinguished from being reversed on appeal). Here, Petitioner pled guilty to a criminal offense and the court entered judgment against her. That the judgment was subsequently expunged because she complied with the terms of her probation does not nullify the original conviction for purposes of determining whether she should be excluded from the Medicare and Medicaid programs. As a prior decision of this office has stated, "post-pleading erasures of convictions [are] included within the statutory definition of conviction." James F. Allen, M.D.F.P., DAB CR71 (1990).

It is clear, furthermore, that this interpretation effectuates the intent of Congress with regard to section 1128. The committee that drafted this section expressly stated that persons who defraud Medicare or Medicaid should not escape exclusion simply because their criminal cases are handled under "first offender" or "deferred adjudication" programs. As noted by the committee, typically in these programs a defendant pleads guilty but no actual judgment of conviction is entered against him, provided he maintains good behavior and satisfies any other conditions during a period of probation. H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S. Code Cong. & Admin. News, 3607.

As to the requirement that the conviction be related to the delivery of an item or service under Medicare or Medicaid, it has already been held that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley, DAB CR128 (1991) and Marie Chappell, DAB CR109 (1990). These holdings also comport fully with the often-expressed intent of Congress to protect the programs by barring those who seek to defraud them, particularly by false billing. See, H.R. Rep. No. 393, Part II, 95th Cong., 1st Sess. 47; reprinted in 1977 U.S. Code Cong. & Admin. News 3039, 3050. Also see S. Rep. No. 109, 100th Cong., 1st Sess. 2; reprinted in 1987 U.S. Code Cong. & Admin. News 682.

Thus, I find that Petitioner was validly convicted of an offense related to the delivery of health care items or services under Medicaid, and that, as a consequence, the mandatory provisions of section 1128(a)(1) require her exclusion for a minimum of five years. An administrative law judge has no discretion to alter this minimum period. Jack W. Greene, DAB 1078 (1989), aff'd. sub nom., Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn 1990).

#### Conclusion

Petitioner's conviction mandates a five-year exclusion, pursuant to section 1128(a)(1) of the Act.

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Joseph K. Riotto  
Administrative Law Judge