

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Graciela Bolumen, R.Ph.,)	DATE: March 5, 1993
Petitioner,)	
- v. -)	Docket No. C-386
)	Decision No. CR254
The Inspector General.)	

DECISION

In a letter dated March 31, 1991, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in the Medicare program and any State health care program for a period of five years.¹ The I.G. stated that Petitioner was being excluded because she had been convicted of a criminal offense related to the delivery of an item or service under the Florida Medicaid program. The notice letter informed Petitioner that sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) require that individuals convicted of such crimes be excluded from participation in the Medicare and Medicaid programs for a minimum of five years.

Petitioner timely requested a hearing. In a letter dated June 13, 1991, Jose E. Ferrer, Esq., entered his appearance on behalf of Petitioner. In that letter, he requested that proceedings be stayed for 30 days. In a subsequent telephone communication, Mr. Ferrer's office requested that proceedings be stayed pending the outcome of an appeal of Petitioner's criminal conviction. I

¹ "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 plans from which Petitioner was excluded.

issued an Order Staying Proceedings which required Mr. Ferrer to provide a status report regarding Petitioner's appeal on or before October 1, 1991. Mr. Ferrer did not provide such a report, nor did he respond to telephone calls and letters from this office inquiring as to the status of the case.

On August 24, 1992, I issued an Order to Show Cause requiring Petitioner or her counsel to respond as to why the case should not be dismissed for abandonment. Petitioner responded by letter dated August 27, 1992. In that letter she stated that she had not intended to abandon her appeal of her exclusion and that she was no longer represented by Mr. Ferrer. Petitioner's letter stated that she was being represented by Eladio Armesto, III. On the basis of Petitioner's representations, I concluded that she had not abandoned her appeal.

On October 7, 1992, I conducted a telephone prehearing conference in this case at which Petitioner was represented by Mr. Armesto. At the prehearing conference, Mr. Armesto admitted that Petitioner had been convicted of a criminal offense, within the meaning of section 1128(i) of the Act. During the conference, the parties also agreed that this case could appropriately be decided on motions for summary disposition. The I.G. submitted a motion for summary disposition, supported by documentary evidence. Petitioner did not file a response to the I.G.'s motion. For this reason, the facts as presented in the I.G.'s motion and exhibits are uncontested.² On the basis of these uncontested facts and the law, I conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Therefore, the exclusion imposed and directed against Petitioner was mandated by law. Accordingly, I enter summary disposition in favor of the I.G., sustaining the exclusion.

ISSUE

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

² I have numbered (which the I.G. should have done in accordance with my prehearing Order) and have admitted the I.G.'s documents into evidence as I.G. Exhibits (I.G. Ex.) 1 through 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During 1989 and 1990, Petitioner was a pharmacist licensed in the State of Florida and was the sole owner of St. Gema Pharmacy. I.G. Ex. 1 at p.1.
2. On or about February 9, 1989, in response to a complaint from the Florida Department of Health and Rehabilitative Services (DHRS), the State Medicaid agency, the Florida Office of Auditor General, Medicaid Fraud Control Unit (MFCU) initiated an investigation of the billing practices of St. Gema Pharmacy. I.G. Ex. 1 at p. 2.
3. On various dates from February 22, 1989 through October 24, 1989, special agents of the MFCU, in an undercover capacity, presented themselves at St. Gema Pharmacy as Medicaid recipients with prescriptions to be filled. I.G. Ex. 1 at pp. 2-6.
4. On various dates from February 22, 1989 through October 24, 1989, Petitioner, or her employees, offered the special agents merchandise credits at the pharmacy in exchange for the agents' Medicaid prescriptions. The pharmacy then billed the Medicaid program for filling the prescriptions, although no medications were actually dispensed to the agents. I.G. Ex. 1 at pp. 2-6.
5. On May 15, 1990, a criminal information was filed in Dade County Court charging Petitioner with "Medicaid fraud -- receiving unauthorized payments for false claims," in violation of sections 409.325(4)(c) and (5)(a) of the Florida Statutes. I.G. Ex. 2.
6. Specifically, the information charged that, from about February 22, 1989 to November 1, 1989, Petitioner knowingly and unlawfully received, attempted to receive, or aided and abetted in the receipt of unauthorized payments based on false claims made to the Florida Medicaid program seeking payment for pharmaceutical services which were not rendered as represented. I.G. Ex. 2.
7. On July 19, 1990, Petitioner pled nolo contendere to the offense charged in the information. I.G. Ex. 4 at pp. 1-2.
8. On July 19, 1990, the Dade County Court found Petitioner guilty of the offense, but withheld adjudication, ordering Petitioner to pay a fine of \$100.00, restitution of \$360.77 to DHRS, investigative

costs of \$1500.00 to the Florida Office of the Auditor General, and court costs. I.G. Ex. 4 at pp. 2-3.

9. The Dade County Court accepted Petitioner's nolo contendere plea. I.G. Br. 4.

10. Petitioner admits that she was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Prehearing Order, dated October 9, 1992, at 2.

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

12. The offense of which Petitioner was convicted was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1-6.

13. 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 (1983).

14. 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).

15. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1-11; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

The evidence adduced by the I.G. and not disputed by Petitioner amply demonstrates that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. For this reason, Petitioner's five-year exclusion is required as a matter of law, and summary disposition in favor of the I.G. is appropriate.

Petitioner has admitted that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Finding 10. I note that, even without Petitioner's admission, there is uncontested evidence in the record proving that Petitioner's conviction meets the statutory definition. Section 1128(i)(3) provides that

an individual is convicted, "when a plea of guilty or nolo contendere . . . has been accepted by a Federal, State, or local court. . . ."

In the present case, Petitioner pled nolo contendere to Medicaid fraud as charged in the information. Finding 7. The I.G. has represented that the Dade County Court accepted that plea. I.G. Br. 4. Petitioner has not disputed the I.G.'s representation. Additionally, the documentary evidence submitted by the I.G. tends to support the I.G.'s representation, as the court found Petitioner guilty of the offense, based on her plea. Finding 8. Therefore, I find that the court accepted Petitioner's plea of nolo contendere and, accordingly, Petitioner's conviction falls within the definition of section 1128(i)(3). Findings 9-11.

Petitioner did not file a response to the I.G.'s motion for summary disposition. However, at the October 7, 1992 telephone prehearing conference in this case, Petitioner argued that her conviction should not subject her to the mandatory exclusion provision of section 1128(a)(1) because she did not personally engage in any illegal acts directed at the Medicaid program. Petitioner represented that she had been convicted based solely on the illegal acts of others in her employ. These arguments are insufficient to negate the application of section 1128(a)(1).

Petitioner's assertion that she did not engage in any illegal acts directed at the Medicaid program is, in essence, an assertion that she is not guilty of the offense for which she was convicted. However, arguments regarding an individual's culpability for the acts underlying a conviction are irrelevant in determining the applicability of section 1128(a)(1). An appellate panel of the Departmental Appeals Board (Board) held in DeWayne Franzen, DAB 1165 (1990), that the authority to impose an exclusion pursuant to section 1128(a)(1) of the Act derives from a party's conviction of a program-related offense and not from the party's conduct on which the conviction is premised:

[Section 1128(a)(1)] merely requires . . . that the individual's acts cause the individual to be convicted of an offense and that the offense be related to the delivery of an item or service under the Medicaid program.

Id. at 7. Therefore, Petitioner's assertion that she is not guilty of the offense for which she was convicted is

not a basis to negate the I.G.'s authority to impose an exclusion under section 1128(a)(1).

Petitioner's second argument is, essentially, that her conviction does not qualify for an exclusion under section 1128(a)(1) because, even if she may have been convicted of fraud, she never manifested an intent to commit fraud. The facts in this case do not support Petitioner's apparent argument that her conviction did not subsume an element of intent. The criminal information charging Petitioner with Medicaid fraud, pursuant to which she was convicted, charged her with acting "knowingly." Finding 6. Thus, the crime of which Petitioner was convicted encompassed an element of criminal intent. However, the exclusion authority in section 1128(a)(1) is not limited to convictions which involve an element of criminal intent. In Franzen, the Board held that criminal intent is not required to bring a conviction within the ambit of section 1128(a)(1):

Section 1128(a)(1) does not require that the individual must intend to commit a criminal offense, or indeed fraud, for an exclusion to be proper.

DAB 1165, at 7. Therefore, even if the offense of which Petitioner was convicted had involved no element of criminal intent, the I.G. would nevertheless be required to exclude her if the offense was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

The offense of which Petitioner was convicted is, by the terms of the criminal information, related to the delivery of an item or service under Medicaid. Petitioner was charged with "Medicaid fraud -- receiving unauthorized payments for false claims." Finding 5. The information alleged that Petitioner knowingly and unlawfully received, attempted to receive, or aided and abetted in the receipt of unauthorized payments from the Florida Medicaid program based on claims for pharmaceutical services that were not provided as claimed. Finding 6. In accepting Petitioner's plea of nolo contendere, the Dade County Court found her guilty of the offense charged in the information. Finding 8. Thus, Petitioner was convicted of the criminal offense of receiving unauthorized payments based on false Medicaid claims. On its face, this crime is related to the delivery of Medicaid items or services.

In Douglas Schram, R.Ph., DAB 1372 (1992), the Board held that submitting a false claim to Medicaid is related to the delivery of an item or service under Medicaid, within

the meaning of section 1128(a)(1) of the Act. The Board reasoned:

By submitting a claim to Medicaid seeking payment or allowance, an individual or entity is representing that an item or service has been (or will be) delivered under the program for which payment or allowance is due.

Id. at 8. See also Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 & 838 (E.D. Tenn. 1990) (pharmacist who billed Medicaid for brand name drugs while dispensing less expensive generic drugs was convicted of a program-related offense).

In the present case, Petitioner was convicted of receiving unauthorized payments on account of false Medicaid claims rather than of submitting the false claims. Petitioner obtained the unauthorized payments because her pharmacy submitted claims to Medicaid for services that were not rendered. An investigation by the Florida MFCU revealed that Petitioner, or employees of her pharmacy, offered Medicaid recipients (special agents operating undercover) merchandise credits at the pharmacy in exchange for their Medicaid prescriptions. The pharmacy then billed the Medicaid program for filling the prescriptions, although no medications were actually dispensed to the recipients. Findings 2-4.

Petitioner's receipt of unauthorized payments would not have been possible had she, or some employee of her pharmacy, not submitted claims to the Medicaid program representing that an item or service had been delivered for which Medicaid payment was due. Therefore, as was the case in Schram, Petitioner's conviction here is related to the delivery of an item or service under Medicaid. This is so even though the false Medicaid claims for which Petitioner received unauthorized payments sought reimbursement for items or services that were never in fact provided. See Francis Shaenboen, R.Ph., DAB 1249, at 4 (1991). Because Petitioner's conviction was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act, her exclusion was required, as a matter of law.

CONCLUSION

Based on the law and the undisputed facts, I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare, and to direct her exclusion from Medicaid, for five years was mandated by law. Therefore, I am granting the I.G.'s motion for summary disposition.

/s/

Steven T. Kessel
Administrative Law Judge