

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Jacqueline A. Cordle-Boggs,	)	DATE: April 19, 1994
Petitioner,	)	
- v. -	)	Docket No. C-94-008
The Inspector General.	)	Decision No. CR311
	)	

DECISION

By letter dated September 22, 1993, Jacqueline A. Cordle-Boggs, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.<sup>1</sup> The I.G.'s rationale was that exclusion, for at least five years, was mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare.

Petitioner filed a timely request for review of the I.G.'s action. The I.G. moved for summary disposition.

Because I have determined that there are no facts of significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

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<sup>1</sup> In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

#### APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs to be excluded from participation in such programs for a period of at least five years.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was president of Ancor Med Serv, Inc., an Ohio corporation, whose principal business was supplying medical equipment to nursing homes. I.G. Ex. 1.<sup>2</sup>

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<sup>2</sup> The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s Brief in Support of the I.G.'s Motion for Summary Disposition	I.G. Br. (at page)
Petitioner's Brief	P. Br. (at page)
I.G.'s Reply Brief	I.G. R. Br. (at page)
My Findings of Fact and Conclusions of Law	FFCL (number)

The I.G. submitted four exhibits. I admit I.G. exhibits 1-4 into evidence. I cite the I.G.'s exhibits as "I.G. Ex(s). (number) (at page)." Petitioner submitted 14 exhibits, identifying them by letters A through N. Because Petitioner did not identify her exhibits by whole numbers, as required in my November 23, 1993 Order and Schedule for Filing Briefs and Documentary Evidence, I have marked her exhibits with whole numbers. I cite Petitioner's exhibits as "P. Ex(s). (number) (at page)." P. Ex. A is now marked as P. Ex. 1, P. Ex. B is now marked as P. Ex. 2, and so on. I admit Petitioner's Exs. 1-14 into evidence.

(continued...)

2. Upon receiving complaints alleging unlawful billing practices by Petitioner through Ancor Med Serv, the I.G. conducted an investigation which revealed that, in or about 1986, Petitioner began supplying nursing homes with catheter irrigation kits to be used as nutritional devices for administering fluids to patients who could swallow but could not drink normally. I.G. Ex. 1; P. Ex. 14.

3. A catheter irrigation kit is reimbursable under Medicare when it is used for urological purposes. I.G. Ex. 1 at 4-6; P. Ex. 14.

4. A catheter irrigation kit is not reimbursable under Medicare when it is used for dietary purposes, i.e. feeding. I.G. Ex. 1 at 5-6; P. Ex. 14.

5. On August 20, 1991, Petitioner was indicted on 68 counts of mail fraud. The indictment alleged that the basis of the counts against Petitioner was her submission of false and fraudulent Medicare claims for reimbursement, in which she billed for catheter irrigation kits purportedly used for urological purposes when, in fact, Petitioner knew that the kits had been provided for dietary purposes. Petitioner received more than \$12,000 in Medicare reimbursement. I.G. Ex. 1; FFCL 2-4.

6. Petitioner acknowledges that, on September 21, 1992, in the United States District Court, Southern District of Ohio, pursuant to a plea agreement, she entered a guilty plea to count 2 of the indictment, mail fraud in violation of 18 U.S.C. §§ 1341 and 2. I.G. Exs. 2, 3; P. Exs. 1, 15; letter from Petitioner's attorney dated October 4, 1993.

7. On February 3, 1993, the court accepted Petitioner's guilty plea and entered a judgment of conviction for mail fraud in violation of 18 U.S.C. §§ 1341 and 2. I.G. Ex. 3; letter from Petitioner's attorney dated October 4, 1993.

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<sup>2</sup>(...continued)

I also note that, with her request for hearing, Petitioner submitted affidavits from herself and from an individual named Duena R. Ames. I have marked Petitioner's affidavit as P. Ex. 15. I have marked Duena Ames' affidavit as P. Ex. 16. I admit P. Exs. 15 and 16 into evidence.

8. Petitioner was sentenced to the following: 1) 24-month term of imprisonment, all but three months suspended; 2) five-year probation; and 3) special assessment, and restitution of approximately \$104,000. I.G. Ex. 3.

9. The judgment of conviction entered by the court on February 3, 1993, constitutes a "conviction" of Petitioner, within the meaning of section 1128(i)(1) of the Act. FFCL 7.

10. The judgment of conviction entered by the court against Petitioner on February 3, 1993, states that the court made a finding of guilt against Petitioner as to count 2 of the indictment. FFCL 7; I.G. Ex. 3.

11. The court's finding of guilt against Petitioner constitutes a "conviction" of Petitioner within the meaning of section 1128(i)(2) of the Act. FFCL 10.

12. Petitioner's guilty plea, and the actions taken by the court indicating acceptance of her plea, constitute a "conviction" of Petitioner within the meaning of section 1128(i)(3) of the Act. FFCL 6-8.

13. For a conviction to subject an individual or entity to exclusion under section 1128(a)(1) of the Act, there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467, at 5 (1994).

14. There exists a nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicare. FFCL 2-5.

15. The criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1). FFCL 14.

16. The statutory requirements for mandatory exclusion pursuant to section 1128(a)(1) of the Act -- that the individual or entity in question have been convicted of a criminal offense under federal or State law, and that such offense be related to the delivery of an item or service under Medicare or Medicaid -- have been satisfied by Petitioner's conviction, which involved defrauding the Medicare program. FFCL 5-15.

17. The Act requires an exclusion of not less than five years if an individual or entity is convicted of a criminal offense related to the delivery of an item or service under Medicare. Act, sections 1128(a)(1), 1128(c)(3)(B).

18. Under section 1128(a)(1) of the Act, the fact that a conviction within the meaning of section 1128(i) has occurred mandates exclusion. The Secretary of HHS (Secretary) is not permitted to look behind the conviction.

19. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory minimum five-year period of exclusion. Act, sections 1128(a)(1), 1128(c)(3)(B).

20. The I.G. acted properly in excluding and directing the exclusion of Petitioner from participation in the Medicare and Medicaid programs for the minimum period of five years. Act, sections 1128(a)(1), 1128(c)(3)(B).

#### PETITIONER'S ARGUMENT

Petitioner acknowledges that she was convicted of a felony. FFCL 6. She contends, however, that she entered a guilty plea when charged with this offense only because she did not want to risk a trial, not because she knowingly violated the law. Letter from Petitioner's attorney, dated October 4, 1993; P. Ex. 1; P. Br. at 2-3.

Further, Petitioner asserts that the I.G. should have considered mitigating factors which she alleged existed in her case in directing and imposing her exclusion. Letter from Petitioner's attorney, dated October 4, 1993; P. Br. at 6-8.

Petitioner asserts also that the criminal offense she acknowledges committing -- mail fraud -- falls within the scope of section 1128(b)(1) of the Act, and, thus, she should be subject to a permissive exclusion, not a mandatory exclusion. P. Br. at 4-8.

Finally, Petitioner asserts that the billing practices which led to her criminal conviction for fraud were approved in advance by an official of the Medicare carrier which handled her claims, Nationwide Mutual Insurance Co. P. Exs. 1, 15; P. Br. at 2. Petitioner argues that, since she followed this individual's advice, she was legally blameless. Id.

## DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question have been convicted of a criminal offense under federal or State law. In the present case, I find that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(i)(1), (2), and (3) of the Act.<sup>3</sup> The court, on February 3, 1993, entered a judgment of conviction against Petitioner. FFCL 7. Such judgment falls within the definition of "conviction" found at section 1128(i)(1) of the Act. FFCL 9. Additionally, the judgment of conviction entered against Petitioner states that the court made a finding of guilt against Petitioner as to count 2 of the indictment. FFCL 10. Thus, the court's finding of guilt against Petitioner also constitutes a "conviction" within the meaning of section 1128(i)(2) of the Act. FFCL 11. Further, it is undisputed that Petitioner pled guilty to a crime and that the court accepted her guilty plea. FFCL 6-8. These events constitute a "conviction" within the meaning of section 1128(i)(3) of the Act. FFCL 12.

I find also that the second requirement for mandatory exclusion pursuant to section 1128(a)(1) -- that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid -- has been satisfied here.

For a conviction to subject an individual or entity to exclusion under section 1128(a)(1) of the Act, there must be some nexus or common sense connection between the criminal offense for which the individual or entity has been convicted and the delivery of an item or service under the Medicare or Medicaid programs. FFCL 13. Here, Petitioner was convicted of the criminal offense of mail fraud.

Petitioner's mail fraud arose from her submission of false and fraudulent Medicare claims for reimbursement, in which she billed for catheter irrigation kits purportedly used for urological purposes when, in fact,

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<sup>3</sup> For a Petitioner to be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, it is only necessary to find that one of the four subsections of section 1128(i) has been satisfied. Here, however, I found that Petitioner's conviction fell within three subsections of section 1128(i).

Petitioner knew that the kits had been provided for dietary purposes.<sup>4</sup> FFCL 2-5. Moreover, the bills and supporting documentation submitted to Medicare by Petitioner were fraudulent in that they had been prepared or altered to include the false diagnosis of "Permanent Urinary Incontinence." I.G. Ex. 1. Petitioner received more than \$12,000 in Medicare reimbursement. FFCL 5. The fact that Petitioner's offense was formally characterized as "mail fraud" is irrelevant; the purpose and result of Petitioner's actions was to defraud the Medicare program.

Thus, there exists a direct connection between the criminal offense for which Petitioner was convicted and the Medicare program. Moreover, because Petitioner's fraudulent claims for Medicare reimbursement related to the furnishing of catheter irrigation kits to Medicare patients for a nonreimbursable purpose (feeding), I find that there exists a nexus or common sense connection between the criminal offense for which Petitioner was convicted and the delivery of an item or service under Medicare. FFCL 14. It is well-established that financial misconduct directed at the Medicare and Medicaid programs, connected with the delivery of items or services under a covered program, constitutes a program-related offense invoking mandatory exclusion. Siegel, DAB 1467, at 5. In particular, filing fraudulent Medicare or Medicaid claims has been held to constitute program-related misconduct. Jack W. Greene, DAB CR19 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Thus, I find that the criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1). FFCL 15.

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<sup>4</sup> The judgment of conviction entered against Petitioner stated that counts 1 and 3-68 were dismissed. I.G. Ex. 3. I note, however, that count 2 of the indictment, the count for which Petitioner was convicted, stated that it "incorporates by reference each and every allegation of Paragraphs 1 through 24 of Count 1 of the Indictment." I.G. Ex. 1 at 8. Thus, I find that Petitioner, by her guilty plea to count 2, has admitted the factual background upon which her conviction was based, which background was related in paragraphs 1-23 of Count 1.

Once it is shown that an appropriate program-related criminal conviction has occurred, exclusion is mandatory under section 1128(a) as a purely derivative action. The Secretary is not permitted to look behind the conviction. FFCL 18; Peter J. Edmonson, DAB CR163 (1991), aff'd, DAB 1330 (1992). The intent of the individual committing the offense is not relevant under section 1128(a). DeWayne Franzen, DAB CR58 (1989), aff'd DAB 1165 (1990). Further, assertions by a petitioner that he or she actually is innocent, that his or her trial was unfair, or that the mandatory exclusion specified in section 1128(a) should be modified because of mitigating circumstances cannot be addressed in this forum. Edmonson, DAB 1330, at 4-5; Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992); Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). Thus, in the case at hand, Petitioner's assertion that her billing practices had been approved by the Medicare carrier is irrelevant.

As to the use of permissive versus mandatory exclusion, it is well-established that mandatory exclusion will be initiated by convictions for program-related financial misconduct (including filing fraudulent claims for Medicare reimbursement, as occurred in the case at hand). Also, a mandatory exclusion under section 1128(a) of the Act is required where applicable to an offense, even if the permissive exclusion provisions at section 1128(b) of the Act could also be read to apply. Thus, it was entirely appropriate for the I.G. to proceed under section 1128(a)(1) of the Act in the present matter. David D. DeFries, D.C., DAB CR156 (1991), aff'd, DAB 1317 (1992) (and cases cited therein).

#### CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years. FFCL 17. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year mandatory minimum exclusion. Greene, DAB CR19, at 12-14; Stanley H. Guberman, D.C., DAB CR111, at 9 (1990) (citing Samuel W. Chang, M.D., DAB 1198 (1990)); FFCL 19.



Petitioner's five-year exclusion is, therefore,  
sustained.

/s/

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Joseph K. Riotta  
Administrative Law Judge