

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	Date: January 28, 1998
Coleen Haney, L.P.N.,)	
)	
Petitioner,)	
)	Docket No. C-97-432
- v. -)	Decision No. CR513
)	
The Inspector General.)	
)	
_____)	

DECISION

By letter dated May 6, 1997, Coleen M. Haney, L.P.N., the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health and Human Services, that it had been decided to exclude her 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.¹ The I.G. explained that the five-year exclusion was mandatory under section 1128(a)(1) 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 the Medicaid program.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. Both parties submitted briefs in this matter (I.G. Br. and P. Br.). The I.G. submitted seven proposed exhibits (I.G. Exs. 1-7). Petitioner did not object to these exhibits. I hereby receive into evidence I.G. Exs. 1-7. Petitioner did not submit any proposed exhibits with her brief. The I.G. also submitted a reply brief.

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

¹ In this decision, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

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

PETITIONER'S ARGUMENTS

Petitioner contends that she is not subject to mandatory exclusion because her offense does not relate to the delivery of an item or service under the Medicaid program. Specifically, she maintains that exclusion is not appropriate as her offense related to an "administerial [sic] function," that is, "the reporting of hours worked," and had no "direct and causal link" to the services provided to the Medicaid beneficiary and did not harm the beneficiary. P. Br. at 3-4.

Petitioner also argues that to exclude her from the Medicare and Medicaid programs violates the constitutional protection against double jeopardy. Because she has received a suspended jail sentence and has been ordered to pay restitution and court costs, pursuant to the judgment of conviction entered against her by the State of Indiana, she asserts that to now exclude her is punitive in nature.

Finally, Petitioner asserts that imposition of a section 1128(a)(1) exclusion violates her right to equal protection under the U.S. Constitution. Petitioner cites to the 1996 amendments to section 1128 of the Act, whereby a new section 1128(a)(3) provides for mandatory exclusion for felony convictions related to health care fraud, in addition to discretionary authority in section 1128(b)(1) for misdemeanor convictions. Petitioner argues that "[t]he statutory scheme is arbitrary and capricious," because all program-related convictions, felonies and misdemeanors alike, are subject to mandatory exclusion. Petitioner takes the position that her "more severe treatment . . . bears no rational relation to her conviction for a misdemeanor offense." P. Br. at 6-8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a practical nurse licensed to practice in the State of Indiana and was employed in that capacity by Memorial Home Health Care. I.G. Ex. 6.

2. On July 11, 1995, the State of Indiana filed an information charging Petitioner with one count of conspiracy to commit Medicaid fraud (a class D felony). The information alleged that Petitioner accepted payment for nursing services which she did not provide, by submitting a falsified time card. The information further alleged that Petitioner's actions were in furtherance of an agreement between Petitioner, Rhonda Cravens (the Medicaid recipient's mother), and Debra Jean Jena (a co-worker), to knowingly obtain payments from the Medicaid program by means of a false written statement. I.G. Ex. 1.

3. The July 11, 1995 information was based on a July 18, 1994 investigative report prepared by the Medicaid Fraud Control Unit of the Indiana State Attorney General's office. This report alleged that between August 1993 and the end of April 1994 Petitioner, identified as an employee of Memorial Home Health Care, falsified her time cards so that the Indiana Medicaid program was billed for nursing that she never provided to a Medicaid recipient, Kristen Cravens, a four-year old child. This report further alleged that, when the State Medicaid agency reimbursed Petitioner based on her falsified claims, she shared a portion of the money with the child's mother. I.G. Ex. 7.
4. Based on her guilty plea, Petitioner was convicted of conspiracy to commit Medicaid fraud (a class A misdemeanor), on November 13, 1995. I.G. Ex. 4.
5. As a result of her conviction, Petitioner was sentenced to one year in prison which was suspended, placed on probation for one year, and assessed court costs, plus restitution. I.G. Ex. 4.
6. Section 1128(a)(1) of the Act provides for the mandatory exclusion from the Medicare and Medicaid programs of individuals convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs.
7. Petitioner's criminal conviction constitutes a conviction within the meaning of sections 1128(i)(1) and (3) of the Act.
8. Petitioner's conviction for conspiracy to commit Medicaid fraud is 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.
9. Once an individual has been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, exclusion is mandatory under section 1128(c)(3)(B) of the Act.
10. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a five-year period, as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.

DISCUSSION

The first statutory requirement for the imposition of mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual or entity in question be convicted of a criminal offense under federal or State law. In the case at hand, Petitioner does not contest that she was convicted of a criminal offense. A judgment of conviction was entered in Petitioner's case and she was sentenced by the State court. Petitioner was thus convicted within the meaning of section 1128(i)(1) of the Act.

Next, it is required by section 1128(a)(1) of the Act that the crime at issue be related to the delivery of an item or service under Medicare or Medicaid. Petitioner does not dispute that her services were billed to Medicaid and the criminal information in her case reveals this fact. In her defense, Petitioner instead claims that her conviction is not program-related because it involved

an "administerial [sic] function"--reporting the number of hours worked. I find no merit in this assertion.

Petitioner's conviction for conspiracy to commit Medicaid fraud resulted from her submission of time cards to her employer, Memorial Home Health Care, that fraudulently indicated that she had provided health care services to Kristen Cravens, a Medicaid recipient, although she had not in fact provided such services. Petitioner subsequently received payment for these claimed services from her employer, after her employer was reimbursed by Medicaid for services allegedly provided by Petitioner to Kristen Cravens.

On these facts, I find that Petitioner's conviction for conspiracy to commit Medicaid fraud is related to her failure to deliver health care items or services to a Medicaid recipient, because she caused the Medicaid program to be billed for services which were never provided. Petitioner's argument that she should not be excluded because her actions were purely "administerial" [sic] is without merit. But for Petitioner's fraudulent representations, her employer would not have submitted claims for reimbursement to Medicaid for reimbursement and Medicaid would not have reimbursed her employer for services that were never provided.

Petitioner's characterization of her conviction as resulting from an "administerial [sic] function" has no bearing on whether the I.G. appropriately imposed an exclusion mandated under section 1128(a)(1) of the Act. It is well established that convictions for financial crimes, such as the filing of false claims for reimbursement from Medicare or Medicaid, are program-related within the meaning of section 1128(a)(1) of the Act. Kathleen M. Casey, DAB CR401 (1995); 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).

The performance of an administrative activity or function can be related to the delivery of a health care item or service. In Debra J. Jena, L.P.N., DAB CR502 (1997), a case involving one of Petitioner's co-conspirators, I found that the petitioner, who also caused the submission of fraudulent claims to the Medicaid program based on her submission of false time sheets, was rightfully excluded for five years under section 1128(a)(1) of the Act. I find that the facts in this case are virtually identical. In Jena, I cited Robert C. Greenwood, DAB 1423 (1993), a case in which an appellate panel of the Departmental Appeals Board (DAB) upheld the five-year mandatory exclusion of a home health care aide who was employed by Medicaid providers to whom he submitted fraudulent time sheets.

As in Jena and Greenwood, there is a direct causal relation between the false claims for reimbursement submitted to the Medicaid program and Petitioner's criminal activities. Petitioner does not contest that she was convicted of a criminal offense. I find the only pertinent fact in this case--that Petitioner sought financial remuneration to which she was not legally entitled and which subsequently resulted in false claims being submitted to Medicaid--is verified by her guilty plea and the State court's acceptance of that plea. A conviction is "program-related" whenever there is a logical nexus or common sense connection between the offense for which the individual has been convicted and the Medicare or Medicaid programs. Berton Siegel, D.O., DAB 1467, at 5 (1994). As a result of the fraudulent time cards that Petitioner prepared, false claims were submitted to Medicaid, and the Medicaid program provided reimbursement for

services that were not provided to a Medicaid recipient. This offense was inherently detrimental to the Medicaid program and was "program-related."

Petitioner also asserts that she should not be excluded because she did not harm the Medicaid recipient, Kristen Cravens. Such argument is misplaced. Even if there were no harm to the recipient, such alleged lack of harm is not an element required for exclusion under section 1128(a)(1) of the Act. It is sufficient that Petitioner put the Medicaid program at risk. See, e.g., Carolyn C. Nagy, DAB CR182, at 12 (1992).

Petitioner also argues that to exclude her from the Medicare and Medicaid programs would violate the constitutional protection against double jeopardy because she received a suspended jail sentence and paid restitution and court costs pursuant to the sentence imposed by the State of Indiana. An administrative law judge (ALJ), however, has no authority to rule on the constitutionality of the I.G.'s actions. See, e.g., Roberta E. Miller, DAB CR367 (1995). Moreover, appellate panels of the DAB and federal district courts have found that exclusions imposed under section 1128 of the Act are remedial in nature, rather than punitive, and do not violate the double jeopardy provision of the Constitution. Id. at 6-7; Manocchio v. Kusserow, 961 F.2d 1539, 1541-42 (11th Cir. 1992); Kahn v. Inspector General of the U.S. Department of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994); Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994). Because the purpose of Petitioner's exclusion is to protect individuals from future misconduct by a provider who has proven herself to be untrustworthy based on a conviction for a program-related crime, and not to punish Petitioner, this exclusion is remedial in nature. See Paul Karsch, DAB CR454 (1997).

Finally, Petitioner also asserts that imposition of a section 1128(a)(1) exclusion violates her equal protection rights. I find, however, that I am unable to consider such a claim as it has been held that an ALJ does not have the authority to resolve such constitutional issues in exclusion cases. See Shanti Jain, M.D., DAB 1398 (1993). In any event, contrary to Petitioner's argument, her mandatory exclusion bears a clear and rational relation to her conviction. She was convicted of a program-related crime, conspiracy to commit Medicaid fraud. She is precisely the sort of person from which the Medicare and Medicaid programs must be protected.

Petitioner also has no basis on which to claim that she has been treated unfairly under the statutory scheme as all individuals convicted of program-related crimes are subject to the mandatory exclusion provisions of section 1128(a)(1) of the Act. Because the law mandates that the I.G. impose at least a minimum five- year exclusion whenever a conviction is related to the delivery of items or services in the Medicare or Medicaid programs, the I.G. had no discretion to apply the permissive exclusion provisions of section 1128(b) of the Act. See Travers v. Sullivan, 801 F. Supp. 394 (E.D. Wash. 1992), aff'd 20 F.3d 993 (9th Cir. 1994).

CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because she has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The five-year exclusion is therefore sustained.

_____/s/

Joseph K. Riotto
Administrative Law Judge