

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Catherine Monaco,)	Date: March 3, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-350
)	Decision No. CR520
The Inspector General.)	
)	

DECISION

By letter dated March 6, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Catherine Monaco (Petitioner) that she would be excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.¹ The I.G. explained that an exclusion of at least five years is 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 Medicare.

Petitioner filed a request for review of the I.G.'s action. I convened a prehearing conference on June 30, 1997. Both parties were represented by counsel during the prehearing conference. During the conference, the parties agreed that it would be appropriate to proceed by submitting written arguments supported by documentary evidence. Accordingly, I established a briefing schedule.

The I.G. filed a motion for summary disposition, accompanied by an initial brief and six proposed exhibits (I.G. Ex. 1 - 6). Prior to filing a response brief, Petitioner's counsel withdrew from the case. Petitioner elected to proceed pro se, and I modified the briefing schedule to allow Petitioner additional time to prepare her written submissions.

¹ Unless the context indicates otherwise, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

Petitioner filed a response brief. The I.G. filed a reply brief. Petitioner filed a surreply. Petitioner did not object to the six exhibits submitted by the I.G. and I admit I.G. Ex. 1 - 6 into evidence.

Because there are not 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. I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid 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 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 her criminal offense is not program-related because she is not a provider of Medicare services. She argues that the I.G. does not have the authority to exclude her under section 1128(a)(1) of the Act because her actions, which involved theft of Medicare reimbursement checks from a doctor for whom she was employed as a bookkeeper, did not result in a loss of funds to any government agency.

She also asserts that she was suffering from a mental illness at the time she committed the actions which resulted in her criminal conviction, implying that she did not have the requisite criminal intent to warrant the criminal conviction. She further asserts that her mental state at the time of the misconduct warrants mitigation of her exclusion. She also asserts that she has made restitution and that she did not directly defraud Medicare. For these reasons, Petitioner claims that her exclusion should be mitigated.

Finally, Petitioner asserts that the I.G. acted improperly in having her exclusion begin over three years after the date of her criminal conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was employed as a bookkeeper for Dr. Walter Jaros. I.G. Ex. 4.
2. Dr. Jaros treated patients and received payments from private insurance companies as well as Medicare for claims submitted on their behalf. I.G. Ex. 4.
3. On February 1, 1993, an indictment was issued by the Commonwealth of Massachusetts charging Petitioner with several offenses, including larceny, forgery, and uttering. I.G. Ex. 4, 5, and 6.
4. The Commonwealth of Massachusetts alleged that from July 1991 through October 1992, Petitioner stole approximately 80 checks which were payable to Dr. Jaros from private insurers and from Medicare. The Commonwealth of Massachusetts alleged also that Petitioner forged Dr. Jaros' endorsement and cashed or deposited these checks in her own account. I.G. Ex. 4.
5. On October 14, 1993, Petitioner entered a plea of guilty to larceny, forgery, and uttering. I.G. Ex. 6.
6. Based on its acceptance of Petitioner's guilty plea, the court sentenced Petitioner to six to nine years in prison with 40 days to serve and the balance suspended. The court also placed Petitioner on probation for three years, and required her to pay restitution to Dr. Jaros in the amount of \$109,749. I.G. Ex. 2.
7. Petitioner's guilty plea, and the court's acceptance of that plea, constitutes a "conviction" within the meaning of section 1128(i)(3) of the Act.
8. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act.
9. Pursuant to section 1128(a)(1) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.
10. Pursuant to section 1128(c)(3)(B) of the Act, the minimum mandatory period for an exclusion imposed pursuant to section 1128(a)(1) of the Act is five years.
11. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

12. An administrative law judge is without authority to change the effective date of an exclusion imposed and directed by the I.G.

13. Petitioner may not utilize this administrative proceeding to collaterally attack her underlying criminal conviction by seeking to show that she lacked the requisite criminal intent.

14. Neither the I.G. nor the administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a)(1) of the Act is that the individual to be excluded must have been convicted of a criminal offense. In this case, Petitioner does not dispute that she was convicted of a criminal offense. Moreover, the undisputed evidence adduced by the I.G. establishes that Petitioner was convicted of a criminal offense.

Section 1128(i)(3) of the Act expressly provides that when an individual enters a plea of guilty to a criminal charge and the court accepts such plea, the individual will be regarded as having been “convicted” within the meaning of the mandatory exclusion provisions of the Act. The undisputed facts establish that the Commonwealth of Massachusetts charged Petitioner with various criminal offenses, including larceny, forgery, and uttering. Petitioner pled guilty to larceny, forgery, and uttering. Based on this plea, the court imposed a prison sentence, placed her on probation, and ordered her to pay restitution.

This evidence establishes that Petitioner pled guilty in order to dispose of the criminal charges against her, and the court disposed of the case based on its receipt of Petitioner’s guilty plea. That transaction amounts to “acceptance” of a guilty plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore convicted of a criminal offense within the meaning of that provision.

The statute further requires that the criminal offense in question must have been “program-related,” i.e., related to the delivery of items or services under Medicare or Medicaid. In this regard, Petitioner contends that her criminal offense is not program-related because she is not a provider of health care services. Contrary to this assertion, however, there is no requirement in the statute or regulations requiring that the excluded individual be directly involved in the provision of

services to patients. In fact, as stated in a recent case, section 1128(a)(1) has been interpreted to apply to administrators, administrative staff, and others:

Congress intended the imposition of a mandatory exclusion whenever the Medicare or Medicaid programs are victimized by the offense at issue, whether or not this offense involved actual delivery of care by the convicted individual . . . The regulations are . . . clear that program-related offenses include 'the performance of management or administrative services relating to the delivery of items or services under any such programs.'

Sabina E. Acquah, DAB CR480 (1997). See also 42 C.F.R. § 1001.101; Mary Katherine Lyons, DAB CR49 (1989) (data processing clerk who generated false claims and cashed fraudulently received Medicare checks was found to have been properly excluded under section 1128(a)(1)); Muhammad A. Malick, DAB CR463 (1997) (Petitioner's argument that exclusion is not proper because he was not a health care provider was rejected).

Petitioner also contends that her offenses were not program-related because her actions were private theft against an individual and are not therefore encompassed by the I.G.'s exclusion authority. This same argument has been rejected in the past and it has been held that theft of a Medicare check made out to another person as reimbursement for Medicare services is within the scope of section 1128(a)(1). Napoleon S. Maminta, M.D., DAB No. 1135 (1990).

Consequently, on the basis of the above-cited authority, I reject Petitioner's arguments that her offenses were not program-related. The record reflects that Petitioner worked as a bookkeeper for Dr. Walter Jaros. She was responsible for the management of fees received by the office as reimbursement for claims submitted to private insurance companies and Medicare. The services rendered by Petitioner to her employer constitute the provision of administrative services relating to the delivery of health care services under Medicare. The record further reflects that a substantial portion of the money that Petitioner stole was in the form of checks made payable to her employer by Medicare. Petitioner's theft of Medicare funds payable to Dr. Jaros related to the delivery of a service under Medicare. Napoleon S. Maminta, M.D., DAB No. 1135 (1990). I therefore conclude that the financial misconduct of the sort engaged by Petitioner is related to the delivery of an item or service under Medicare and is conduct that invokes mandatory exclusion.

Petitioner also claims that she suffered from mental illness at the time she engaged in the criminal conduct. To the extent such argument constitutes a collateral attack on her criminal conviction as a claim that she lacked the requisite criminal intent,

such argument is not effective. The Departmental Appeals Board has previously held that the I.G. and the administrative law judge are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter J. Edmonson, DAB No. 1330 (1992).

Petitioner asserts also that her mental state warrants mitigation of the exclusion penalty and also cites in mitigation that she has made restitution and that her fraud was against her employer, not Medicare. These arguments are also without merit. I have concluded that, based on the undisputed material facts in the record of this case, the I.G. properly excluded Petitioner pursuant to section 1128(a)(1) of the Act. The length of this exclusion is controlled by section 1128(c)(3)(B) of the Act. That section mandates a minimum period of exclusion for a period of five years. Since I do not have the authority to reduce the five-year minimum exclusion mandated by section 1128(c)(3)(B) of the Act, the mitigating circumstances which Petitioner seeks to establish would not affect the outcome of this case.

Petitioner also claims that it is unfair that her exclusion did not commence at the date of her criminal conviction. I find no merit in this claim. The I.G. has discretion to determine when to impose an exclusion. Laurence Wynn, M.D., DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. See Chander Kachoria, R.Ph., DAB No. 1380 (1993). It is clear that an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. This means that the exclusion must take effect 20 days after Petitioner's March 6, 1997 exclusion letter and not 20 days after Petitioner's conviction. Although Petitioner implies that her exclusion should be retroactive, an administrative law judge is without authority to change the effective date of an exclusion. Stanley Karpo, D.P.M., DAB CR356 (1995); Chander Kachoria, R.Ph., DAB No. 1380 (1993); Laurence Wynn, M.D., DAB CR344 (1994); Samuel W. Chang, M.D., DAB No. 1198 (1990). The regulations are clear that the effective date of an exclusion is not a reviewable issue in this administrative proceeding. 42 C.F.R. § 1001.2007.

CONCLUSION

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

/s/

Joseph K. Riotto
Administrative Law Judge