

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

In the Case of:	)	
	)	
Diane Amicucci, L.P.N.,	)	DATE: June 29, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-98-115
	)	Decision No. CR540
The Inspector General.	)	
	)	

**DECISION**

By letter dated October 31, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Diane Amicucci, L.P.N., the Petitioner herein, that she would be excluded for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Services Block Grant, and Block Grants to States for Social Services programs (Medicare and Medicaid).<sup>1</sup> 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 in connection with the delivery of a health care item or service under the Medicaid program.

Petitioner filed a request for hearing. 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 four proposed exhibits (I.G. Exs. 1-4). Petitioner did not object to these exhibits. I hereby receive into evidence I.G. Exs. 1-4. Petitioner submitted two proposed

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

exhibits, which I have designated as Petitioner's exhibits 1 and 2 (P. Exs. 1-2).<sup>2</sup> The I.G. did not object to these exhibits. I hereby receive into evidence P. Exs. 1-2. The I.G. also submitted a reply brief (I.G. Rep.).

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.

#### **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 a health care 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, because the court in which she was convicted granted her a "Certificate of Relief from Disabilities" under New York law, she is protected from exclusion from the Medicare and Medicaid programs.

Petitioner also maintains that the five-year exclusion in her case should be reduced, because she did not profit financially from her crime, but rather engaged in such conduct to provide monetary help to her patient. She also cites as mitigating factors: (1) her lenient treatment by the criminal court; (2) the assistance provided to State investigators which led to the discovery of additional fraud by others; and, (3) her reinstatement as a provider in the State Medicaid program.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. During the period relevant to this case, Petitioner worked as a licensed practical nurse, and was enrolled as a provider in the New York State Medicaid program. I.G. Ex. 1.

2. On October 24, 1995, the Acting Deputy Attorney General, State of New York (Deputy Attorney General), filed Superior Court Information No. 95-1415 (Information) in the County Court, County of Westchester, State of New York (Westchester County Court), whereby he alleged that Petitioner submitted Medicaid claims to

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<sup>2</sup> Petitioner submitted three proposed exhibits with her request for a hearing dated December 10, 1997. Petitioner submitted two of these same exhibits with her brief.

the Computer Sciences Corporation (CSC), the fiscal agent for the New York Medicaid program, for services she claimed were provided to a Medicaid recipient, but which, in fact, were not rendered, during the period beginning on or about May 24, 1989 and ending on or about October 4, 1994. I.G. Ex. 1.

3. In the Information, Petitioner was charged with grand larceny in the fourth degree, in violation of New York Penal Law 155.30, based on her alleged participation in a Medicaid fraud scheme, as specified in the Information. I.G. Ex. 1.

4. On December 5, 1995, Petitioner, pursuant to an agreement entered into with the Deputy Attorney General's office, pled guilty to one count of grand larceny in the fourth degree, based on her involvement in a scheme to defraud Medicaid, and the Westchester County Court consented to receive Petitioner's plea. I.G. Exs. 2, 3.

5. On March 5, 1996, the Westchester County Court sentenced Petitioner to a conditional discharge for one year and ordered her to pay a \$3000 fine. I.G. Ex. 3, at 3.

6. Petitioner's guilty plea, the Westchester County Court's consent to receive that plea, and her subsequent conviction, constitute conviction of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i)(3) of the Act.

7. Section 1128(a)(1) of the Act provides for 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.

8. Petitioner's conviction for grand larceny in the fourth degree, as a result of her participation in a scheme to defraud Medicaid, is related to the delivery of a health care 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, the minimum mandatory period of exclusion pursuant to that section is five years. Section 1128(c)(3)(B) of the Act.

10. The Westchester County Court also approved issuance of a Certificate of Relief from Disabilities. P. Ex. 2; I.G. Ex. 3, at 4. Such certificate does not preclude the I.G. from excluding Petitioner from participation in Medicare and Medicaid.

11. Petitioner's assertion, that the statutory five-year minimum exclusion mandated under sections 1128(a)(1) and (c)(3)(B) of the Act should be modified or reduced because of mitigating circumstances, cannot be addressed in this forum.

12. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a five-year period, which is the minimum period mandated under section 1128(c)(3)(B) of the Act and regulations codified at 42 C.F.R. § 1001.102(a).

13. Neither the I.G. nor an administrative law judge (ALJ) has the authority or discretion to reduce the five-year minimum exclusion mandated by 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. Petitioner does not challenge that she has been convicted under State law and I so find. Section 1128(i)(3) of the Act provides, inter alia, that when a person enters a guilty plea to a criminal charge and the court accepts such plea, the individual will be regarded as having been convicted within the meaning of section 1128 of the Act. A plea is "accepted" within the meaning of section 1128(i)(3) whenever a party offers the plea and the court consents to receive the plea in disposing of the pending criminal matter. Maximo Levin, M.D., DAB CR343 (1994); Lila M. Nevrekar, M.D., DAB CR319 (1994).

In the present case, the record reflects (and Petitioner concedes) that she entered a plea of guilty to grand larceny involving her submission of false Medicaid claims and the court accepted her plea. Petitioner's admissions are supported by the evidence adduced by the I.G. I.G. Ex.2. Thus, Petitioner was convicted within the meaning of section 1128(i)(3) of the Act.

Next, section 1128(a)(1) of the Act requires that the crime at issue be related to the delivery of an health care item or service under Medicare or Medicaid. To determine if an offense is program-related, an ALJ must analyze the facts and circumstances underlying the conviction to determine whether a nexus or common sense connection links the offense for which a petitioner has been convicted and the delivery of an health care item or service under a covered program. Berton Siegel, D.O., DAB No. 1467 (1994).

In the present case, the record reflects that, over a period of time which began in 1989 and continued until 1994, Petitioner submitted claims to CSC, a fiscal agent of the New York State Medicaid program, for services she allegedly provided to a Medicaid recipient. In fact, Petitioner never provided such services, submitted numerous false claims to CSC, and admitted receipt of approximately \$30,000 in improper reimbursements from CSC.

Here, the record shows that Petitioner, by being found guilty of the offense charged in the Information, was found to have filed, or caused to be filed, claims against Medicaid, in order to obtain reimbursement from Medicaid for services she did not provide. The filing of fraudulent Medicare or Medicaid claims consistently has been held to constitute clear program-related misconduct. Alan J. Chernick, D.D.S., DAB CR434 (1996) (I.G.'s five-year mandatory exclusion of dentist who was convicted in New York State court of false claims upheld); see also, Barbara Johnson, D.D.S., DAB CR78 (1990) (I.G.'s five-year mandatory exclusion of dentist convicted of filing false claims upheld). In Rosalyn Saba Khalil, M.D., DAB CR353 (1995), the ALJ found that a criminal offense stemming from the fraudulent receipt of reimbursement checks from Medicaid provided a sufficient nexus between the offense and the delivery of health care items or services under Medicaid.

Additionally, in Khalil, at 8, the ALJ held that a nexus may exist "despite the fact that Petitioner may not have provided items or services to Medicaid recipients personally or made reimbursement claims for those items or services." Thus, the nexus between Petitioner's offenses and the delivery of health care items or services is firmly established by her conviction for the charge of grand larceny, based on the allegations contained in the Information--and, Petitioner has not contested the veracity of the allegations contained therein. It is well-established that upon determining that a program-related criminal conviction has occurred, exclusion is mandatory under section 1128(a) of the Act, as a "purely derivative action." Chernick, at 5, citing Peter J. Edmonson, DAB CR163 (1991), aff'd, DAB No. 1330(1992).

In her defense, Petitioner contends that she should not be subject to an exclusion under section 1128(a)(1) of the Act because she received a "Certificate of Relief from Disabilities" from the criminal court. I find that such certificate does not protect Petitioner from exclusion under section 1128(a)(1) of the Act. Such conclusion is supported by New York law which provides that granting such certificate does not "in any way prevent any judicial, administrative, licensing or other body, boards or

authority from relying upon the conviction specified therein as a basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license permit or other authority or privilege." McKinney's Consolidated Laws of New York Annotated, Chapter 43, Article 23, section 701.3.

Further, an appellate panel of the Departmental Appeals Board (DAB) has found previously that such "Certificate of Relief from Disabilities," issued by the State court under New York law, does not bar the exclusion of an individual from participation in Medicare and Medicaid. Janet Wallace, L.P.N., DAB No. 1326 (1992). The DAB appellate panel also found that "to allow the state to bar enforcement of the federal law would be to frustrate and override federal law in violation of the Supremacy Clause (U.S. Const. art. VI, § 2)." Wallace, at 12. The DAB appellate panel concluded its discussion on this point by stating:

[W]e therefore find that based on the Supremacy Clause issues as applied to certificates of relief, which were resolved in Nass,<sup>3</sup> the ALJ properly found that Petitioner's mandatory exclusion . . . was not precluded by the Certificate of Relief from Disabilities issued by the New York court . . . ."

Id.<sup>4</sup>

Finally, Petitioner contends that her period of exclusion should be mitigated, because she was trying to help a patient and, due to the facts that: (1) she did not profit financially from her offense; (2) she was treated leniently by the State court; (3) she was reinstated under the State Medicaid program; and (4) she assisted officials in their investigation of other Medicaid fraud. Even accepting Petitioner's assertions as true, these assertions are irrelevant, because I cannot consider them. It is well-established that I cannot consider assertions that the statutory minimum five-year exclusion required by section 1128(a) of the Act "should be modified because of mitigating

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<sup>3</sup> Nass v. Local 348, Warehouse Production, et. al., 503 F. Supp. 217, 221 (E.D.N.Y. 1980).

<sup>4</sup> Although the Wallace case involved an exclusion imposed under section 1128(a)(2) of the Act, rather than an exclusion under section 1128(a)(1) of the Act, as in Petitioner's case, it has been held that "the derivative authority for exclusions under the two sections (convictions for specified offenses) is the same." Khalil, at 7, fn.4.

circumstances . . . . " Chernick, at 5 (1996); see also, Wallace, DAB CR155, at 4 (1991), aff'd, DAB No. 1326 (1992).

Further, mitigating factors are not relevant unless the I.G. relies upon aggravating factors to exclude a petitioner for more than five years. 42 C.F.R. § 1001.102(a), (c). Petitioner was excluded for the minimum mandated period, with no aggravating factors cited. Thus, I am unable to consider Petitioner's assertions that the length of her exclusion period should be reduced.

#### CONCLUSION

Petitioner was properly excluded, and the length of her exclusion is mandated by law. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act require 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 a health care item or service under the Medicaid program. Therefore, I sustain the five-year exclusion.

/s/

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**Joseph K. Riotto**  
**Administrative Law Judge**