

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:	)	DATE: January 23, 2007
Brenda Mills, M.D.,	)	
a/k/a Brenda Kluttz,	)	
	)	
	)	
Petitioner,	)	Civil Remedies CR1461
	)	App. Div. Docket No. A-06-101
	)	
	)	Decision No. 2061
- v. -	)	
	)	
Inspector General.	)	
	)	

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FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION

On August 23, 2006, pursuant to an extension of time granted by the Board, Brenda Mills, M.D. (Mills or Petitioner) appealed the June 19, 2006 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. Brenda Mills, M.D., a/k/a Brenda Kluttz, DAB CR1461 (2006) (ALJ Decision). The ALJ upheld the Inspector General's (I.G.) ten-year exclusion of Petitioner from participation in Medicare, Medicaid and all federal health care programs under section 1128(a)(3) of the Social Security Act (Act).<sup>1</sup> The exclusion was based on Mills' conviction of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with

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<sup>1</sup> The current version of the Social Security Act can be found at [www.ssa.gov/OP\\_Home/ssact/comp-ssa.htm](http://www.ssa.gov/OP_Home/ssact/comp-ssa.htm). Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

the delivery of a health care item or service. On appeal, Mills contends that there is no basis for an exclusion because she was not convicted of a felony of that type. In addition, she denies that her acts caused financial loss in excess of \$5,000, which the ALJ found was one of two aggravating factors justifying an increase in the mandatory five-year exclusion. Mills further contends that she was unable to properly defend herself in the proceedings before the ALJ because the I.G. withheld records she had requested under the Freedom of Information Act (FOIA) concerning her Medicare provider account.

For the reasons discussed below, we conclude that the ALJ Decision is legally sound and is supported by substantial evidence. We therefore affirm the exclusion as imposed by the I.G. and upheld by the ALJ.

#### Relevant Law

Section 1128(a)(3) of the Act requires the Secretary of Health and Human Services to exclude from participation in any federal health care program (as defined in section 1128B(f)) any individual who "has been convicted for an offense . . . under Federal or State law, in connection with the delivery of a health care item or service . . . consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." See also 42 C.F.R. § 1001.101(c)(1). The term "convicted" means, among other things, that a "Federal, State or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity[.]" 42 C.F.R. § 1001.2. An individual who is excluded pursuant to section 1128(a)(3) may not collaterally attack the basis for the underlying conviction on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The mandatory minimum period of exclusion for an individual subject to section 1128(a)(3) is five years. Act, section 1128(c)(3)(B); see also 42 C.F.R. § 1001.102(a). The regulations set out several factors that "may be considered to be aggravating and a basis for lengthening the period of exclusion," including that "[t]he acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of \$5,000 or more." 42 C.F.R. § 1001.102(b)(1).

#### Standard of review

We review an ALJ decision involving an I.G. exclusion to determine whether the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial

evidence in the record as a whole as to a disputed issue of fact. 42 C.F.R. § 1005.21(h).

Record for decision

Mills did not present any exhibits during the proceedings before the ALJ. On appeal to the Board, Mills presented eleven exhibits (some consisting of multiple documents). The applicable regulations state:

If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing [before the ALJ] is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

42 C.F.R. § 1005.21(f). We conclude that, with one exception, this regulation precludes admitting into the record the exhibits presented by Mills on appeal.<sup>2</sup> According to Mills, the exhibits were not presented below because "Petitioner did not understand that it was necessary to submit items as exhibits which were already of record [.]" P. letter dated 9/15/06, at 1. (By "of record," Mills appears to mean records maintained by public agencies or courts.) Since Mills was represented by counsel in the proceedings before the ALJ (although not before us), Mills' own lack of understanding of administrative procedure does not excuse counsel's failure to present the documents in question in those proceedings. Mills also asserts that "any tardiness in submitting exhibits . . . was because she has been awaiting the response and receipt of information being held by federal agencies and authorities." Id. Some of the exhibits are letters

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<sup>2</sup> Petitioner Exhibit 10 consists of an October 6, 2005 hearing request in this matter signed by Mills' counsel (P. Ex. 10, at 1) and a November 14, 2005 letter, also signed by Mills' counsel, stating that it is "a follow up to the formal request for an appeal" (P. Ex. 10, at 2). The latter letter but not the former is in the record for the ALJ Decision transferred by the Civil Remedies Division to the Board. In response to the Board's inquiry, the Civil Remedies Division stated that it never received the October 6, 2005 letter. We see no reason to conclude that this letter was not mailed in the ordinary course of business, however, and therefore include it in the record for this case as Board Exhibit 1. Since the November 14, 2005 letter is already in the record, we need not admit it as an exhibit.

addressed to or written by Mills or her counsel, however, and Mills does not explain why they could not have been presented to the ALJ notwithstanding any outstanding requests she had made for other documents. Moreover, since Mills does not specify when the remaining exhibits came into her possession, we cannot determine whether these documents were available prior to the date the ALJ Decision was issued. Thus, Mills has not shown that there were reasonable grounds for failing to present the exhibits in the proceedings before the ALJ. Moreover, not only are the exhibits inadmissible on this basis, but Mills does not persuade us that any of the exhibits would have had a substantive effect on the issues before us.

### Analysis<sup>3</sup>

On appeal, Mills argues that there is no basis for the exclusion because her conviction "for Making a False Statement" was not the type of felony described in section 1128(a)(3). Mills did not raise this argument before the ALJ. Instead, her brief below conceded that "the Inspector General has a statutory basis for the exclusion[.]" The applicable regulations provide that the Board "will not consider . . . any issue in the [parties'] briefs that could have been raised before the ALJ but was not." 42 C.F.R. § 1005.21(e). Moreover, Mills does not say that she could not have disputed before the ALJ whether there was a statutory basis for the exclusion. Instead, Mills argues that she gave "notice" of this "issue[]" in 2003 in "certified letters and other documented material[]" P. letter to Board dated 9/15/06, at 1. However, in 2003, the proceedings before the ALJ had not commenced, nor had Mills been convicted or excluded. In any event, the fact that Mills indicated in her brief before the ALJ that she was not disputing that there was a statutory basis for the exclusion establishes that Mills was aware of this potential issue and could have raised it before the ALJ. Accordingly, the Board lacks authority to consider this issue.

Even if we had authority to consider this issue, we would not resolve it in Mills' favor since all of the elements of section 1128(a)(3) were present here. As the I.G. explains in response to the appeal, Mills' plea of guilty and the Court's acceptance of that plea fall squarely within the definition of "conviction" in section 1001.2; the offense to which she pled guilty occurred

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<sup>3</sup> We have fully considered all arguments raised on appeal and reviewed the full record, regardless of whether we have specifically addressed particular assertions or documents in this decision.

after the effective date of the Health Insurance Portability and Accountability Act of 1996; her conviction was a felony offense; the offense for which she was convicted--a false statement that an employee of hers was a qualified physical therapist on which statement the Department of Labor relied to pay claims for physical therapy services provided by that employee--involved fraud or other financial misconduct; and the conviction was in connection with the delivery of a health care item or service since there is a nexus between the false statement and the delivery of a health care item or service. See I.G. Br. at 16-18. In her reply to the I.G.'s brief, Mills does not dispute that these elements were present here.

Mills also denies on appeal that there was an aggravating factor within the meaning of section 1001.102(b)(1), i.e., that the acts of which she was convicted, or similar acts, caused financial loss of more than \$5,000 to the government or other entities. According to Mills, her acts caused only a loss of \$480 paid for the physical therapy services and the loss of the additional amounts alleged "was unrelated to the charge of Making a False Statement." Appeal Br. at 8. Mills also asserts that the PreSentence Investigation Report (Petitioner Exhibit 3) did not include an amount related to her and that the U.S. Attorney's Sentencing Memorandum (Petitioner Exhibit 7) "clearly states that the government could not prove that Petitioner was responsible for losses although she was ordered to pay restitution for those amounts." Id. In addition, Mills asserts that "the dollar amounts" on two lists, captioned Indictment Count Patients and Non-Indictment Count Patients (Petitioner Exhibit 4), "cannot be substantiated and have not been admitted" by her. Id. at 4. Further, Mills relies on explanations of benefits sent to her by the Department of Labor regarding \$4,400 in claims for physical therapy services filed in her name (Petitioner Exhibit 1).

The ALJ Decision does not address any arguments regarding the existence of the aggravating factor in question, stating instead that "Petitioner does not challenge the existence of" this aggravating factor, and identifying as an undisputed fact that "[t]he financial loss to the department was more than \$30,000 but less than \$70,000." ALJ Decision at 3-4, citing I.G. Ex. 3, at 8.<sup>4</sup> As noted above, the ALJ was unaware of Mills' hearing

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<sup>4</sup> Contrary to what the I.G. argues, Mills' argument does not constitute an impermissible collateral attack on the basis for Mills' conviction under 45 C.F.R. § 1001.2007(d) since the amount of financial loss to Medicare or another program or

(continued...)

request (now admitted into the record), which states that "[t]here was no proof that Mills caused or attributed to cause [sic] financial loss to the government of \$5,000.00 or more." P. letter dated 10/6/05. The resulting failure of the ALJ Decision to treat the existence of this aggravating factor as disputed was harmless. Mills does not deny that the plea agreement signed by her, which the ALJ cited, states that the financial loss to the Department of Labor from Mills' criminal activity was more than \$30,000. The other documents on which Mills relies are inadmissible because Mills did not show why she could not have presented them in the proceedings before the ALJ. Even if we were to consider these documents, moreover, we would conclude that they support the conclusion that this aggravating factor existed. Contrary to what Mills asserts, the PreSentence Investigation Report lists dollar amounts of actual losses totalling \$201,141.92 which clearly pertain to her. In addition, Mills misreads the Sentencing Memorandum, which clearly states that the losses directly attributable to Mills totalled \$84,112.26 although the losses in excess of those attributed directly to her are not readily provable. Moreover, Mills does not dispute that each of the two lists in Petitioner Exhibit 4 attributes losses well in excess of \$5,000 to her. Whether or not Mills affirmatively admitted the specific amounts listed as billed in her name, the lists certainly offer no support to her position that the loss was less than \$5,000. Furthermore, Mills offers no reason to believe that the amounts on the documents in Petitioner Exhibit 1 constituted the total amount she claimed from the Department of Labor. Other documents, such as the PreSentence Investigation Report, appear to suggest that the amount claimed was much higher. Accordingly, the record clearly establishes the existence of this aggravating factor.

We turn now to Mills' argument relating to her FOIA request. Mills argues that she was unable to properly defend herself before the ALJ because the I.G. withheld documents Mills had requested under FOIA concerning her Medicare provider account. According to Mills, someone else used her Medicare provider number to file claims, and the complete record of her Medicare provider account may contain "exculpatory evidence." P. Appeal Br. at 8. The disposition of Mills' FOIA request is not material to her appeal of her exclusion, however. (Petitioner Exhibits 2, 5, and 11--documents relating to the FOIA request--are thus

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<sup>4</sup>(...continued)

entity was not an element of the offense for which she was convicted.

inadmissible on this basis as well.<sup>5</sup>) As indicated above, the exclusion was based on Mills' conviction for making a false statement regarding a claim for services to the Department of Labor. Even if Mills were able to establish that other claims were erroneously attributed to her, that would not affect the basis for her conviction (assuming she were permitted to collaterally attack it, which she is not). Also, even if someone else improperly submitted claims under Mills' name and provider number, as she appears to claim, Mills' false statement to the Department of Labor that one of her employees was a physical therapist still caused the Department of Labor to pay the claims for physical therapy services.

### Conclusion

For the reasons explained above, we affirm the ALJ Decision.

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/s/  
Judith A. Ballard

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/s/  
Donald F. Garrett

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/s/  
Leslie A. Sussan  
Presiding Board Member

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<sup>5</sup> Petitioner Exhibit 6, captioned "Gramm-Leach-Bliley Privacy Act Notice," Petitioner Exhibit 8, a search warrant for Mills' offices, and Petitioner Exhibit 9, a subpoena addressed to Mills, are similarly inadmissible since they are cited by Mills in connection with her argument that the I.G. withheld documents related to her Medicare provider account. See Appeal Br. at 8.