

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Katie Herman,)	Date:November 29, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-615
)	Decision No. CR1703
The Inspector General.)	
_____)	

DECISION

This matter is before me on the Inspector General’s (I.G.’s) Motion for Summary Affirmance of the I.G.’s determination to exclude the Petitioner herein, Katie Herman, from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.’s Motion and determination to exclude Petitioner are based on the terms of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the imposition of a five-year exclusion, and for that reason I grant the I.G.’s Motion for Summary Affirmance.

I. Procedural Background

Katie Herman, Petitioner, was a Licensed Practical Nurse and Medicaid provider in the State of Ohio between July 2005 and April 2006. She billed the Ohio Medicare program for Medicaid services purportedly provided during that period to two individuals, JM and SM, who were Medicare recipients.

On June 20, 2006, Petitioner was named in an Indictment handed up by the Special Grand Jury sitting for the Court of Common Pleas, Franklin County, Ohio: the Indictment charged Petitioner with one count of Medicaid fraud, in violation of OHIO REV. CODE § 2913.40(B), a fifth-degree felony based on the amount of Petitioner’s claims for services.

Petitioner appeared with present counsel in the Court of Common Pleas, Franklin County, Ohio, on November 13, 2006, and pleaded guilty to the stipulated lesser offense of first-degree misdemeanor Medicaid fraud. She was sentenced on the same day to a suspended term of 10 days' jail time and was fined \$100.00.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(1) of the Act mandates the exclusion, for a period of not less than five years, of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program." On June 29, 2007, the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years.

Acting through her trial counsel, Petitioner timely sought review of the I.G.'s action by letter dated July 24, 2007. I convened a telephonic prehearing conference on August 23, 2007, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case, and the procedures best suited for addressing those issues. The parties agreed that the case likely could be decided on written submissions, and by Order of August 23, 2007, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on November 21, 2007. Throughout these proceedings, Petitioner has been represented by her trial counsel in the Ohio criminal case.

The evidentiary record on which I decide the issues before me consists of 10 exhibits. The I.G. proffered eight exhibits marked I.G. Exhibits 1-8 (I.G. Exs. 1-8). In an untimely Motion *in Limine* filed simultaneously with her response to the I.G.'s brief (Response), Petitioner sought to exclude I.G. Exhibits 4, 5, 6, and 8. Because Petitioner's Motion ignored the explicit deadline established for objection to exhibits established in paragraph 6 of the Order of August 23, 2007, it is denied. Additional reasons for denial of the Motion appear in the discussion below. I.G. Exs. 1-8 are admitted as designated.

Petitioner proffered two exhibits. In disregard of clear and repeated written directions, Petitioner's two exhibits as proffered were un-paginated, marked "Exhibit A" and "Exhibit B," and bore no indication of the docket number of this case. To ensure that the record is orderly and complete, Petitioner's "Exhibit A" is admitted with the designation Petitioner's Exhibit 1 (P. Ex. 1), and Petitioner's "Exhibit B" is admitted with the designation Petitioner's Exhibit 2 (P. Ex. 2).

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and
2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for her predicate conviction has been established. A five-year period of exclusion is reasonable as a matter of law, since it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII or under any State health care program." The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

In Ohio, the crime of Medicaid fraud is defined by a specific statute, OHIO REV. CODE § 2913.40(B), which provides:

No person shall knowingly make or cause to be made a false or misleading statement or representation for use in obtaining reimbursement from the medical assistance program.

The crime of Medicaid Fraud is classified by degree according to the value of the property, services, or funds fraudulently obtained. As classified by OHIO REV. CODE § 2913(E), Medicaid fraud can range from a first-degree misdemeanor to a third-degree felony:

Whoever violates this section is guilty of medicaid fraud. Except as otherwise provided in this division, medicaid fraud is a misdemeanor of the first degree. If the value of property, services, or funds obtained in violation of this section is five hundred dollars or more and is less than five thousand dollars, medicaid fraud is a felony of the fifth degree. If the value of property, services, or funds obtained in violation of this section is five thousand dollars or more and is less than one hundred thousand dollars, medicaid fraud is a felony of the fourth degree. If the value of the property, services, or funds obtained in violation of this section is one hundred thousand dollars or more, medicaid fraud is a felony of the third degree.

The Act defines “conviction” as including those circumstances “when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged,” section 1128(i)(1) of the Act; “when there has been a finding of guilt against the individual . . . by a . . . State . . . court,” section 1128(i)(2) of the Act; “when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court,” section 1128(i)(3) of the Act; or “when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld,” section 1128(i)(4) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On her plea of guilty on November 13, 2006, in the Court of Common Pleas, Franklin County, Ohio, Petitioner Katie Herman was found guilty of the first-degree misdemeanor offense of Medicaid fraud, in violation of OHIO REV. CODE § 2913.40(B). I.G. Exs. 5, 6, 8.
2. Final judgment of conviction was entered against Petitioner, and sentence was imposed upon her, in the Court of Common Pleas, on November 13, 2006. I.G. Ex. 6.

3. The accepted guilty plea, finding of guilt, judgment of conviction, and sentence described above constitute a “conviction” within the meaning of sections 1128(a)(1) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which she was found guilty, as noted above in Findings 1 and 2, and on which plea and finding of guilt the final judgment of conviction was entered and sentence imposed, as noted in Finding 3, and the delivery of an item or service under a State health care program. I.G. Exs. 5, 6, and 8; P. Ex. 1; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

5. On June 29, 2007, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, based on the authority set out in section 1128(a)(1) of the Act.

6. On July 24, 2007, and acting through counsel, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request.

7. By reason of Petitioner’s conviction, a basis exists for the I.G.’s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

8. By reason of her conviction, Petitioner was subject to, and the I.G. was required to impose, the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all other federal health care programs. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a).

9. Because the five-year period of Petitioner’s exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

10. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Mark D. Perrault, M.D.*, DAB CR1471 (2006); *Andrew L. Branch*, DAB CR1359 (2005); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005). Those two essential elements are fully established in the record before me.

Petitioner does not deny here that she has been convicted. The fact of her misdemeanor conviction is clear and undisputed: I.G. Ex. 6 shows that on November 13, 2006, Petitioner appeared with her present counsel in the Court of Common Pleas and pleaded guilty to the first-degree-misdemeanor crime of Medicaid fraud. The trial court's acceptance of that guilty plea and its finding of Petitioner's guilt are manifest in the fact that the trial court proceeded immediately to the imposition of sentence. I.G. Exs. 4, 6. Those procedural steps satisfy the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

Petitioner's defense to the exclusion takes three forms. It is based partly on her denial of a nexus or common-sense connection between her crime and Ohio's Medicaid program, the second essential element; partly on the fact that she appears here convicted of a misdemeanor, and not a felony; and partly on the assertion that the I.G. should have reviewed her conviction under the discretionary authority conveyed to him by section 1128(b)(1)(a) of the Act.

Petitioner's first defense fails when examined in the light of the documents reflecting her conviction. The original Indictment could hardly be plainer in relating her activity to the Ohio Medicaid program:

Beginning on or about July 3, 2005 and continuing until on or about April 2, 2006, in Franklin County, Ohio, as a continuing course of conduct, Katie Herman did knowingly make or cause to be made false or misleading statements or representations to the Ohio Department of Job and Family Services for use in obtaining reimbursement from the State of Ohio Medical

Assistance Program, also known as Medicaid, the value of the funds obtained being five hundred dollars or more, all in violation of R.C. 2913.40(B), a felony of the fifth degree.

I.G. Ex. 5.

But the relationship of her crime to the Ohio Medicaid program is even plainer in light of the Bill of Particulars filed by prosecutors on July 27, 2006:

Specifically, Herman, a Medicaid provider, knowingly made and/or caused to be made claims to the Medicaid program that stated and/or represented that certain services had been provided to [JM and SM] . . . , Medicaid recipients, when, in fact, these services had not been provided. The loss to the Medicaid program was \$2,536.50.

I.G. Ex. 8.

The submission of false billings to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Mark D. Perrault, M.D.*, DAB CR1471; *Kennard C. Kobrin*, DAB CR1213 (2004); *Norman Imperial*, DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Mark Zweig, M.D.*, DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996). I find that the Indictment and the Bill of Particulars, especially when read in the context of the sentencing document and OHIO REV. CODE § 2913(E), demonstrate the requisite nexus and common-sense connection between the criminal act and the program. *Berton Siegel, D.O.*, DAB No. 1467. I also believe that Petitioner's conviction for violating OHIO REV. CODE § 2913.40(B), given the statute's specific application to the Medicaid program, is a program-related crime as a matter of law. *See, e.g., Stanley Junious Benn*, DAB CR1501 (2006); *Mark D. Perrault, M.D.*, DAB CR1471. The I.G. has proved the second essential element.

Petitioner's second defense is without substance. The plain language of section 1128(a)(1) makes no distinction whatsoever between convictions based on misdemeanors and convictions based on felonies. A conviction based on either class of criminal offense is an adequate predicate for an exclusion based on section 1128(a)(1). *Lorna Fay Gardner*, DAB No. 1733 (2000); *Tanya A. Chuoke*, DAB No. 1721 (2000); *Amable de los Reyes Aguiluz*, DAB CR1417 (2006). It will be noted, moreover, that the only difference

between the Indictment's felony charge and Petitioner's misdemeanor plea is the amount of loss, negotiated down from \$2536.50 to less than \$500.00. The essential elements of the crime, and the quantum of *mens rea* required to be proven, are precisely the same.

Petitioner's third defense is the one she appears to rely on most heavily. Petitioner would avoid the mandatory effect of section 1128(a)(1) by arguing that "the sole issue to be determined on appeal is whether such exclusion, if any, should more properly occur pursuant to 42 U.S.C. 1320a-7(b)(1)." P. Ans. Br., at 3. That particular provision forms part of section 1128(b) of the Act, 42 U.S.C. § 1320a-7(b). Section 1128(b) provides for permissive, rather than mandatory, exclusions, and is generally regarded as appropriate to situations in which individuals or entities may present less-serious threats to the integrity of the protected programs. But once a conviction is shown to be within the ambit of section 1128(a)(1), the mandatory operation of that section bars any petitioner, including this one, from demanding that other more lenient, more discretionary, or more favorable exclusionary provisions should be applied instead. Even in situations where the underlying conviction could plausibly be argued to fall within both section 1128(a)(1) and one or more of the permissive exclusions or three-year mandatory minimum periods of sections 1128(b)(1)-(15), the rule is clear: if section 1128(a)(1) fits, then the mandatory exclusion and mandatory minimum period prescribed by section 1128(a)(1) must be imposed. Neither the I.G. nor the Administrative Law Judge may choose to proceed otherwise.¹ *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002); *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000); *Lorna Fay Gardner, D.D.S.*, DAB No. 1733; *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992); *David S. Muransky, D.C.*, DAB No. 1227 (1991); *Leon Brown, M.D.*, DAB No. 1208 (1990); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990); *Charles W. Wheeler*, DAB No. 1123 (1990); *Jack W. Greene*, DAB No. 1078, *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835.

When Petitioner filed her Response Brief, she also filed a Motion *in Limine* by which she sought to exclude from my consideration I.G. Exs. 4, 5, 6, and 8, four documents reflecting her conviction. I have noted the untimeliness of that Motion and have denied it for that reason. But there are other reasons on which I rely, entirely independent of any

¹ In a somewhat unclear argument, Petitioner cites *Syed Hussaini*, DAB CR193 (1992), as supporting the notion that the magnitude of Petitioner's crime requires her exclusion to be based exclusively on section 1128(b)(1) of the Act. Unclear or not, such an argument is not original: reliance on *Hussaini* for that notion was soundly and explicitly rejected in *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992), and again in *Muhammad R. Chaudhry, M.D.*, DAB CR326 (1994).

question of timeliness, and entirely sufficient in themselves, for my denial of the Motion *in Limine*. Those reasons are the legal insufficiency of the facts and theory on which the Motion is based.

Petitioner's Motion asserts that she has applied for the sealing of her conviction record pursuant to an Ohio statutory procedure set out at OHIO REV. CODE § 2953.31-36. That procedure allows the sentencing court to order records of convictions sealed in some circumstances. The Motion does not claim that the Court of Common Pleas has entered such an order, but does rather baldly assert that "Such motions are routinely granted." Pet. Motion at 2. Thus, Petitioner's Motion relies on an assumption and an expectation, not on an accomplished fact. On the date of this Decision, Petitioner's conviction remains unsealed, and it remains in full force and effect under Ohio law.²

But assuming *arguendo* that the Ohio procedure were carried to a successful completion and Petitioner's conviction were effectively expunged from the public record, that result would not require excluding the documents and would not invalidate her conviction as a predicate for the I.G.'s proposed exclusion. Section 1128(i)(1) of the Act explicitly defines "conviction" to include those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged." The Ohio procedure on which Petitioner now relies has been assayed at least twice in this forum and has been held insufficient to bar the I.G.'s imposition of a section 1128(a) mandatory exclusion. *Robert F. Tschinkel, R.Ph.*, DAB CR1323 (2005); *Karen S. Tanner*, DAB CR795 (2001). This forum has never denied that dispositions like those provided by OHIO REV. CODE § 2953.31-36 might well represent reasonable state choices in criminal justice policy, but the operation of such a policy in Ohio does not protect Petitioner here. For purposes of this federal exclusion sanction, based on federal policy choices, created and authorized by federal statute and intended to protect federally-funded health programs, federal law defines "conviction." *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); *Marc Schneider, D.M.D.*, DAB No. 2007 (2005); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994); *Mark D. Perrault, M.D.*, DAB CR1471; *Theresa A. Bass*, DAB CR1397 (2006); *Gerald David Austin*, DAB CR1207 (2004).

² It may usefully be pointed out that the record-sealing procedure is hardly automatic: OHIO REV. CODE § 2953.32(B) requires that upon the filing of an application for such relief the court "shall set a date for a hearing," requires that the prosecutor's office be notified of the hearing, and allows the prosecutor to object to the proposed sealing of the record of conviction.

Without citation of authority, Petitioner challenges the proposed period of exclusion as “unreasonable as a matter of law.” P. Ans. Br. at 3. But the five-year period of exclusion proposed in this case is the statutory minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable. 42 C.F.R. § 1001.2007(a)(2). Neither the Departmental Appeals Board nor I may reduce it. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Krishnaswami Sriram, M.D.*, DAB CR1463 (2006), *aff’d*, DAB No. 2038 (2006).

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.’s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.’s exclusion of Petitioner Katie Herman from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby affirmed.

/s/
Richard J. Smith
Administrative Law Judge